

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DOUBLE A CONSTRUCTION OF)
ALASKA,)
)
Plaintiff,)
)
v.)
)
STATE OF ALASKA, DEPARTMENT)
OF TRANSPORTATION & PUBLIC)
FACILITIES,)
)
Defendant.)
_____)

Case No. 3AN-15-11174 CI

ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANT

After an adverse decision from the Office of Administrative Hearings (“Office”), Plaintiff Double A Construction (“Double A”) filed a complaint with the Superior Court. The complaint alleges that the Office lacks jurisdiction over appeals of construction contract claims. Double A subsequently moved for summary judgment. On the same day, the State of Alaska, Department of Transportation and Public Facilities (“State”) moved to dismiss. The parties argued their motions before the Court on August 26, 2016. Double A’s claim against the State lacks merit because, under the relevant provisions of the State Procurement Code, the Office may hear appeals of construction contract claims. Accordingly, the State should prevail as a matter of law.

I. BACKGROUND

In May 2013, after a competitive bidding process, Double A and the State of Alaska, Department of Natural Resources (“Department”) entered into a contract for improvements to the campground at Johnson Lake State Recreation Area. State’s Opp. Ex. J at 3. The contract required Double A to file any claim

arising out of the contract no more than 90 days after it discovered the basis of the claim. State's Opp. Ex. J. at 8. Double A agreed to waive any claim not filed within 90 days. *Id.* The contract also contained a clause known as "Standard Specification 105-1.17," which provides that any appeal of the contracting officer's decision on such a claim "shall be decided in accordance with the State Procurement Code's appeal procedures, including AS 36.30.625, AS 36.30.627, AS 36.30.630, and AS 36.30.631."

Disputes between Double A and the Department arose almost immediately. In August 2013, Double A informed the Department that it would be filing a claim with the contracting officer for additional compensation based on the Department's alleged "decision to use poor materials" and "errors in plans." *Id.* In October 2013, the Department declared Double A in breach of the contract due to "incomplete tasks" and "disrespectful behavior" towards Department staff. *Id.* at 4.

On October 28, 2013, Double A filed a public records request under AS 40.25.110 for all files related to the Johnson Lake Campground project. However, on November 7, 2013, Double A, hoping the parties would "be able to resolve [the] deteriorating situation," agreed to withdraw the public records request. *Id.* Double A stated in an email that it would advise the Department "if the necessity [arose] to review the project records."

Negotiations continued until March 2014. On March 14, 2014, counsel for the Department informed Double A via email that the 90-day period for filing a claim would end on March 31.¹ On March 24, Double A renewed its public records request. *Id.* The next day, the Department provided Double A with the requested files in electronic format. *Id.* Double A filed a claim with the contracting officer on April 14, 2014—12 days after the 90-day deadline. *Id.* at 6.

The contracting officer denied Double A's claim and Double A appealed to the Commissioner of Transportation and Public Facilities ("Commissioner"). The

Commissioner referred the appeal to the Office, citing AS 44.64.030(b). AS 44.64.030(b) authorizes the Office, at the request of an agency, to “conduct an administrative hearing of that agency.”

On December 22, 2014 Double A sent the Office an email contesting the Office’s jurisdiction over the case. State’s Opp. Ex. D at 4. Double A argued that “contract claim[s] filed under AS 36.30.620 et seq.” are “specifically exempted from the Administrative Procedures Act.” *Id.* According to Double A, only “the Commissioner . . . or his designated hearing officer” could hear the case. *Id.* Later that day, however, Double A sent a second email withdrawing its objection to the Office’s jurisdiction. The second email acknowledged that “AS 36.30.670 has been amended to permit delegation to [the Office],” and requested a hearing officer with “construction experience.” *Id.* at 3. The Office assigned the case to an Administrative Law Judge (“ALJ”). However, Double A successfully moved to vacate the assignment under AS 44.64.070(c). State’s Opp. Ex. F at 3. The Office then reassigned the case to ALJ Andrew M. Lebo. *Id.*

After nearly a year of litigation, ALJ Lebo concluded that Double A had not timely filed its claim with the contracting officer. Accordingly, on December 1, 2015, the ALJ gave an oral ruling indicating that he would issue a proposed decision dismissing Double A’s appeal. On December 7, 2015, Double A sent a letter to the Commissioner arguing, for the first time since its December 22, 2014 email, that the Office lacked subject matter jurisdiction over the case. *Id.* In addition, Double A warned that it would sue if the Commissioner did not vacate his order referring the case to the Office.

