IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

HENRY S. BARTOS, Appellant, vs. REAL ESTATE COMMISSION, FOR THE STATE OF ALASKA, Appellee.	)	Case No. 4FA-09-2150 CI OAH Case No. 08-0054-REC Real Estate Commission Case No. 3000-04-012

MEMORANDUM DECISION AND ORDER

BACKGROUND

The Alaska Real Estate Commission (the Commission) issued a final order in *In Re Bartos*, No. 3000-04-012, which Henry Bartos appeals the determinations that he was in violation on four separate counts, the disciplinary action taken, and the procedures under which the Commission acted. Each issue involves multiple subissues and a separate set of facts. The basic facts are as follows.

Especially important to an understanding of the factual background is the knowledge of the different entities involved. During the relevant period of time and Bartos was president and majority shareholder of Hank Bartos Realty, Inc.; Lori Schooley was a minority shareholder and treasurer. Hank Bartos Realty, Inc. owned a Century 21 franchise named Gold Rush, for which Bartos was broker and Schooley was associate broker. In 2003 Hank Bartos Realty, Inc. acquired a Coldwell Banker franchise named Gold Country. In April 2004, Schooley resigned as an associate broker for Gold Rush and registered as Gold Country's broker.

The Commission issued an Accusation against Bartos in January 2008. The Counts of the Accusation, as well as their factual and legal bases, have been narrowed on appeal to the following: Counts 1 and 2 accuse Bartos, as broker of Gold Rush, of failing to report the names of some of his licensees to the Commission. The licensees were Gold Country employees who worked for Gold Rush on certain occasions. Count 3 accuses Bartos of failing to disclose his dual agency in a transaction in which Gold Rush represented the buyer and Gold Country represented the seller. Count 5 accuses Bartos of failing to adequately supervise a licensee's transaction in which the buyer apparently never received a statutorily required defect disclosure form.

Administrative Law Judge (ALJ) James T. Stanley heard Bartos's case from August 19 to 22, 2008. Sixteen witnesses testified, and more than 3000 pages of exhibits were taken into evidence. Before ALJ Stanley had time to issue his recommended decision, he resigned, and the case was reassigned to ALJ Chris Kennedy. Bartos requested that ALJ Kennedy rehear all non-telephonic witnesses. ALJ Kennedy ("the ALJ") denied this request and on March 19, 2009, issued a recommended decision based on the audio recordings of the hearing. Regarding the issues under appeal, the ALJ determined that Bartos was not in violation as to Counts 1 and 2 based on a narrow interpretation of the term "employed" but was in violation as to Counts 3 and 5.

In June 2009, the Commission met to finally decide the case. Bartos attended the meeting but was excluded when the Commission retreated to deliberate his case in an executive session. The Commission resolved that Bartos was in violation as to Counts 1 and 2 after adopting a broader interpretation of "employed." The Commission adopted the ALJ's

recommended decisions as to Counts 3 and 5. The Commission imposed the following discipline:

i. for the Count 1 violation, a $1000 fine and 6 hours of education;

ii. for the Count 2 violation, a $2500 fine and 6 hours of education;

iii. for the Count 3 violation, a $1000 fine, 6 hours of education, and a written reprimand to be placed in Bartos's file;

iv. for the Count 5 violation, a $5000 fine, 12 hours of education, and a written reprimand to be placed in Bartos's file; and

v. for the cumulative effect of the violations, a 60 day license suspension followed by 1 year of license probation.

David Somers, who was asked to be an expert witness against Bartos in a separate civil case involving the facts in Count 5, served as a member of the Commission that decided Bartos's case.

STANDARD OF REVIEW AND DEFERENCE

In administrative appeals cases, the court reviews questions of fact under the substantial evidence standard,[1] which requires the court to uphold factual findings that are supported by relevant evidence that a reasonable mind might accept as adequate to support the finding.[2] The court reviews questions of law involving agency expertise under the reasonable basis standard.[3] If the agency lacks expertise, then the court reviews the question of law under the "independent judgment" standard.[4] The court reviews an agency's interpretation of its own regulations under the reasonable basis standard.[5] Finally, the court reviews an agency's discretionary actions[6] and

[1] *Alford v. State, Dep't of Admin.*, 195 P.3d 118, 122 (Alaska 2008).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *State, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1207 (Alaska 2010).
[6] *May v. State, Comm. Fisheries Entry Comm'n*, 168 P.3d 873, 978-80 (Alaska 2007).

applications of the law to the facts[7] under the arbitrary, unreasonable, and abuse of discretion standard. An abuse of discretion exists where the court is left with the definite and firm conviction that a mistake has been made.[8]

DISCUSSION

I. Counts 1 and 2: affirmed in part and set aside in part

A. Background

Counts 1 and 2 are addressed together because they allege violations of the same provisions and the analyses—consisting primarily of statutory interpretation—share much in common. The following two sets of facts gave rise to Count 1; the third set of facts gave rise to Count 2.

First, in 2004, Bartos, as Century 21 Gold Rush's broker, was instructed by a client to proceed with a purchase. Bartos briefly left town, and in his place Bartos had Schooley, Coldwell Banker Gold Country's broker at the time, write-up and present the offer. Bartos completed the transaction upon his return.

Second, in 2005, Century 21 parent Cendant Corporation was under a "relocation contract" to act through Gold Rush to sell or buy a residence on Kendrick Court and relocate the owner. Performance under the contract required specialized training, which Schooley possessed. Also, Cendant Corporation was familiar and wanted to work with Schooley. Schooley proceeded to become extensively involved in the transaction for a period of several months.

[7] *Cleaver v. State, Commercial Fisheries Entry Comm'n*, 48 P.3d 464, 467 (Alaska 2002).
[8] *Burke v. Houston Nana, L.L.C.*, 222 P.3d 851, 858 (Alaska 2010).

Third, from early 2005 through 2006, Gold Country real estate licensee Noelle Childress conducted all of Gold Rush's property management business. Childress conducted this work from her office at Gold Country.

The Commission accused Bartos of violating AS 08.88.291(a) and 12 AAC 64.110(e). AS 08.88.291(a), "Location; contact information," provides:

> A person licensed as a real estate broker shall, by registering with the commission, inform the commission of the person's principal office and of any branch offices of the person's real estate business and include in the information the names of the real estate licensees who are employed at each office. . . . Failure of a real estate broker to maintain a place of business or to inform the commission of its location and the names and addresses of all real estate licensees employed at each location by the broker is grounds for the suspension or revocation of the broker's license.

12 AAC 64.110(e), "Requirements for establishing and maintaining an office," implements AS 08.88.291(a) and states:

> A broker shall, before operating any office or branch office, register the office or branch office with the commission on a form provided by and approved by the commission. The information provided by the broker must include the . . . (6) name and license number of all licensees employed by the broker at that office.

