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:	)	
	)	
CALISTA CORPORATION	)	OAH No. 05-0889-SEC
(Ivan Case)	)	Agency Case No. 05-00043
	)	
	)	

DECISION AND ORDER

I. Introduction

This case relates to an alleged material misstatement in a proxy solicitation that Ivan M. Ivan published in the Delta Discovery prior to Calista Corporation's 2005 annual meeting of shareholders. Calista seeks to appeal an election by the Division of Banking and Securities ("division") not to pursue enforcement action against Mr. Ivan. Administrative Law Judge David G. Stebing conducted a short evidentiary hearing in the case on February 10, 2006.

Mr. Stebing resigned from the Office of Administrative Hearings in August of 2006. He did not begin working on his decision in this case before he departed. The delay was due to a variety of factors, including the presence of much older unresolved cases on his docket and a regrettable encounter involving Mr. Stebing, a bicycle, and a moose. After Mr. Stebing's departure, the case was reassigned to Administrative Law Judge Christopher Kennedy.

Before Mr. Stebing heard the case, he discussed it with Mr. Kennedy, who suggested that the Office of Administrative Hearings was without jurisdiction to hear the matter. Kennedy drafted a Request for Posthearing Briefing, describing the jurisdictional problem and soliciting the parties' views, which Stebing signed and distributed to the parties at the hearing. Counsel for the division and Calista filed short responses to the request, both contending, with little analysis or support, that jurisdiction was proper.

Upon a complete review of the relevant portions of the record, the undersigned remains convinced that the decision challenged in this appeal is one from which no administrative appeal can lie. The appeal will be dismissed.

II. Facts

Calista is a regional native corporation under the Alaska Native Claims Settlement Act. Mr. Ivan is a shareholder and former board member of the corporation, and in 2005 he sought to be elected to the board again. He authored a newspaper article published by The Delta Discovery on April 6, 2005, that contained a "Shareholder Proponent Statement" and the text of a proposed shareholder resolution for the upcoming shareholder meeting. The proposed resolution would resolve that "The Shareholders direct the board of directors to hold its next Annual Meeting in Bethel."[1] Ivan filed the article with the division as a proxy solicitation on April 11, 2005.[2]

Mr. Ivan's appeal for shareholder support in The Delta Discovery contained three statements that Calista Corporation alleges to be false:

(1) "I was on the board over twenty years ago when shareholders voted, by a majority vote, to hold meetings outside of Bethel."

(2) "The vote nearly twenty years ago didn't need a bylaw change to pass. It needed only a majority vote. Why do we need enough votes to get a bylaw change to have a meeting in Bethel now? Why isn't a majority vote good enough this time?"

(3) "Why don't board members listen to shareholders when they vote for something by a majority vote? They are supposed to serve shareholders wants and needs. A Bethel meeting is one of those wants and needs. Last year's vote said that loud and clear."[3]

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[1] Exhibit E. For convenience, a copy of the article accompanies this decision as Attachment A.

[2] Exhibit 4 (letter from Buchanan to Linxwiler, July 18, 2005); Exhibit A at 2 (letter from Ivan to Buchanan, June 13, 2005).

[3] Calista's most succinct distillation of the first three statements at issue is found in its Motion for Summary Disposition Without Evidentiary Hearing, which slightly misquotes the statements.

(4) "The people living in Bethel and near Bethel should not be excluded by just a few people that control the location of our annual meetings."[4]

Calista contends that the references to the vote twenty years ago are in error, the meeting in question having been a Board of Directors meeting in 1982 rather than a shareholder meeting.[5] Calista also takes issue with the description of "Last year's" [2004] vote: Calista observes that while a large majority of the votes *cast* supported a Bethel meeting, the measure nonetheless failed to pass because it did not attract a majority of Calista's total outstanding shares, as required by the bylaws.[6] Finally, Calista complains that Ivan's implication that Bethel has been "excluded" is unfair, because eleven of 31 annual meetings have been held in Bethel.[7]

In a May 17, 2005, letter to the Director of the Division of Banking and Securities, Calista contended that the alleged misstatements were material under 3 AAC 08.315 and related law. The corporation asked that Ivan be required to publish a correction, that proxies he obtained for his proposed resolution prior to the correction be invalidated, that proxies he obtained for his candidacy for the Board of Directors prior to the date of correction be invalidated, that he be fined, and that he be enjoined from future misrepresentations in proxy materials.[8]

By letter dated July 18, 2005, the division informed Calista that it would not be taking administrative action on the complaint, noting that the matter related to events that occurred "over twenty years ago," and that the division "[did] not find that the misstatements made rise to the level of materiality necessary for us to take administrative action."[9] After waiting a number of months, Calista wrote to the division requesting an appeal hearing on the July 18 "decision."[10]

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4 This alleged misstatement was quoted in Calista's May 17, 2005 request to Division of Banking and Securities Director Mark Davis to take enforcement action against Ivan (Exhibit 2 at 3).

