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

In the Matter of:	)	
	)	
MATTHEW J. MORRISON	)	
	)	
Applicant.	)	OAH No. 08-0471-MED
	)	Board Case No. 2856-086-002

DECISION BY SUMMARY ADJUDICATION

I. Introduction

This case arises from Matthew J. Morrison's application for a physician assistant license in the spring of 2007. After routine checking revealed potential concerns about Mr. Morrison's fitness to be licensed, the Division of Corporations, Business and Professional Licensing corresponded and conferred with him, requesting more information to address the concerns and offering him the option of withdrawing his application. Morrison attempted to withdraw the application, but his withdrawal request may not have reached the division because of a technical malfunction within the state's computer system.

On July 24, 2008, thirteen months after all contact with Morrison ended, his application was placed on a State Medical Board agenda and the Board voted to deny the license. Morrison appealed on the basis that he had no application pending at the time on which the Board could act. By means of a pre-hearing motion, he then sought summary adjudication in his favor on some of the grounds for his appeal, including his contention that his application, if not successfully withdrawn, had been denied automatically by operation of law a month before the Board acted on it. Because uncontested facts show that his argument is well-taken, the administrative law judge informed the parties that he would grant the motion and recommend to the Board that it adopt a final decision vacating its July 24, 2008 action. This decision follows that ruling.

II. Summary Adjudication

After a period of information exchange, the attorneys representing the parties in this case agreed to a delay in the hearing to see whether the case might be resolved by a written motion. The applicant then moved for summary adjudication, and a full schedule of briefing was accepted from both sides.

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[1] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.[2] In evaluating a motion for summary adjudication, if there is any room for differing interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom judgment may be granted.[3]

This case has some factual disputes relating to such matters as whether the division received Mr. Morrison's attempt to withdraw his application, but it is not necessary to resolve the disputes because there is a set of undisputed facts that fully resolve the case and render the other questions moot. It is important to note that in contrast to factual disputes, legal disputes—such as disputes about the meaning of regulations—do not require a hearing to resolve. This case does involve a significant disagreement about the law, which is evaluated in detail in Part IV below.

III. Relevant Facts in Light Most Favorable to the Division

Matthew Morrison graduated from a physician assistant program at Nova Southeastern University in 1998.[4] While enrolled in the program he had serious disciplinary issues.[5] Disciplinary sanctions were imposed that included an eight-week suspension (1997)[6] and a written warning (1998).[7]

On April 3, 2007, Mr. Morrison applied for an Alaska license to practice as a physician assistant.[8] The physician assistant application asks if the applicant has ever been disciplined "by a medical school."[9] Mr. Morrison marked the "no" box for that question.[10]

On April 5, 2007, the division informed Mr. Morrison that his application was incomplete.[11] On May 14, 2007, the division received a response to a routine request for

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1 *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000); 2 AAC 64.250.

2 *See Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

3 *Samaniego v. City of Kodiak*, 2 P.3d 78, 82-83 (Alaska 2000).

4 Agency Record Part A (A.R.A.) 59. Most of this portion of the Agency Record is also Exhibit 1 to the Gallant Deposition, which was filed as an exhibit to Morrison's Motion for Summary Adjudication.

5 A.R.A. 74-83.

6 A.R.A. 80.

7 A.R.A. 76.

8 A.R.A. 51.

9 A.R.A. 55.

10 *Id.*

11 A.R.A. 117.

verification of education that it had sent to Nova Southeastern University.[12] The verification form asked if the applicant had ever been investigated or disciplined by the program "during this physician assistant's education," and the school responded in the affirmative.[13] On May 23, 2007, Executive Director Leslie Gallant wrote Mr. Morrison to inform him that "we have received information that you were suspended from medical school."[14] She asked for an explanation of the events leading to the discipline and of his "no" answer on his application.[15]

Mr. Morrison responded by e-mail letter (a method of response Ms. Gallant had invited[16]) the following day, addressing both of Ms. Gallant's questions.[17] On June 18, 2007, Morrison and Gallant spoke on the telephone. She asked him for names and addresses of past employers.[18] She informed him that he had the option to withdraw his application (with the withdrawal to be reported as a withdrawal to avoid sanctions) or to continue to pursue his application.[19]

Morrison did not respond to the request for names and addresses of past employers. Instead, on June 23, 2007, Morrison sent Ms. Gallant an e-mail with an attached letter asking that his application be withdrawn.[20] The letter bears no handwritten signature, but Ms. Gallant has testified that—had she received it—the division "would have considered his application withdrawn."[21] Ms. Gallant has also testified that she did not receive the withdrawal letter.[22] Although it has been established that the letter was in fact received in June of 2007 on the state e-mail system,[23] for purposes of this motion Ms. Gallant's recollection that it did not appear in her in-box is assumed to be correct. The evidence indicates that this could have occurred if there were a "malfunction" in the state e-mail system, though none was documented at the time.[24]

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12 A.R.A. 58.