The ALJ concluded that Bartos did not violate these provisions because Schooley and Childress were not "employed" by Gold Rush for purposes of the provisions. The ALJ reasoned that "'employ' ordinarily seems to denote to hire for compensation," cited AS 08.88.398 which refers to employee wages, and noted that the Commission did not prove that Schooley and Childress were compensated. The Commission rejected the ALJ's definition of "employed," stating: "Although the Commission recognizes that the word 'employed' has several definitions, the Commission interprets the word 'employed' in AS 08.88.291(a) and 12 AAC 64.110(e)(6) to mean 'to commission or entrust with the performance of certain acts or functions or with the management of one's affairs' (see Black's Law Dictionary, 5th ed.), as the meaning most in

keeping with the purpose of that statute and that regulation." The Commission went on to hold that Bartos violated the statute and the regulation.

B. Analysis

Whether Bartos violated AS 08.88.291(a) and 12 AAC 64.110(e)(6) turns on the meaning of "employed" in the provisions. Bartos argues that the term "employed" is ambiguous and the Court should interpret in his favor based on the rule of lenity. Bartos also argues that the conduct involving Childress does not constitute a violation because Childress performed her property management work at the Coldwell Banker Gold Country office rather than at the Century 21 Gold Rush office. The Commission responds that its interpretation is entitled to deference, the rule of lenity does not apply, and "employed" should be given a broad interpretation in light of AS 08.88.910, which groups employees with independent contractors.

The Court concludes that the Commission's interpretation is not entitled to deference and "employed" means something more than temporary, informal relationships. Accordingly, the Count 1 violation based on the first set of facts is set aside. The degree of relationship necessary to achieve employment is unclear, but it is clear enough to determine that the relationships in Count 1's second set of facts and in Count 2 constitute employment. Accordingly, these violation are affirmed. The regulatory violations correspond to the statutory violations and are set aside and affirmed in corresponding fashion. Finally, Bartos's argument that he was not in violation under Count 2 because Childress did not perform her work at the Gold Rush office is rejected.

1. The Commission's interpretation of "employed" in AS 08.88.291(a) is not entitled to deference

The Alaska Supreme Court in *Kelly v. Zamarello*,[9] a fundamental case for Alaska administrative deference law, identified

> two distinct types of administrative decisions on questions of law. One type involves questions in which the particularized experience and knowledge of the administrative personnel goes into the determination. When this type of question is presented to the court for review, deference should be given to the administrative interpretation, since the expertise of the agency would be of material assistance to the court. . . .
>
> The other kind of case presents questions of law in which knowledge and experience in the industry affords little guidance toward a proper consideration of the legal issues. These cases usually concern statutory interpretation or other analysis of legal relationships about which courts have specialized knowledge and experience. Consequently, courts are at least as capable of deciding this kind of question as an administrative agency.[10]

Applied to this case, *Zamarello* instructs that interpretation of "employed" in AS 08.88.291—a matter of discerning the legislature's intent through the text, context, legislative history, and purpose—lays within the Court's rather than the Commission's scope of particularized experience and knowledge. Therefore, the Commission's interpretation of the statute is not entitled to deference.

2. "Employed" means more than temporary, informal relationships, though the precise definition is unclear

Alaska courts interpret statutes by looking at the language of the statute, the legislative history, and the purpose.[11] In addition, courts consider the context and, "where possible, . . . construe sections of a statutory scheme to be consistent with one another."[12]

This case raises two questions in particular regarding the meaning of "employed." The first question is whether uncompensated as well as compensated workers may qualify as employees. The second question is what degree of relationship is necessary to qualify as an

[9] 486 P.2d 906 (Alaska 1971).
[10] *Id.* at 916.
[11] *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).
[12] *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 315 (Alaska 2001).

employee; for example, does a temporary, informal substitution for a sick or out-to-lunch broker qualify as employment? Or is something more required, and if so how much more?

The legislature selected the word "employed" and used it without qualification. Neither "employed" nor a variation thereof is defined in Title 8 Chapter 88, the real estate broker and licensee statutes.[13] According to Black's Law Dictionary, "employ" means: "1. To make use of. 2. To hire. 3. To use as an agent or substitute in transacting business. 4. To commission and entrust with the performance of certain acts or functions or with the management of one's affairs."[14] Arguably, the legislature's choice to make unqualified use of a term with multiple meanings suggests the legislature intended the term to encompass all of the meanings. On the other hand, the legislature's failure to clarify the term's meaning may just leave it ambiguous.

The real estate broker and licensee statutes,[15] which provide context for interpreting section 291, establish significant barriers to achieving employment and restrictions that flow from being employed. The barriers include prior reporting of employment to the Commission[16] and three-party written agreements for licensee employment of another licensee.[17] The restrictions include a prohibition on working for anyone other than an employer.[18] These provisions demonstrate the importance of being classified as employed more than they define what qualifies as employment. Nonetheless, the seriousness of these ramification of employment

[13] See AS 08.88.990, the definitions section for Chapter 88, which governs real estate brokers and other licensees.
[14] Black's Law Dictionary (8th ed. 2004) (defining employ).
[15] Title 8, Chapter 88.
[16] AS 08.88.291.
[17] AS 08.88.398.
[18] AS 08.88.291, .305, .331. *See also* AS 08.88.080 (suspending an employee's license when the license of the employee's supervising broker is suspended); AS 08.88.398 (requiring a three-party agreement before an employee may work for a non-broker licensee).

suggest that the legislature intended them to be matched by some elevated threshold for qualifying as employed.[19]

While the objective of statutory interpretation is to discern the intent solely of the legislature, the Real Estate Commission's implementation through its regulations of the real estate statutes is informative as to how the statutes are intended to operate in the real world. Most notably, in 12 AAC 64.077, the Commission contemplates and indirectly approves temporary, informal substitutions for absent brokers, and the Commission chooses not to impose barriers on such relationships until a particular threshold is met. 12 AAC 64.077 provides:

> When the registered broker of an office notifies the commission office in advance of an absence from the office, the broker or an associate broker designated by the registered broker to supervise transactions or licensees during the broker of record's absence may sign for the broker of record on a license application.

This regulation implies approval of substitutions for the purpose of "supervis[ing] transactions and licensees"; but, where the higher threshold of "sign[ing] for the broker of record on a license application" is reached, the broker must first "notif[y] the commission office in advance of [the] absence." The fact that the broker and licensee statutes and regulations do not expressly approve or disapprove temporary broker substitutions and rather impose requirements only where a threshold is met, as in 12 AAC 64.077, gives credence to the conclusion that the legislature expects temporary substitutions to occur and does not label them "employment."