5 *See* Exhibit 2 at 2.

6 *Id.* at 3.

7 *Id.*

8 *Id.* at 8.

9 Exhibit 4. For convenience, a copy of the letter accompanies this decision as Attachment B.

10 Letter from Linxwiler to Buchanan, November 14, 2005. The appeal letter was sent 119 days after the letter it sought to appeal. The division's appeal regulation at 3 AAC 08.930 contains no time limit for appeals, a seeming oversight that the division may wish to address at the next revision of 3 AAC 08; as the regulation is written, appeals of actions taken many years ago might be deemed permissible.

So far as can be determined from the record, Calista has never filed an action for injunctive relief against Mr. Ivan in Superior Court in relation to the proxy solicitation at issue in this case.

III. Discussion

In American law, there is a widely honored "general presumption of unreviewability of decisions not to enforce."[11] This is particularly true where the legislative branch has created no standards by which to measure whether enforcement should or should not be pursued, so that a reviewing body is left with no "law to apply."[12] This case is an appeal of a letter declining to pursue enforcement action. For this case to proceed, it must be established that decisions not to take enforcement action in the context of Alaska securities regulation are among the rare exceptions to this principle.

Calista has framed its appeal as one brought under AS 45.55.935 and 3 AAC 08.930.[13] The specific question presented by this appeal, therefore, is whether either of these provisions affords Calista an appeal of an election *not* to initiate enforcement action against someone other than Calista.

AS 45.55.930 directs the commissioner or his designee to adopt regulations for hearings regarding four kinds of orders:

1. "orders issued under AS 45.55.120" (denial, suspension, and revocation of registration);
2. "orders issued under . . . AS 45.55.900(d)" (orders to deny or revoke an exemption from registration);
3. "orders issued under . . . AS 45.55.920" (cease and desist orders, orders for prior filing of materials relating to proxy solicitations, orders voiding proxies, and orders imposing civil penalties); and

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[11] *Heckler v. Chaney*, 470 U.S. 821, 834 (1985). *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).

[12] *Id.* at 834-35.

[13] These are the provisions Calista has relied on in its Post-Hearing Brief and in the original appeal letter (Letter from Linxwiler to Buchanan, November 14, 2005, at 1). The appeal letter also mentions AS 44.64.030, but that provision from the organic statute for OAH creates no independent appeal rights, and Calista's allusion to it appears to be merely a reference to the route by which any appeal would be heard.

4. "orders issued under AS 45.55.060" (denial, revocation, suspension, cancellation, and postponement of registration).

As amended effective July 1, 2005, the statute places jurisdiction to conduct the hearings with the Office of Administrative Hearings (OAH).

The regulation adopted pursuant to the directive in AS 45.55.935 is 3 AAC 08.930. It says, in relevant part, that "[t]he administrator or the administrator's designated hearing officer will hold hearings under AS 45.55.935 upon written request by any person *aggrieved by any act or failure to act of the administrator* or by any report, ruling, or order of the administrator."[14] The basis for Calista's belief that it may appeal the July 18, 2005 letter is the italicized language; Calista observes that the refusal to enforce seems to fit within the literal terms of the regulation, since it is a failure to act.[15]

The task of this decision is to construe the italicized language. The Alaska Supreme Court has held that "Administrative regulations which are legislative in character are interpreted using the same principles applicable to statutes."[16] This means, among other things, that the regulation should generally be interpreted according to its intent. A literal interpretation is not required if reason and context indicate that the intent of the regulation was otherwise. As the Court has pointed out in the context of statutory interpretation: "'In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter . . . .'"[17]

Two potential interpretations of the regulation suggest themselves. The first potential interpretation of 3 AAC 08.930 would result in a determination that there is no regulatory basis for Calista's appeal, and a dismissal of the appeal for lack of jurisdiction. Under this interpretation, the regulation would be construed as a set of procedures adopted to govern the hearings *required* by AS 45.55.935. The regulation's broad

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[14] 3 AAC 08.930(a) (emphasis added). Note that by its own text the regulation addresses only hearings "under AS 45.55.935." In order to qualify for a hearing under 3 AAC 08.930, therefore, a challenge certainly must relate in some way to an order that is one of the four types enumerated in AS 45.55.935. *See In re Calista Corp.*, OAH No. 05-0888-SEC (Order on Summary Disposition, adopted July 5, 2006).

[15] Calista's Post-Hearing Brief at 3.

