

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF REVENUE**

In the Matter of the City of Valdez)
Notice of Escaped Property)
)
Oil & Gas Property Tax (AS 43.56) 1974-)
2002 Tax Years) OAH No. 04-0322-TAX
_____)

ORDER OF THE CHIEF ON DISQUALIFICATION REQUEST

The City of Valdez’s request that the chief administrative law judge either change the administrative law judge (ALJ) assigned to this case, without cause, or disqualify the ALJ from continuing to hear this case, for cause, is denied for the reasons in part B of this order. First, however, in part A, this order will attempt to clear up the parties’ apparent confusion about which laws govern the proceedings in this case.

A. GOVERNING LAWS

Valdez’s challenge in this case to the Tax Division’s decision regarding escapement of oil and gas property arises under AS 43.56 and was filed with the Department of Revenue long before the Office of Administrative Hearings (OAH) existed. This case did not fall under the jurisdiction of OAH’s predecessor agency, the former Office of Tax Appeals. As such, the final executive branch decisionmaker for this case is the Commissioner of Revenue (or his designee).

Effective January 1, 2005, the case and the long-ago assigned ALJ (then a Revenue Hearing Examiner) Mark Handley were transferred to OAH under the transition provisions of the law that created OAH. Six months later, on July 1, 2005, most of the statutory provisions on OAH’s jurisdiction and procedures took effect. Until that point, only the transition provisions, plus the sections creating OAH, prescribing the chief ALJ’s duties, and authorizing work on regulations had been in effect.

Even after the effective date of OAH’s jurisdictional and procedural statutes, however, cases arising under AS 43.56 remain within the final decisionmaking purview of the Commissioner of Revenue. OAH hears such cases pursuant to its authority under AS 44.64.030(b) to accept voluntary referrals. The substantive laws that apply to the cases remain unchanged. The procedures have been affected to some extent by the OAH governing statutes and, most recently, by OAH’s procedural regulations.

The legislature exempted only a few case types from the general statutory procedures that apply to OAH-heard cases. In the tax category, only the cases within OAH’s original jurisdiction

(those arising under AS 43.05.405 *et seq.*) were exempted from the AS 44.64.060 case referral/decision process.¹ A few other case types were exempted from that process and from the AS 44.64.070 ALJ change/disqualification provisions.² Since an oil and gas property-related tax case under AS 43.56 is not an OAH original jurisdiction tax case, and since the legislature did not exempt AS 43.56 cases specifically, or voluntary referrals generally, from the coverage of OAH's procedural statutes, once those procedural statutes took effect, they began to apply to AS 43.56 voluntary referrals heard by OAH for the Commissioner of Revenue.

In addition, the statutes through which the legislature created OAH and empowered its ALJs to act can affect the conduct of proceedings before OAH, including proceedings in AS 43.56 voluntary referrals. Most pertinent among these are (1) authority to adopt procedural regulations; (2) authority to exercise agency (e.g., Department of Revenue) powers in performance of the hearing function; and (3) authority to award fees as a sanction for frivolous and delay-causing tactics.³

OAH has adopted procedural regulations, which are found in 2 AAC Chapter 64. They took effect July 2, 2006. They do not change procedures required by statutes (e.g., the appeal procedures in AS 43.56.110 – AS 43.56.130). They do supersede the Department of Revenue's preexisting procedural regulations (e.g., 15 AAC 05.030 & 15 AAC 05.035) to the extent that the Revenue and OAH regulations conflict.⁴

In sum, the statutory and regulatory procedures *currently* governing the conduct of an AS 43.56 hearing or other proceeding by OAH are found in

- (1) OAH's governing statutes (AS 44.64, effective July 1, 2005);
- (2) OAH's regulations (2 AAC 64, effective July 2, 2006); and
- (3) the Department of Revenue's regulations (15 AAC 05), unless the procedures required or authorized by the Revenue regulation in question conflicts with the procedure required by an applicable statute or by OAH's regulations.

