BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION & PUBLIC FACILITIES

SEWARD SHIP'S DRYDOCK, INC	)	
	)	
v.	)	
	)	
ALASKA MARINE HIGHWAY SYSTEM.	)	OAH No. 14-1305-CON
	)	Project No. 73068/SHAK-9500(129)

ORDER DENYING MOTION TO DISMISS

Seward Ship's Drydock filed a contract claim regarding work that it did under contract with the Alaska Marine Highway System to repair a ferry vessel called the *M/V Tustemena*. The Marine Highway System denied the claim. Seward Drydock appealed the denial to the Commissioner of the Department of Transportation and Public Facilities ("commissioner"). Both the Marine Highway System and Seward Drydock had expected that the commissioner would consult with them to select a hearing officer from a list of private attorneys. Instead, the commissioner referred the dispute to the Office of Administrative Hearings (OAH) for the Chief Administrative Law Judge to assign an administrative law judge to hear the case on behalf of the commissioner.

Seward Drydock then filed this motion to dismiss, arguing that OAH does not have jurisdiction to hear this dispute. It also argued that the appointment of an ALJ violated its due process rights and that the department was bound by the doctrine of equitable estoppel to follow the expected practice of appointing a private attorney.

Seward Drydock's motion implicates two threshold issues: (1) What law applies to contract claims for the Marine Highway System; and (2) Is the contract a "construction" contract, as that term is defined in the procurement code? These questions will be addressed first. I will then turn to Seward Drydock's arguments regarding jurisdiction, due process, and equitable estoppel.

A. What law applies to contract claims for the Marine Highway System?

In general, the state procurement code applies to state contract disputes. In this case, however, the definition of "agency" in the procurement code excludes the Department of Transportation and Public Facilities ("department") when it is engaged in "the repair, maintenance, and reconstruction of vessels . . . of the Alaska marine highway system."[1] This

[1] AS 36.30.990(1)(B)(v).

definition removes this case from the current procurement code because the code only applies to expenditures of money by "the state, acting through an *agency*, under contract."[2] Given that the department is not an agency under the code for the purpose of ferry repair contracts, the current version of the procurement code does not apply to this dispute.

Two other legal instruments, however, bring versions of the procurement code to bear on this case. First, the department has adopted regulations regarding Marine Highway System procurements. The regulations incorporate sections of the 1992 version of the procurement code, including the mandatory contract claim process.[3] Second, the parties' contract provided that "[p]rocedures for appeals are covered under AS 36.30.625, AS 36.30.627 and AS 36.30.630."[4] For this dispute, the law will apply as follows. The three provisions of current law adopted by contract will be applied first. Matters that go beyond these three provisions will be governed by the 1992 code adopted by regulation.[5] This process is illustrated in the next section of this brief to determine whether this contract is a construction contract.

B. Is the contract a "construction" contract, as that term is defined in the procurement code?

Whether this contract is a "construction contract" looms large in this appeal and this motion. If the contract is not a construction contract, then the final decisionmaker in this dispute would be the Commissioner of Administration, not the Commissioner of Transportation and Public Facilities.[6] If this were the case, this motion would be moot.[7]

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[2] AS 36.30.850(b) (emphasis added). Subsection .850(b) explicitly identifies exceptions to the procurement code. Paragraph (29) of subsection .850(b) excludes "construction of new vessels by the Department of Transportation and Public Facilities." This paragraph does not address contracts regarding repairs to vessels. Although it is not clear why the legislature chose one approach to exclude new vessels and another approach to exclude repairs, the effect is the same.

[3] 7 AAC 70.400. Because this contract is exempt from the procurement code under AS 36.30.990(1)(A)(v), I had asked the parties whether this contract dispute would be governed by AS 44.77, which generally applies to disputes over state expenditures not governed by the procurement code. The answer is "no." Under AS 44.77.070, the claims procedures of AS 44.77 "do not apply to a department in the executive branch or to the legislative or judicial branches if that department or branch has adopted a mandatory claims and appeal procedure." Here, the Marine Highway System has adopted a mandatory claims and appeal procedure. 17 AAC 70.400(7). Therefore, this dispute is not under AS 44.77.

[4] Alaska Marine Highway System's Exhibit C at 4 (§ 105-1.17 of the contract). This incorporation must apply to current statutes, not the incorporated 1992 statutes, because section .627 did not exist in 1992.