One day later, On December 8, 2015, Double A filed the present case with the superior court, seeking an injunction and a declaration that the Office lacks subject matter jurisdiction over construction contract claims. On the same day, Double A filed a motion to stay with the ALJ. The motion to stay, like Double A’s complaint, alleges that the Office lacks subject matter jurisdiction. The ALJ

¹ *Id.* The Department miscalculated. The last day for Double A to file a claim was April 2, 2014.
ORDER GRANTING SUMMARY JUDGMENT Page 3 of 13
Double A Construction v. State, Case No. 3AN-15-11174 CI, May 3, 2016.

concluded that the Office had jurisdiction under AS 44.64.060(b). Accordingly, the ALJ denied Double A's motion to stay, as well as a subsequent motion for reconsideration.

On December 14, 2015, Double A filed a petition for review with the Superior Court, Case No. 3AN-15-11252CI. The petition requested review of the ALJ's order on Double A's motion to stay. This Court denied the petition, concluding that the ALJ's decision did not qualify for interlocutory review under Appellate Rule 610. In particular, the Court found that "judicial review would not cure injustice, reduce delay, or advance the disposition of the case" because the petition "d[id] not differ, in terms of costs and delay, from a proper appeal of the Commissioner's [final] decision."

The ALJ issued a proposed order dismissing the case on December 29, 2015. Along with the proposed order, the ALJ included a Notice of Proposed decision which informed the parties that they could file a "proposal for action" requesting that the Commissioner "reject, modify, or amend" the order.

The State moved to dismiss the present case on January 22, 2016 and Double A moved for summary judgment. Meanwhile, Double A and the Department each filed proposals for action in response to the ALJ's December 29 proposed order. On February 11, 2016, the Commissioner remanded the case back to the ALJ "for the purpose of allowing [the Department] to respond to [Double A's] new arguments, and for the purpose of allowing the ALJ to consider the new arguments and responses in the preparation of the decision."

On March 11, 2016 the ALJ issued a revised proposed order rejecting the arguments Double A raised in its proposal for action. The Commissioner adopted the ALJ's revised order on March 15, 2015. The Commissioner's adoption states, "[j]udicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with [Appellate Rule] 602(a)(2) within 30 days after the date of this decision."

II. LEGAL STANDARDS

A. Motion to Dismiss

A motion to dismiss tests the legal sufficiency of the complaint. *Dworkin v. First National Bank of Fairbanks*, 444 P.2d 777, 779 (Alaska 1968). Well-pleaded allegations are deemed admitted for purposes of the motion. *Id.* To survive a motion to dismiss, the complaint must set forth allegations of fact consistent with and appropriate to some enforceable cause of action. *J & S Services, Inc. v. Tomter*, 139 P.3d 544, 547 (Alaska 2006). Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, the motion should be denied. *Division of Family and Youth Servs. v. Native Village of Curyung*, 151 P.3d 388, 396 (Alaska 2006). When, on a motion to dismiss, a party introduces matters outside the pleadings, the court has two options. First, it may restrict its analysis to the pleadings. *Martin v. Mears*, 602 P.2d 421, 426 (Alaska 1979). Second, it may consider matters outside the pleadings and treat the motion as a motion for summary judgment. *Id.*

B. Summary Judgment

Summary judgment is proper when “there is no genuine issue as to any material fact” and “the moving party is entitled to judgment as a matter of law.” Civil Rule 56(c); *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 516 (Alaska 2014). “[A] party seeking summary judgment has the initial burden of proving, through admissible evidence, that there are no [genuine] disputed issues of material fact and that the moving party is entitled to judgment.” *Christensen*, 335 P.3d at 517 (quoting *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 n. 25 (Alaska 2008)). Once the moving party has made that showing, the burden shifts to the non-moving party “to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant’s evidence and thus demonstrate that a material issue of fact exists.” *Christensen*, 335 P.3d at 517 (quoting *State, Dep’t of Highways v. Green*, 586 P.2d 595, 606 n.

32 (Alaska 1978)). The Court must make all reasonable inferences from the evidence in favor of the non-moving party. *Christensen*, 335 P.3d at 520.