[16] *State, Dep't of Highways v. Green*, 586 P.2d 595, 603 n.24 (Alaska 1978).

[17] *Irby-Northface, J.V. v. Commonwealth Elec. Co.*, 664 P.2d 557, 561 (Alaska 1983) (ellipsis in original) (quoting Chancellor Kent).

reference to appeal of any "act or failure to act . . . report, ruling, or order" would be regarded as 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." An example of an AS 45.55.935 order that is, in effect, a failure to act would be an order under AS 45.55.120 denying registration, since the order is the formal expression of a decision to fail to register a security.

The only hearings required by AS 45.55.935 are hearings to challenge orders "issued" under the four cross-referenced statutes. In this case, an order under AS 45.55.920—one of the cross-referenced statutes—was sought, but no order was "issued." Thus, AS 45.55.935 itself does not require a hearing in this situation. If 3 AAC 08.930 does no more than create procedures for the hearings required by section 935, and does not expand the universe of hearings beyond the statute, it would follow that there is no basis for the present hearing. This interpretation would place securities enforcement on the same footing as almost all other varieties of regulatory enforcement in Alaska and elsewhere.

The second potential interpretation of 3 AAC 08.930 would result in a determination that this appeal was properly taken and should be decided on the merits. Under the second interpretation, the regulation would be construed as having the intent to expand the universe of potential hearings beyond those required by the section 935, something the administrator is probably empowered to do, if he so chooses, under his general authority in AS 45.55.950. In particular, the second interpretation would posit that 3 AAC 08.930 created a new right to appeal the *refusal* to "issue" an order of one of the four types enumerated in section 935.

In an order distributed to the parties at the hearing, OAH asked them to investigate any adoption history of 3 AAC 08.930 that might shed light on its intent, and to investigate any prior agency interpretations of the regulation. Neither party provided any adoption history for the regulation that would illuminate intent, and so it must be assumed that none exists. Neither party identified any prior interpretations of the regulation outside of this case. This therefore appears to be a case of first impression, and one that must be resolved based only on context, common sense, and general

principles of statutory/regulatory construction, since no other interpretive aids are available.

The strongest clue to the proper interpretation of this regulation is its context. Let us return to the four varieties of orders referenced in AS 45.55.935. The issuance of each of those orders has been expressly committed, by statute, to agency discretion. In AS 45.55.920—the statute governing the type of order Calista wants in this case—each provision starts with the preamble that "the administrator *may* . . . issue an order."[18] The other three cross-referenced statutes use the same permissive word, "may."[19] None of these statutes provides any real criteria as to how this discretion is to be exercised, such as factors the administrator must weigh in deciding whether or not to pursue an enforcement order. If 3 AAC 08.930 were interpreted to provide an adjudicatory hearing on a decision *not* to pursue one of these orders, an administrative law judge would be faced with reviewing a discretionary decision with no standard—no "law"—to apply in conducting the review.

Calista and the division's counsel seem to assume, moreover, that the discretion written into AS 45.55.920 and the other enforcement statutes is only about whether a potential enforcement target did, or did not, commit a violation. This is far from being the case. In the words of one commentator:

> An agency entrusted with grandiosely stated responsibilities and far-reaching powers can only realize a modest measure of its potential. It must ration its limited resources of time, energy and money. It must devote them to those exigent and soluble problems which are more nearly related to its core responsibility.[20]

A decision not to enforce may legitimately rest on myriad factors beyond merely whether or not a violation took place, including the resources available to pursue the matter, the relative importance of competing enforcement issues on the agency's plate at the time, the seriousness of the violation, and the ease of proof. Thus, to fairly review a decision not to pursue an enforcement order in a case such as this one, a hearing would need to be held on far more than just what Mr. Ivan did or did not do, but also on the internal

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[18] AS 45.55.920(a), (b), (c) (emphasis added). For (b) and (c) the quotation should be read without the ellipsis.

[19] AS 45.55.060(a), (b); AS 45.55.120(a), (c); AS 45.55.900(d).

[20] Jaffe, *Judicial Control of Administrative Action* 567 (abridged ed. 1965).

priorities, resources, and workings of the Division of Banking and Securities. And in conducting this review, there would be no legal parameters to apply.

There is no compelling policy reason to grant those who wish the division to take action against third parties a right to a hearing to force the agency to take up their cause. Alaska law already provides a party such as Calista an efficient remedy to address any wrong they may be suffering at the hands of another in violation of the securities laws. The remedy is a direct action for injunctive relief in Superior Court. Such an action need not be cluttered by an effort to balance the allocation of enforcement resources; instead, it can and does turn solely on whether a violation occurred and on remedying any harm it caused. A recent example of such a case is *Meidinger v. Koniag, Inc.*:[21] in that case, a corporation similar to Calista obtained direct relief against three shareholders found to have made untrue statements in proxy solicitations.

