

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

DOUBLE A CONSTRUCTION of)
ALASKA,)
)
Plaintiff,)
)
v.)
)
STATE, DEPARTMENT OF)
NATURAL RESOURCES,)
)
Defendant.)
_____)

Case No. 3AN-15-11252 CI

ORDER DENYING PETITION FOR REVIEW

I. BACKGROUND

This case began as a contract dispute between Double A Construction (“Double A”) and the State of Alaska, Department of Natural Resources (“Department”). On November 11, 2014, after an adverse decision from the Department’s contracting officer, Double A appealed to the Commissioner of the Department of Transportation and Public Facilities (“Commissioner”). The Commissioner referred the case to the Office of Administrative Hearings (“Office”), citing AS 44.64.060(b). AS 44.64.060(b) establishes the discretionary jurisdiction of the Office and permits an agency to “request that the [O]ffice conduct an administrative hearing of that agency.” The Office assigned the case to Administrative Law Judge (“ALJ”) Andrew M. Lebo.

ALJ Lebo concluded that Double A had not timely filed its claim. Accordingly, the ALJ issued a proposed order dismissing the case. Under AS 44.64.060, the Commissioner retains final jurisdiction over the case and must accept, reject, or modify the proposed order within 45 days. However, before the Commissioner made a final decision, Double A moved to stay the proposed order.

Double A claimed that the Office lacks subject matter jurisdiction over the case. Specifically, Double A argued that AS 44.64.030 specifically exempts construction contract claims from the Office's discretionary jurisdiction.

The ALJ denied Double A's motion for a stay on December 9, 2015. One day prior, on December 8, 2015, Double A filed an original action in the Superior Court (case no. 3AN-15-11174CI) which, like the motion for a stay, claimed the Office lacks subject matter jurisdiction over construction contract claims. On December 10, 2015, Double A filed a motion for reconsideration with the ALJ. On December 11, 2015, the ALJ denied Double A's motion for reconsideration. Double A then filed the instant petition for review.

II. DISCUSSION

Appellate Rule 610 authorizes the superior court to review non-final agency decisions under certain circumstances. Such review "is not a matter of right, but will be granted only when the sound policy behind the general rule of requiring appeals to be taken only from final judgment is outweighed." Appellate Rule 610. Here, Double A has not shown that its interests in this matter justify interlocutory review.

Although Rule 610 does not expressly set forth a finality requirement, one is nonetheless implied. *Ostman v. State, Commercial Fisheries Entry*, 678 P.2d 1323, 1327 (Alaska 1984). Indeed, the rule permits review only when:

- (1) postponement of review . . . will result in injustice because of impairment of a legal right or because of unnecessary delay, expense, hardship or other related factors;
- (2) the order or decision involves a controlling question of law on which there is a substantial ground for difference of opinion, and an immediate review of the order may materially advance the termination of the proceeding in the other forum; or
- (3) the . . . the administrative agency has so far departed from the accepted and usual course of administrative adjudication, as to call for the superior court's power of supervision and review.

Appellate Rule 610(b).

Here, judicial review would not cure injustice, reduce delay, or advance the disposition of the case. Double A did not formally challenge the Office's jurisdiction until its December 2015 motion for reconsideration. By that time, the case had been with ALJ Lebo for roughly a year. During that year, Double A impliedly consented to the Office's jurisdiction by litigating the merits of its claim. Moreover, Double A challenged the ALJ's jurisdiction only after an adverse decision, which suggests that Double A seeks a more favorable venue, rather than a remedy for manifest injustice. While a party may challenge subject matter jurisdiction at any time, Double A's delay in bringing this claim shows that it will not suffer any substantial injustice if the case remains with the Office until its immanent conclusion.

Moreover, interlocutory review will likely cause, rather than reduce, delays and costs. Double A filed its petition for review after the ALJ heard the entire case and issued a proposed decision. The petition comes just weeks before the Commissioner enters a final decision pursuant to AS 44.64.460. The Commissioner may substantially alter or even reverse the ALJ's order, and thereby render Double A's claims moot. If Double A disagrees with the Commissioner's final decision, it may appeal that decision to the Superior Court. Thus, Double A's petition serves only to prolong the litigation and increase costs for all parties involved. Moreover, the instant petition does not meaningfully differ, in terms of costs and delay, from proper appeal of the Commissioner's final decision.

Finally, the agency has not departed so far from "the accepted and usual course of administrative adjudication as to call for the superior court's power of supervision and review." Appellate Rule 610(b). The Office has decided on three separate occasions that it has subject matter jurisdiction over construction contract claims. Thus, its jurisdiction over this matter is at most subject to good-faith dispute, and not a radical departure from proper procedures. And, as discussed above, Double A consented to the Office's jurisdiction for a year, which suggests


that, even from Double A's perspective, the Office did not substantially depart from "the accepted and usual course of administrative adjudication."

III. CONCLUSION & ORDER

By filing its petition and civil action, rather than waiting for a final decision from the Commissioner, Double A has substantially complicated these proceedings and sought to delay a final decision. Thus, Double A's petition fails to assert a colorable claim for interlocutory review. In fact, this case illustrates the disadvantages inherent in piecemeal appeals. *See City of Fairbanks v. Schaible*, 352 P.2d 129, 130 (Alaska 1960) (observing that unfettered interlocutory review is "unwise, because in many cases [it] would add to the delay of litigation and would result in decisions on points that might otherwise be disposed of during the course of the litigation without substantial prejudice to anyone").

At an earlier stage of the administrative proceeding, the Court would have been more inclined to grant a petition for review based on the Office's subject matter jurisdiction. Now, however, Double A's petition only delays a final decision and will likely increase costs for all parties involved. Accordingly, the Court concludes that Double A's petition for review is DENIED.

ORDERED this 22nd day of January, ~~2015~~²⁰¹⁶, at Anchorage, Alaska.


ANDREW GUIDI
Superior Court Judge

I certify that on 1-22-16
a copy of the above was mailed to
each of the following at their
addresses of record:

K. Brady / S. Gray - AGO


Jacie Kapper, Judicial Assistant