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

In the Matter of:	)	
	)	
ERIK P. KOHLER, MD	)	
	)	
Respondent.	)	OAH No. 10-0635-MED
	)	Board Case No. 2800-08-002

ORDER ON MOTION FOR SANCTIONS

At the hearing in this matter, the respondent moved for dismissal or other sanctions for conduct by the Division of Corporations, Business and Professional Licensing (division) and its counsel in connection with a subpoena the division provided to itself during the course of the hearing. Because the issuance of the subpoena was improper and the associated conduct falls within the definition of bad faith, the motion is granted. The sanction of dismissal is rejected as excessive, however. The division and its counsel will be required to pay the expenses occasioned by their course of action.

A. Conduct at Issue

This is a case seeking license revocation and other discipline against a neurosurgeon, Erik Kohler, for allegedly substandard medical practice. The case became an adjudicatory matter on December 21, 2010 with the filing of an accusation against Dr. Kohler. It was referred to the Office of Administrative Hearings on December 28, 2010.

On January 19, 2011, the administrative law judge (ALJ) entered a scheduling order that, among other things, addressed the conduct of discovery. It provided that the parties would attempt to conduct any discovery through informal means and "by agreement." One specific item of agreed discovery was noted; beyond that, the order provided that "[c]ounsel shall confer to discuss any other discovery needs." If cooperative discovery did not work, either party could move for "an order under AS 44.62.440" providing for discovery.[1] No such order was ever requested.

[1] Scheduling Order at 1 and 2.

The hearing in this case was conducted in two parts. From March 21-24, 2011 the division put on its case in chief. Beginning April 25, Dr. Kohler put on his defense, which was followed by a brief rebuttal case.[2]

During the interim between the two parts of the case, the division and its counsel decided to seek information by subpoena from Alaska Native Medical Center (ANMC), where Dr. Kohler worked several years ago. The division acknowledges that the "only purpose" of the subpoena was to gather information for the hearing then in progress.[3] The subpoena was not related to any new investigation of Dr. Kohler for alleged misconduct that was not at issue in the hearing in progress. Instead, the division was trying to determine whether Dr. Kohler had been "recruited" when he left ANMC to go to another hospital,[4] a matter that was thought to have some bearing on the existing allegations and that might be used in cross-examination of Dr. Kohler about those allegations.

The division's counsel did not confer with opposing counsel regarding the need for discovery. The division did not request a discovery order under AS 44.62.440, and did not request a subpoena from the Office of Administrative Hearings (OAH). Instead, the division decided to issue the subpoena itself under the authority in AS 08.01.087. Subpoenas under AS 08.01.087 require, among other things, the concurrence or non-objection of a majority of the members of the State Medical Board. The division chose the second route, rather than the OAH route, because going to OAH for a subpoena "would be tipping the division's hand, basically."[5]

The division is correct that had a subpoena been sought through OAH, the other party would have been made aware of the request.[6] Likewise, had the division "confer[red]" with opposing counsel about its discovery needs as envisioned by the Scheduling Order, its adversary would necessarily have become aware of what it was seeking.

On April 11, 2011, a division investigator contacted five members of the Medical Board. Neither she nor the division's counsel informed Dr. Kohler's counsel of the contact. The

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[2] The reason for this structure was that the division had unilaterally amended the accusation two business days before the hearing to expand the subject matter of the case from four surgeries to 28 surgeries. It was necessary to delay presentation of the defense to give Dr. Kohler an opportunity to prepare to address the greatly expanded subject matter.

[3] Cross-exam and ALJ exam of Nelson. Ms. Nelson's admission is corroborated by the timing and return date of the subpoena ultimately prepared.

[4] *Id.*

[5] Statement of Assistant Attorney General Karen Hawkins.

[6] In cases assigned to this ALJ, a copy of any subpoena issued is routinely sent to the opposing party. In the case of a mid-hearing discovery subpoena not authorized by the discovery plan, it is likely that, before issuance, there would have been an additional step, most likely a telephonic status conference with counsel for both parties.

investigator obtained the consent of the five board members to issuance of the subpoena. She made no record of her contacts at the time.

