

BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE COMMISSIONER OF THE DEPARTMENT OF
COMMERCE, COMMUNITY AND ECONOMIC DEVELOPMENT

In the Matter of the)
Frank R. Peterson, Sr.) OAH No. 05-0696-SEC
) Agency Case No. 05-00036
_____)

NOTICE TRANSMITTING FINAL DECISION

Attached is the final decision in this matter, which took effect on January 2, 2007, by operation of law under AS 44.64.060(f), because the final decisionmaker did not act on the proposed decision within 45 days after its issuance. The proposed decision, therefore, has become the final decision.

Judicial review of the final decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the decision is mailed or otherwise distributed.

DATED this 12th day of January, 2007.

By: _____
Neil Roberts
Office of Administrative Hearings
P.O. Box 110231
Juneau, Alaska 99811-0231
(907) 465-1886

The undersigned certifies that
this date an exact copy of the
foregoing was provided to the
following individuals:

Frank Peterson, Sr.
Middleton & Timme, PC

Liam Weyhrauch, AAC
Signature Date

1/12/07

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE DEPARTMENT OF COMMERCE, COMMUNITY AND ECONOMIC
DEVELOPMENT, DIVISION OF BANKING AND SECURITIES**

In the Matter of Frank R. Peterson, Sr.)
))
_____)

OAH No. 05-0696-SEC

ORDER GRANTING SUMMARY ADJUDICATION

I. Introduction

This securities case involves a proxy solicitation complaint brought by Frank Peterson, Sr., against Koniag Inc. (Koniag). Mr. Peterson requested a hearing to appeal a letter from the Division of Banking and Securities (Division) explaining that the Division investigated Mr. Peterson's complaint and concluded that the proxy solicitation did not violate Alaska law.

In accordance with a briefing schedule agreed by the parties, R. Collin Middleton, counsel for Koniag, has filed a Motion for Summary Adjudication in this appeal, alleging that no material facts are in issue and that Koniag is entitled to judgment as a matter of law. Mr. Peterson opposed Koniag's motion. The Division Securities, (Division), represented by LuAnne Weyhrauch, Assistant Attorney General, filed a reply in support of Koniag's motion. The Administrative Law Judge grants this motion.

II. Facts

Mr. Peterson raised two points on appeal. Firstly, Mr. Peterson argued that the Division should not have declined to take further administrative action on his allegation that Koniag violated 3 AAC 08.315 by not disclosing the Stratman lawsuit¹ in Koniag's 2003 and 2004 Annual Reports.

After an investigation of this claim the Division had in part determined that:

A corporation is not required to disclose in its financial statements all litigation taken against it. It must, however, disclose all litigation anticipated to materially affect its financial statements. Koniag Incorporated (Koniag) and its lawyer, Collin Middleton,

¹ The Stratman lawsuit is litigation and mediation that has been ongoing since the 1970's, which was originally initiated by Omar Stratman. This ongoing lawsuit has essentially been an effort to remove the native village on Woody Island, now incorporated as the village corporation Leisnoi, from coverage under ANCSA.

determined that this litigation would not materially affect the financial statements and therefore it did not merit disclosure.

For his second point on appeal, Mr. Peterson argued that Division wrongly declined not to take further administrative action on Mr. Peterson's allegation that Koniag violated 3 AAC 08.345(b)(4) by not disclosing the Stratman lawsuit in Koniag's 2003 and 2004 Annual Reports. After an investigation of this claim the Division had, in part, determined that:

The regulation you cite at 3 AAC 08.345(b)(4) requires disclosure of legal proceedings when a director or executive officer is involved in the action in opposition to the corporation. This regulation does not require disclosure by an officer or director of any effort they make to aid their corporation with the litigation. It only requires disclosure when the officer or director is a party to the action on the side of the opposition. Since you do not allege that Koniag's officers and directors are parties aiding Omar Stratman in the legal battle against Koniag, the officers and directors have no disclosure requirement regarding the litigation.

III. Discussion

A. Summary Adjudication Allowed in Administrative Adjudications

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.² It may be granted if there is no genuine dispute as to any material fact, so that the case may be resolved as a matter of law.³

B. No Right to an Administrative Hearing to Appeal Division's Failure to Issue an Order in a Proxy Dispute

It is not necessary to address whether the Division's decision regarding the issues Mr. Peterson has raised was correct, or even to decide if a hearing would be needed to take evidence in order to resolve those issues, unless Mr. Peterson has a right to an administrative appeal of the Division's decision not take further action regarding his allegations.