As to whether uncompensated workers can qualify as employees, the context is not definitive but suggests that the answer is no. The first suggestion comes from AS 08.88.910, where the legislature grouped contractual relationships and independent contractors with

[19] *See McKee v. State*, 488 P.2d 1039, 1042 (Alaska 1971) (preferring the "practical interpretation of [] statutory language"); *State, Dep't of Commerce v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 628 (Alaska 2007) (the court interprets statutes "according to reason, practicality, and common sense, taking into account the plain meaning and purpose of the law as well as the intent of the drafters").

employees and employment.[20] Under the principle of *noscitur a sociis*—a word is know by the company it keeps[21]—this grouping suggests employees should be interpreted consistent with contractors. And since contractors are basically always compensated (as is required to satisfy the contract law requirement of consideration), the principle suggests employees should also be limited to compensated workers. The second suggestion comes from AS 08.88.398, which anticipates employee compensation where it states that employers are responsible for employees' wages and taxes and for completing the appropriate tax forms. Admittedly, this provision does not mandate that employees be compensated in the first place. While these suggestions do not definitively establish that uncompensated workers cannot qualify as employees, they buttress the conclusion that employment is more than a casual relationship.

Aside from text and context, the other means of statutory interpretation are of little help: neither the legislative history[22] nor any stated purpose[23] indicates the legislature's intent as to the meaning of "employed." The Commission in its final order purports to support its interpretation by invoking legislative purpose, but the Commission fails to identify what stated purpose it relies on.[24] [25]

Much of the parties' arguments revolve around the rule of lenity. They dispute the threshold questions of whether the Commission imposed penalties or remediation, whether "employed" is ambiguous, and whether Bartos waived the lenity argument by failing to raise it

[20] AS 08.88.910 states "[t]he provisions of this chapter that apply to employment relationships and employees also apply to contracting relationships and independent contractors."
[21] *Smith v. State*, 229 P.3d 221, 227 (Alaska 2010).
[22] *See* House Labor and Commerce Standing Comm. Meeting Minutes, H.B. 33, Tape No. 98-26 (side 1), No. 1524 (Jan. 26, 1998).
[23] *See* H.R. 313, 3rd Leg. (Alaska 1964); H.R. 33, 20th Leg. (Alaska 1998).
[24] Adoption as Modified, Real Estate Commission, Bd. Case No. 3000-04-012, p.1 (June 18, 2009).
[25] The Commission in its brief to the Court identifies two policies that arguably support its interpretation. Brief of Appellee at 17, 20 (referring to the desire to ease the Commission's ability to keep track of licensees and the desire to ease consumer's ability to verify worker's licensed status). However, these policies are not supported by citations to legislative history and thus are not helpful with the Court's effort to discern the legislature's intent.

earlier. The rule of lenity applies where the court has exhausted its tools for interpretation and the statute remains ambiguous.[26] Though the text and context provide only limited assistance, they reveal a definition of "employed" that is sufficient to resolve this case, and the rule of lenity does not need to be applied.

3. Schooley was "employed" in the second set of facts but not the first set of facts; Childress was "employed"

"Employed" in AS 08.88.291(a) means something more than a temporary substitution or other informal relationship, though the precise degree of relationship necessary to qualify as employment remains unclear. This definition is adequate to resolve Counts 1 and 2.

The relationship in the first set of facts in Count 1 does not qualify as employment. In the first set of facts, Schooley acted as a temporary substitute for Bartos while he was absent. As a substitute, Schooley wrote up and presented an offer. The facts do not suggest Schooley was paid for this work,[27] and it appears the work took Schooley only a short period of time. This amount of work was within the scope of temporary substitutions presumed by the legislature to occur without the restrictions that accompany employment.

The relationships in Count 2 and the second set of facts in Count 1 qualify as employment. In the second set of facts for Count 1, Schooley became extensively involved over a period of several months in one of Gold Rush's transactions. In Count 2, Gold Country licensee Childress managed all of Gold Rush's property management business from early-2005 through 2006. These relationships exceed the scope of non-employment temporary substitutions. Further, the substantial barriers and restrictions placed on employment are justified where the

[26] *De Nardo v. State*, 819 P.2d 903, 907-08 (Alaska App. 2003) ("th[e] rule of lenity . . . comes into play only when, after employing normal methods of statutory construction, the legislature's intent cannot be ascertained or remains ambiguous").
[27] Bartos asserted at oral argument that Schooley did not receive compensation for the transaction.

relationship lasts several months or more and is extensive or involves single-handedly managing the entirety of a large number of transactions.

An additional factor important to this conclusion is that, although Schooley and Childress were not compensated by Gold Rush for their work, they were employed—directly or indirectly—by Hank Bartos Realty, Inc., a company that derives part of its revenue from Gold Rush. This argument could also be made to support Count 1's first set of facts, but it appears Schooley in the first set of facts acted gratuitously but Schooley in the second set of facts of Count 1 and Childress in Count 2 did not.

4. Bartos's regulatory violations correspond to the statutory violations and are disposed of accordingly

The Commission determined that Bartos also violated 12 AAC 64.110(e)(6). That provision implements AS 08.88.291(a) and contains basically the same requirements. As with the statute, the Commission interpreted "employed" in the regulation to encompass even temporary, informal substitutions. This interpretation should be upheld if it is reasonable.[28]

The interpretation *supra* part I.B.2 of "employed" in AS 08.88.291(a) controls the reasonableness of the Commission's interpretation of "employed" in 12 AAC 64.110(e)(6): the Commission's interpretation of "employed" in the regulation is reasonable to the extent it is consistent with the above interpretation of "employed" in the statute. Likewise, Bartos's violations based on the facts in Count 2 and the second set of facts in Count 1 are affirmed, and Bartos's violation based on the first set of facts in Count 1 is set aside.

5. Bartos's additional argument relating only to Count 2 is rejected

[28] *State, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1207 (Alaska 2010).

Bartos raises one other issue, and it pertains only to Count 2. Bartos argues that, even if Childress was "employed," she did not perform her work at the Gold Rush office, which Bartos contends is necessary for a violation. AS 08.88.291(a) requires brokers to report "names of the real estate licensees who are employed *at each office*."[29] And 12 AAC 64.110(e)(6) requires brokers to report "the name and license number of all licensees employed by the broker *at that office*."[30] The Commission did not respond to this argument.

Bartos's understanding of the law is rejected for the very practical reasons that it could easily be intentionally circumvented by instructing employees to work from another location and, worse yet, it would often be circumvented by nature, given the modern real estate industry in which many agents work remotely.[31] Instead, which office employs a worker must depend at least in part on which office assigns and benefits from the worker's work. This practical reading is grounded in the text, which requires reporting licensees who are *employed by* an office rather than licensees who *perform their work at* the office. For these reasons, the Commission correctly applied the law to the facts, and the Count 2 violation is affirmed.