The investigator's discussions with the board members were extremely brief and nonspecific. She did not identify the case for which she was seeking a subpoena, and the board members do not appear to have been able to tell that the subpoena related to Dr. Kohler.[7] She did not tell the members the purpose of the subpoena. The discussions were so nonspecific that one board member thought the subpoena related to a spa.[8]

The division issued the subpoena to ANMC on April 12, 2011. The subpoena was issued under the agency case number for this case. No copy was provided to Dr. Kohler's counsel.

On or about April 21, 2011, Dr. Kohler's counsel learned of the subpoena through other channels. On the morning of April 21, he requested a hearing to inquire into its issuance. He expressed particular concern about the division's contact with board members, since the subpoena recited (not quite accurately[9]) that "[a]ll of the members of the Alaska State Medical Board were notified of this proposed action." After Dr. Kohler's counsel raised his protest, the division's investigator prepared an affidavit recording her contact, ten days previously, with the five board members.[10] The affidavit was not provided to opposing counsel or OAH, however.

A special hearing was held in response to the request from Dr. Kohler's counsel. Division personnel involved in issuing the subpoena testified under oath. The existence of the affidavit came to light during the hearing, and a copy was then produced.

At the hearing, the division's counsel conceded that it would have been improper for Dr. Kohler's counsel to contact members of the board to seek action from them related to this case, even if he did not mention the name of his client or describe the case in any detail. The division nonetheless contends that its own conduct was appropriate, which suggests that the above scenario will be repeated in future cases if no measures are taken to deter it.

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[7] Testimony of Nelson. Ms. Nelson's account was confirmed through individual, *in camera* interviews of board members by the ALJ.

[8] *In camera* interview. No opinion is rendered here as to whether consent given in these circumstances is sufficiently informed to meet the requirements of AS 08.01.087(b).

[9] Investigator Nelson testified that she tried to reach all eight board members, but spoke with only five. The division did not explain why the subpoena was inaccurate in this regard.

[10] The investigator testified that she did not recall whether she prepared the affidavit before or after learning that the subpoena had been protested. The ALJ draws an inference that it was likely prepared in response to the protest because (i) the protest occurred early on the 21st, and the affidavit is dated April 21; (ii) this investigator has generally avoided maintaining a contemporaneous written record of her activities in this case, and thus it is unlikely that she would, without prompting, have turned to making such a record on April 21.

None of the material obtained from ANMC was subsequently used in the hearing on the merits of the case.

B. Discussion

1. The conduct was improper

Under AS 08.01.087(b), when it appears to the Commissioner of Commerce, Community and Economic Development that a person has violated or is about to violate a professional licensing law, the commissioner may issue an investigative subpoena. Authority to issue these subpoenas apparently has been delegated to the division. A prerequisite of such subpoenas is that all members of the applicable licensing board be notified and given an opportunity to object.[11]

Section AS 08.01.087(b) allows the division to use compulsory process to investigate suspected violations. The difficulty in this case is that the AS 08.01.087(b) procedure was used, not as part of the investigation of suspected violations, but rather as a private discovery tool after an accusation had already been filed.

The filing of an accusation against a licensee initiates an adjudicatory proceeding. In such a proceeding, the board becomes the adjudicator, and contact between an agency's prosecutorial staff and the board on the allegations at issue must, in general, occur openly and on the record.[12]

Medical Board disciplinary matters must be referred to the Office of Administrative Hearings.[13] Once such a referral has taken place, the board is not to take "further adjudicatory action in the case" except "to render a final decision."[14] This restriction helps to prevent a mixing of the board's roles. Adjudicatory actions such as approval and issuance of discovery and hearing subpoenas and management of discovery become the province of the assigned ALJ, and they occur in full view of both parties. Within the context of the adjudication, the statutes do not envision that the board will be approached in any capacity other than the capacity to make the final decision.

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[11] AS 08.01.087(b).