III. ANALYSIS

Double A alleges in its complaint that the Office lacks jurisdiction over this case and argues that the Commissioner should have assigned an independent hearing officer. Double A maintains that this was, historically, the practice of the Commissioner.²

Double A argues that AS 44.64.030—the statute which established the Office—expressly removes contract claims under AS 36.30.627(a)(2) from the Office’s jurisdiction. Double A acknowledges that AS 44.64.030 authorizes ALJs within the Office to preside over a variety of hearings. Subsection (a) of AS 44.64.030 lists 50 different types of cases over which an ALJ must preside. The 25th item listed is, “AS 36.30 (State Procurement Code), other than AS 36.30.627(a)(2).” Double A argues that this provision expressly “carves out” claims under AS 36.30.627(a)(2) from the Office’ jurisdiction.

In addition, Double A argues that AS 44.64.030(b)—which authorizes discretionary referrals to the Office of matters not “listed” in subsection (a)—does not apply to contract claim appeals under AS 36.30.627(a)(2). Double A believes that because AS 36.30.627(a)(2) is (in the most literal sense) “listed” in subsection (a), it is necessarily excluded from the Office’s discretionary authority under subsection (b).

² Until July 1, 2005 AS 36.30.670(a) provided as follows:

The commissioner of administration or the commissioner of transportation and public facilities shall act as a hearing officer or appoint a hearing officer for a hearing conducted under this chapter. The hearing officer shall arrange for a prompt hearing and notify the parties in writing of the time and place of the hearing. The hearing shall be conducted in an informal manner. The provisions of AS 44.62 (Administrative Procedure Act) do not apply to a hearing conducted under this chapter.

The Commissioner, on the other hand, argues that subsection (b) of AS 44.64.030 provides the Office with “permissive” or “discretionary” jurisdiction over this case. As discussed above, subsection (b) permits referral to the Office of claims not “listed” in subsection (a). In this case, the Commissioner cited AS 44.64.030(b) for authority to refer the matter to the Office. According to the Commissioner, subsection (a) removes construction contract claims from the Office’s mandatory jurisdiction—meaning the Office is not *required* to hear all claims under AS 36.30.627(a)(2). However, the Commissioner argues he may, when appropriate, refer some cases under AS 36.30.627(a)(2) to the Office under subsection (b).

Double A rejects the Commissioner’s interpretation of AS 44.64.030. It contends that any statute “listed” in subsection (a)—whether specifically included or exempted—does not fall within the broader discretionary authority of subsection (b). At oral argument, Double A maintained that the exemptions from subsection (a) were deliberate and absolute withdrawals from the Office’s authority. In support of its position, Double A cited AS 08.08, which governs attorney licensing and is exempted from subsection (a)(6). Double A implied that the State’s interpretation of AS 44.64.030 would subject such matters as attorney licensing and violations of the Food, Drug and Cosmetic Act (AS 17.20.360) to the authority of unqualified ALJs.

There is, however, a fundamental flaw in Double A’s argument. Double A’s position conflicts with the plain language of the State Procurement Code—specifically AS 36.30.627(a)(2), AS 36.30.630, and AS 36.30.670. This court interprets the Alaska Statutes “together, in context with [any] other pertinent provisions” and endeavors to “reconcil[e] conflict and produc[e] ‘a harmonious whole.’” *City of Anchorage v. Scavenius*, 539 P.2d 1169, 1174 (Alaska 1975)

The current version of the statute, enacted in 2004 and effective July 1, 2005, provides in pertinent part: “[t]he chief administrative law judge (AS 44.64.010) shall assign an administrative law judge to act as a hearing officer for a hearing conducted under this chapter.”

(quoting 2 J. Sutherland, *Statutes and Statutory Construction*, § 4703, at 336–37 (Horrack ed., 3d ed.1943)). Thus, with respect to matters where subsection (a) of AS 44.64.030 does not expressly confer jurisdiction on the Office, the Office may nonetheless have jurisdiction to adjudicate such matters if it is not inconsistent with existing statutory procedures. The relevant question under this approach is whether adjudication by the Office would contradict a different process, set forth by statute or regulation, for the specific matter at hand. In matters of attorney discipline, or violations of the Food, Drug and Cosmetic Act, adjudication by the Office would create a conflict. In cases involving contract appeals under AS 36.30.627(a)(2), it would not.