C. Conclusion

In sum, the Commission's interpretation is not entitled to deference, and interpretation of AS 08.88.291(a) reveals that employment consists of more than temporary, informal relationships. Applying this definition to the facts of this case, Bartos's statutory violations based on the second set of facts in Count 1 and the facts in Count 2 are affirmed, but Bartos's violation based on the first set of facts in Count 1 is set aside. Bartos's regulatory violations are

[29] (Emphasis added).
[30] (Emphasis added).
[31] Bureau of Labor Statistics, U.S. Dep't of Labor, Occupational Outlook Handbook, 2010-11 Ed., Real Estate Agent, *available at* http://www.bls.gov/oco/ocos120.htm (last visited Sept. 23, 2010).

set aside and affirmed in corresponding fashion. Finally, Bartos's argument that he is not in violation under Count 2 because Childress did not perform her work at Gold Rush is rejected.

II. Count 3: affirmed

A. Background

Count 3 involves the transaction from the first set of facts in Count 1. Coldwell Banker Gold Country's Bill Burrows represented seller Nancy Viale in the transaction, and Century 21 Gold Rush's Bartos represented buyer William St. Pierre. Schooley, acting as a temporary substitute for Bartos who was out of town, wrote out and presented St. Pierre's offer. The offer identified "Lori Schooley for Hank Bartos" as the selling agent. Schooley's simultaneous roles as Gold Country's broker and as substitute for Gold Rush's Bartos made her a dual agent. Bartos's roles as Gold Rush's owner and selling agent and as Gold Country's owner made him a dual agent. The offer, which became the Earnest Money Receipt and Purchase Agreement upon acceptance, included a Consensual Dual Agency Agreement. The Dual Agency Agreement states: "The Buyer and Seller hereby give their consent to dual agency . . . . One company, C-21 Gold Rush /Coldwellbanker, will be representing the interests of both parties to this agreement. . . . Hank Bartos of Century 21 Gold Rush is/are the agent(s) of (check one):

□ The SELLER, exclusively ☒ The BUYER, exclusively ☒ SELLER AND BUYER (DUAL AGENCY)"

Viale signed the Agreement, and Schooley signed "L Schooley for Hank Bartos" as agent. St. Pierre did not sign the Agreement, but he did initial at the bottom of the page and signed at the end of the Earnest Money Receipt and Purchase Agreement. St. Pierre and Viale were orally advised that Bartos was a dual agent.

The Commission accused Bartos of failing to disclose his conflict of interest in violation of AS 08.88.391(b) and failing to get written consent to dual agency in violation of AS 08.88.396(c). The ALJ determined Bartos violated the dual agency disclosure provision for the following reasons relevant to this appeal: (a) the Dual Agency Agreement is defective because it contains the contradictory statements that Bartos represented the buyer exclusively as well as the buyer and the seller; and (b) St. Pierre's signature on the last page of the Earnest Money Receipt and Purchase Agreement and initials in the bottom corner of the Dual Agency Agreement do not suffice as written consent. For similar reasons, the ALJ determined that Bartos also failed to disclose his conflict of interest. The Commission adopted the ALJ's determinations but took disciplinary action based only on the dual agency disclosure violation. As a result, Bartos appeals only the dual agency disclosure violation. AS 08.88.396(c) states:

> A person licensed under this chapter may act as a real estate licensee for both a prospective seller or lessor and a prospective buyer or lessee of real estate only after the licensee informs both the seller or lessor and the buyer or lessee of the dual agency representation and obtains written consent to the dual agency representation from both principals.

B. Analysis

To have his Count 3 violation set aside, Bartos must win reversal of two Commission determinations: (1) the Commission's determination that the Dual Agency Agreement was rendered defective when both the "BUYER, exclusively" box and the "SELLER AND BUYER" box were checked; and (2) the Commission's determination that St. Pierre's initials at the bottom of the Dual Agency Agreement and signature at the end of the Earnest Money Receipt and Purchase Agreement do not suffice as written consent to the Dual Agency Agreement. These

determinations involved applying the law to the facts. The court reviews an agency's application of the law to the facts under the arbitrary, unreasonable, and abuse of discretion standard.[32]

1. The Commission's determination that the agreement is defective is not arbitrary, unreasonable, or an abuse of discretion

The Commission's determination that the Dual Agency Agreement is defective is not arbitrary, unreasonable, or an abuse of discretion. Bartos argues

> The "buyer, exclusively" box was check [sic] to reflect Century 21's exclusive representation of the buyer. The dual agency box was checked to reflect Ms. Schooley's role in covering for Mr. Bartos. . . . The written dual agency disclosure accurately reflected Ms. Schooley's involvement on both sides of the Sprucewood Court transaction.

Bartos's argument seems reasonable.[33] On the other hand, the Commission, through adoption of the ALJ's decision, reasoned that "[t]hese are contradictory statements, and they render the disclosure defective." The Commission's logic seems reasonable as well. And the Commission's position is supported by the policy of strictly requiring "full and fair"[34] disclosure so that the parties can "evaluate the significance of the agent's interest[s]."[35] The Commission's application of the law to the facts is affirmed because it is not arbitrary, unreasonable, or an abuse of discretion.

2. The Commission's determination that St. Pierre did not give written consent is not arbitrary, unreasonable, or an abuse of discretion

[32] *Cleaver v. State, Commercial Fisheries Entry Comm'n*, 48 P.3d 464, 467 (Alaska 2002).
[33] In the nonbinding case of *Clancy Realtors v. Rubick* the Michigan Court of Appeals approved a nearly identical disclosure agreement on which the agent circled both the section title "seller's agent" and the section title "disclosed dual agent." 2008 WL 4958793, at *5 (Mich. App. Nov. 20, 2008).
[34] Restatement (Third) of Agency § 8.06 (2006).
[35] *Id.*

The second issue does not need to be addressed because Bartos must prevail on both issues and his argument on the first issue is unavailing. Nonetheless, Bartos's arguments on the second issue similarly fall short.

Bartos contends that St. Pierre's signature at the end of the Earnest Money Receipt and Purchase Agreement along with St. Pierre's initials at the bottom of the Dual Agency Agreement are adequate to satisfy the written consent requirement. Bartos cites *United States v. Thornburgh*[36] and *Biggs v. Eaglewood Mortgage, LLC*[37] to support his position. However, neither of these cases presented a situation where, as in this case, the signatory improperly or incompletely signed a document; rather, in *Thornburgh* and *Biggs* the signatory properly signed and initialed the document, and the court held that the signature and initials were adequate consent to enforce the document against the signatory.[38]

In Re Estate of Leavey[39] is more on point. To properly execute Leavey's will under Kansas law, the will needed to be signed by Leavey and subscribed by two witnesses.[40] Instead, Leavey and the two witnesses initialed the bottom corner of each page but Leavey and only one of the witnesses signed the will.[41] The issues was whether the second witness's initial in the bottom corner of the page where he was supposed to sign was sufficient to execute the will.[42] The court held that it was not, noting that even the second witness—the attorney who prepared the will—admitted that the proper place for subscribing was on the signature line.[43] Further, the court recognized the potential injustice that would flow from refusing to enforce the will, but the

[36] 368 Fed. App. 908 (10th Cir. 2010).
[37] 353 Fed. App. 864 (4th Cir. 2009).
[38] *Thornburgh*, 368 Fed. App. at 911; *Biggs*, 353 Fed. App. at 868.
[39] 202 P.3d 99 (Kan. App. 2009).
[40] *Id.* at 103.
[41] *Id.* at 101-02.
[42] *Id.* at 103.
[43] *Id.* at 103-04.

court also recognized the possibility that the court was preventing a fraud by enforcing the subscription requirement.[44]

In this case, Bartos similarly cannot dispute that the proper place for St. Pierre's written consent was on the signature line. And by requiring a signature, this Court could be preventing fraud. Although Bartos contends St. Pierre was orally informed of the dual agency, perhaps St. Pierre was not so committed as to give written consent, the oral disclosure was incomplete, or by initialing St. Pierre intended simply to signify acknowledgement that the Dual Agency Agreement was part of the Earnest Money Receipt and Purchase Agreement and not to consent to the terms of the Dual Agency Agreement.