[12] *See, e.g.,* AS 39.52.120(e). AS 39.52.120(e) does not represent the full extent of the restrictions on such contact. *See, e.g., In re Robson,* 575 P.2d 771, 774 (Alaska 1978) (due process prevents *ex parte* contact between prosecutorial staff and decisionmaking body).

[13] AS 44.64.030.

[14] AS 44.64.080(c). This provision, which was written for a wide range of agency structures, permits "the agency" to act in only two roles: that of "party litigant" and that of final decisionmaker. In the professional licensing context, the staff takes the role of "party litigant" and the board takes the other role.

Parenthetically, one should note that a board does not lose its full range of powers to regulate a profession simply because an adjudication is pending.[15] Thus, if additional misconduct comes to light that is outside the scope of the adjudication, it is surely permissible for the division and the board to work together normally to see that it is investigated. That is not the situation here, where the "only purpose" of the subpoena was to gather information for the hearing then in progress.

There are several risks that arise when the division's prosecutorial staff fails to observe the more restricted role a board must take once a matter is in adjudication, and when they insist on having a unilateral, private channel to the board. Private, unrecorded conversations between the prosecutorial staff and the board about the staff's discovery needs to prepare for cross-examination risk enlisting the board as a partner in the prosecution, a role inconsistent with its role as a neutral. They also open the door to improper discussions of the merits of the case.[16] They create a serious risk that individual board members will have to recuse themselves from the matter, potentially depriving the board of a quorum and forcing it to delegate its decisionmaking function. Conversely, if in its effort to avoid these results the board feels it must provide consent for subpoenas with virtually no understanding of the circumstances, these contacts have the potential to discredit the board in the eyes of the public, making it appear to rubber-stamp anything the staff lays before it. Finally, the use of the investigative subpoena process as a discovery tool after litigation is underway creates an uneven playing field, in which one party

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[15] The final sentence of AS 44.64.080(c) reflects this continuing oversight power.

[16] Heightening this concern is the possibility that this particular division is insufficiently mindful of the risks of *ex parte* communication. Two recent cases have created this appearance. Prior to the special hearing on the matter at issue in this order, the ALJ brought those two cases to the attention of counsel, and counsel had an opportunity to comment on them.

The first of those cases is *In re Malstrom,* OAH No. 11-0062-POT. Approximately three weeks prior to contacting the board for a subpoena in this case, the division initiated an improper contact with the chair of the Board of Physical Therapy and Occupational Therapy in connection with the *Malstrom* case to inquire about the chair's attitude toward the case. A special hearing had to be held to investigate the contact. The same counsel who represented the division in *Malstrom* is the division's lead counsel in this case.

The second of those cases is *In re Taylor,* OAH No. 10-0409-CNA. In December of 2010, a different investigator from the same division initiated an improper *ex parte* contact with the ALJ assigned to that case to complain about one of his findings. In the contact, the investigator appeared to threaten to make yet another *ex parte* contact, this one with the Board of Nursing. The Chief Administrative Law Judge had to caution the division as follows:

> It is wholly inappropriate for the employee (witness or otherwise) of a party to initiate an *ex parte* (private, off-the-record) communication about a case under adjudication with the adjudicator—the hearing assigned judge or the board. For an executive branch employee, doing so can constitute a violation of the Executive Branch Ethics Act for which sanctions such as a personnel disciplinary action can result. *See* AS 39.52.120(d); AS 39.52.410(a)(3).

must obtain discovery in the open according to the limitations laid down by the administrative law judge, whereas the other party has a second means of obtaining discovery that is hidden from view and subject to no limitations.

In sum, what occurred in this case was improper in at least three ways. First, the division had secret, unrecorded contact with a decisionmaking authority on the subject of the matter under adjudication. Second, by obtaining board consent, the division had the board perform a function other than "render a final decision" at a time when rendering a final decision is the only function the board is permitted to perform in the matter under adjudication. Third, the division did all of this in violation of the January 19, 2011 order governing discovery.