[5] If a party believes that a conflict exists among the code provisions adopted by the contract and the code provisions adopted by regulation, the party may brief the question of which prevails. Otherwise, I will attempt to apply all provisions with an understanding that the three current law provisions adopted by contract will supplement and fill voids in the 1992 code.

[6] AS 36.30.625 (2014).

[7] Assuming the (hypothetical) hearing on behalf of the Commissioner of Administration would be under current AS 36.30.630, as provided in contract, the cross-reference to the current AS 36.30.670 in AS 36.30.630 would make referral to OAH mandatory for non-construction contracts. *See also* AS 44.64.030(a)(22).

Seward Drydock argues that the contract is obviously a construction contract under the statutes in Title 19 that govern the Marine Highway System, and under the terms used in the contract.[8] I agree—if Title 19 and a commonsense understanding of the term "construction" were the only criteria, this contract would be a construction contract because refurbishing the *Tustemena* involved construction processes. Yet, the governing 1992 procurement code does not adopt a broad definition of the term "construction." Under the code, "construction" means "the process of building, altering, repairing, maintaining, improving, or demolishing a public highway, structure, building, or other public improvement of any kind to real property other than privately owned real property leased for the use of agencies."[9]

The question here is whether this definition applies to a vessel, or is it limited to real property. A vessel is a type of structure, so arguably this definition could include repair of a vessel.[10] Yet, the most straightforward interpretation of this definition would limit "construction" to real property. The clause "or other public improvement of any kind to real property" implies that the list of public improvements that precede this clause—highways, structures, and buildings—include *only* improvements to real property. If so, this would exclude vessels.

This decision, however, will not adopt this limiting definition for two reasons. First, AS 36.30.850(29) (1992) uses the term "construction" to apply to vessels when it excludes "construction of new vessels by the Department of Transportation and Public Facilities for the Alaska marine highway system" from the procurement code. In general, the definition of "construction" should be the same in all sections of the procurement code.[11] Because AS 36.30.850(29) implies that "structure," as used in the definition of "construction" in AS 36.30.990(6) includes "vessels," we can assume that the legislature intended to apply the same definition of "construction" in AS 36.30.627 to also include vessels.[12] Second, both the Marine Highway System and Seward Drydock clearly expected that the Commissioner of

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[8] Seward Drydock's Reply in Support of Motion to Dismiss at 5-6.

[9] AS 36.30.990(6) (1992). The definition is the same in the current code.

[10] A common dictionary defines "structure" to include "something constructed or built." Webster's Third New Int'l Dict. (unabridged) at 2267 (1986). This would include a vessel.

[11] *Cf., e.g., Dawson v. State*, 264 P.3d 851, 858 (Alaska App. 2011) ("Where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that [the word] means the same thing throughout the statute." (Quoting Norman J. Singer, *Sutherland's Statutes and Statutory Construction* (Seventh edition, 2007 revision), § 47.16, Vol. 2A, pp. 356–57.)).

[12] The current version of section .627 applies because it was adopted by contract. Sections .850 and .990 were not adopted by contract so technically the 1992 versions of these sections apply. Because the 1992 version and the current version of these sections are the same, I do not need to worry about mixing and matching codes.

Transportation and Public Development would be the final decisionmaker. In addition, as Seward Drydock points out, the contract incorporated AS 36.30.627, a section of the procurement code that applies *only* to construction contracts. This demonstrates the parties' intent to have this case adjudicated under the provisions applicable to construction contracts. Given the ambiguity and need for consistency in the definition, agreement of the parties, and commonsense notion that the services here were construction, I agree with Seward Drydock that this contract was a construction contract as that term is used in the procurement code. Therefore, the Commissioner of Transportation and Public Facilities is the final decisionmaker. This means that Seward Drydock's arguments that the commissioner erred by referring this dispute to OAH are not moot, and those arguments will be addressed below.