Bartos alternatively argues that St. Pierre's signature at the end of the Earnest Money Receipt and Purchase Agreement constitutes written consent. If St. Pierre's signature at the end of the Earnest Money Receipt and Purchase Agreement suffices as consent to the Dual Agency Agreement, then the signature line on the Dual Agency Agreement would be superfluous. Yet apparently Schooley and Viale did not think signing the Dual Agency Agreement was superfluous; they each signed both the Dual Agency Agreement and the Earnest Money Receipt and Purchase Agreement.[45]

For these reasons, the Commission's determination that St. Pierre did not give written consent is not arbitrary, unreasonable, or an abuse of discretion.

C. Conclusion

Neither of the Commission's determinations were arbitrary, unreasonable, or an abuse of discretion, and Bartos's Count 3 violation is affirmed.

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[44] *Id.* at 105-06.
[45] *Stepanov v. Homer Elec. Ass'n, Inc.*, 814 P.2d 731, 734 (Alaska 1991) (stating that the goal of contract interpretation is to give effect to the parties' reasonable expectations).

III. Count 5: affirmed

A. Background

Count 5 accuses Bartos of failing to adequately supervise in violation of 12 AAC 64.125, which states:

> (a) Failure of a broker or associate broker to adequately supervise the activities of licensees for whom they are responsible is grounds for disciplinary action against the (1) employing broker . . . .
> . . . .
> (b) Adequate supervision of a licensee includes (1) reviewing and approving all real estate agreements . . . .[46]

In 2002, Century 21 Gold Rush licensee Ed King represented Dale and Nadia Packard in the purchase of a residence on Constitution Drive. On the Packards' behalf, King executed an offer, which became the Earnest Money Receipt and Purchase Agreement upon acceptance. The Agreement listed as an attachment an "AS 34.70 Disclosure" form. AS 34.70 requires sellers to complete a disclosure form that identifies defects and give it to an offeror before an offer is made.[47]

In 2002, after a licensee executed a transaction, Bartos as supervising broker would systematically check the closing file for completeness.

A lawsuit later filed by the Packards revealed that Gold Rush's closing file for the Packards' transaction did not contain a copy of the disclosure form signed by the Packards. The listing agent did not have a copy of the disclosure form signed by the Packards either.

The ALJ concluded that Bartos failed to properly supervise in violation of 12 AAC 64.125 by failing to review and approve the Packards' Agreement prior to closing. The ALJ's

[46] This provision has been revised, but the revisions did not take effect until January 1, 2005, after the relevant conduct occurred.
[47] AS 34.70.010, .030.

conclusion was based on his interpretation that 12 AAC 64.125 requires review and approval prior to closing and his finding that Bartos did not review and approve the Packards' file prior to closing. The ALJ reasoned that the Packards never signed the disclosure form since neither agent's file contained a signed copy and that if Bartos actually timely reviewed the Packards' file then Bartos would have discovered the error and fixed it. The Commission adopted without modification the ALJ's decision.

B. Analysis

Bartos challenges the Commission's interpretation requiring review and approval prior to closing and the Commission's finding that Bartos did not review and approve the Packards' agreement prior to closing.

The Commission's interpretation of its own regulation must be upheld if it is reasonable.[48] The Commission's finding must be upheld if it is supported by substantial evidence.[49] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[50]

1. The Commission's interpretation of "reviewing and approving" in 12 AAC 64.125 is reasonable

The Commission's interpretation of "reviewing and approving" in 12 AAC 64.125 is reasonable because it selects the meaning that gives effect to the regulation's words. Approval, or lack thereof, would not have effect if it was issued after closing because it would not rescind

[48] *State, Dep't of Natural Resources v. Alaska Riverways, Inc.*, 232 P.3d 1203, 1207 (Alaska 2010).
[49] *Alford v. State, Dep't of Admin.*, 195 P.3d 118, 122 (Alaska 2008).
[50] *Id.*

or otherwise affect the already-completed transaction. Only pre-closing approval could have an effect. Considering that each word should be given effect if possible,[51] the Commission's interpretation is reasonable.

2. The Commission's finding that Bartos did not review the Packards' agreement prior to closing is supported by substantial evidence

Bartos argues that the facts do not support the Commission's finding that Bartos did not review the Agreement, but the real issue is whether the facts support the Commission's finding that Bartos did not review the Agreement *prior to closing*.[52]

The Commission's finding is affirmed because it is supported by substantial evidence: Bartos admitted that his standard procedure was to review agreements after closing.[53] This admission is adequate for a reasonable mind to conclude that Bartos reviewed the Packard's Agreement, if at all, after closing. The Commission's finding is also supported by its determination that the Packards never signed the form,[54] the fact that Gold Rush's file did not contain a signed copy of the form,[55] and the fact that Bartos looked in the filed for the form in 2004 expecting to find it there.[56]

C. Conclusion

The Commission reasonably determined that 12 AAC 64.125 requires review and approval of agreements prior to closing, and substantial evidence supports the Commission's

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[51] *See State, Dep't of Commerce v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 629 (Alaska 2007).
[52] The ALJ found and the Commission agreed that since Bartos "let the transaction close, it is likely that he did not review the [] Agreement." Decision and Order, *In Re Bartos*, OAH No. 08-0054-REC, at 29 (Mar. 29, 2009).
[53] Transcript at 723-25, *In Re Bartos*, OAH No. 08-0054-REC.
[54] Decision and Order, *supra* note 52, at 27.
[55] Apellant's Reply Brief at 6 ("Mr. Bartos acknowledges that the disclosure statement was not in Century 21's file"); *see also* Decision and Order, *supra* note 56, at 30 (citing the direct examination of Bartos and finding that Bartos's search of Century 21's files, the listing agent's files, the title company's files, and the lender's files did not produce a copy of the disclosure form signed by the Packards).
[56] Bartos's argument that he could have reviewed the file but failed to notice that the form was missing should be rejected. The issue on review is simply whether the Commission's finding that Bartos did not review the file is supported by substantial evidence. *See Alford v. State, Dep't of Admin.*, 195 P.3d 118, 122 (Alaska 2008).

finding that Bartos did not review and approve the Packards' file prior to closing. Accordingly, Bartos's Count 5 violation is affirmed.

