

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

SHANE O’HARE, )  
 )  
 Appellant, )  
 vs. )  
 )  
 ALASKA REAL ESTATE )  
 COMMISSION, )  
 )  
 Appellee. ) CASE NO. 3AN-15-06467 CI

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**ORDER REMANDING CASE**

The Alaska Real Estate Commission has disciplined Shane O’Hare because of his federal criminal conviction. Among other conditions imposed was a one year suspension of his real estate license. O’Hare has appealed the discipline. The Court heard oral argument on 29 March 2016.

1. The Court concludes that this appeal involves a question of statutory interpretation of the commission’s disciplinary authority pursuant to AS 08.88.071(a)(3)(C). There are two standards of review that are applicable to such questions. The Court concludes that the “reasonable basis” rather than the “substitution of judgment” test applies.<sup>1</sup>

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<sup>1</sup> *Wendte v. State, Bd. of Real Estate*, 70 P.3d 1089, 1091 (Alaska 2003) (“Because this appeal concerns a disciplinary statute authorizing the Board of Certified Real Estate Appraisers to exercise its own discretion in sanctioning license holders, we will apply the ‘reasonable basis’ test.”).

2. The underlying facts were not in dispute before the administrative judge or the commission. The parties agree that the facts are as set forth by the administrative judge.<sup>2</sup>

3. The Division of Corporations, Business and Professional Licensing argued for a suspension of his license for one year.<sup>3</sup> O'Hare argued that no discipline was necessary or alternatively that much less than a one year suspension was warranted.<sup>4</sup> The administrative judge recommended that the commission suspend O'Hare's license for 180 days but suspend the period of suspension during a period of probation.<sup>5</sup>

4. In making this recommendation the administrative judge rejected various factual inferences that the Division asked him to make. Thus the administrative judge declined to infer that O'Hare posed a "risk to use other people's homes for criminal conduct" or "a risk for committing a property

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<sup>2</sup> Exc. 003-006.

<sup>3</sup> Exc. 015.

<sup>4</sup> Exc. 010.

<sup>5</sup> Exc. 017.

crime.”<sup>6</sup> He did find that “O’Hare’s conviction supports an inference that Mr. O’Hare’s judgment is sufficiently impaired the he is not trustworthy.”<sup>7</sup>

5. The Division sought to have O’Hare’s license revoked.<sup>8</sup> The administrative judge rejected that conclusion<sup>9</sup> and the commission implicitly agreed when it imposed the lesser discipline of a suspension.<sup>10</sup> The Court finds that the commission had a reasonable basis for rejecting the need for a revocation (as explained by the administrative judge).<sup>11</sup>

6. The administrative judge recommended that the commission suspend O’Hare’s license for 180 days but suspend the suspension for a period of probation.<sup>12</sup> The commission rejected that recommendation but did not explain why it did. Nor did it explain why it imposed the one year suspension. Without an explanation of its rejection of the recommendation of the administrative judge the

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<sup>6</sup> Exc. 007.

<sup>7</sup> Exc. 008.

<sup>8</sup> Exc. 013.

<sup>9</sup> Ec. 014-015.

<sup>10</sup> Exc. 002.

<sup>11</sup> Exc. 012-015.

<sup>12</sup> Exc. 015-017.

Court cannot determine whether the commission had a reasonable basis for its decision.

Counsel for the commission argued that the Court should assume that the commission reached its decision for the same reasons as the administrative judge came to a different recommendation. The Court is unwilling to do that as the commission must have rejected some aspect of the administrative judge's thinking or based its decision on other grounds altogether. The Court will not speculate in order to determine the commission's reasoning.

7. The case is remanded to the commission for a fuller explanation of why it imposed the discipline that it did.

8. The Court retains jurisdiction over the case. Once the commission issues a new decision, O'Hare shall have 30 days to file a new memorandum if he chooses. The memorandum need not be a formal brief. The commission may have 30 days after O'Hare files his memorandum to file its own memorandum. O'Hare will have 15 days to file a reply.

9. The stay of the suspension remains in effect.<sup>13</sup>

**DONE** this 29th day of March 2016, at Anchorage, Alaska.

*Signed*

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William F. Morse  
Superior Court Judge

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

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<sup>13</sup> Order (6 May 2015).