Because this case came to OAH under the transition provisions of the legislation long before most of OAH's governing statutes took effect, however, a few of the required or optional

¹ See AS 43.05.405.

² E.g., AS 14.20.030(c) & AS 18.80.120(b) (exempting, respectively, Professional Teaching Practices Commission and Human Rights Commission cases from the requirements of AS 44.64.060 and AS 44.64.070).

³ AS 44.64.020(a)(11); AS 44.64.040(b); AS 44.64.060(a).

⁴ For voluntary referrals, the OAH regulations also recognize that the agreement under which an agency voluntarily refers a case to OAH might affect the procedures that apply. See 2 AAC 64.100(b)(3). The transition agreement under which this case was transferred to OAH did not dictate which procedures apply.

procedural steps that apply in post-July 1, 2005 cases do not apply in this case. Simply put, some procedures came into being after it was too late to make use of them.

B. DISQUALIFICATION

In his July 3, 2006 order denying Valdez's motion to disqualify, ALJ Handley extended the opportunity afforded by AS 44.64.070(b) to parties in post-July 1, 2005 cases to appeal the hearing-assigned ALJ's decision on disqualification for cause to the chief ALJ. For the reasons set out in Part A above, that was appropriate. Even though Valdez's motion to disqualify predated the effective date of AS 44.64.070 by about six weeks, the disqualification-for-cause provisions of that statute can, and should, be applied to this case at any point after the statute's July 1, 2005 effective date when disqualification for cause becomes an issue. The same cannot be said for the change-of-ALJ (disqualification without cause) provisions of AS 44.64.070(c), however.

AS 44.64.070(c) gives parties in most cases heard by OAH the right to a change of ALJ once, as a matter of course, without cause, if they exercise that right within five days after notice of the ALJ's assignment. That right did not exist when this case was assigned to ALJ Handley. It did not exist when the parties participated in this case while ALJ Handley presided over it during the many months leading up to creation of OAH. It did not exist when the case was transferred to OAH as part of ALJ Handley's then-existing Department of Revenue docket. It did not exist when the parties were notified that ALJ Handley and the case had been transferred to OAH. It did not even exist when Valdez filed it motion to disqualify ALJ Handley for cause.

The right did not exist for any party, in any case, until July 1, 2005. OAH has consistently denied requests to change ALJs without cause ostensibly made under AS 44.64.070(c) by parties in cases that arose before July 1, 2005, precisely because the right did not exist in those cases. In the months leading up to July 1, 2005, if a party to a new case filed a notice of ALJ change, the request was rejected because the law did not apply and thus the right did not exist.

Valdez takes the position that it has timely exercised the right to an ALJ change under AS 44.64.070(c) because it promptly filed a notice of change after learning from ALJ Handley's July 3, 2006 order "that these proceedings are now governed by the new procedural regulations promulgated by the Office of Administrative Hearings rather than 15 AAC 05.030."⁵ A

⁵ Notice of Change of Judge Pursuant to AS 44.64.070(c) or Alternatively Motion for Reconsideration of Motion for Disqualification of Administrative Law Judge at p. 3 (July 11, 2006); also City of Valdez's Reply Regarding Disqualification of Judge at p. 3 (July 27, 2006).

procedural regulation does not change a substantive statutory or regulatory right. Nothing in ALJ Handley’s July 3, 2006 order even remotely suggested the contrary. In the order, ALJ Handley pointed out that the Revenue regulation does not provide a *procedure* through which to dispose of a disqualification motion filed at this late stage in the case and, indeed, it does not: 15 AAC 05.030(c) addresses only disqualification motions filed “within 10 days after the date of notice that the hearing officer was assigned to the appeal.” The Revenue regulation does not speak to disqualification for cause when the alleged cause arises later in the case. Thus, the *procedure* on disqualification for cause in AS 44.64.070(b) and OAH’s regulations applies to the for-cause aspect of Valdez’s motion. Application of that *procedure*, however, does not vest in Valdez a substantive right to a without-cause ALJ change.