IV. The Commission's disciplinary action was appropriate, but remand is necessary for the Commission to reconsider its disciplinary action for Count 1

The ALJ recommended a $1000 fine, a reprimand to be placed in Bartos's file, and three hours of education for the Count 3 violation. For Count 5, the ALJ recommended a $1400 fine and a reprimand to be placed in Bartos's file. The ALJ determined that Bartos did not commit the violations alleged in Counts 1 and 2 of the Accusation.

The Commission imposed the following discipline: for Count 1, a $1000 fine and 6 hours of education; for Count 2, a $2500 fine and 6 hours of education; for Count 3, a $1000 fine, 6 hours of education, and a reprimand to be placed in Bartos's file; for Count 5, a $5000 fine, 12 hours of education, and a reprimand to be placed in Bartos's file; and for the cumulative effect of the violations, a 60 day license suspension followed by 1 year of license probation.

AS 08.01.075 governs the Commission's disciplinary action and states: "A board shall seek consistency in the application of disciplinary sanctions. A board shall explain a significant departure from prior decisions involving similar facts in the order imposing the sanction." AS 08.88.071 states that "[t]he commission shall . . . have the authority to suspend or revoke the license of a licensee or impose other disciplinary sanctions authorized under AS 08.01.075 on a licensee." AS 08.88.071 give the Commission discretion—within the bounds of AS 08.01.075—in wielding its disciplinary authority. The Commission's discretionary decisions are reviewed under the arbitrary, unreasonable, and abuse of discretion standard.[57] An abuse of discretion

[57] *May v. State, Comm. Fisheries Entry Comm'n*, 168 P.3d 873 (Alaska 2007).

exists where the court is left with the definite and firm conviction that a mistake has been made.[58]

To comply with AS 08.88.071, the Commission was ordered to file with the Court all prior decisions involving a violation of AS 08.88.291(a), violation of 12 AAC 64.110(e)(6), violation for failure to disclose a conflict of interest or dual agency, violation for failure to adequately supervise, or any combination thereof. The Commission complied with the order by filing *In re Enoch,*[59] *In re Mehner,*[60] *In re Yoon,*[61] *In re Crowell and Larry,*[62] and *In re Burbridge*.[63]

A. Count 1 violation

Bartos contends the $1000 fine and education imposed for the Count 1 violation was inappropriate because the Commission failed to note a comparable decision and because the disciplinary action should have been minimal. AS 08.01.075(f) only requires the Commission to distinguish prior decisions that have similar facts and even then only if the Commission significantly departs from the prior decision. The Commission has not issued, and Bartos fails to cite, a prior decision with similar facts from which the Commission significantly departed. Additionally, the $1000 fine and required education are well within the Commission's discretion.[64]

[58] *Burke v. Houston Nana, L.L.C.*, 222 P.3d 851 (Alaska 2010).
[59] Alaska Real Estate Commission, No. 3004-07-010 (Feb. 1, 2007). This case was specifically requested by the court.
[60] Alaska Real Estate Commission, No. 3002-02-005 (Mar. 4, 2004). This case was specifically requested by the court.
[61] Alaska Real Estate Commission, No. 3004-95-011 (Aug. 6, 2003).
[62] Alaska Real Estate Commission, No. L-86-090, L-86-094 (Mar. 29, 1988).
[63] Alaska Real Estate Commission, No. RE-88L-52 (Sept. 15, 1988).
[64] *See* AS 08.88.071(a)(3); AS 08.88.071(a)(3)(E); AS 08.01.075(a)(6); AS 08.01.075(a)(8).

Nonetheless, the Commission did not specify whether it took disciplinary action in response to the first or second set of facts, and based on the interpretation of "employed," *supra* part I.B.2, the violation based on the first set of facts must be set aside. Accordingly, this case is remanded for the Commission to take disciplinary action for the Count 1 violation based solely on the second set of facts.

B. Count 2 violation

Bartos contends the fine and education imposed for the Count 2 violation should have been less severe. The fine and required education were well within the Commission's discretion.[65] Bartos also challenges the basis for this discipline: the "long duration and the deliberate nature of the improper arrangement," according to the Commission. This finding is supported by substantial evidence: Childress performed Gold Rush's property management work for more than a year and this extended duration suggests the arrangement was deliberate.

C. Count 3 violation

Bartos contends the $1000 fine, reprimand, and education imposed for the Count 3 violation are inappropriate in light of prior decisions involving allegedly similar facts. Bartos distinguishes his case from *In Re Mehner,*[66] which involved multiple violations for failure to disclose dual agency and substantial misrepresentations.[67] The Commission responded to the violations in *In Re Mehner* by imposing a 120 day suspension, one year of probation, required education, and a $5000 fine.[68] Bartos contends his case is similar to *In Re Enoch,*[69] which

[65] *See* AS 08.88.071(a)(3); AS 08.88.071(a)(3)(E); AS 08.01.075(a)(6); AS 08.01.075(a)(8).
[66] Alaska Real Estate Commission, No. 3002-02-005.
[67] *Id.* at 51-52.
[68] *Id.* at 61.
[69] Alaska Real Estate Commission, No. 3004-07-010.

involved a failure to disclose a conflict of interest and delayed deposit of earnest money.[70] The Commission responded to these violations by imposing a $1000 fine but suspending $750, a reprimand, one year of probation, and required education.[71] While Bartos compares his case to *Enoch*, he contends his discipline should be less severe because *Enoch* involved the mishandling of money.

The law required the Commission to "seek consistency in the application of disciplinary sanctions" and to "explain a significant departure from prior decisions involving similar facts." The ALJ described each of these cases, used them as points of reference, determined that this case is "quite close" to *In Re Enoch* , and in "the interest of simplicity and finality" advised foregoing probation but substituting additional monetary sanctions. The ALJ recommended a $1000 fine, "at least" three hours of continuing education, and a reprimand to be placed in Bartos's file. The Commission adopted the ALJ's recommendation with the modification that Bartos must attend six hours of continuing education. The Commission's discipline nearly mirrors that in *Enoch* and thus did not significantly depart from that case. Bartos's argument that *Enoch* was a more serious case because it involved mishandling client money is rejected because the seriousness of violations is a matter best measured by the Commission and the Commission did not abuse its discretion when making that measurement in this case.[72] Accordingly, the Commission's discipline is affirmed.