C. Does OAH lack subject-matter jurisdiction to hear this dispute on behalf of the commissioner?

Seward Drydock argues that OAH does not have subject-matter jurisdiction to hear this appeal on behalf of the commissioner. "Subject matter jurisdiction is 'the legal authority of a court to hear and decide a particular type of case.'"[13] Administrative agencies acting in their quasi-judicial capacity must have subject-matter jurisdiction to hear a case to "to ensure that they do not overreach their adjudicative powers."[14] Whether an agency has subject-matter jurisdiction turns on whether the legislature has authorized the agency to hear the type of dispute in question.[15]

Here, as noted above, ultimate subject-matter jurisdiction lies with the Commissioner of Transportation and Public Facilities.[16] The question raised by Seward Drydock is whether a statute, regulation, or contract provision prohibits the commissioner from referring the appeal to OAH to hear this dispute on his behalf.

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[13] *Northwest Medical Imaging, Inc. v. State, Dep't of Rev.,* 151 P.3d 434, 438 (Alaska 2006) (quoting Erwin Chemerinsky, *Federal Jurisdiction* 257 (3d Ed.1999)).

[14] *Id*.

[15] For examples of the Alaska Supreme Court analyzing a statutory grant of authority to an agency to see whether the agency had subject-matter jurisdiction, see *Colville Environmental Services, Inc. v. North Slope Borough,* 831 P.2d 341, 346 -347 (Alaska 1992) (explaining how court applies "the narrow scope of [Commission] jurisdiction to review a particular type of dispute" (brackets in original)); *Northwest Medical Imaging*, 151 P.3d at 438 ("[t]he jurisdiction of the Office of Tax Appeals to hear tax disputes has been clearly and explicitly prescribed by the legislature."). In certain situations, subject-matter jurisdiction can be made clear in the agency's contract. *E.g. Calhoun v. State, Dep't of Trans. and Pub. Fac.,* 857 P.2d 1191, 1196 (Alaska 1993) (holding that agency had jurisdiction under contract to adjudicate claim regarding loss of bonding provision).

[16] 17 AAC 70.400(7); Marine Highways Exhibit C at 4.

1. Do any statutes or statutory schemes deprive OAH of subject-matter jurisdiction to hear this case on behalf of the commissioner?

Seward Drydock begins its argument by noting that this case is a construction claim filed under AS 36.30.627(a). It then concludes that OAH cannot hear this case because the statute that defines OAH's mandatory jurisdiction (paragraph (22) of AS 44.64.030(a)), specifically excludes cases under AS 36.30.627(a)(2).[17] Seward Drydock concludes that AS 44.64.030(a)(22) is a jurisdictional barrier to OAH conducting this hearing,

The text of AS 44.64.030, however, does not support Seward Drydock's argument. Subsection (b) of AS 44.64.030 gives OAH authority "to conduct an administrative hearing or other proceedings of [an] agency" at the request of the agency.[18] There is no subject-matter limitation on this grant of authority to conduct voluntarily-referred administrative hearings. Furthermore, nothing in AS 36.30.627, or any other provision of the procurement code (1992 or current), requires the commissioner to select the hearing officer from a list of private attorneys or otherwise prohibits the commissioner from appointing a hearing officer employed by OAH. The plain language of subsection .870(c) of the procurement code requires the Commissioner of Administration to adopt regulations establishing qualifications for arbitrators to arbitrate construction claims, but *contains no requirement for qualifications of hearing officers* who would hear construction claims. Therefore, under the plain language of AS 44.64.030(b), the commissioner has discretion to refer a construction contract claim—or any administrative claim—to OAH.

Seward Drydock has two responses to this plain language argument. First, it argues that subsection (b) of AS 44.64.030 does not apply to the department because the department is not an agency for purposes of ferry vessel repair. In making this argument, however, Seward Drydock is looking at the wrong set of definitions.[19] Seward Drydock references the definitions in the procurement code, AS 36.30.990(1)(B)(iv). Yet, the definitions that apply to OAH's jurisdiction are the definitions in Chapter 64 of Title 44, and under these definitions, the department is an agency.[20] Therefore, the permissive jurisdiction of OAH under AS 44.64.030(b) includes the department, even when the department is contracting for ferry repairs.

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17 Seward Drydock's Corrected Motion to Dismiss at 2.
18 AS 44.64.030(b).
19 Seward Drydock's Corrected Motion to Dismiss at 2.
20 AS 44.64.200(3).

Second, Seward Drydock argues that the "purpose of the law" was "that construction appeals will not be heard by OAH."[21] In its view, the exclusion of OAH from the mandatory jurisdiction of construction contract claims governed by AS 36.30.627(a)(2) signifies a clear intent by the legislature to prevent the commissioner from using OAH in a claim of this type.

