

**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)
)
13th Regional Corporation)
)
_____) OAH No. 06-0594-SEC

ORDER GRANTING MOTION TO DISMISS

I. Introduction

This securities case involves a proxy solicitation complaint brought by Carl R. Hart against 13th Regional Corporation (13th). Mr. Hart requested a hearing to review a consent agreement entered into by the Division of Banking and Securities (Division) and 13th. Mr. Hart argues that the consent agreement should be amended to require that 13th be required to disclose additional information.

Mr. Hart filed a Motion for Summary Adjudication in this appeal, alleging that no material facts are in issue and that he is entitled to judgment as a matter of law. The Division Securities, (Division), represented by LuAnne Weyhrauch, Assistant Attorney General, filed a motion to dismiss Mr. Hart’s appeal. This order grants the Division’s motion and denies Mr. Hart’s motion because under Alaska law a shareholder has no right under AS 45.55.01-955 (Alaska Securities Act) to an administrative appeal of a settlement agreement between the Division and a corporation which resolve allegations that the corporation has failed to disclose required information in its proxy solicitation.

II. Facts

Mr. Hart provided the following facts in his appeal, which are not in dispute for the purposes of ruling on the parties’ dispositive motions. Mr. Hart is a shareholder of 13th stock. He is also a member of the Washington State Bar. Mr. Hart filed a complaint with the Division regarding a proxy solicitation for the management’s slate of 13th board candidates that he received in late June of 2005.

The proxy solicitation had informed shareholders that 13th was in a dispute with Alaska Catch LLC in connection with a document titled “Subscription Agreement” and cash payments of over \$2 million from 13th to the partnership. In this dispute, it was the position of 13th that

the then acting CEO of 13th did not have the authority to enter into the “Subscription Agreement.”¹ The proxy statement I also informed shareholders that 13th had entered into a settlement with the former CEO of 13th to resolve his claims for breach of contract and discrimination in regards to his termination.²

Mr. Hart requested information about the settlement agreement between 13th and the former CEO. 13th did not disclose the terms of that settlement to Mr. Hart, informing him that the information he had requested was confidential.³

In his appeal, Mr. Hart alleges that part of the reason that 13th refused to disclose the terms of the settlement was that these terms required the former CEO to assist 13th in its ongoing litigation against Alaska Catch LLC. Mr. Hart alleges that false purchase orders were issued to cover some of the payments made by the former CEO to Alaska Catch LLC under the “Subscription Agreement.” Mr. Hart provides details of his attempts to obtain more information from the Division and 13th about these transactions.⁴

After investigating Mr. Hart’s complaint, the Division entered into a consent agreement with 13th.⁵ Under the consent agreement, 13th agreed to pay the Division \$200 for its costs of investigation and to comply prospectively with the Alaska Securities Act, specifically including the disclosure requirements for proxy solicitations.⁶ The Division included a finding that 13th violated 3 AAC 08.345(b)(2)(a) by failing to disclose the former CEO’s compensation in its 2005 proxy statement, but the consent agreement provided that 13th did not admit or deny any of the Division’s findings, and the consent agreement did not require that 13th issue a correction to its 2005 proxy statement.⁷

III. Discussion

A. Dismissal or Summary Adjudication Allowed in Administrative Adjudications

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.⁸ It may be granted if there is no genuine dispute as to any

¹ Hart’s Declaration of Original Complaint, pages 1-2.

² Hart’s Declaration of Original Complaint, pages 2-3.

³ Hart’s Declaration of Original Complaint, pages 2-3.

⁴ Hart’s Declaration of Original Complaint, pages 3-6.

⁵ Division’s agency record, pages 54-57.

⁶ Division’s agency record, page 57.

⁷ Division’s agency record, pages 56 & 57.

⁸ *See, e.g., Schikora v. State, Dept. of Revenue*, 7 P.3d 938 (Alaska 2000).

material fact, so that the case may be resolved as a matter of law.⁹ In an administrative adjudication, where summary adjudication is appropriate based on the undisputed facts due to procedural rules or jurisdictional limitations, that summary adjudication is equivalent to a dismissal in a court proceeding.

B. Mr. Hart failed to Provide Authority for Claimed Relief

Mr. Hart argues that he and the other shareholders of 13th are entitled to an order from the Division that 13th provide “total and complete disclosure of all remuneration for the persons subject to the Findings and Conclusions of the Division.”¹⁰ As authority for this claim, Mr. Hart cites AS 45.01.106(a), which provides:

The remedies provided by the code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed, but neither consequential or special nor penal damages may be had except as specifically provided in the code or by other rule of law

Mr. Hart argues that only by providing the relief he seeks will the shareholders be put in as good a position as they would have been if 13th had complied with the Alaska Securities Act.¹¹

As the Division points out in its motion, the problem with the statutory authority that Mr. Hart cites to support his position is that it does not apply to the Alaska Securities Act.