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[70] *Id.* at 2.
[71] *Id.* at 4-5.
[72] Nor is the Commission's disciplinary action inappropriate in light of *In re Yoon*, Alaska Real Estate Commission, No. 3004-95-011, *In re Crowell and Larry*, Alaska Real Estate Commission, No. L-86-090, L-86-094, or *In re Burbridge*, Alaska Real Estate Commission, No. RE-88L-52. *In re Yoon* involved a variety of egregious violations, not the worst of which was failure to disclose dual agency. The Commission revoked Yoon's license based on, *inter alia*, Yoon's "total lack of remorse," "failure to see the error of his ways," "a lack of respect for the Commission's regulatory authority," and two instances of intentional misrepresentation in two years. The Commission revoked Yoon's license based on the cumulative effect of Yoon's conduct and not based on each violation. *In re Crowell*

D. Count 5 violation

Bartos contends the $5000 fine, education, and reprimand imposed for the Count 5 violation are inappropriate in light of *In Re DiCenso and Sutton Group Tower Realty Inc.*,[73] a case from the Real Estate Council of Ontario. *In Re DiCenso* involved violations for failure to supervise which led to inadequate disclosure of dual agency and failure to maintain an adequate transaction file.[74] The Ontario Real Estate Council responded by fining the supervising broker $2000.[75] Bartos complains that the Commission failed to distinguish *In Re DiCenso* and that disciplinary action in line with that case is more appropriate. AS 08.01.075(f) requires the Commission to explain significant departures from prior decisions of the Commission; the statute does not require the Commission to distinguish decisions from all other jurisdictions as well. To the extent *In Re DiCenso* is even relevant, the Commission explained the reason for its departure from that case: "*DiCenso* does not seem to have involved any harm to the client" whereas "[Bartos] failed to prevent a very serious error."[76] Finally, none of the Commission's prior decisions involve similar facts, and the $5000 fine, required education, and reprimand are within the Commission's discretion.[77]

E. Cumulative effect of the violations

Finally, Bartos contends the 60 day license suspension followed by the one year license probation imposed for the cumulative effect of the violations are inappropriate because the

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and Larry also involved multiple violations, which were based on "a pattern of fraudulent and dishonest conduct." Neither *Yoon* nor *Crowell and Larry* involved facts similar to those in Bartos's case. *In re Burbridge* was an uncontested hearing in which the Commission revoked Burbridge's already-expired license. The *Burbridge* decision does not state the pertinent facts and as such cannot be deemed inconsistent with the Commission's decision in Bartos's case.

[73] Real Estate Council of Ontario (Jan. 28, 2004), *available at* http://www.reco.on.ca/publicdocs/20040128_5940.pdf.

[74] *Id.* at 2, 4.

[75] *Id.* at 5.

[76] Decision and Order, *supra* note 52, at 38.

[77] *See* 12 AAC 64.125(a); 12 AAC 64.130; AS 08.01.075(a)(3); AS 08.01.075(a)(6); AS 08.01.075(a)(8).

Commission failed to consider comparable decisions. The Commission has not issued, and the parties do not identify, a comparable prior decisions with similar facts. Further, the Commission kept within its discretion in imposing the fine and probation.[78]

F. Conclusion

The Commission kept within its discretion and did not fail to explain significant departures from prior decisions with similar facts. Nonetheless, this case should be remanded for the Commission to reconsider its discipline for the Count 1 violation.

V. The Commission did not commit any procedural violations

Bartos contends three procedural violations require reversal and remand. However, all of Bartos's arguments are unavailing.[79]

A. The Commission did not violate Bartos's Due Process rights or AS 44.62.500 when one ALJ heard Bartos's case and another ALJ wrote the recommended decision

First, Bartos contends he was not afforded Due Process and AS 44.62.500(a) was violated when ALJ Stanley heard his case and then retired and was replaced by ALJ Kennedy. ALJ Kennedy listened to the recordings of the hearing and issued the recommended decision without any input from ALJ Stanley. In his decision, ALJ Kennedy explained:

> The recording, while of low quality at times due to electronic interference, is clear enough that I could, with some effort and repeat listening, hear every work of all testimony of all witnesses. I believe the recorded testimony and its relationship to the exhibits gives me a substantial basis on which to make the necessary credibility judgments.
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> . . . .

[78] *See* AS 08.01.075(a).

[79] The Commission contends that Bartos waived all of his procedural arguments by failing to raise them below. Because each argument can be resolved against Bartos on the merits, whether the arguments were timely raised is not addressed.

> . . . . Taking further live testimony would impose enormous expense on both sides, and would run the risk of losing accuracy in situations where witnesses would, by virtue of prior rehearsal, be able to better anticipate cross-examination.
>
> I note that it is only Mr. Bartos who desired additional live testimony, and that for the only two allegations on which I am inclined to find against Mr. Bartos I have essentially accepted his testimony, and that of his fact witnesses, at face value. . . .

As ALJ Kennedy also pointed out, the Alaska Supreme Court in *Chocknock v. State, CFEC* rejected a Due Process argument where different ALJs heard the case and issued the recommended decision.[80] The *Chocknock* court limited its decision to the facts of the case but unfortunately did not identify the relevant facts.[81] The *Chocknock* court did, however, cite *Utica Mutual Insurance Co. v. Vincent,*[82] which stresses the need to take a flexible approach to applying the Due Process Clause,[83] and which refers to two other cases that recognized substitution of hearing officers after the hearing but before a decision was rendered as consistent with Due Process.[84] In light of these precedent, the *Chocknock* case, the need to take a flexible approach to applying the Due Process Clause, ALJ Kennedy's note that he carefully listened to every word of the four day testimony, and the fact that ALJ Kennedy's decision gives Bartos the benefit of the doubt on the relevant credibility judgments, the ALJs did not violate Bartos's right to Due Process.

Bartos also contends AS 44.62.500(a) was violated when ALJ Kennedy rather than Stanley attended the meeting at which the Commission adopted the recommended decision. Subsection 500(a) provides: "If a contested case is heard before an agency (1) the hearing officer who presided at the hearing shall be present during the consideration of the case and, if

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[80] 696 P.2d 669, 676 n.10 (Alaska 1985).
[81] *Id.*
[82] 375 F.2d 129, 131 (2nd Cir. 1967).
[83] *Id.* at 131-34.
[84] *Id.* at 131 (citing *NLRB v. Stocker Mfg. Co.*, 185 F.2d 451, 453 (3rd Cir. 1950) and *Gamble-Skogmo, Inc. v. FTC,* 211 F.2d 106, 113 (8th Cir. 1954)).

requested, shall assist and advise the agency." 500(a) is followed in 500(b) and 500(c) by agencies' options where the hearing officer alone hears the case.[85] These options do not require the hearing officer to be present at the meeting at which the agency considers the case. The justification for this difference was explained in *Storrs v. State Medical Board*: where the agency hears the case, the hearing officer must be available to assist and advise "to avoid possible procedural and substantive errors"; where the agency does not hear the case but relies on the hearing officer's report, the agency "has the advantage of a formal, written proposed decision for its consideration, one which has been at the Board members' and the parties' disposal prior to deliberations."[86] In this case, the ALJ rather than the Commission heard Bartos's case, and thus ALJ Stanley did not need to be present.