In sum, to interpret 3 AAC 08.930 to expand the universe of hearings beyond those required by AS 45.55.935 so as to encompass a hearing of the type Calista has requested would

--lead to an evidentiary hearing on enforcement decisions that are committed to the administrator's discretion by statute;

--lead to an evidentiary hearing at which the agency's inner workings, capabilities, staffing priorities, and such would be subjects for review;

--lead to an evidentiary hearing for which no statute or regulation provides any "law to apply" to the evidence; and

--create an extra remedy where a fully adequate judicial remedy already exists.

In light of these considerations, and in view of the fact that a plausible alternative reading of the regulation is available, I find it unlikely that the hearing Calista has pursued in this case is within the scope of the hearings 3 AAC 08.930 was intended to afford. I adopt the first interpretation of 3 AAC 08.930, set out at pages 5-6 *infra*.

In reaching this conclusion, I am mindful that both Calista and the Assistant Attorney General assigned to this case have taken a position in favor of jurisdiction. For Calista, the motivation is presumably to use the hearing process to conscript the division as an unwilling ally in the corporation's dispute with a dissident shareholder. Calista

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[21] 31 P.3d 77 (Alaska 2001).

may have thought this was its only option; its brief makes no mention of the alternative, direct judicial remedy that cases such as *Meidinger* have recognized.[22] Moreover, it appears from the briefing that, in informal conversations during the fall of 2005, it was the AAG who talked Calista's counsel into the idea that an appeal to OAH was his only option.[23] Having initially taken that position with opposing counsel, rightly or wrongly, the AAG may not have felt free to switch sides when asked in February of 2006 to conduct a more nuanced analysis of appeal rights under 3 AAC 08.930.

Neither OAH nor the administrator, however, bear any responsibility for the fact that Calista's experienced and able counsel has taken an unnecessary detour in pursuing this matter. At this stage, jurisdiction should be afforded only if 3 AAC 08.930, correctly construed with an eye to overall good administration, provides for a hearing. In my view, it does not.

IV. Conclusion

Because AS 45.55.935 requires no hearing on the matter Calista has sought to appeal, and 3 AAC 08.930 should not be construed to expand the universe of appeals beyond those required by the statute it seeks to implement, there is no statutory or regulatory basis for this appeal. Calista's appeal is dismissed.

DATED at Anchorage, Alaska this 22nd day of September, 2006.

Christopher Kennedy
Deputy Chief Administrative Law Judge

22 Calista's Post-Hearing Brief at 2-4.
23 *Id.* at 3.

Adoption

The undersigned adopts this Decision and Order in OAH Case No. 05-0889-SEC as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 25th day of Sept., 2006.

By: _____
Signature

Mark R. Davis
Name

Administrator Securities
Title

Deputy Director of
Banking and Securities

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

CALISTA CORPORATION, Appellant, v. ALASKA DIVISION OF BANKING, SECURITIES and CORPORATIONS, Appellee.	)	Case No. 3AN-06-12556 CI

MEMORANDUM DECISION ON APPEAL

This case is before the superior court in its capacity as an appellate court on appeal from the final administrative decision made by the administrator of the Alaska Division of Banking, Securities and Corporations. For the reasons set forth below, the decision is affirmed.

Facts and proceedings

This administrative appeal arises from the Alaska Division of Banking, Securities and Corporations' decision not to take administrative action with respect to Calista Corporation's allegation that Mr. Ivan M. Ivan made materially false or misleading statements in a published proxy solicitation.

Calista is a regional native corporation organized under the Alaska Native Claims Settlement Act. Mr. Ivan M. Ivan is a shareholder and former board member of the corporation.

On April 6, 2005, Mr. Ivan caused to be published a proxy solicitation urging shareholders to support a resolution calling for an annual shareholders' meeting to take

place at Bethel, Alaska. (R. at 330.) In the proxy solicitation, Mr. Ivan made three statements[1] which Calista believes were in violation of the Alaska Securities Act.[2]

On May 23, 2005, Calista filed a Proxy Solicitation Complaint with the Division alleging that Mr. Ivan's proxy solicitation made three materially false and misleading statements. (R. at 320-27.) Calista sought to have Mr. Ivan's statements corrected and to invalidate any proxy held by Mr. Ivan which was obtained prior to such correction.[3] (R. at 327.)

