

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL FROM THE BOARD OF REGISTRATION FOR ARCHITECTS,
ENGINEERS AND LAND SURVEYORS**

In the Matter of:)	
)	
MICHAEL ADAMS,)	
)	
Respondent.)	OAH No. 07-0178-AEL
_____)	Agency No 0100-07-002

DECISION AND ORDER

I. Introduction

Michael K. Adams applied in 2007 to take the professional engineering examination for the sixth time. The Board of Registration for Architects, Engineers and Land Surveyors voted not to allow him to sit for the examination because he lacks the educational qualifications required by the current regulation regarding eligibility for the exam. Mr. Adams requested a formal hearing, contending that his eligibility ought to be determined by the regulation in effect when he first applied for examination in 2002.

After a period of discovery to allow Mr. Adams to gather information from the Division of Corporations, Business and Professional Licensing, a live hearing took place on June 12, 2007. Mr. Adams attended in person and testified on his own behalf. There was also brief testimony from two licensing officials, whom Mr. Adams was able to cross-examine. Exhibits A through H were admitted without objection.

Mr. Adams believes the eligibility change the Board made to its regulations in 2003 should not be applied to him because the Board did not give appropriate formal notice of the regulatory change, because a Board member omitted to mention the change to him in informal discussions, and because applying the regulation to him would deny him equal protection under the law. None of the contentions is legally supportable, and the Board's initial decision should be affirmed.

II. Facts

There are no factual disputes in this case. The parties disagree only about the legal implications of the facts. Except where otherwise noted, the facts provided in this opinion are drawn from the brief recording of the oral hearing.

Michael Adams, who holds Bachelor of Science and Master of Science degrees in Architecture from the University of Michigan, has been a licensed architect in Alaska for more than 18 years. Since 1988, he has worked in the civil engineering field. He seeks to advance his career by adding an engineering license. He has passed the fundamentals of engineering (FE) examination.

In 2002, Mr. Adams applied for Board approval to sit for the professional engineering (PE) examination, receiving his approval early the following year.¹ The approval effectively entitled Mr. Adams to sit for the examination up to five times within a five-year period.² He took the PE exam five times between April 2003 and October 2006, but did not pass.

During this period, Mr. Adams approached the examination somewhat casually, typically working a full schedule up to the week before the exam and then cramming in the final week. He was willing to accept a high risk of failure because he was confident that he could retake the test if he did not succeed. Apparently, this approach was not uncommon among PE candidates in the past; Mr. Adams's own father, for example, had passed the PE exam on his seventh attempt in Michigan. In the spring of 2004, just before his second attempt at the examination, Mr. Adams suffered an additional distraction when his father died immediately before the test date; he chose to proceed with the examination anyway because of his confidence that he would have other opportunities. He took the examination three more times thereafter. Insofar as numerical scores are available, they are not particularly close to the passing level.³

As required of applicants who have failed five examinations, Mr. Adams returned to the Board in early 2007 to seek permission to continue testing. By 2007, however, the regulations had been altered since Mr. Adams first received approval to sit for the examination. Under the new regulations, he did not have the necessary education to sit for the PE exam. By unanimous

¹ Ex. A, p. 57.

² As the Board has consistently interpreted its regulations, applicants who have once been approved for examination under 12 AAC 36.010 may obtain reexamination under 12 AAC 36.040 without any reevaluation of their eligibility under the work experience and education tables in 12 AAC 36.063. Testimony of Ginger Morton. Hence changes in those tables would not affect an applicant until the applicant was required to go back through a full application under 12 AAC 36.010. Applicants have to return to the full application process after five failures or the passage of five years, whichever comes first. 12 AAC 36.040(c).

³ Ex. B.

vote on February 22, 2007, the Board denied his application.⁴ It is from this denial that Mr. Adams appeals.

The regulatory change that has frustrated Mr. Adams's continued quest for the PE credential occurred through a regulatory process in 2003, affecting applications submitted on or after January 1, 2004. Mr. Adams, however, was unaware of this change until 2007. To qualify for continued testing under the new regulations, Mr. Adams would need to return to school for substantial additional coursework over a period of years. At this stage of his career, this would represent a large financial hardship.