Valdez also argues that it “should be afforded the opportunities available to all other participants in appeals before [OAH], including the right to request a one time change of judge.”⁶ This argument misses the point that not “all other participants” in OAH-heard cases have the right to a one-time ALJ change. As explained in Part A, the legislature exempted some case types from the AS 44.64.070 disqualification provisions, including the subsection (c) without-cause-ALJ-change provision. Parties in case categories that were not exempted have the right to a one-time change only if they can and do exercise it in accordance with the requirements of AS 44.64.070(c)—something that was impossible for a party to do in a case that predated the July 1, 2005 effective date of that law. Parties in individual cases that predated AS 44.64.070(c)’s creation of the without-cause ALJ change right never had the right to make such a change. In short, Valdez has not been deprived of a right afforded to “all other participants” in OAH-heard cases.

This leaves only one question: should ALJ Handley be disqualified for cause from continuing to hear this case? Disqualification for cause is appropriate if the party requesting disqualification shows that “a fair and impartial hearing cannot be accorded by [the ALJ].”⁷ Valdez’s argument that ALJ Handley cannot accord it a fair and impartial hearing rests largely on a ruling with which Valdez disagrees and inferences Valdez draws from ALJ Handley’s previous employment by the Department of Revenue and current work on another tax matter—

⁶ City of Valdez’s Reply Regarding Disqualification of Judge at p. 3 (July 27, 2006).

⁷ AS 44.64.070(b). *Compare* 15 AAC 05.030(c) (describing the standard for disqualification at the outset of a case under the Revenue regulation as requiring the moving party to show “that the hearing officer is personally prejudiced and would be incapable of according the party an impartial hearing ...”); *accord* AS 22.20.020(a)(9) (setting the test for recusal by court system judges as whether “a fair and impartial decision cannot be given”).

the State Assessment Review Board's valuation of the Trans Alaska Pipeline System—affecting both that department and Valdez as a tax recipient.⁸

When this appeal commenced, ALJ Handley was an employee of the Department of Revenue. He was a Revenue Hearing Examiner attached to the Revenue Commissioner's office. He did not work for the Tax Division, or any of the many other subdivisions of the Department of Revenue whose decisions were then and are now the subject of appeals to the Commissioner. The appeal file contains no motion to disqualify Handley (or the Commissioner, for that matter) from hearing this appeal based on the bias Valdez presumes exists by virtue of employment status. In any event, ALJ Handley is no longer a Revenue employee. He is employed by the independent OAH. He is not subject to supervision by the Department of Revenue. His past employment with Revenue hearing cases for the Revenue Commissioner does not provide grounds for disqualification for cause.

Similarly, ALJ Handley's work assisting the State Assessment Review Board in conducting property tax valuation hearings does not provide grounds for disqualification for cause. Valdez is correct that in that capacity ALJ Handley drafted the board's decision. OAH's ALJs provide that service to all adjudicatory boards and commissions for which it hears or assists with the hearing of cases, even those boards and commissions that (like the State Assessment Review Board) hear the evidence directly and deliberate on the decision before a written document memorializing that decision is prepared. The board functions as a neutral decisionmaker and the ALJ that assists it likewise is a neutral. Nothing about filling that role suggests a bias for or against any of the many parties—taxpayers, political subdivisions or the Department of Revenue.

Finally, Valdez's disagreement with ALJ Handley's ruling on discovery does not provide grounds for disqualification for cause. Adverse rulings, in and of themselves, do not provide sufficient evidence of bias to warrant disqualification.⁹ “[A] judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons.”¹⁰ ALJ Handley acknowledged in his order denying disqualification that it was premature for him to respond to the Tax Division's request for clarification about the discovery ruling without first giving Valdez an opportunity to respond. I agree. The better approach would

⁸ See Notice of Change of Judge Pursuant to AS 44.64.070(c) or Alternatively Motion for Reconsideration of Motion for Disqualification of Administrative Law Judge at pp. 5-6 (July 11, 2006); City of Valdez's Reply Regarding Disqualification of Judge at pp. 3-6 (July 27, 2006).