2. The conduct is sanctionable

The administrative law judge assigned to a case has the authority to sanction a party or its attorney for "actions done in bad faith or as a result of tactics used frivolously or solely intended to cause unnecessary delay."[17] The only one of these grounds relevant to the conduct at issue here is "actions done in bad faith." In addition, an ALJ may sanction a party (but not an attorney) for failure to comply with an order.[18]

The concept of bad faith has both subjective and objective components. Subjective bad faith focuses on the actor's intent or motive, and is established when the intent is to deprive another of something he or she has the right to receive.[19] Objective bad faith is established when the actor "fails to act in a manner that a reasonable person would consider fair . . . ."[20] Exploring this concept further, the Alaska Supreme Court has observed:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction . . . .[21]

In the context of attorneys, bad faith can encompass conduct "that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound," even though the attorney believes it to be permissible.[22]

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17 AS 44.64.040(b)(2); 2 AAC 64.360(b).

18 2 AAC 64.360(a).

19 *Witt v. State*, *Dep't of Corrections,* 75 P.3d 1030, 1034 (Alaska 2003); *Luedtke v. Nabors Alaska Drilling, Inc.*, 834 P.2d 1220, 1223-1224 (Alaska 1992).

20 *Witt*, 75 P.3d at 1034; *see also Pitka v. Interior Reg. Housing Auth.,* 54 P.3d 785, 789 (Alaska 2002).

21 *Leudtke,* 834 P.2d at 1224 (quoting *Restatement (Second) of Contracts* § 205, comment d (1981)). Although the Alaska Supreme Court made this observation in the context of bad faith in the contractual context, the court dealt in the same case with alleged bad faith in the litigation context, and it did not suggest that the concept is to be applied any differently in the two contexts.

In the present case, the division and its counsel seem to have believed that it was entirely proper for them to violate a discovery order, enlist the board in a role from which it is barred during litigation, hide the conduct from opposing counsel, and obtain a unilateral advantage in litigation. Despite this belief, the admitted motive for this conduct was to avoid notifying Dr. Kohler that a subpoena had been requested. This constitutes subjective bad faith as Dr. Kohler had a legitimate expectation under the rules governing administrative hearings, as well as under the scheduling order, that he would receive notice of any subpoena issued to obtain information for use in this case.[23]

The conduct also constitutes objective bad faith. The division and its counsel used subterfuge in an attempt to gain a tactical advantage at the hearing. Taken as a whole, this conduct is not something a reasonable person would regard as fair. It is also conduct that an attorney, exercising reasonable care, could have ascertained was out of bounds.

3. Appropriate Sanction

It is natural and foreseeable that an attorney who learns that his adversary has been in private contact with a decisionmaking board about a matter in active litigation will insist on exploring the nature of that contact. Indeed, Dr. Kohler's counsel might have been derelict had he not done so. Dr. Kohler's counsel devoted about two and a half hours to the matter, including the special investigatory hearing. This time investment was reasonable. At his standard billing rate of $300 per hour, the time spent had a value of $750.

It is not clear whether Dr. Kohler (or any entity in privity with him) is paying for his counsel's time; his counsel has previously suggested that his services are being provided without charge. If that is so, however, an expense has nonetheless been imposed on another person by the division's conduct. The expense has fallen either on Dr. Kohler *or* his counsel, or the two of them in combination.

The sanction authorized by statute for bad faith conduct is an award of "reasonable expenses, including attorney fees."[24] In the present case, the burden imposed by the division's conduct is most fairly borne by the division and its counsel rather than by those with whom they failed to deal in good faith.

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22 *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985).

23 *See Harris v. State*, 195 P.3d 161, 175 (Alaska App. 2008) (violation of pretrial order to gain tactical advantage is bad faith).

24 AS 44.64.040(b)(2)

An OAH regulation, 2 AAC 64.360(a), authorizes additional sanctions for failure to comply with an order, including, in appropriate cases, exclusion of evidence from the hearing or outright dismissal of the case. The conduct at issue in this case was improper in part because it was inconsistent with the discovery provision in the case scheduling order, and thus these additional sanctions are potentially authorized.