On July 18, 2005, the Division, in a one-page letter signed by Eileen Buchanan, responded to the complaint. (R. at 318.) In the Division's response, Ms. Buchanan wrote: "We have reviewed your complaint and Ivan Ivan's response . . . . This relates to statements made by Mr. Ivan relating to events that occurred '...over twenty years ago...' We do not find that the misstatements made rise to the level of materiality necessary for us to take administrative action. Thus, we decline to do so." (*Id.*)

In response to Ms. Buchanan's letter, Calista requested a hearing before the Office of Administrative Hearings ("OAH").[4] (R. at 316.) Calista asserted that "[t]he

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[1] The substance of Mr. Ivan's statements is not directly relevant to the decision on appeal.

[2] *See* AS 45.55.160, which provides: "A person may not, in a document filed with the administrator or in a proceeding under this chapter, make or cause to be made an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."

[3] *See* AS 45.55.920(a)(1)(C), which provides: "If it appears to the administrator that a person has engaged or is about to engage in an act or practice in violation of a provision of this chapter or regulation or order under this chapter, the administrator may in the public interest or for the protection of investors, issue an order . . . voiding the proxies obtained by a person required to file under AS 45.55.139 . . . if the proxies were solicited by means of an untrue or misleading statement prohibited under AS 45.55.160."

[4] The OAH conducts the adjudicative administrative hearings required under the Alaska Securities Act and under regulations adopted to implement that statute. AS 44.64.030(a)(35).

Division erred when it found that Mr. Ivan's misstatement did not rise to the level of materiality necessary for the Division to take administrative action." (*Id.*)

On November 29, 2005, the Division granted Calista's hearing request. (R. at 315.) The case was assigned to Administrative Law Judge David G. Stebing. (R. at 311.) An evidentiary hearing was held before ALJ Stebing on February 10, 2006.

After the hearing, ALJ Stebing distributed to the parties a Request for Posthearing Briefing. (R. at 72-74.) Among the issues on which he requested briefing was the proper interpretation of 3 AAC 08.930(a). That regulation provides:

> (a) The administrator or the administrator's designated hearing officer will hold hearings under AS 45.55.935 upon written request by any person aggrieved by any act or failure to act of the administrator or by any report, ruling, or order of the administrator. The written request for hearing must specify the grounds to be relied upon as a basis for the relief requested at the hearing. The administrator or the hearing officer will, in the administrator's discretion, hold hearings upon the administrator's own motion, under AS 45.55.935.

AS 45.55.935, cited in the above regulation, provides in relevant part as follows:

> (a) The administrator shall adopt regulations, consistent with the provisions of this chapter and with regulations adopted under AS 44.64.060, governing administrative hearings conducted by the office of administrative hearings (AS 44.64.010) for the following:
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> (1) orders issued under AS 45.55.120, 45.55.900(d), or 45.55.920; ...and
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> (2) orders issued under AS 45.55.060 . . . .

In the Request for Posthearing Briefing, ALJ Stebing noted that AS 45.55.935 specifies four types of orders for which hearing procedures are to be established, and that 3 AAC 08.930 refers only to hearings "under AS 45.55.935." In his view, there are two potential interpretations of 3 AAC 08.930. Under the first interpretation, "[t]he regulation would be seen as simply a set of procedures adopted to govern hearings *required* by AS 45.55.935." (R. at 73, emphasis in original.) Since no order had been

issued under AS 45.55.920, that interpretation "would result in a determination that there is no regulatory basis for Calista's appeal, and a dismissal of the appeal for lack of jurisdiction." Under the second interpretation, "[t]he regulation would be construed as having the intent to expand the universe of potential hearings beyond those required by the section 935," including "a new right to appeal the *refusal* to 'issue' an order of one of the four types enumerated in section 935." (R. at 73-74, emphasis in original.)

Calista and the Division each submitted post-hearing briefs. (R. at 59-65, 66-69.) Both parties asserted that the OAH had jurisdiction to hear the case. (R. at 60, 69.) As stated by the Division, "[i]n the event that the administrator cannot determine the veracity of a statement from its mere filing, it would be reasonable and within the administrator's authority under 3 AAC 08.930 to hold a hearing regarding the filing either at the request of an aggrieved party or on his own motion." (R. at 67.)

On August 21, 2006, the case was reassigned from ALJ Stebing to ALJ Christopher Kennedy. (R. at 56.)

On September 22, 2006, ALJ Kennedy issued a nine-page Decision and Order dismissing the appeal, concluding that the Division's decision not to pursue an enforcement action "is one from which no administrative appeal can lie." (R. at 39.) Citing *Heckler v. Chaney*, 470 U.S. 821, 834 (1985), ALJ Kennedy analyzed Calista's appeal in the context of the "general presumption of unreviewability of decisions not to enforce." (R. at 41.) ALJ Kennedy interpreted 3 AAC 08.930 as specifying the set of procedures that would govern the appeal hearings for the four types of orders enumerated in AS 45.55.935. (R. at 42-43.) He found the regulation did not "expand the universe of potential hearings beyond those required by the section 935." (R. 43.)