13 *Id.*

14 A.R.A. 60.

15 *Id.*

16 A.R.A. 61.

17 A.R.A. 62-63.

18 A.R.A. 48.

19 *Id.*

20 Gallant Deposition, Ex. 6.

21 Gallant Deposition at 76-77. Ms. Gallant so testified without qualification, notwithstanding the Division's more recent contention in a legal brief that the withdrawal was ineffective because it lacked a handwritten signature.

22 *Id.* at 75.

23 Gallant Affidavit, ¶ 9. Morrison's e-mail seems to have been sent to leslie_gallant@commerce.state.ak.us, which was the return address for Ms. Gallant's most recent e-mail to him. *Compare* Gallant Dep., Ex. 4 *with* Gallant Dep., Ex. 6. Unknown to Mr. Morrison, on June 19, 2007 Ms. Gallant's e-mail had been changed to leslie.gallant@alaska.gov. Agency Record Part C at 1. Nonetheless, state technology personnel contend that the system would have forwarded the e-mail to Ms. Gallant's in-box unless there were some "undocumented malfunction." *Id.*

24 Agency Record Part C at 1.

There was no further contact between Mr. Morrison and the division for the ensuing thirteen months. On July 24, 2008, thirteen months later, Ms. Gallant presented Mr. Morrison's license application to the Board "so that [she] could close out the file."[25] The Board voted to deny the application.[26] This appeal followed.

IV. Analysis

A. Automatic Denial of Stale Application

It has been Morrison's starting contention in this case that he withdrew his application on June 23, 2007, through the e-mail letter that he sent (and that was successfully received on a state e-mail server) on that date. However, to be effective a withdrawal request must be "received by the division" at least five days before the Board meeting at which the application is first to be taken up.[27] Ms. Gallant has testified that she, as the division's representative, never received the withdrawal message in her in-box before taking the matter to the Board. In the context of a summary adjudication motion from the other side, her recollection must be taken as conclusive on the matter and the withdrawal argument must be disregarded. The main thrust of Mr. Morrison's motion for summary adjudication is premised on a fallback position: that if one assumes he did not successfully withdraw his application, it was still inappropriate for the Board to take it up in July of 2008 because it had already been denied by operation of a regulation concerning abandonment of applications.

In 1990, the Department of Commerce and Economic Development (predecessor of today's Department of Commerce, Community, and Economic Development, or DCCED) adopted the following regulatory language at 12 AAC 02.910 to govern license applications handled by the department, which includes the licenses issued by the State Medical Board:

> **ABANDONED APPLICATIONS.** (a) An application is considered abandoned when
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> (1) 12 months have elapsed since correspondence was last received from or on behalf of the applicant; or
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> (2) the applicant has failed to appear for two successive examinations.

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[25] A.R.A. 34.

[26] A.R.A. 8.

[27] 12 AAC 40.986(a). There are other requirements to make such a request effective, including that it be "signed by the applicant." *Id*. At her deposition Ms. Gallant seems to have been willing to treat a typewritten name at the bottom as an adequate signature, *see supra* note 21, and it is possible that the Division has so administered the regulation in the past and that it would be bound by estoppel or other principles to so apply it in this case. Because it has been assumed for purposes of this motion that the withdrawal was not "received by the division" in the first place, the withdrawal's adequacy in other respects has not been considered.

(b) An abandoned application is denied without prejudice and the application fee forfeited.

The Department amended this regulation in 2003 to make the following changes:

Abandoned applications. (a) Except if procedures are otherwise expressly provided in this title for a particular board or occupation, an ~~An~~ application is considered abandoned when

(1) 12 months have elapsed since correspondence was last received from or on behalf of the applicant; or

(2) the applicant has failed to appear for two successive examinations.

(b) An abandoned application is denied without prejudice and the application fee forfeited.

The 2003 version of the regulation remained in effect through the period when Mr. Morrison's application was pending. Notwithstanding the provision added in 2003 to recognize the right of individual boards to do so, the State Medical Board has not adopted a regulation of its own "otherwise expressly provid[ing]" for a different procedure, which suggests that the Board is content to rely on the generic DCCED regulation.

If one assumes (as one must for purposes of this motion) that Morrison did not successfully deliver a withdrawal request on June 23, 2007, then the last contact between the division and Mr. Morrison prior to the Board's action was June 18, 2007. On June 18, 2008, twelve month had passed without any further correspondence or other contact from the applicant. Morrison contends that by operation of 12 AAC 02.910, his application "is denied without prejudice" on that date. This would mean that when the Board took up the application at a meeting on July 24, 2008, it was considering an application that had already been denied and was no longer pending before the Board.