In this case, the evidence obtained though the subpoena to ANMC was never offered at the hearing on the merits. Accordingly, the sanction of excluding that evidence does not arise. More broadly, while the violation here was serious there was, fortuitously, no actual prejudice to Dr. Kohler other than the time spent addressing the violation. Thus, the award of attorney fees is a sufficient sanction in this matter.

C. Order

The Division of Corporations, Business and Professional Licensing and Karen Hawkins, jointly and severally, shall be liable to Dr. Kohler[25] in the sum of $750. Payment is due 45 days from the date of this order.

This order is a final agency action of the Office of Administrative Hearings pursuant to AS 44.64.040(b)(2). It is not an order of the Alaska State Medical Board.

Judicial review of this order may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this order.

DATED this 31st day of May, 2011.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 31st day of May, 2011, a true and correct copy of this document was e-mailed and mailed to the following: Paul Stockler, counsel for Erik Kohler; Karen Hawkins, AAG.

By: *Signed*
Kimberly DeMoss

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

[25] Dr. Kohler shall ensure that any funds received are forwarded to the individuals or entities who bore the cost of his counsel's time, if he was not the one who bore that cost.

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Respondent.	)	OAH No. 10-0635-MED
	)	Board Case No. 2800-08-002

ORDER ON MOTION FOR RECONSIDERATION OF SANCTIONS

The Division of Corporations, Business and Professional Licensing (division) and Karen Hawkins, through new counsel, have moved for reconsideration of the Order on Motion for Sanctions issued in this case on May 31, 2011. For the reasons explored below, the motion is granted as to Ms. Hawkins and the sanctions order is vacated as to her. The motion is denied with respect to the division.

A. Authority to Issue Sanctions Order

The division and Hawkins question whether the administrative law judge (ALJ) has authority to issue a sanctions order, suggesting that when an ALJ is acting on behalf of a board, sanction authority under AS 44.64.040 rests with the board.[26] The division says it "reserves this issue for appeal" but has declined to argue the issue at this level.[27]

The sanction imposed in this case was imposed under AS 44.64.040(b). That statute authorizes an ALJ to "exercise the powers authorized by law for exercise by that agency" on whose behalf the ALJ hears a case. In addition, it grants three further powers, not to the agency, but expressly to the ALJ. One of these is the limited sanctioning authority in AS 44.64.040(b)(2). This is not a power possessed by the Alaska State Medical Board under any of its own statutes, and since AS 44.64.040(b)(2) does not grant it to the board, it resides only in the ALJ.

It has never been controversial in the past that this limited power is administered solely by the ALJ. When the Office of Administrative Hearings (OAH) was first established, the

26 Motion for Reconsideration at 1 nn. 1-2.

27 *Id.* Ordinarily, issues are reserved for appeal by actually arguing them, not by merely mentioning them. Presenting an argument allows the tribunal below to address the issue in a fully informed way and cure any errors it may have made.

Attorney General's bill review letter to the Governor explicitly acknowledged it as an ALJ power rather than an agency power.[28] In the six and a half years since that time, OAH has been presented with a number of motions for sanctions against agency staffs and attorneys, all of which have been denied until the present occasion. In arguing for and receiving these denials of sanctions, the Department of Law has never previously contended that the issue of sanctions must be (or even may be) presented to the board or commission deciding the case on the merits.[29] The division made no such contention in this case, either, until after it had received an adverse ruling.

There is no basis to vacate the present order on the ground of lack of authority.

B. Due Process for Ms. Hawkins

The issue of sanctions came before the ALJ in this case by means of an oral motion from Dr. Kohler. The motion requested sanctions against "the division." It was that motion to which the division responded. In ruling on the motion a month later, the ALJ granted sanctions against both the division and Ms. Hawkins, jointly and severally. While sanctions against an attorney are within an ALJ's statutory authority, they were not within the scope of the motion before the ALJ.