He reasoned that a more expansive interpretation would be troublesome because it would result in an ALJ being faced with reviewing a discretionary decision of the Division without a legal standard to apply. (R. at 44.) This would occur, according to ALJ Kennedy, because the four kinds of orders that may be appealed as directed in AS 45.55.935 expressly commit the issuance of those orders to agency discretion by using the term "may."[5] (*Id.*) ALJ Kennedy reasoned that because the legislature failed to provide any real criteria as to how this discretion is to be exercised, such as factors the Division must consider in deciding whether or not to pursue administrative action, a judge reviewing a decision not to issue an order would be faced with no law to apply. (*Id.*)

In adopting the more restrictive interpretation, ALJ Kennedy also relied on two other factors. First, he reasoned that an agency's decision not to enforce may involve many factors beyond whether or not a violation took place. Allowing review of such a decision would "lead to an evidentiary hearing at which the agency's inner workings, capabilities, staffing priorities, and such would be subjects for review." (*Id.* at 45.) Secondly, ALJ Kennedy reasoned that Alaska law already provides a remedy in the form of a direct action for injunctive relief in superior court, so there is no need to create an extra administrative remedy where a fully adequate judicial remedy already exists. (*Id.*)

On September 25, 2006, the Administrator of the Division adopted the OAH's proposed Decision and Order as the "final administrative determination" in the matter.

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[5] For instance, AS 45.55.920 states that "the administrator *may* . . . issue an order . . . voiding the proxies . . . ." (Emphasis added.) The other three cross-referenced statutes use the same permissive word, "may." *See* AS 45.55.060(a), (b); AS 45.55.120(a); AS 45.55.900(d).

(R. at 35.) On October 31, 2006, Calista appealed that final administrative determination to this court. Briefing was completed by the parties in late July, 2007. and oral argument was held on October 9, 2007.

Standard of Review

The substitution of judgment standard applies to this court's review of the administrator's decision dismissing Calista's administrative appeal. This standard applies "when reviewing legal questions that do not require agency expertise" or "where the case concerns statutory interpretation or other analysis of legal relationships about which the courts have specialized knowledge and experience." *ACS of Alaska, Inc. v. Regulatory Comm'n of Alaska*, 81 P.3d 293, 295 n.18 (Alaska 2003) (internal quotations and citations omitted). Under the substitution of judgment standard, this court conducts an independent review and adopts "the rule of law that is most persuasive in light of precedent, reason, and policy." *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003).

This standard applies because the OAH's determination that it lacked jurisdiction to hear Calista's appeal, as adopted by the administrator of the Division, was based on a purely legal issue -- the interpretation of 3 AAC 08.930(a) and AS 45.55.935. Because these are principles of law which do not implicate the administrator's expertise regarding banking and securities regulations, the substitution of judgment standard should be applied.

The Alaska Securities Act grants the Division the discretion to decide whether or not to take enforcement action with regard to unlawfully solicited proxies. AS

45.55.920(a)(1)(C). The abuse of discretion standard as set forth in *Vick v. Board of Electrical Examiners* applies to this court's review of the Division's July 18, 2005 decision not to take administrative action with respect to Calista's proxy solicitation complaint. 626 P.2d 90, 92-93 (Alaska 1981); see *also Anderson v. Alaska Bar Association*, 91 P.3d 271, 272 (Alaska 2004).

Discussion

The primary issue before the court in this appeal is whether the administrator of the Division of Banking, Securities and Corporations, through the adoption of the OAH's Decision and Order, properly determined that the OAH is without jurisdiction to conduct an administrative hearing reviewing the Division's decision to take no administrative enforcement action. Specifically, this court must determine whether 3 AAC 08.930, as interpreted in light of AS 45.55.935, accords to Calista the right to a hearing before the OAH to review the Division's decision not to take administrative action with respect to Calista's proxy solicitation complaint.

I. Interpretation of 3 AAC 08.930 and AS 45.55.935

AS 45.55.935 directs the administrator of the Division of Banking, Securities and Corporations to adopt regulations for hearings regarding four kinds of orders:

1. "orders issued under AS 45.55.120" (denial, suspension, and revocation of registration);
2. "orders issued under . . . AS 45.55.900(d)" (orders to deny or revoke an exemption from registration);

3. "orders issued under . . . AS 45.55.920" (cease and desist orders, orders for prior filing of materials relating to proxy solicitations, orders voiding proxies, and orders imposing civil penalties); and
4. "orders issued under AS 45.55.060" (denial, revocation, suspension, cancellation, and postponement of registration).