The “code” referred to in AS 45.01.106(a) is the Uniform Commercial Code (UCC). As is explained in Alaska’s short title of the UCC, found at AS 45.01.101, the code consists of AS 45.01 - AS 45.08, AS 45.12, AS 45.14, and AS 45.29. The general definition section of the UCC, found at AS 45.01.201, provides that the word “code” means AS 45.01 - AS 45.08, AS 45.12, AS 45.14, and AS 45.29, the same statutes as the UCC.¹²

Mr. Hart argues that in order to comply with title 45 of the Alaska Statutes, the Division is required to apply a remedy that places 13th shareholders in the position that they would be in if the corporation had not violated provisions of the code.¹³ While both the UCC and Alaska Securities Act are located under title 45 of the Alaska Statutes, the Alaska Securities Act is found under chapter 55 of that title, not under chapters 1 - 8, 12, 14, or 29. The Alaska Securities Act is therefore not part of the UCC or the “code” which has its remedies described in AS 45.01.106(a).

The UCC is the codification of the laws of contracts and rules governing commercial transactions. The purpose of the “code” is to give effect to legally binding agreements between

⁹ *E.g., Smith v. Dep’t of Revenue*, 790 P.2d 1352, 1353 (Alaska 1990).

¹⁰ Hart’s Memorandum in Support of Motion for Summary Adjudication at page 5.

¹¹ Hart’s Memorandum in Support of Motion for Summary Adjudication at page 3.

¹² AS 45.01.201(10).

private parties, and enforce the obligations of good faith, diligence reasonableness and care, by the parties involved in commercial transactions.¹⁴ Disputes between parties that arise from transactions governed by the code are settled by bringing an action, or lawsuit, in court. Under AS 45.01.106(b), rights and obligations declared by the code are enforced by “action.” Under the AS 45.01.201(1), an “action” is described as a “judicial proceeding” in which rights are determined.

The Alaska Securities Act, under which the Division was acting when it entered into the disputed consent agreement, establishes executive branch police powers, rather than codifying common law commercial practices.¹⁵ Focusing primarily on the regulation of the sales of securities in Alaska,¹⁶ it is administered by the Division, not the courts.¹⁷ Rather than providing aggrieved parties with the opportunity to seek remedies in court, the Alaska Securities Act provides Division with broad authority to investigate and sanction violations of the act.¹⁸

C. No Right to an Administrative Hearing to Appeal Division’s Failure to take further action in a Proxy Dispute

While it is easy to understand Mr. Hart’s frustration with the failure of the consent agreement to provide him with the information he has worked so hard to obtain, it is not necessary or appropriate to address whether the Division’s decision to enter into the settlement was correct unless Mr. Hart has a right to an administrative appeal of the Division’s decision not take further action regarding his allegations.

Mr. Hart’s right to an administrative appeal of the Division’s settlement and its decision not to take further action is covered 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 that was adopted to follow the directive in AS 45.55.935. This regulation sets out the procedure for requesting an administrative hearing for acts, failures

¹³ Hart’s Memorandum in Support of Motion for Summary Adjudication at page 4.

¹⁴ See the purpose section of the UCC found at AS 45.01.101.

¹⁵ See Alaska Securities Act, AS 45.55.01-955.

¹⁶ AS 45.55.01-955.

¹⁷ AS 45.55.905.

¹⁸ The Division’s investigative and enforcement authority is provided for under AS 45.55.905-925. Under AS 45.55.930, the Alaska Securities Act provides also provides creates civil liability for special damages to certain injured parties for some violations, but these claims, like the UCC, are enforced through filing an action in court, not by the Division.

to act, reports, rulings, or orders.¹⁹ 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 case of *In re Calista Corp.*²⁰ 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 “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.

Similarly in *In the Matter of Frank R. Peterson, Sr.*, summary adjudication was granted to the Division in an administrative appeal of its decision not to take further action in response to a shareholder complaint after its investigation concluded that there was no merit to the shareholder’s allegations. The Division’s motion was granted based on the legal conclusion that there is no right to an administrative appeal of the Division’s failure to issue a requested order in a proxy dispute.²¹

Insofar as the consent agreement was a refusal to act—a refusal to take further enforcement action against 13th—*Calista* and *Peterson* establish that it is unappealable. If a hearing were held in this case, the Division’s decision-making process in agreeing to the settlement would be subject to review. This means that the Division would be called upon to describe and defend its inner workings, the limitations on its enforcement capabilities, and its staffing priorities. 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.²²

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.²³ To

¹⁹ 3 AAC 08.930(a).