Upon further reflection, the ALJ believes the proper procedure, if he wished to contemplate sanctions against Ms. Hawkins in addition to the division, would have been to issue a show-cause order to Ms. Hawkins. Ms. Hawkins could then have presented arguments or testimony beyond what she deemed necessary in opposing the motion regarding the division. Since this opportunity was not afforded, no sanctions should have been assessed against Ms. Hawkins. Reconsideration will be granted and the order will be vacated as to her.[30] The ALJ apologizes for the error.

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[28] 2004 Alaska Op. Atty. Gen. 1, 2004 WL 2366163.

[29] A recent example is the "Joint Opposition to Respondent's Motion for Attorney Fees" (Feb. 11, 2011) filed in *In re Ulofoshio,* OAH No. 10-0274-ALH, over the signature of Chief Assistant Attorney General Stacie L. Kraly.

[30] A motion for reconsideration would not ordinarily be granted without giving the adverse party an opportunity to respond to it. *Cf.* Alaska R. Civ. P. 77(k)(3). In this case, however, reconsideration is only being granted as to an aspect of the sanctions order that Dr. Kohler never sought in the first place, and thus his input on this correction seems unnecessary. Moreover, the ALJ is mindful that asking Dr. Kohler for a response would only impose further legal expense on him. It is exactly that harm—the imposition of extra legal expense—that the original sanctions order was intended to correct, and the ALJ does not wish to compound the harm that the division's conduct has already caused.

C. Due Process and Fairness for the Division

The division argues that it

> has [not] had an opportunity to respond to the sanctions, or to present evidence and testimony in opposition to a request for sanctions. This violates the division's . . . rights to due process . . . .[31]

This argument is much less compelling than the argument regarding Ms. Hawkins.

As a preliminary matter, one should note that the division has no due process rights. What has happened here is that one government agency has, under authority the legislature has given it, decided that a sister agency must reimburse a private citizen for an expense the sister agency inappropriately caused the citizen to incur. This is a disbursement decision within the executive branch of Alaska state government. While there are legal restrictions on such decisions, neither the Alaska Constitution nor the United States Constitution gives executive branch agencies "due process" rights in their dealings with each other.[32]

With that said, the division is entitled to fair treatment, and this it has received. The division's reconsideration motion inexplicably fails to mention that there was a *motion* for sanctions. Once the motion was put on the record, the division was asked, "how would you like to respond?" The division then made the election to deliver an oral opposition. In that response, the division did not ask for an opportunity to respond further at a later time, nor to present any evidence beyond the considerable testimony that had already been received. When the division made this election, it was represented at counsel table by two attorneys, one of them a Chief Assistant Attorney General.

In moving for reconsideration, now represented by a third attorney, the division still does not make an offer of proof or identify anything it would add to the record were the record on the sanctions motion to be reopened. Under the circumstances, the division's argument that it has not had a fair opportunity to present its case is unpersuasive.

D. Violation of an OAH Order

Much of the motion for reconsideration is devoted to minimizing the importance of the January 19, 2011 scheduling order entered in the case, providing for the parties to conduct discovery through informal means and "by agreement." One specific item of agreed discovery

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[31] Motion at 20.

[32] *See, e.g., Kenai Peninsula Borough v. State, Dep't of Comm. & Reg. Affairs,* 751 P.2d 14, 18-19 (Alaska 1988) (Alaska due process clause not designed to protect one governmental unit from another; case also notes inapplicability of federal due process protections).

was noted; beyond that, the order provided that "[c]ounsel shall confer to discuss any other discovery needs." The division contends that this was not a "discovery order."

The assessment of the particular sanction imposed in this case was not dependent on the violation of a discovery order. What is important for purposes of both of OAH's sanctioning authorities, AS 44.64.040 and 2 AAC 64.360(a), is that it was an order of some kind. Moreover, it was an order entered based on agreement of the parties. Insofar as the order as drafted did not reflect their agreement, the parties were specifically instructed to contact the OAH Clerk to schedule a further discussion.[33] The division sought no further discussion.