AS 45.55.935(a)(1)-(2). The statute further provides that the regulations the administrator adopts shall govern the "administrative hearings conducted by the office of administrative hearings." AS 45.55.935(a).

3 AAC 08.930 is the regulation adopted pursuant to AS 45.55.935 and sets out the general procedures for the OAH to follow when conducting hearings. It provides, in relevant part, that "[t]he administrator or the administrator's designated hearing officer [*i.e.*, the OAH] will hold hearings under AS 45.55.935 upon written request *by any person aggrieved by any act or failure to act of the administrator or by any report, ruling, or order of the administrator.*" 3 AAC 08.930(a) (emphasis added).

The italicized language above forms the basis for Calista's assertion that the regulation provides for an administrative hearing and review of the Division's July 18, 2005 letter stating it will not take enforcement action. (*See* Calista Br. at 16.) Calista argues that under the plain language of the regulation, the corporation is a "person aggrieved" by the Division's July 18, 2005 finding, and that the Division's decision not to take action constitutes "any act or any failure to act" by the Division. (*Id.*)

In contradistinction, the underlined language above forms the basis for the Division's assertion that Calista is not entitled to a hearing because the regulation only provides for administrative hearings for orders issued "under 45.55.935." (Division Br.

at 9.) The Division argues that Ms. Buchanan's July 18, 2005 letter is not an order issued "under AS 45.55.920" for purposes of hearings pursuant to AS 45.55.935, and therefore the OAH is without jurisdiction under 3 AAC 08.930(a) to review that decision. (*Id.*)

For the reasons set forth below, this court concludes that Calista does not have the right to a hearing before the OAH to review the Division's July 18 decision not to take administrative action.

First of all, 3AAC 08.930 is a procedural regulation which "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Federal Deposit Ins. Corp. v. Laidlaw Transit, Inc.*, 21 P.3d 344, 353 (Alaska 2001). As ALJ Kennedy correctly noted, Calista's interpretation would create a new right to an administrative hearing to review the Division's decision not to issue an order of one of the four types enumerated in AS 45.55.935. (R. at 43.) Because the statute itself does not recognize a right to a hearing on this action, Calista's expansive reading of the regulation would render the words "under AS 45.55.935" inoperative and insignificant. That is to say, Calista's reliance on the "failure to act" language in the regulation overrides, or makes meaningless, the provision in the regulation that applies to "hearings under AS 45.55.935."

Moreover, pursuant to the Alaska Administrative Procedure Act ("APA"), "[t]o be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law." AS 44.62.020. "A regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute." AS 44.62.030. Although

these APA provisions are more typically invoked when challenging the validity of a regulation, if 3 AAC 08.930(a) is interpreted to authorize hearings beyond those required by AS 45.55.935, then the regulation might be inconsistent with and could be beyond the scope of the Division's statutory authority.

The Division's interpretation, on the other hand, construes 3 AAC 08.930(a) consistent with the limits of its authorizing statute, AS 45.55.935, and gives effect to every clause of the regulation. The Division asserts that "the regulation defines who may file a request [for a hearing] expansively, to ensure that all orders issued under AS 45.55.935 will be included, without respect to the action taken or the failure to act reflected in the order." (Division Br. at 12.) Accordingly, the italicized language's reference to administrative hearings for any "act or failure to act . . . report, ruling, or order" is regarded as 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." An example of an AS 45.55.935 order that is, in effect, a failure to act would be an order issued under AS 45.55.060 denying broker registration. Such an order is the formal expression of the Division's decision not to register a securities broker; it is a decision not to take action, *i.e.*, a failure to act.

In this case, an order was sought under AS 45.55.920 -- one of the cross-referenced statutes in AS 45.55.935 -- but no order was "issued." Thus, AS 45.55.935 does not require a hearing in this situation. Because this court finds that 3 AAC 08.930(a) does no more than create procedures for the hearings that are required by section 935, Calista does not have the right to a hearing before the OAH to review the Division's July 18, 2005 decision not to issue any order.

II. Agency Decisions Not to Enforce Receive Limited Judicial Review

Given this court's finding that Calista did not have the right to an administrative hearing with respect to the Division's decision not to seek enforcement, it follows that the July 18, 2005 letter was, effectively, the final administrative determination in this case. The Alaska Supreme Court has held, "all final administrative actions are presumed to be reviewable." *State, Dept. of Fish & Game v. Meyer*, 906 P.2d 1365, 1370 (Alaska 1995). Specifically, discretionary agency decisions not to pursue enforcement actions are subject to judicial review as to whether an abuse of discretion occurred. *See, e.g. Vick v. Board of Electrical Examiners*, 626 P.2d 90, 93 (Alaska 1981). This review is both limited and deferential – so long as the record demonstrates that the agency gave some consideration to the complaint, a decision not to enforce a discretionary statute will be upheld because of the general unsuitability of further review of such determinations. *Anderson v. Alaska Bar Association*, 91 P.3d 271, 272 (Alaska 2004); *Roberts v. State, Dept. of Revenue*, 162 P.3d 1214, 1224-1225 (Alaska 2007).