Mr. Peterson brought his appeal under AS 45.55.935 and 3 AAC 08.930. AS 45.55.935 directs the commissioner or his designee to adopt regulations for hearings regarding "orders issued under . . . AS 45.55.920." As amended effective July 1, 2005, the statute places jurisdiction to conduct the hearings with the Office of Administrative Hearings (OAH).

3 AAC 08.930 is the regulation was adopted to follow the directive in AS 45.55.935. This regulation sets out the procedure for requesting an administrative a hearing for acts, failures to

² See, e.g., *Schikora v. State, Dept. of Revenue*, 7 P.3d 938 (Alaska 2000).

³ E.g., *Smith v. Dep't of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

act, reports, rulings, or orders.⁴ The statutory text addresses only hearings “under AS 45.55.935.” On the surface, the regulation’s reference to “failures to act” might seem to encompass refusals to issue an order under AS 45.55.935. However, the regulation has been interpreted otherwise in the recent case of *In re Calista Corp.*⁵ In that case, the Director of the Division of Securities concluded that 3 AAC 08.930 set out procedures adopted to govern the hearings *required* by AS 45.55.935. The regulation’s broad reference to appeal of any “act or failure to act . . . report, ruling, or order” is merely a reflection of the fact that directives that are functionally “orders” of the kind enumerated in AS 45.55.935 can sometimes take the form of, or appear in, “reports,” “rulings,” or “failures to act.” In order to qualify for a hearing under 3 AAC 08.930, the appeal must still be from an order that issued under AS 45.55.935.

Generally a member of the public does not have the right to force an agency to prosecute an alleged violation if the agency has declined to do so in the exercise of its discretion.⁶ Questions of law and fact, of policy, of practicality, prioritization of the allocation of an agency's resources and weighing of these elements all come into play when an agency exercises its discretion in deciding whether or not to prosecute an alleged violation of the law within its administrative jurisdiction.⁷ The language of 3 AAC 08.930 could be read to create a special right to a hearing for a failure to investigate or prosecute a private parties complaint about the accuracy of proxy statement, but such a reading would be inconsistent with the limits on administrative appeals implicitly imposed by this common law doctrine and by the statute the regulation implements.

Under that statute, AS 45.55.935, only certain orders are subject to an administrative appeal. The only orders that are related to proxy disputes that are subject to an administrative appeal are cease and desist orders, orders for prior filing of materials relating to proxy solicitations, orders voiding proxies, and orders imposing civil penalties. A decision by the Division not to issue one of these orders is not in itself an order. It is certainly not one of the orders listed in AS 45.55.935. These are all orders which require some action or inaction on the

⁴ 3 AAC 08.930(a).

⁵ OAH No. 05-0889-SEC (adopted Sept. 25, 2006).

⁶ See *Heckler v. Chaney*, 470 U.S. 821, 834 (1985) regarding the “general presumption of unreviewability of decisions not to enforce.” See also, e.g., *Vick v. Board of Elec. Examiners*, 626 P.2d 90 (Alaska 1981) (no review of Division of Occupational Licensing and Board of Electrical Examiners decision not to file an accusation against a licensee); *Zemansky v. EPA*, No. A81-274 CIV, Memorandum and Order (D. Alaska, April 7, 1986) (no review of EPA decision not to take enforcement action against Alaska placer miners found to be in violation of Clean Water Act permits).

⁷ *Vick v. Board of Elec. Examiners* 626 P.2d 90 (Alaska, 1981).

part of the party to whom they are directed, not decisions that the Division itself will take or refrain from taking further action.

The Division's decisions in this case are not orders that are subject to an administrative appeal under AS 45.55.935.⁸ The regulation, 3 AAC 08.930, does not create a right to any administrative appeals that are not required by the statute.

IV. Conclusion

In this case, the undisputed facts leading up to this appeal establish as a matter of law that Mr. Peterson does not have a right to a formal hearing under AS 45.55.935 or 3 AAC 08.930.

V. Order

Summary adjudication is granted to Koniag and the Division of Banking and Securities. Mr. Peterson's appeal is dismissed. This case will not be scheduled for a formal hearing.

DATED at Juneau, Alaska this 17th day of November, 2006.

By: _____

Mark T. Handley
Administrative Law Judge

⁸ This applies not only the Division's decision not to take action against Koniag for its failure to disclose the Stratman lawsuit, but also the many procedural investigatory decisions the Division made in its investigation of Mr. Peterson's complaint, which lead to its final decision, such as the Division's decision not to require the production of its billing records.