Seward Drydock is correct that further analysis is needed because in Alaska, the plain language of the statute does not always control the outcome. As the Alaska Supreme Court has explained,

> In interpreting a statute we "look to the plain meaning of the statute, the legislative purpose, and the intent of the statute." We have declined to mechanically apply the plain meaning rule when interpreting statutes, adopting instead a sliding scale approach: "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be." We apply this sliding scale approach even if a statute is facially unambiguous. Canons of interpretation can also provide useful aids in our efforts to interpret a statute.[22]

Thus, Seward Drydock's argument that OAH does not have permissive jurisdiction will depend on the legislative history of the statutes that govern OAH. Given that the plain language of AS 44.64.030, AS 36.30.627(a)(2), and AS 36.30.630 do not support Seward Drydock's argument, Seward Drydock can prevail only if it can identify a clear expression of legislative intent to prohibit the commissioner from referring construction claims to OAH. This decision turns next to the legislative history of the statutes.

The Office of Administrative Hearings was created in 2004 to serve as a central panel of administrative law judges to preside over many types of executive-branch hearings. The legislative history reveals that at the time it was created, the legislature limited the mandatory jurisdiction of OAH because OAH was new, and for the first years of its existence, its staff would be limited to existing state hearing officers.[23] The sponsor's staff explained to the legislature that the list of agencies for which jurisdiction would be mandatory had started at 50, but was "pared down by about 25 percent that matches what the office will be able to do with the

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[21] Seward Drydock's Reply in Support of Motion to Dismiss at 4. Seward Drydock actually argues that the plain language of the statute supports its position. *Id.* That is clearly incorrect. The plain language of AS 44.64.030(b) permits OAH to conduct administrative hearings or other proceedings of an agency without any limitation on subject matter.

[22] *State, Dept. of Commerce, Community & Economic Development, Div. of Ins. v. Alyeska Pipeline Service Co.*, 262 P.3d 593, 597 (Alaska 2011) (internal citations omitted).

[23] 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), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00362&end_line=01254&time=1415&date=20040318&comm=JUD&house=H.

expertise that will coming into the office, with the resources that will be available for the office."[24] Staff explained that the expectation was "once the model works and the agencies start getting comfortable with it - we gave the agencies options to use the hearing officers, as they see fit, out of the model - this all becomes a very orderly, meaningful transition. That's how we got to the list that we got to."[25]

Staff further explained that certain agencies were excluded from mandatory jurisdiction because they "require highly trained technical expertise."[26] Staff identified Workers' Compensation and Regulatory Commission of Alaska hearings as two examples of exclusions that were based on training and expertise.[27] Both of these agencies have their own adjudicative staff. Construction contract claims, however, were not identified as among those that were excluded because of the need for expertise that the new OAH could not provide. Moreover, neither Workers' Compensation nor public utilities regulation hearings were excluded from OAH's permissive jurisdiction, so even these highly technical areas may be referred to OAH.[28] At several places in the legislative history, staff and legislators commented that they viewed OAH's initial limited mandatory jurisdiction as a "pilot project," with the expectation that referrals to OAH would increase over time.[29] Thus, in general, the legislative history of AS 44.64 shows an intent to give agencies the discretion to refer a case to OAH, with no limitation based on subject matter.

With regard to the specific legislative intent behind excluding construction contract claims from OAH's mandatory jurisdiction, the only legislative history I have found is the following discussion from the Senate Finance Committee on February 26, 2004: "Mr. Stancliff stated that recently enacted legislation incorporated new processes at the request of Associated

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24 *Id*.
25 *Id*.
26 *Id*.
27 *Id*.
28 At least one Workers' Compensation Board appeal has been voluntarily referred to an OAH ALJ with workers' compensation experience. Workers' Compensation Appeals Commission appeals have routinely been voluntarily referred to OAH ALJs with workers' compensation experience.
29 *E.g.*, 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 Judiciary Committee hearing on SB 203 (March 18, 2004) (testimony of Dave Stancliff; Rep. McGuire).

General Contractors (AGC) in regard to dispute resolution. In order to allow that process to develop, those processes has [sic] been eliminated from the jurisdiction of the legislation."[30]

This legislative history provides some support for Seward Drydock's basic premise that construction contracts are to be treated differently. Yet, this vague statement also allows for permissive referrals of construction law cases, particularly as the expertise and resources of OAH developed over the years.