AS 36.30.627(a)(2) provides for construction contract appeals to be resolved by either “binding and final arbitration” or “a hearing under AS 36.30.630.” In this case, neither party requested arbitration, so, under the Procurement Code, the case would go to “a hearing under AS 36.30.630.” AS 36.30.630, in turn, requires that hearings on contract claims be “conducted according to AS 36.30.670.” AS 36.30.670 provides for adjudication by the Office. Specifically, the statute provides, “[t]he chief administrative law judge shall assign an administrative law judge to act as a hearing officer for a hearing conducted under this chapter.” Thus, the relevant provisions of the State Procurement Code authorize an ALJ within the Office to hear construction contract claims under AS 36.30.627(a)(2). Whether under AS 44.64.030 or the Procurement Code, the process for resolving Double A’s contract claim is the same: a hearing before an ALJ. Adjudication by an ALJ, therefore, does not conflict with the procedures set out in the Procurement Code for disposition of construction contract appeals. Because no conflict exists, the Office has authority to hear the case.

The Court’s analysis of AS 36.30.627(a)(2), AS 36.30.630, and AS 36.30.670 does not necessarily imply that the State’s interpretation of AS 44.64.030 is entirely correct. Rather, it demonstrates that, whether the Court

accepts the State's interpretation or Double A's, the outcome is the same. If Double A is correct that AS 44.64.030 does not authorize the Office to hear claims under AS 36.30.627(a)(2), the Court must look to the relevant provisions of the State Procurement Code. And, under the Procurement Code, construction contract appeals which do not go to arbitration are heard by an ALJ.

The State does, however, offer the most plausible interpretation of AS 44.64.030. In any but the most literal sense, AS 36.30.627(a)(2) is not "listed" in AS 44.64.030(a). Rather, AS 36.30.627(a)(2) is excepted from the list. Subsection (a) requires the Office to conduct "all adjudicative administrative hearings" under the listed statutes. Thus, matters included in the list should be automatically referred to the Office. The exceptions from the list, including AS 36.30.627(a)(2), do not fall under the Office's mandatory authority. In other words, the exceptions signal that the Legislature did not mean to include certain types of proceedings in the "list." In AS 44.64.030, as in most other contexts, "except" means "not including." Double A argues that AS 36.30.627(a)(2) is "listed" or "included" in one sense—*i.e.*, it is "listed" for purposes of subsection (b)—but not included in another sense, in that the statute does not fall under the Office's mandatory authority. But Double A cannot have it both ways. AS 36.30.627(a)(2) is either included in AS 44.64.030(a) or it is not. And, if the Court declines Double A's invitation to indulge in an unnecessarily strained interpretation of AS 44.64.030, it must conclude that AS 36.30.627(a)(2) is not included in the "list."

While this interpretation might, in theory, confer too much authority on the Office, other statutes may supplement AS 44.64.030 and bar the Office from hearing certain types of claims. For example, some statutes excepted from subsection (a)—such as AS 08.08 and AS 08.62.0846—delegate authority to private or semi-private professional associations. Since adjudication by the Office would conflict with these delegations of authority, the Office may not oversee hearings on particular matters such as attorney discipline. In other cases, statutes such as AS 08.18.125 and AS 46.03.820 provide unique adjudication procedures

for certain types of claims. Including these statutes in AS 44.64.030(a) would have done away with their distinctive, subject-matter-specific hearing procedures. Therefore, the legislature expressly removed these statutes from the “list” in AS 44.63.030(a). Finally, statutes like AS 06.60.590 and AS 36.30627(a)(2) give agencies a choice: depending on the facts of the case or the preferences of the parties, an agency may choose to refer a particular case to the Office. But since these statutes are excepted from AS 44.64.030, cases that arise under them do not automatically go before an ALJ. In sum, specific procedures established in various other parts of the Alaska Statutes give concrete meaning to AS 44.64.030’s broad, and rather abstract, grant of authority.

Double A relies heavily on legislative history to support its position. However, the legislative history of AS 44.64.030 overwhelmingly favors the State in this case. Double A is not the first party to challenge the Office’s jurisdiction over construction contract claims. In *Seward Ship’s Drydock v. Alaska Marine Highway System*, OAH No. 14-1305-CON (2014), a contractor advanced a similar challenge which prompted an ALJ to examine the legislative history of AS 44.64.030 and AS 36.30.627. The ALJ’s inquiry revealed that “the legislature limited the mandatory jurisdiction of [the Office] because [the Office] was new, and for the first years of its existence, its staff would be limited to existing state hearing officers.” *Id.* (citing Minutes, House Judiciary Committee hearing on SB 203 at Tape 04-39 Side B Number 2307 (March 18, 2004) (testimony of David Stancliff, staff to bill sponsor Sen. Therriault)). The legislature intended AS 44.64.030(a) to reflect the limited resources available to the Office when the statute was enacted. *Id.* But, the legislature expected that referrals to the Office would increase over time. *Id.*³ Thus, it included subsection (b), which authorizes