Denial of the application by automatic operation of 12 AAC 02.910 would result in a situation not dramatically different from what the July 24 Board vote presumably sought to bring about: the application would still be denied, and the denial would still be reportable to the Federation of State Medical Boards—indeed, by regulation it must be reported.[28] The denial would be "without prejudice," however. This means that the applicant would be free to apply again, with the merits of whether or not he is worthy to receive a license left to that subsequent application, should it ever be made.[29] The issues that made the 2007 application problematic

[28] 12 AAC 40.987(b).

[29] *See* Black's Law Dictionary (5th ed. 1979) at 1437 (without prejudice means no resolution "of the merits of the controversy").

could be considered in connection with a subsequent application. The division is not satisfied with this outcome, and proposes an alternative reading of the regulation.

The division contends the abandonment regulation is simply a provision to give the division freedom to dispose of certain applications as abandoned and denied, and that applicants may not insist that it be applied. The division argues: "12 AAC 02.910 is utilized as a housekeeping measure that allows licensing examiners to consider license applications 'abandoned' when they are incomplete and have remained in an incomplete status for a considerable period of time."[30] The division bolsters its view of how the regulation should be interpreted with an affidavit of a licensing supervisor stating that "[t]o my knowledge, 12 AAC 02.910 . . . was simply 'housekeeping' to provide staff with direction and authority to 'abandon' applications,"[31] and with an affidavit of Ms. Gallant asserting flatly that "[t]his regulation is a house-keeping measure."[32]

The division's contention that the regulation merely creates discretion for *the Division* to abandon applications if it so chooses is contradicted by the actual language chosen by the drafters of the regulation. The drafters could have provided in paragraph (a) of the regulation that "the division may deem an application abandoned when . . ." or "the board may consider an application abandoned when . . . ." Instead, however, they chose the phrasing, "an application is considered abandoned when . . . ." This is mandatory and immediate language, not consistent with the notion that abandonment occurs only at the election of a division employee. The regulation goes on to say that such an application "is" denied—not that it may be denied as a matter of discretion, nor even that it "shall be" denied in the future. By the plain language of the regulation, the denial is immediate and automatic.

The division contends that the regulation should not be applied according to its plain language because it was intended, when it was adopted, to mean something else. This contention requires a brief review of the principles that apply to interpretation of regulations.

The licensing provisions in Title 12 of the Alaska Administrative Code are not mere policy guidance. The regulations are law.[33] Laws must be interpreted "with due regard for the

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[30] Opposition to Motion for Summary Adjudication at 13 (emphasis added). Although it is undisputed that the division had requested additional information (names and addresses of employers) from Mr. Morrison and he had never supplied that information, the division contends that Morrison's application was "complete."

[31] Affidavit of Weske, ¶ 3.

[32] Affidavit of Gallant, ¶ 12.

[33] *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 777 (Alaska 1980) ("regulations are laws in every meaningful sense").

meaning the[ir] . . . language conveys to others."[34] It is the actual text of regulations that has gone through a public review process; a departure from their text has the potential to make that process irrelevant.[35]

Principles of statutory interpretation carry over to the interpretation of regulations.[36] For a statute, the Alaska Supreme Court prescribes a sliding scale between the plain meaning of a statute, on the one hand, and evidence that the legislature intended something else, on the other.[37] Thus, "[t]he plainer the meaning of the statute, the more persuasive any legislative history to the contrary must be."[38] "The party asserting a meaning contrary to a statute's plain language bears a heavy burden of demonstrating a contrary legislative intent."[39] Translated to the context of regulations, this principle means that the plainer the meaning of a regulation, the more persuasive must be the case that it was intended to mean something else.

In this case, there is no competent evidence at all of a contrary intent behind the regulation. Competent evidence on this subject would be, for example, *contemporaneous* memoranda, public comment documents, or responses to public comments shedding light on what the drafters were trying to accomplish when they wrote the applicable language in 1990. *After-the-fact* assertions by current officials regarding what they think the drafters intended—even if the assertions come from the drafters themselves, which does not appear to be the case with the division's affidavits in this case—are legally irrelevant to the interpretation of a regulation.[40] This principle is a corollary of the fundamental assumption in Anglo-American law that the law, unless duly amended, is fixed and static, capable of being looked up. If regulatory

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[34] *Wilson v. State Dep't of Corrections*, 127 P.3d 826, 829 (Alaska 2006).

[35] Straightforward interpretation of the language of regulations also helps to avoid a public perception that the meaning of rules is being manipulated to achieve a preordained result.

[36] *State Dep't of Highways v. Green*, 586 P.2d 595, 603 n.24 (Alaska 1978).

[37] *E.g., City of Dillingham v. CH2M Hill Northwest, Inc.*, 873 P.2d 1271, 1276 (Alaska 1994); *Alyeska Pipeline Serv. Co. v. DCCED*, No. 3AN-07-11593 CI (Alaska Superior Ct., Decision and Order, March 23, 2009).