Further digging into the legislative history and purpose of the exclusion requires an examination of the earlier bill that created AS 36.30.627 and 36.30.870(c) (the subsection of the procurement code that requires the Commissioner of Administration to adopt regulations establishing qualifications for arbitrators), HB 250. This bill was enacted a year before the OAH statutes. The legislative history of HB 250 provides some support for Seward Drydock's argument that there was a general understanding that "qualifications" would be set for both hearing officers and arbitrators in construction cases. For example, at a hearing in House Labor and Commerce Committee, Representative Holm commented that the important changes of HB 250 included that "qualifications for arbitrators and hearing officers will be established by the commissioner of the department of administration in regulation."[31] This gives some support to Seward Drydock's argument that the 2003 legislature intended only for qualified hearing officers to hear construction law claims.

Yet, the legislative history of HB 250 does not lead to the conclusion that OAH is prohibited from hearing construction or vessel-repair claims. First, HB 250 simply did not address hearing officer qualifications. Although the statement of Representative Holm may have indicated his view regarding qualifications for hearing officers, the text of HB 250, and the resulting statute, AS 36.30.870(c), provided only for setting qualifications of arbitrators, not hearing officers.[32] In general, courts will not rewrite legislation or add terms to a statute.[33]

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[30] Minutes, Senate Finance Committee hearing on SB 203 (February 26, 2004) (testimony of David Stancliff,), available at http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00774&end_line=01029&time=0903&date=20040226&comm=FIN&house=S. It appears that Mr. Stancliff was referring to adoption of AS 36.30.627, which was adopted in 2003 as the result of a negotiation between the Associated General Contractors of Alaska and the Department of Transportation and Public Facilities. *See, e.g.,* Minutes, House Labor & Commerce Committee on HB 250 (April 16, 2003) available at: http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=00204&end_line=00546&time=1520&date=20030416&comm=L!C&house=H.

[31] *See id.*

[32] *Id.*; *see* AS 36.30.870(c). Moreover, the relevant language in current AS 36.30.870(c) was not incorporated into the contract and it did not exist in 1992.

Second, HB 250 preceded the creation of OAH, so the provisions of HB 250 tell us nothing about legislative intent to have OAH ALJs hear construction claims. Third, the legislature in 2004 did not take any action to prohibit the commissioner from referring construction contract claims to OAH. The language of the statute and the legislative history show a legislative intent to give the commissioner the discretion to refer construction law cases to OAH. Fourth, in setting the qualifications for arbitrators of construction claims, the regulations make it open to any attorney with 10 years' experience, including expertise in the areas of construction law *or* public procurement law.[34] Because many OAH ALJs (including myself) would meet the requirement of 10 years' experience, and expertise in public procurement, OAH would be eligible to hear construction law cases even if the regulations on arbitrator qualifications were applicable to hearing officers. Fifth, in two instances, the legislature required special expertise for hearing officers who hear administrative disputes: (i) administrative law judges who conduct a tax proceedings under AS 43.05 must have "at least four years of professional experience as tax attorney, a certified public accountant practicing in the area of tax, or a tax administrator"[35]; and, (ii) the chair of the Workers' Compensation Appeals Commission must be an attorney with at least five years' experience in workers' compensation in the state.[36] Thus, when the legislature intended to set qualification requirements for hearing officers, it knew how to do so. That the legislature did not set qualifications for hearing officers in construction claims, and did not authorize or require an agency to set qualifications, is evidence that the legislature did not intend to foreclose referral of construction law claims to OAH.

In sum, in 2004 the legislature gave OAH limited mandatory jurisdiction, with the expectation that over time agencies would take advantage of the opportunity to refer cases to OAH under OAH's permissive jurisdiction. As the legislature predicted, OAH has expanded—it now has 11 ALJs (in 2005, it had only five), and it has demonstrated an ability to hear complex cases. Indeed, the department has referred other construction contract claims to OAH for

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[33] *Dep't of Commerce*, 262 P.3d at 597-598 (refusing to "invade the legislature's province by extending the plain language" of a statute); *Hickel v. Cowper,* 874 P.2d 922, 927–28 (Alaska 1994) ("We are not vested with the authority to add missing terms or hypothesize differently worded provisions in order to reach a particular result.").

[34] 2 AAC 12.958(b), (c), and (d) (emphasis added).