⁹ *Wasserman v. Bartholomew*, 38 P.3d 1162, 1170 (Alaska 2002), cert. denied 536 U.S. 929 (2002).

have been to allow a period of time for Valdez to respond to the Tax Division's letter requesting clarification, or perhaps to convene another conference with parties' counsel to clarify the previous order.

That ALJ Handley acted in haste to clarify the oral ruling made during the status conference, however, does not show bias against Valdez. Moreover, this haste did not turn the Tax Division's letter into an improper *ex parte* communication as Valdez contends. The letter seeking clarification was copied to Valdez, as Valdez has acknowledged. That Valdez did not receive the letter before ALJ Handley took the opportunity of issuing a routine order on a stipulation by the parties to add a clarifying order regarding discovery does not make the communication an *ex parte* one. Acting in haste shows only that—haste.

I have reviewed the transcript, as well as the other documents filed by the parties, and observe that clarification of the order regarding discovery probably was necessary. The conference was contentious: Valdez wanted broad scale discovery; the Tax Division wanted to allow Valdez none; ALJ Handley expressed a willingness to allow Valdez to take limited discovery related to the statute of limitations matter prior to completing briefing on that matter; counsel for the parties spoke over one another, argued about whether materials had been served late or not at all, and in at least one instance one of them twice directed opposing counsel not to interrupt.¹¹ Ultimately, the parties agreed to a schedule to complete briefing on the statute of limitations matter.¹²

In one portion, the transcript indicates that Valdez expressed a desire to conduct discovery related to the statute of limitations matter prior to completing the briefing.¹³ Thus, Valdez's surprise at the May 4, 2005 order staying discovery "pending [ALJ Handley's] ruling on the parties' briefs" is understandable. Nonetheless, that order does not establish bias.¹⁴

¹⁰ *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979).

¹¹ *See generally* Notice of Change of Judge Pursuant to AS 44.64.070(c) or Alternatively Motion for Reconsideration of Motion for Disqualification of Administrative Law Judge at Exhibit A (transcript of status conference) & especially pp. 5-7.

¹² *Id.* at pp. 7-8.

¹³ *Id.* at pp. 6-7 (stating in response to ALJ Handley's question about whether before he rules on the partial dismissal motion Valdez wanted to supplement the record or take discovery: "Yes. The answer is the City would like an opportunity to conduct discovery and to do additional briefing depending on the resolution of that discovery ...").

¹⁴ Valdez did not request reconsideration of the May 4, 2005 order, which would have been the usual response to an objectionable order. It did, by letter of the same date, ask for a written explanation of the reasons for staying all discovery but did not ask that the decision be reconsidered or otherwise point out that this order may have been inconsistent with the oral proceedings.

This is a contentious appeal with aggressive advocacy on both sides. The confusion apparent in the transcript and exchange of correspondence begged for clarification of the oral orders coming out of the status conference. The better course would have been for ALJ Handley to have delayed responding to the request for clarification until Valdez had a chance to respond. Failure to follow that better course, however, does not warrant disqualification for cause. This appeal remains assigned to ALJ Handley.

DATED this 27th day of September, 2006.

By: Signed
Terry L. Thurbon
Chief Administrative Law Judge

The undersigned certifies that on September ____, 2006, this notice was distributed to the following parties: William Walker & Joe Levesque, counsel for City of Valdez; Bonnie Harris & Jonathan Iversen, Assistant Attorneys General. A courtesy copy was distributed to Leon Vance, counsel for the taxpayer.

Neil Roberts

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