B. Bartos was not denied fair and impartial consideration when Commission member David Somers participated in deciding the case

Second, Bartos contends he was denied fair and impartial consideration in violation of AS 44.62.450 when Commission member David Somers failed to recuse himself from Bartos's case. Somers was offered but rejected the job of expert witness for the Packards against Bartos in a separate lawsuit involving the facts that gave rise to Count 5. Bartos contends Somers "was provided with information about the Constitution Drive matter outside of this proceeding, and from a party adverse to Mr. Bartos."

AS 44.62.450 requires an agency member to seek disqualification and withdraw if the member cannot "accord a fair and impartial hearing or consideration." Such bias consists of "a

[85] *See State, Dep't of Commerce and Economic Development v. Schnell*, 8 P.3d 351, 356 (Alaska 2000) (listing the three options available under section 500).
[86] 664 P.2d 547, 553 (Alaska 1983) (adopting reasoning of the Superior Court).

predisposition to find against a party."[87] "Administrative agency personnel are presumed to be impartial until a party shows actual bias."[88] "A party may request the disqualification of a[n] . . . agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded."[89] Bartos has not submitted any such affidavit at any point in this litigation. Further, even assuming the unsupported assertion—that Somers was provided with relevant information outside the proceeding by an adverse party—on which Bartos bases his claim is true, this assertion does not prove that Somers had a "predisposition to find against" Bartos and is insufficient to overcome the presumption of impartiality. For these reasons, Commission member Somers' participation in Bartos's case did not violate AS 44.62.450.

C. The Commission did not violate AS 44.62.310 by deliberating in executive session

Third, Bartos contends the Commission violated AS 44.62.310 when the Commission deliberated Bartos's case in an executive session. AS 44.62.310 provides that government meetings are open to the public subject to certain exemptions, including *inter alia*

- (c)(2) where the meeting pertains to "subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion," and
- (d)(1) in the case of a "governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding."

[87] *AT&T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).
[88] *Id.*
[89] AS 44.62.450(c).

Bartos asserts that he and Schooley "verbally requested to be permitted to attend" the executive session. This assertion is supported by an affidavit from Schooley submitted by Bartos in support of his brief to this Court.[90]

The Commission's deliberations would qualify under exemption (c)(2) because public consideration of the merits of the accusations against Bartos would tend to prejudice his reputation and character. However, (c)(2) does not apply because Bartos asked the Commission to deliberate in public.

Nonetheless, the Commission's deliberations were exempt from the open meetings requirement under (d)(1). The Commission's deliberations fall under (d)(1) because they were quasi-judicial: the Commission was resolving an accusation against Bartos by weighing the evidence, determining the appropriate disciplinary action, and crafting a decision—traditional judicial functions.[91][92]

Whether the Commission's deliberations are exempt under (d)(1) is a close question because (d)(1) is expressly limited to meetings held "solely to make a decision in an adjudicatory proceeding," and the meeting at which the Commission considered and decided Bartos's case was not held solely to decide the case. Nonetheless, (d)(1) should be interpreted to apply in piecemeal fashion to the parts of a meeting at which an agency acts in its judicial capacity.[93]

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[90] The Commission admitted at oral argument that Bartos requested that the Commission deliberate in public.

[91] *See In re Application of Obermeyer*, 2000 WL 34545818, at *5 (Alaska Aug. 23, 2000) (reasoning that, "[s]ince the Board was required by Rule 6(2) to examine the proffered evidence and decide whether Obermeyer had made sufficient allegations to be granted a hearing, the meeting was undoubtedly an 'adjudicatory proceeding'" as that term is used in AS 44.62.310(d)(1)); *cf. Univ. Alaska v. Geistauts*, 666 P.2d 424 (Alaska 1983) (holding that tenure committee meetings are not quasi-judicial). Further, the law under which the Commission was acting, Article 8 of the Alaska Administrative Procedure Act, labels the Commission's actions "Administrative *Adjudication*." (Emphasis added).

[92] *See generally In re Robson*, 575 P.2d 771 (Alaska 1978) (prohibiting either party's counsel from being present at and participating in Bar Association deliberations).

[93] *See McKee v. State*, 488 P.2d 1039, 1042 (Alaska 1971) (preferring the "practical interpretation of [] statutory language"); *State, Dep't of Commerce v. Progressive Cas. Ins. Co.*, 165 P.3d 624, 628 (Alaska 2007). Regarding

Otherwise, the law would arbitrarily distinguish between meetings spent entirely adjudicating and meetings at which agencies also take care of nonjudicial business. If Bartos's understanding of the law is correct, then agencies would be subjected to unnecessary inefficiencies.[94] Thus, exemption (d)(1) is interpreted to apply piecemeal to separable parts of a meeting, and the Commission's meeting falls within the exemption.[95]

D. Conclusion

The Commission did not commit any procedural violations in arriving at its final decision; none of Bartos's procedural arguments provide grounds for reversal and remand.

ORDER

I. Bartos's violation based on the first set of facts in Count 1 is REVERSED. Bartos's violations based on the facts in Count 2 and the second set of facts in Count 1 are AFFIRMED. Bartos's regulatory violations are REVERSED and AFFIRMED in corresponding fashion.

II. Bartos's Count 3 violation is AFFIRMED.

III. Bartos's Count 5 violation is AFFIRMED.

IV. The Commission's disciplinary action is AFFIRMED except that the case is REMANDED for the Commission to reconsider its disciplinary action for Count 1.

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the Commission's review of ALJ decisions, the Commission at oral argument said "they usually do it at their quarterly meeting."

[94] The legislature states in AS 44.62.312(b) that the exemptions in AS 44.62.310 should be construed to effectuate the policies stated in AS 44.62.310(a). AS 44.62.310(a)(6) recognizes the government's need to be efficient. The piecemeal interpretation of (d)(1) allows agency's to operate efficiently and in this manner is consistent with AS 44.62.310(a)(6).

[95] The Commission's argument that *Storrs* provides authority for agencies to deliberate in executive session is unavailing; apparently in that case Storrs did not request that the meeting be conducted in public, so the private deliberations were supported on the alternative grounds of (c)(2). *Storrs v. State Medical Bd.*, 664 P.2d 547 (Alaska 1983). Equally unavailing is the Commission's argument that Schooley's affidavit should not be considered because it is not part of the record. Bartos had no occasion to document his argument for an AS 44.62.310 violation in the record because the alleged violation had not yet occurred. Further, under normal circumstances Bartos could simply refer to the transcript of the agency's proceedings, but in this case Bartos has been unable to obtain a copy of the transcript of the Commission's meeting, a discrepancy which the Commission has not explained.

V. The Commission did not commit any procedural errors that require reversal and remand; as such, the Commission's procedures are AFFIRMED.

DATED this 16th day of April, 2011, at Fairbanks, Alaska.

Signed
Douglas L. Blankenship
Superior Court Judge

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