[35] AS 43.05.420(b).

[36] AS 23.30.007(c)(2)(C).

adjudication and preparation of proposed decisions.[37] Therefore, AS 44.64.030 does not deprive OAH of subject-matter jurisdiction to hear and prepare a proposed decision in this case.

2. Does 17 AAC 70.400(7) deprive OAH of subject-matter jurisdiction to hear this case on behalf of the commissioner?

Seward Drydock makes two arguments regarding the effect of 17 AAC 70.400(7), the Marine Highway regulation that incorporates the 1992 procurement code. First, in its opening brief, Seward Drydock argues that the incorporation of the regulation results in an "untenable jurisdictional box" because the regulation incorporates the provision of the procurement code that exempts the division from the procurement code, thus nullifying the very incorporation that the regulation seeks to accomplish.[38] In Seward Drydock's view, this results in a lack of a clear jurisdictional pathway, which leads inexorably to one solution—appointment of a private hearing officer to hear this case.

Seward Drydock is incorrect. If a jurisdictional void prevented the commissioner from referring this case to OAH, then the commissioner could not appoint a private hearing officer either. In that case, the Commissioner of Administration would have jurisdiction under AS 44.77. Yet, I do not accept Seward Drydock's interpretation of 17 AAC 70.400(7). The Alaska Supreme Court has advised that laws should not be interpreted in a manner that "would yield the absurd result of rendering [a statute] a nullity."[39] Here, Seward Drydock's interpretation of the regulation would render the entire regulation a nullity. The agency's clear intent was to incorporate a dispute resolution process. The lead-in language to the applicable definitional statute code provides that the definitions in AS 36.30.990 do not apply if "the context in which a term is used clearly requires a different meaning."[40] Here, the context clearly requires that the definition of agency include the department when contracting for Marine Highway System repairs in order to give effect to the department's intent in incorporating the 1992 code. Therefore, 17 AAC 70.400(7) does not create a jurisdictional void.

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[37] *E.g.*, *Silver Bow Const. v. Division of Gen. Serv.*, OAH No. 12-0025-CON (Dep't of Trans. and Pub. Fac. 2013); *Silver Bow Const. v. Division of Gen. Serv.*,OAH No. 12-0024-CON (Dep't of Trans. and Pub. Fac. 2012), *reversed, Silver Bow Const. v. State, Dep't of Trans. and Pub. Fac.*, Case No. 1JU-12-802 CI (Alaska Superior Ct. 2013). These decisions can be found at: http://doa.alaska.gov/oah/decisions/cont.html. In addition, over the years, OAH has adjudicated and mediated numerous complex administrative contract and procurement claims.

[38] Seward Drydock's Corrected Motion to Dismiss at 14.

[39] *Premera Blue Cross v. State, Dept. of Commerce, Community & Economic Development, Div. of Ins.*, 171 P.3d 1110, 1120 (Alaska 2007) ("We generally disfavor statutory constructions that reach absurd results. Therefore, we look for another construction that avoids the absurdity and is consistent with a reasonable interpretation of the terms of the statute."); *see also Boyd v. State*, 210 P.3d 1229, 1232 (Alaska App. 2009) (advising that courts should avoid interpretation that "defeats the obvious administrative purpose behind the regulations").

[40] AS 36.30.990 (1992).

Seward Drydock's second argument regarding 17 AAC 70.400(7) takes the opposite tack, and accepts that 17 AAC 70.400(7) effects a valid incorporation of the 1992 version of AS 36.30.630 and 36.60.670. Seward Drydock then asserts that "[t]his provision does not foresee OAH jurisdiction or the involvement of OAH in selecting a hearing examiner."[41] In support of this conclusion, Seward Drydock cites to the practice of the department, which has generally been to appoint private attorneys to serve as hearing officers in construction contract claims.

The problem for Seward Drydock, however, is that the language of the 1992 statute does not in any sense *prohibit* the department from referring a contract claim regarding a vessel to OAH. Alaska Statute 36.30.670(a) (1992) simply states that "[t]he 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." Although Seward Drydock is correct that the 1992 legislature did not anticipate OAH, neither did it adopt language that prohibits referral to OAH. And as already explained in this decision, the 2004 legislature that created OAH fully anticipated that agencies would, over time, make greater use of their discretion to refer hearings to OAH. The fact that the department had a practice of using private hearings for most construction claims, and now has decided to voluntarily refer to OAH a vessel repair contract claim, is entirely consistent with the legislative history of the statute that created OAH. Accordingly 17 AAC 70.400(7) does not deprive OAH of subject-matter jurisdiction to hear this case on behalf of the commissioner.