> The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Heckler v. Chaney, 470 U.S. 821, 831-32 (1985).

In *Vick v. Board of Electrical Examiners*, the Alaska Supreme Court addressed the reviewability of an agency's discretionary decisions as follows:

> [T]he extent of judicial review of discretionary determinations of an agency must necessarily vary with the subject matter. When a matter falls within an area traditionally recognized as within an agency's discretionary power, courts are less inclined to intrude than when the agency has acted in a novel or questionable fashion.
>
> When an agency functions to protect the public in general, as contrasted with providing a forum for the determination of private disputes, the agency normally exercises its discretion in deciding whether formal proceedings should be commenced. . . . Questions of law and fact, of policy, of practicality, and of the allocation of an agency's resources all come into play in making such a decision. The weighing of these elements is the very essence of what is meant when one speaks of an agency exercising its discretion.

626 P.2d at 93.

In *Vick*, the Board of Electrical Examiners decided not to commence a license revocation proceeding against an electrician after Mr. Vick had filed a written complaint alleging that the electrician had obtained his license by way of an application containing misleading and fraudulent statements.[6] Mr. Vick sought judicial review of the board's decision. *Id.* at 92. Relying on *Spear v. Board of Medical Examiners*, 303 P.2d 886, 890 (Cal. App. 1956), the Court performed a limited and highly deferential review of the board's decision not to enforce and concluded:

> As to the fraud claim, the board considered the apparent discrepancies in Williamson's application insufficient to require the initiation of a disciplinary proceeding. The agency exercised its discretion in conceding the discrepancies and deciding to forego the filing of the accusation. Thus we conclude that the board and the division did

[6] Under the statute at issue in *Vick*, the final decision to revoke or suspend a license lies within the discretion of the agency. *See* AS 08.40.170(a) and (d) ("The department *may* take . . . disciplinary actions . . . upon a finding that . . . the license application is fraudulent or misleading," including license suspension or revocation.) (emphasis added).

> consider the matters put before them and that no abuse of discretion has been demonstrated.

Id. at 93.

The present case is similar. Just as the Board of Electrical Examiners in *Vick* had the discretion to take enforcement action, the Division has the discretion to seek an administrative order voiding unlawfully obtained proxies.[7] And just as the board considered Mr. Vick's complaint, acknowledged potential discrepancies, and ultimately decided to forego taking enforcement action, so too did the Division here consider Calista's complaint, acknowledge misstatements, then decide to forego administrative action. In *Vick*, the Court refused to set aside the board's decision when it had considered the matters put before it and no abuse of discretion had been demonstrated by Mr. Vick. *Vick*, 626 P.2d at 93. Similarly, this court will not set aside the Division's exercise of its discretion as the record reflects that it considered Calista's complaint and elected not to take enforcement action.

In its brief, Calista argues that Mr. Ivan's proxy solicitation statements were materially false and misleading pursuant to applicable case law and administrative regulations. (Calista Br. at 27-31.) But even if Mr. Ivan's statements were material misrepresentations, the Division still retains the discretion to decide whether or not to pursue an enforcement action. AS 45.55.920 clearly authorizes the Division to void illegally obtained proxies, but by using the term "may," the statute commits that decision

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[7] *Compare* AS 08.40.170(a) and (d), *with* AS 45.55.920(a)(1)(C). These statutory provisions use the discretionary word "may" with respect to the agency's decision whether or not to take enforcement action. *Cf. Dep't of Fish and Game v. Meyer*, 906 P.2d 1365, 1373 (Alaska 1995). In *Meyer*, the Court concluded that the statute at issue (AS 18.80.110), which uses the word "shall," grants the agency no discretion to discontinue the enforcement process once an agency investigator finds substantial evidence of a violation. *Id.* at 1373. The Court determined that the statute in *Meyer* was "unlike the statute[] at issue in *Vick*," which provides agency discretion. *Id.*

to the Division's discretion. Accordingly, this court will not set aside the Division's decision not to take enforcement action with respect to Calista's proxy complaint.

Conclusion

For the foregoing reasons, the decision of the Division is AFFIRMED and this appeal is DISMISSED.

ENTERED at Anchorage, Alaska this 7th day of April 2008.

SHARON L. GLEASON
Superior Court Judge

4-8-08 Sent to:
AG
Linxwiler
Davis