

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE DIRECTOR OF THE DIVISION OF INSURANCE**

In the Matter of)	
)	
ALEX A. TATE)	
d/b/a TATE INSURANCE SERVICES)	OAH No. 07-0086-INS
<hr/>)	Agency Case No. D 07-03

ORDER DENYING REQUEST FOR ADMINISTRATIVE ACTION

The February 21, 2008, “Request for Administrative Action” filed on behalf the Division of Insurance is denied, without prejudice to the division’s ability to dispute the order denying summary adjudication¹ when this case is ready for final decision by the Director of Insurance or her delegate. This case is within the jurisdiction of the Office of Administrative Hearings under AS 44.64.030(a)(17). As such, under AS 44.64.040(b), the administrative law judge exercises “the powers authorized by law for exercise by [the director]” during the pendency of the case. Ruling on motions is one such power.

The division’s request for administrative action, in effect, asks for an interlocutory review by the final decisionmaker of a dispositive motion ruling by the administrative law judge. The statutory procedures that govern the conduct of this case by the administrative law judge, on behalf of that decisionmaker, do not provide for interlocutory reviews of motion decisions by the final decisionmaker. If the motion ruling had disposed of the entire case, it would have been issued as a proposed decision and the parties would have been entitled to file proposals for action under AS 44.64.060(e) and 2 AAC 64.340, before the case was presented to the director for final action. Because the motion ruling does not purport to dispose of the case, it is not a proposed decision ripe for final action by the decisionmaker; rather than being a proposed decision, the ruling on the motion is an interlocutory ruling by the administrative law judge.

The denial of the motion will be encompassed in the proposed decision prepared by the administrative law judge following the hearing. This approach is used in cases subject to AS 44.64.060 when a dispositive motion is denied or granted only in part, unless another (e.g., case-

¹ The order denied the Division’s motion for summary adjudication on Counts I and II of the five-count amended accusation.

type specific) law provides for interlocutory review of motion rulings. The division's request did not identify such other law or authority. Therefore, the request for interlocutory review must be denied.

Accordingly, the division's request for administrative action is denied. This denial is without prejudice to the division's right to dispute the predicates for the motion ruling in briefing or other argument at appropriate points in this proceeding, including at the proposal for action stage following issuance of a proposed decision after the hearing, or in any subsequent appeal.

DATED this 28th day of February, 2008.

By: Signed
James T. Stanley
Administrative Law Judge

Certificate of Service: The undersigned hereby certifies that on the 22nd day of February, 2008, a true and correct copy of this document was mailed to the following: Gary A. Zipkin, counsel for Alex Tate and Tate Insurance Services; Daniel Wilkerson, AAG; and Barbara Karl, paralegal for the Division of Insurance. A copy of this order was also sent by facsimile to Messrs. Zipkin and Wilkerson on this date.

By: Signed
Linda Schwass

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

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE DIRECTOR OF THE DIVISION OF INSURANCE**

In the Matter of)
)
ALEX A. TATE)
d/b/a TATE INSURANCE SERVICES) OAH No. 07-0086-INS
) Agency Case No. D 07-03
_____)

ORDER CONFIRMING DENIAL OF REQUEST FOR ADMINISTRATIVE ACTION

The order issued on February 22, 2008, denying the Division of Insurance staff’s request for administrative action is hereby confirmed for the reasons set forth in that order, and for the following additional reasons which address the division’s February 29, 2008, filing:

1. On February 23, 2007, the Director of the Division of Insurance, Linda S. Hall, elected not to participate in the hearing of this matter.¹ Therefore, the administrative law judge is properly exercising any powers authorized by law for the insurance director during the pendency of this case.²
2. Granting a motion for partial summary adjudication in an appropriate case may be an efficient way to resolve legal questions raised in an administrative adjudication, providing that resolution of those questions does not depend on material facts disputed by the parties. Granting of a motion for partial summary adjudication may very well

¹ See February 23, 2007 Case Referral Notice (selecting “no” as the response to the question “[d]oes final decisionmaker wish to participate in hearing”). The chief administrative law judge may permit a final decisionmaker to participate in the hearing of a case, but such a request must be made when the materials required to initiate a case are transmitted, not at some later point in the case when one party or the other disagrees with an interim ruling by the administrative law judge. AS 44.64.060(c) provides as follows:

The agency may, with materials transmitted under (b) of this section [notice of referral, hearing request and other materials], request the chief administrative law judge to permit the individual, board, or commission that will make the final decision to participate with the assigned administrative law judge in the conduct of the administrative hearing. The chief administrative law judge shall determine the degree and manner of participation and may terminate that participation at any time. However, the individual, board, or commission that participates under this subsection may not serve as the administrative law judge or preside during the hearing and may not take action on behalf of the agency in the agency’s capacity as a party to the proceedings.