3. Does the contract's incorporation of current AS 36.30.627 deprive OAH of subject-matter jurisdiction to hear this case on behalf of the commissioner?

Finally, Seward Drydock notes that § 105-1.17 of the Contract states that "[p]rocedures for appeals are covered under AS 36.30.625, AS 36.627 and AS 36.30.630."[42] In Seward Drydock's view, this incorporation evinces an intent of the parties to adhere to the process under which the department would appoint a private hearing officer selected by the parties off of a list of eligible private attorneys. Seward Drydock particularly focuses on the incorporation of section .627, which provides for arbitration as an option. This argument, however, is not persuasive because, as already discussed, section .627 does not mandate arbitration or appointment of a private hearing officer agreed to by the parties from a list.

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41 Seward Drydock's Reply in Support of Motion to Dismiss at 3.

42 *Id.* at 2; *see also* Marine Highways Exhibit C at 4.

In sum, AS 44.64.030(b) gives OAH subject-matter jurisdiction to "conduct an administrative hearing or other proceeding of an agency" whenever the agency has requested the office to conduct the hearing or other proceeding. Nothing in the current procurement code, the 1992 procurement code, the department's regulations, or the contract deprives OAH of subject-matter jurisdiction to hear this contract claim.

D. Does Seward Drydock have a right, as a matter of due process, or under the doctrine of equitable estoppel, to require the commissioner to dismiss this case and appoint a private hearing officer?

Seward Drydock raises two additional arguments in support of its motion to dismiss. First, it argues that it was deprived of due process of law. In support, it notes that the department did not follow its past practice of providing the parties to construction disputes with a list of private attorneys. Second, it argues that it is entitled to relief because it relied to its detriment on a representation made by the counsel for Marine Highways, which it interpreted to mean that past practice would be followed. Both arguments lead Seward Drydock to conclude that this case must be dismissed. I address the two arguments together because the commissioner's exercise of discretion to refer the case to OAH resolves both.

With regard to due process, the basic elements of due process in an administrative hearing are notice, an opportunity to be heard by an impartial decisionmaker, and a sufficient record to allow for judicial review.[43] Seward Drydock does not contest that a hearing before OAH would provide those elements, but argues that for construction contracts disputes, the statutory scheme and past practice make additional process due: the right to recommend a mutually-agreeable private hearing officer with construction law experience from a list. With regard to the statutes and regulations, the argument is based on a false premise. Although statues and regulations can require an agency to add steps to the process, the statutes and regulations applicable here simply do not require the process advocated by Seward Drydock.

With regard to past practice, I do not agree with Seward Drydock that past practice of an administrative agency gives rise to a due process *right* to have that process continue indefinitely. Seward Drydock has not cited to any case that supports its argument. Here, the applicable statutes give the agency discretion to appoint a private hearing officer or to refer the case to OAH. Past practice is not controlling. Further, as stated earlier, the department has referred

[43] *State v. Lundgren Pac. Const. Co., Inc.*, 603 P.2d 889, 892 (Alaska 1979).

construction contract claims to OAH. Therefore, Seward Drydock has not made a case that any additional process is due.

With regard to the doctrine of equitable estoppel, the analysis is similar. To establish that it is entitled to relief under this doctrine, Seward Drydock must prove that the agency asserted a position, that it reasonably relied on the agency's assertion of the position, that it was harmed by its reliance, and that estopping the agency from taking a contrary position is in the public interest.[44] All four elements are required. Here, for the same reason that Seward Drydock was not deprived of due process, it has not identified any cognizable harm that it suffered because of the commissioner's decision to refer the case to OAH. To be cognizable, prejudice has to be a denial of or a detriment to an identifiable interest that a person holds, not just a disappointment that the person's preferred process was not selected. Here, as shown above, the department had discretion to refer the case to OAH or to appoint a hearing officer who was not in OAH. That the department chose to exercise its discretion in a manner that was not Seward Drydock's first choice does not constitute prejudice to Seward Drydock.[45]