Mr. Adams testifies plausibly that had he known of the regulatory change, he would have made a more concerted effort to prepare for one or more of his four re-takes of the PE examination (all four of which occurred after the new regulation was on the books). He would have realized that passing the exam within five tries was of critical importance for him.

III. Discussion

Mr. Adams, who was admirably frank and straightforward at the hearing, candidly agrees that he does not meet the education requirements of the new regulation.⁵ He also does not challenge the validity of the new regulation. His contention is that the new regulation should not be applied to him. He has three arguments in support of this view.

A. Notice Requirements of Administrative Procedure Act

Mr. Adams first contends that when the new regulation was proposed, he—as an applicant already in the system whose situation would be altered by the new requirements—was an “interested” party who should have been notified of the proposed change. He points to AS 44.62.190(a) which, in addition to mandating newspaper or Internet publication of notice of proposed regulations, provides that notice be

- (2) furnished to every person who has filed a request for notice of proposed action with the state agency; . . . [and]
- (4) when appropriate in the judgment of the agency,
 - (A) furnished to a person or group of persons whom the agency believes is interested in the proposed action

⁴ Ex. C.

⁵ The new regulation, 12 AAC 36.063 as amended June 13, 2003, is reprinted at Ex. D. Mr. Adams's concession that he does not meet its requirements is found at 0:45:30 on Digital Recording File 1.

Mr. Adams concedes, however, that he never filed a request for notice of new regulations with the Board or the Department of Commerce, Community and Economic Development.⁶ He therefore does not qualify as a person to whom direct notice was mandatory under AS 44.62.190(a)(2). The remainder of the language quoted above is purely permissive, allowing but not requiring agencies to give special notice to people or groups they believe to be interested in regulatory proposals. Because the provision is permissive, the fact that the agency did not cull its records to identify and notify applicants like Mr. Adams does not constitute a violation.

Because no violation of AS 44.62.190(a) has been shown, it is unnecessary to evaluate what the legal remedy would be had there been such a violation.

B. Estoppel Based on Contacts with Kenneth Maynard

Kenneth Maynard has been a member of the Alaska Board of Registration for Architects, Engineers and Land Surveyors since 2004. Mr. Adams related at the hearing that during 2004 and 2005 both he and Mr. Maynard sat on another body, the Board of Directors of the Alaska Chapter of the American Institute of Architects. He said that the two of them discussed the fact that Mr. Adams was in the process of testing to become a licensed professional engineer, discussed the trend toward upgrading requirements for that credential in other states, and discussed the expectation that Alaska applicants will need a master's degree starting in 2015. Despite touching on all of these related issues, Mr. Maynard did not mention to Mr. Adams the regulatory change at issue in this case.

Mr. Adams's argument is essentially that the Board of Registration for Architects, Engineers and Land Surveyors is prevented from applying its new regulation to him on equitable grounds because he was misled by one of its members into relying on its old regulation. He seeks on this basis to require the Board to administer the PE examination to him. The Alaska Supreme Court has established a doctrine that could potentially achieve this result. This doctrine, known as promissory estoppel,⁷ arguably may be applied to obtain affirmative relief from a government agency.⁸

⁶ *Id.* at 0:50:00.

⁷ The discussion of promissory estoppel below uses, with some modifications, language originally authored by Administrative Law Judge Andrew Hemenway.

⁸ The Alaska Supreme Court has "arguably recognized the availability of promissory estoppel against a governmental agency." *James v. State*, 815 P.2d 352, 356 n. 10 (Alaska 1991), citing *State v. First National Bank of Ketchikan*, 629 P.2d 78, 80-81 (Alaska 1981). *But see Application of Stephenson*, 511 P.2d 136, 143 (Alaska 1973) ("[I]t is well established that a state is not estopped to assert a result dictated by its rules, even if a state office has made a contrary representation from the terms of the rules to an employee and caused reliance on such