Obtaining a purely discovery subpoena without conferring with the other party (and indeed, with the express intent of hiding the subpoena from the other party) was a violation of both the spirit and the letter of this agreed order.

E. Division's Freedom to Use the AS 08.01.087(b) Procedure

Sworn testimony establishes that the "only purpose" of this subpoena was to gather information for the hearing then in progress. This makes it a discovery subpoena, not an investigative subpoena. In Part IV of its reconsideration argument, the division seems to acknowledge this, but it asserts that AS 08.01.087(b)(4) is "'an applicable statute or regulation [that] allows discovery.'"[34] The division argues that AS 08.01.087(b), because it is a statute, supersedes OAH discovery regulations.

This argument is beside the point. It is not OAH regulations that made the use of the AS 08.01.087(b)(4) procedure inappropriate. The problem was that having the board issue a discovery subpoena in a pending case placed the board in a role prohibited by another statute, AS 44.64.080(c);[35] that it violated an agreed order; that it undermined the integrity of the proceeding and the ability of the ALJ to ensure a level playing field; and that it was conducted in secret.

The division and the board are free to use AS 08.01.087(b) to investigate new or different misconduct outside the scope of a pending hearing. The sanctions order took care, at the top of page 5, to acknowledge that. Regrettably, this legitimate investigative authority was misappropriated in this case for use as a private discovery tool.

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[33] Scheduling Order at 1.

[34] Motion at 9 (quoting 2 AAC 64.240).

[35] Note that AS 44.64.080(c) cannot be preempted by AS 08.01.087(b)(4). The preemption provision in AS 44.64 is found at AS 44.64.060(a), and it applies only to "this section," that is, to AS 44.64.060. This indicates that the legislature intended the more general provisions of AS 44.64 to apply across the board.

F. Lack of Violation of AS 39.52.120(e)

The division flatly states that "The ALJ found the division's communications with the Board violated AS 39.52.120(e)."[36] This assertion is baffling, as the sanctions order contains no such finding. The ensuing discussion of the propriety of such a finding is therefore beside the point.

The division says that "the ALJ proclaims that all ex parte communications between prosecutorial staff and a decisionmaking . . . body is prohibited."[37] The sanctions order contains no such proclamation. It does suggest that the division needs to be more careful about such contacts than it has been in recent cases, as discussed in footnote 16 of the sanctions order.

G. Bad Faith

The concept of bad faith has been given a variety of definitions. In giving meaning to the term as it appears in AS 44.64.040(b)(2), the ALJ drew in part from cases involving the covenant of good faith and fair dealing in contracts. The division argues that these cases are inapposite. However, the Alaska Supreme Court has never suggested that the term has a different meaning in the contractual context from its meaning in the litigation context. Moreover, the present case does have a contractual overtone, in that the scheduling order's requirement of discovery consultation was one the division had agreed to.[38] Thus there was an obligation to opposing counsel quite analogous to the one that arises in the negotiation and execution of contracts.[39]

The division cites *Kowalski v. Kowalski*,[40] in which the Alaska Supreme Court suggested that the conduct to be classed as bad faith or vexatious for purposed of enhanced attorney fees would be "Conduct . . . such that the parties are prevented from litigating the action on an equal plane." The conduct at issue in this case presents exactly that problem. The division, by taking an investigative tool and misusing it as a private avenue for unsupervised mid-litigation

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36 Motion at 9.

37 Motion at 10. The ellipsis omits a parenthetical "(sic)" that the division included in the sentence.

38 *See* Part D above.

39 This may be an appropriate juncture in the discussion to correct a misleading statement of fact in the division's reconsideration motion. In an apparent effort to suggest that the division and its counsel were entirely straightforward with opposing counsel, the division says: "All of the information was provided to opposing counsel, and if any documents were going to be used, opposing counsel would have an opportunity to respond to them in any way the ALJ would have allowed." Motion at 4 n.4. This statement could create a misimpression. The information was not provided to opposing counsel until after (i) counsel for ANMC had reported to Dr. Kohler's counsel what the division was doing; (ii) a special hearing had been convened on Dr. Kohler's motion; and (iii) the division was expressly asked, during the hearing, to turn over the documents. Only then did the division's counsel volunteer the documents.