Moreover, although Seward Drydock may be disappointed in not having a private attorney serve as the hearing officer, the commissioner's referral of the case to OAH does benefit the parties. Because of this referral, the parties will receive or have received the benefit of certain processes they would not have had under a non-OAH hearing officer, including the right to

- bump the initially-assigned hearing officer (AS 44.64.070(c));
- have the Chief Administrative Law Judge select the hearing officer rather than having the selection made by the department (AS 44.64.080(b));
- file a proposal for action with the commissioner regarding the recommended decision before the commissioner enters the final decision (AS 44.64.060(e));
- have the hearing process be governed by regulations that supplement the department's regulations (2 AAC 64.010 – 64.990).

Although Seward Drydock complains that the appointed ALJ has little to no experience in construction law, in fact, the Chief ALJ selected the ALJ based on the ALJ's "qualifications and

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[44] *State, Dep't of Comm. and Eco. Dev. v. Schnell*, 8 P.3d 351, 356 (Alaska 2000); *Property Owners Ass'n of the Highland Subd,. a Portion of USMS 769, Ketchikan, Alaska v. City of Ketchikan*, 781 P.2d 567, 573 (Alaska 1989) (identifying four elements necessary to apply equitable estoppel against government).

[45] *See, e.g., Exxon Corp. v. State*, 40 P.3d 786, 798 -799 (Alaska 2001) ("Exxon has not been prejudiced by the department's use of its discretion to deny the expansion to the PBU. Thus, estoppel does not apply here.").

expertise."[46] I have over 20 years' experience in administrative law, including significant experience in public procurement. I also have 20 months' experience in serving as a neutral decisionmaker in administrative hearings, which includes training from the National Judicial Council in conducting administrative hearings.

In addition, Seward Drydock argues that the referral to OAH was based on "the whim of the Commissioner."[47] Although we do not know the commissioner's precise reasons for referring this case to OAH, the procedural advantages of using OAH listed above show that the referral was not whimsical. In addition, the commissioner may also have had valid administrative reasons to refer the case to OAH. For example, OAH provides archiving and record-keeping functions, which often would not be available from a private attorney. The ability to have OAH staff process administrative details is not trivial or whimsical, and may be a reason for the commissioner's exercise of discretion. Moreover, a significant advantage of using OAH is that the final administrative decisions from the OAH process are published and indexed on the OAH website. This is good for the agency in that it helps parties prepare for hearings and helps keep administrative decisionmaking consistent and fair. And, it may be that OAH is able to provide services at a lower cost than private hearing officers. In short, the commissioner had many reasons to exercise discretion to refer this case to OAH. Exercise of that discretion was not capricious and it did not harm Seward Drydock.

Finally, it may appear that I am ignoring Seward Drydock's argument that it relied on representations made by Assistant Attorney General Dana Burke regarding the process for appointing a hearing officer. I am not. I understand that Seward Drydock, acting in good faith, was surprised by the referral of this case to OAH. I also understand that AAG Burke, also acting in good faith, had communicated to Seward Drydock what he honestly believed would be the process.[48] Although this situation does not give rise to equitable estoppel or a violation of due process, I frequently see similar situations in administrative adjudications—situations in which one or both parties have a misunderstanding and are surprised by the circumstances. If a party is prejudiced by, or has concerns about, the misunderstanding, I try to address that prejudice or

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[46] AS 44.64.020(a)(4).

[47] Reply in Support of Motion to Dismiss at 12.

[48] To be clear: I am not ruling that Seward Drydock reasonably relied on AAG Burke's communications for purposes of equitable estoppel, or that his communications or past practice established an agency position. I understand Seward Drydock's arguments, but I am doubtful that they meet the elements of the doctrine of equitable estoppel. I do not reach the issues, however, because the lack of prejudice is so evident.

concern—usually by granting extra time or some other extra process. I remain open to addressing concerns related to this genuine misunderstanding.

At this time, however, my biggest concern is delay. This case involves a small business that wants to get paid for services it provided to the government. It also involves a government agency that believes it has already paid enough. Both parties should have a strong interest in having this dispute resolved expeditiously. To accomplish this goal, I will by separate order reconvene a scheduling conference, and work with the parties to get this hearing underway as soon as possible.

ORDER

Seward Ship's Drydock's Motion to Dismiss is DENIED.

DATED this 7th day of November, 2014.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

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