Accord 2 AAC 64.120(5) (requiring that a request to participate under AS 44.64.060(c) be delivered to the Office of Administrative Hearings as part of the case referral packet).

² AS 44.64.040(b).

streamline the evidentiary hearing component of a case.³ However, the possibility of using partial summary adjudication in this manner does not entitle a party to entry of partial summary adjudication at all, let alone when the administrative law judge determines that material facts in dispute bear upon resolution of the issues.

3. Denial of a motion for partial summary adjudication does not dispose of the issues on which the movant sought summary adjudication. The denial simply preserves those issues until the evidence is in and findings can be made on disputed material facts. The division staff's February 29th filing is therefore incorrect in contending that a denial of summary adjudication is "dispositive." A denial of summary adjudication is not a resolution of a case.⁴ It is not a "proposed decision . . . that may be adopted as the final decision by the agency with authority to make the final decision," and thus is not a matter on which the final decisionmaker would take action under AS 44.64.060(e).
4. When, as here, the administrative law judge has concluded, based on the summary adjudication briefing, that disputes exist as to facts that might make a difference to the outcome on the two counts on which the division staff sought summary adjudication, the prudent course is to proceed to hearing on those and the other counts; then, make such fact findings as the evidence supports and reach appropriate legal conclusions, and memorialize the facts and conclusions in a proposed decision for the final decisionmaker's consideration. This process allows for development of the factual record while the case is still with the executive branch, which is one of the primary reasons for an administrative adjudication.
5. Director Hall remains the final decisionmaker in this case.⁵ The division staff's February 29th filing correctly observes as much, and is not mistaken in its assertion that the director

³ In administrative adjudications, the right to a hearing does not require development of facts through an evidentiary hearing when no factual dispute exists. *See Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990). Conversely, if a factual dispute exists, and the disputed facts are material, it is incumbent upon the administrative law judge to proceed to a hearing. 2 AAC 64.250 (allowing the parties to file motions for summary adjudication when material facts are not in dispute, or effectively disputed, but stopping short of mandating entry of summary adjudication, even when the opposing party fails to effectively counter affidavit evidence). A fact is not "material" unless it would make a difference to the outcome. *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968).

⁴ *See, e.g.*, Annotation, *Reviewability of Order Denying Motion for Summary Judgment*, 15 A.L.R.3d 899, 902, 922-24 (1967), *cited with approval in Johnson v. Alaska State Dep't of Fish & Game*, 836 P.2d 896, 904 n.11 (Alaska 1991); *cf. Medlin v. State, Dep't of Revenue*, 2002 WL 32903103 (unpub. disp., Alaska 2002) at 2-3 & n.8.

⁵ *See* February 23, 2007 Case Referral Notice (selecting "no" as the response to the question "[i]s final decisionmaking authority delegated to the assigned ALJ").

“has never surrendered the authority to render a final decision and even [one] at odds with one issued by the ALJ.”⁵ However, this is not a matter purely within the director’s discretion, as the staff’s filing suggests. Rather, under AS 44.64.060(e), just like any other final decisionmaker in a case subject to that statute, when presented with a proposed decision for consideration, the director will have five options for action. Director Hall will have the opportunity to exercise one or more of the five options based on the record developed through the hearing process and the applicable law.

In sum, it is premature for Director Hall to take any action in this case at this time. Absent a settlement between the parties that disposes of all issues, this matter will proceed to the evidentiary hearing which is scheduled to commence on May 19, 2008. After the hearing, the director will be presented with the administrative law judge’s proposed decision encompassing all counts of the accusation (except those, if any, dismissed by the division or compromised through settlement before the proposed decision is issued). The parties will be permitted to file proposals for action in response to the proposed decision under AS 44.64.060(e). Then, the case will be ready for Director Hall’s decision.

DATED this 4th day of March, 2008.

By: Signed
James T. Stanley
Administrative Law Judge

Certificate of Service: The undersigned hereby certifies that on the 4th day of March, 2008, a true and correct copy of this document was mailed to Gary A. Zipkin, counsel for Alex Tate and Tate Insurance Services; Daniel Wilkerson, AAG; and hand-delivered to Barbara Karl, paralegal for the Division of Insurance. A copy of this order was also sent by facsimile to Messrs. Zipkin and Wilkerson on this date.

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

⁵ February 29, 2007 Response to ALJ’s Order Denying Request for Administrative Action at 2.