³ Citing Minutes, Senate State Affairs Committee, hearing on SB 203 (May 6, 2003) (testimony of Sen. Stevens; Kevin Jardell; Andrew Hemenway); Senate Judiciary Committee hearing on SB 203 (Feb. 6, 2004) (testimony of sponsor Sen Therriault; Dave Stancliff); Minutes, Senate finance Committee hearing on SB 203 (Feb. 24, 2004) (testimony of Dave Stancliff); Minutes, House

discretionary referrals of cases not expressly included in subsection (a). *Id.* The legislature determined that some types of proceedings—such as Worker’s Compensation hearings and disputes over public utilities regulation—required special expertise. *Id.* However, the legislature did not set special qualifications for hearing officers in construction claims. The legislative history therefore suggests that the legislature did not intend for foreclose referral of construction contract claims to the Office.

In addition to legislative history, Double A relies on a 2011 Superior Court case, *North Pacific Erectors, Inc. v. State*, 2011 WL 12873526 (Alaska Super. 2011). In *North Pacific Erectors*, the court observed that “the jurisdiction of [the Office] does not extend to appeals pursuant to AS 36.30.627(a)(2).” However, this statement is dicta and not binding on this Court. The jurisdiction of the Office was not at issue in *North Pacific Erectors*. Rather, the case focused on the specific conduct of certain officials within the Office and the Department of Transportation and Public Facilities. After an extensive fact-based inquiry, the court concluded that “the process by which [the Department of Transportation and Public Facilities] made its decision” was reasonable and not “legally flawed.” The court made no specific findings of fact or conclusions of law regarding the Office’s jurisdiction, or the meaning of AS 44.64.030. On the other hand, the ALJ’s analysis in *Seward Ship’s Drydock* directly addresses the Office’s power to hear cases under AS 44.64.030 and AS 36.30.627(a)(2). As persuasive authority, *Seward Ship’s Drydock* addresses the issues in the present case more directly and comprehensively than *North Pacific Erectors*.

Double A argues that it is entitled to attorney’s fees and costs because it is a “public interest litigant.” However, Double A cannot claim public interest litigant status because it has a direct financial stake in the present litigation. In *Gilbert v. State*, 526 P.2d 1131, 1136 (Alaska 1974), the Alaska Supreme Court recognized a

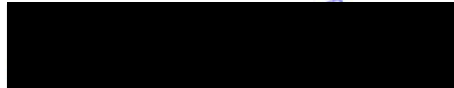
Judiciary Committee hearing on SB 203 (March 18, 2004) (testimony of Dave Stancliff; Rep. McGuire).

public interest exception to Civil Rule 82. In order to qualify as a public interest litigant, a party must show that: (1) the case is designed to effectuate strong public policies; (2) the plaintiff's success would benefit numerous people; (3) only a private party would have been expected to bring the suit; and (4) the purported public interest litigant would not have sufficient economic incentive to file the suit if the action involved only narrow issues lacking general importance. *Alaska R.R. Corp. v. Native Vill. of Eklutna*, 142 P.3d 1192, 1203 (Alaska 2006). Here, Double A has a strong economic incentive to sue. Its underlying claim against the Department sought \$232,345.49 in damages. And, because the Office dismissed the case, Double A has an equally strong incentive to seek a new forum for litigation. Double A would have had reason to sue based solely on its economic interests, notwithstanding the policy implications of its claim. Because of its financial interests in the matter, Double A cannot claim public interest litigant status.

IV. CONCLUSION

Double A's case fails on the merits because both AS 44.64.030(b) and the State Procurement Code authorize the Commissioner to refer construction contract claims to the Office. In addition, Double A cites no current authority for its position that the Commissioner should have appointed an independent hearing officer. Based on the pleadings and the evidence now before the Court, the State should prevail as a matter of law. Because the Court's analysis of Double A's claim considered matters outside the pleadings, the Court has converted the State's motion to dismiss into a motion for summary judgment. *Martin v. Mears*, 602 P.2d 421, 426 (Alaska 1979). The Court now concludes that summary judgment is GRANTED in favor of the State. The Court further concludes that Double A is not entitled to public-interest litigant status because it has a significant financial stake in the case.

ORDERED this 3rd day of May, 2016, at Anchorage, Alaska.



ANDREW GUIDI
Superior Court Judge

I certify that on 5-4-16
a copy of the above was mailed to
each of the following at their
addresses of record:

K. Brady / G. Gustafson



Jackie Kapper, Judicial Assistant