[38] *City of Dillingham*, 873 P.2d at 1276.

[39] *Alyeska Pipeline v. DCCED*, slip op. at 6.

[40] In Alaska, this principle has been established in the context of interpretation of statutes but, as noted above, principles of statutory construction carry over to interpretation of regulations. The seminal Alaska case is *Alaska Public Empl. Ass'n v. State*, 525 P.2d 12, 16 (Alaska 1974) ("subsequent testimony of even the prime sponsor of a bill as to . . . the meaning of that bill should not be considered"; "we do not wish to transform statutory construction into a parade of legislators' affidavits"). *See also, e.g., Department of Community & Reg. Affairs v. Sisters of Providence in Wash.*, 752 P.2d 1012, 1015 (Alaska 1988) (after-the-fact letter from legislator irrelevant to determining legislative intent); *State v. Alaska State Employees Ass'n/AFSCME Local 52*, 923 P.2d 18, 24 (Alaska 1996) (subsequent testimony about legislature's intentions irrelevant). In other jurisdictions, the same concept has been applied in the context of regulations. *E.g., Armco, Inc. v. Commissioner*, 87 T.C. 865 (U.S. Tax Ct. 1986) (affidavit of IRS employee who drafted regulations irrelevant to interpreting regulation); *Apel v. Murphy*, 70 F.R.D. 651, 654, 656 (D.R.I. 1976) (testimony of administrative officials on purpose of regulations barred as irrelevant).

intent could be established by testimony, the "law" would vary depending on who was available to testify in a given case.

In this case, all the division has offered is the conclusory, after-the-fact testimony of current officials about what they think the drafters intended, the kind of evidence of intent that cannot be accepted. Since there is no cognizable evidence that this regulation was intended to mean anything but what it says, the division cannot meet its "heavy burden" to overcome a plain reading of the regulation's language on the basis of contrary intent.

The division's next contention is that if the regulation were read the way it is written, it would "den[y] the Medical Board its statutory authority and duty to 'examine and issue licenses' or deny licenses."[41] This argument proves too much. If it were really improper for the division to have a regulation automatically denying applications that have been dormant for a year, it would likewise be improper for the division to have a regulation doing what the division claims this regulation does—a regulation in which the division gives itself authority to decide, if it so chooses, to treat applications as lapsed and denied, likewise without going before the Board. In either case the application does not go before the single state entity that has expressly been given authority to license physician assistants. If accepted, the division's argument would force the administrative law judge and the Board to declare the regulation invalid. Except in very unusual circumstances that are not present here, executive branch decisionmakers simply do not have the authority to declare a regulation invalid; that is a function solely for the courts.[42] Instead, agencies and boards in the executive branch must follow the regulation. Moreover, this particular regulation is one the Medical Board has accepted for many years, even though it could easily adopt an exception for medical licenses. This suggests that the Board accepts that adopting this regulation was reasonable exercise of DCCED's role, assigned by the legislature, to manage the application process.[43]

In short, there is no basis to read 12 AAC 02.910 to mean anything other than what it says on its face: after one year with no correspondence from the applicant, an application is treated as abandoned, is automatically denied, and is to be reported as a denial without prejudice. Applying the regulation to this case, Mr. Morrison's application was denied by operation of law

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41 Opposition to Motion for Summary Adjudication at 13 (quoting AS 08.64.101(1)).

42 *See* Alaska Dep't of Law, Hearing Officer's Manual (5th ed. 2002) at 10 (explaining that repeal under Administrative Procedure Act is the only way executive branch agencies have been empowered to overturn problematic regulations).

43 *See* AS 08.01.080(3).

on or about June 18, 2008. When the Board was presented with the application a month later, the application was no longer pending and there was nothing for the Board to act upon.

B. Other Arguments

Mr. Morrison also argues that his application was incomplete and should have been ineligible for action under a Board regulation on over-age application materials, and that his constitutional due process rights were denied when Ms. Gallant presented his application to the Board without letting him know she was doing so. Because 12 AAC 02.910 fully disposes of this case, it is not necessary to address these additional contentions.

V. Ruling

The applicant's motion for summary adjudication is granted. Because Mr. Morrison's application was denied by operation of 12 AAC 02.910 in June, 2008, Mr. Morrison did not have a pending application on which the Board could act in July of 2008. Upon adoption of this decision by the Board, the Board's denial action of July 24, 2008 is vacated.

The denial of Mr. Morrison's for a physician assistant license shall be reported as a denial without prejudice in the manner set forth in 12 AAC 40.987(b).

DATED this 15th day of April, 2009

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

The Alaska State Medical Board 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 distribution of this decision.

DATED this 16th day of July, 2009.

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

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