In order to establish a claim for relief based upon promissory estoppel, the claimant must show: (1) an actual promise was made;⁹ (2) the claimant took an action in reliance on the promise; (3) the claimant's reliance was actually or reasonably foreseeable by the promisor; (4) the action was a substantial change of position; and (5) enforcement of the promise is necessary in the interest of justice.¹⁰ Mr. Adams falls short at the first hurdle: he has not shown that any actual promise was made to continue to handle his application under the regulation in effect when he first applied. The traditional rule is that a promise for purposes of promissory estoppel must be one that is "sufficiently definite and certain to constitute an offer or acceptance under contract law."¹¹ The Alaska Supreme Court recently observed that under its precedents, "an actual promise must be very clear" and "definitive,"¹² and it has observed that a statement of present intent is not a promise of future performance.¹³ Far from being able to show "definitive" promise, Mr. Adams can show no promise at all. All he has alleged is that Mr. Maynard, in casual discussions, gave an incomplete review of the regulatory developments that might eventually affect Mr. Adams.

Moreover, it bears noting that Mr. Adams did receive some direct notice of the change in regulations from the Board before he had used up all five of his examination opportunities. On December 28, 2005, informing him of his fourth failure, the Board told him in a letter that "with the changes in regulations, it is possible that you no longer qualify for the examination."¹⁴ He was told to contact the Division of Corporations, Business and Professional Licensing if he had questions. Mr. Adams did not inquire further.

The Maynard contacts do not create a basis on which to exempt Mr. Adams from application of the new regulation.

C. *Equal Protection Under the Laws*

Mr. Adams's final argument focuses on an obscure provision at the end of the regulation setting education and work experience requirements. This provision, 12 AAC 36.0063(i), provides:

representation."); *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1969) (promise by state employee that is contrary to law "would be unauthorized and of no effect, and therefore the state would not be estopped").

⁹ See, e.g., *Brady v. State*, 965 P.2d 1, 10 (Alaska 1998).

¹⁰ See *Simpson v. Murkowski*, 129 P.3d 435, 440 (Alaska 2006).

¹¹ *Brady*, 965 P.2d at 10 n. 20.

¹² *Simpson*, 129 P.3d at 434; *Eufemio v. Kodiak Island Hospital*, 837 P.2d 95 (Alaska 1992).

¹³ *Valdez Fisheries Development Association, Inc. v. Alyeska Pipeline Services Company*, 45 P.3d 657, 668 (Alaska 2002).

¹⁴ Ex. B, p. 4.

Notwithstanding (a) – (h) of this section, an applicant authorized by the board to take the examination before 11/20/99, may continue to qualify for the examination under 12 AAC 36.040.

As Mr. Adams reads this regulation, a person who started on the PE examination track before 1999 may continue testing indefinitely regardless of the new education and work experience thresholds, whereas he, having started a little later, is not allowed to continue testing under the old thresholds. He sees this as unequal treatment of citizens without any logical basis for distinguishing between them. Such unequal treatment can violate the Alaska Constitution's dictate that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."¹⁵

The evidence taken at the hearing established two facts that prevent any serious equal protection issue from arising, however. First, the Board did not interpret subsection (i) to permit pre-1999 applicants to test indefinitely; it allowed them to test only until they exhausted their five opportunities under 12 AAC 36.040. In other words, it interpreted (i) to incorporate, rather than override, the limitations built into section 36.040, and applicants under (i) were treated exactly as Adams has been.¹⁶ Second, there are no applicants testing now under (i).¹⁷ Thus, there is no class of actual people from whom Mr. Adams could allege that he is being treated unequally.

IV. Conclusion

Because Mr. Adams does not meet the current educational requirements to take the Professional Engineering Examination, and because he has established no basis to be exempted from those requirements, the denial of his application to sit for the examination should stand.

DATED this 20th day of July, 2007.

By: _____
Christopher Kennedy
Administrative Law Judge

¹⁵ Alaska Const., Art. I, § 1.

¹⁶ Testimony of Ginger Morton, Digital Recording File 2 at 29:00.

¹⁷ Ex. H at 1. This discovery response, though unsworn when made, was sworn by Ms. Morton at the hearing. Digital Recording File 2 at 39:00.

Adoption

On behalf of the Alaska Board of Registration for Architects, Engineers and Land Surveyors, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 10th day of Aug., 2007

By: _____
Signature
Bruce J. Brownfield
Name
CHAIRMAN
Title