40 806 P.2d 1368, 1373 (Alaska 1991).

discovery, has quite deliberately sought to place itself on a different plane from its adversary in the litigation. The division has expressly stated that it would not have been proper for Dr. Kohler to attempt to do what the division did.

The ALJ has given the division the benefit of the doubt and assumed that it did not subjectively perceive that its conduct was wrongful.[41] The division argues that this lack of subjective perception should excuse it from sanctions. In the ALJ's view, however, it is unlikely that the legislature intended, when it used the "bad faith" standard in AS 44.64.040(b)(2), to create a standard so empty that parties could undermine the hearing process with impunity so long as they could avoid direct proof that they actually knew they were doing wrong. Instead, it seems more sensible to apply the slightly lower threshold laid out in the sanctions order.

Many factors played into the decision to assess this conduct as being above the threshold for sanctions. These include:

- The conduct was deliberate in the sense that the division consciously set out to use an investigative subpoena for discovery, precisely because it wanted to avoid "tipping [its] hand" to its adversary. This was not an inadvertent violation such as forgetting to turn over a document in discovery.
- The conduct involved the riskiest kind of behavior: a direct, unmonitored contact with the decisionmaking board on the very subject being adjudicated. While contact with the board can sometimes be appropriate, it should have prompted careful thinking about whether it was appropriate in this instance.
- It was plainly foreseeable that the conduct, if discovered, would force opposing counsel to trigger an investigation and would thus needlessly impose legal expenses on the adversary.

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[41] The factual record contains troubling indications that might have supported a different finding. Of particular concern are the indications in the record that the division not only hoped to keep its access to ANMC records a secret pending their use in the hearing, but also wished to avoid making a paper trail of how it obtained those records. This might have supported an inference that the division knew it had done something wrong.

The division's investigator did not prepare any contemporaneous written record of her contacts with the decisionmaking board—and then created such a record ten days later, just after Dr. Kohler's counsel protested the subpoena. She testified at the hearing that she could not recall whether she prepared the record before or after his protest, but under the circumstances this testimony did not quite ring true. Finally, the record she created, though sworn, was not completely accurate. Sanctions Order at 3 & n.9.

- There was potential for very serious consequences to the proceeding, including tainting the board so that it could not decide the case or undermining public confidence in the fairness of board proceedings.
- This division has a vexing recent history of similar problems, as discussed in footnote 16 of the sanctions order.

No basis to revise this assessment has been made out.

H. Conclusion

In closing, the Office of Administrative Hearings wishes to make it clear that there is no intent to vilify the division as an institution. This division does much good work in a difficult and varied subject area.

It may be profitable to step back to look at the sanctioned conduct in broad context. The division was embroiled in a highly contentious and challenging hearing. The first stage of that hearing had gone badly for the division, and it found itself in desperate straights with respect to the majority of its case. At that point, it succumbed to the temptation to take a shortcut, seeking a unilateral advantage that it ought to have recognized was inappropriate.

The sanction that has been imposed is the mildest available. The division has been asked to reimburse an expense that it should not have imposed on its adversary. The amount of the reimbursement is small. Nonetheless, the Office of Administrative Hearings is hopeful that, in using its sanction authority for the first time in six and a half years, it will prompt the division to take steps to ensure that problems of this kind do not recur.

The motion for reconsideration is granted in part. Upon reconsideration, the sanction imposed against Karen Hawkins is vacated. In all other respects the motion is denied.

DATED this 29th day of June, 2011.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The Undersigned certifies that on the 29th day of June, 2011, a true and correct copy of this document was e-mailed and mailed to the following: Paul Stockler, counsel for Erik Kohler; Karen Hawkins, AAG; Clyde E. Sniffen, AAG; Terry L. Thurbon, CALJ.

By: Signed
Kimberly DeMoss

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