²⁰ OAH No. 05-0889-SEC (adopted Sept. 25, 2006).

²¹ OAH No. 05-0696-SEC (adopted Jan. 2, 2007).

²² *Vick v. Board of Elec. Examiners*, 626 P.2d 90 (Alaska 1981).

²³ *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

permit a private party to force an agency to initiate enforcement actions and carry them through every step of the adjudicatory process would be quite wasteful of government resources.²⁴ For example, in *Vick v. Board of Elec. Examiners*, the Alaska Supreme Court upheld a lower court's refusal to force the Alaska Department of Commerce and Economic Development to issue an accusation against the an electrical administrator or to allow the complainant to file and prosecute his own disciplinary action against an occupational license holder.

There are some cases where an agency is required by statute to investigate complaints and is also required under certain circumstances to provide an administrative adjudicatory process to litigate the results of those investigations. In those cases, the agency has no discretionary authority to dismiss a complaint if those circumstances exist. For example, in *State, Dept. of Fish and Game, Sport Fish Div. v. Meyer* the Alaska Supreme Court upheld a lower court's determination that the Alaska Human Rights Commission did not have the discretionary authority to dismiss a discrimination claim against an employer without a hearing after the complainant had made a prima facie showing of discrimination, because there was a statutory requirement for a hearing if there was substantial proof of discrimination.²⁵

AS 45.55.920, the statute governing the Division's the enforcement powers, however, does not contain any language that limits the Division's authority to dismiss a complaint or refuse to issue an order. In contrast to AS 18.80.120, the statute that limited the Human Rights Commission's authority to dismiss complaints, the word "may" rather than the word "shall" is used repeatedly in AS 45.55.920 to describe the Division's authority to take various actions to carry out its duties under AS 45.55. This indicates that the Division has the discretionary authority use its resources as it deems appropriate by choosing between the listed actions or choosing to take no action in any particular case in its efforts to enforce the Alaska Securities Act.

D. No Right to an Administrative Appeal of an Order Addressed to Someone Else

Just as Mr. Hart cannot appeal the Division's decision not to pursue further enforcement against 13th, he also cannot appeal the consent order that it did issue to the corporation. If

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).

²⁴ *Vick v. Board of Elec. Examiners*, 626 P.2d 90, 94 (Alaska, 1981).

²⁵ *State, Dept. of Fish and Game, Sport Fish Div. v. Meyer*, 906 P.2d 1365 (Alaska 1995).

consent agreement was an order under AS 45.55.920, such orders are subject to appeal under AS 45.55.935(a) and 3 AAC 08.930.²⁶ The mere fact that an order is appealable does not mean that Mr. Hart can appeal it, however.

Nothing in AS 45.55.935(a) implies that the normal procedural and jurisdictional limitations for administrative appeals, such as the rules pertaining to the standing of the appealing party, do not apply.²⁷ On the contrary, the statute implies that a party to whom one of these orders is direct is the only party who is entitled to an administrative appeal to challenge the order. Under AS 45.55.925(d), a temporary order may be issued prior to a hearing, but even a temporary order becomes final if the party to whom the order is addressed does not request a hearing within 15 day of receipt. This implies that only the party to whom AS 45.55.925 orders are addressed can appeal these orders, because these only these parties receive notice and must file a timely appeal or the order becomes final.

E. Mr. Hart's Remedy Is Elsewhere

Mr. Hart does not have a right to a hearing to force the Division to take further action on his complaint or the challenge the order it has issued. Alaska law already provides him with an efficient remedy to recover his damages as a shareholder that resulted from a violation of the securities laws, however. That remedy is a direct action in Superior Court. In a direct action against 13th, instead of the Division, the limits of Division's discretionary authority would not be an issue.²⁸

IV. Conclusion

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

²⁶ See the consent agreement at Division's agency record, pages 54-57. It is not clear that this agreement is an order. Although some of the language in the consent agreement indicates that at some point in the negotiations the Division was attempting to get 13th to agree to an order, in the final document the Division does not order 13th to do or refrain from doing anything, rather, the parties "agree" to certain things.

²⁷ Standing is being the appropriate party to bring a particular dispute before a tribunal. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

²⁸ See, for example, *Meidinger v. Koniag, Inc.*, 31 P.3d 77 (Alaska 2001).

V. Order

Summary adjudication is denied to Mr. Hart and granted to the Division. Mr. Hart's appeal is dismissed. This case will not be scheduled for a formal hearing.

DATED at Juneau, Alaska this 11th day of February, 2008.

By: Signed
Mark T. Handley
Administrative Law Judge

Adoption

The undersigned adopts this Decision and Order in OAH Case No. 06-0594-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 27th day of March, 2008.

By: Signed
Signature
Michael L. Black
Name
Deputy Commissioner
Title

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