

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ERIC SALITAN,)	
)	
Appellant,)	
v.)	ORDER REVERSING THE DECISION
)	OF THE BIG GAME COMMERCIAL
ALASKA BIG GAME)	SERVICES BOARD AND ORDERING
COMMERCIAL SERVICES BOARD,)	A TRIAL DE NOVO
)	
Appellee.)	
_____)	Case No. 3AN-16-07948CI

ORDER

I. INTRODUCTION

The state division of professional licensing brought an accusation against a licensed registered guide, Eric Salitan, alleging that he violated a number of regulations and statutes during a 2012 Dall Sheep hunt. The accusation alleged that he failed to retrieve his clients from the field in a timely manner and to ensure the preservation of the clients' trophy capes and meat. The division sought disciplinary sanctions against Mr. Salitan. Following a hearing, an administrative law judge ("ALJ") concluded that Mr. Salitan had breached the parties' contract and his duties, and suggested that the reviewing agency, the Big Game Commercial Services Board, should impose discipline.

The Big Game Commercial Services Board ("The Board") reviewed the ALJ's conclusions during an off-record executive session that lasted nearly an hour. The Board voted to remand the decision. The ALJ corrected a factual finding in favor of Mr. Salitan. The Board adopted this corrected decision on July 22. It is from this decision that Mr.

Salitan appeals, alleging that his right to an impartial tribunal was violated when one of the Board members brought a complaint against Mr. Salitan, testified on behalf of the division at the hearing, and admitted personal bias against Mr. Salitan.

The court finds that Mr. Salitan's right to an impartial decision-maker was violated by this Board member's participation in his case. As discussed herein, this conflict was serious, apparent, and because the Board acted off record, the court is unable to evaluate the extent of his influence or participation. The Board's decision is REVERSED. Because of the nature of the violation, this court orders a de novo trial before the superior court. Because the Board's decision is reversed on other grounds, the court does not reach Mr. Salitan's contention that the Board's findings were not supported by substantial evidence.

II. FACTUAL AND PROCEDURAL BACKGROUND

a. Background Facts

Erik Salitan, through his business Bushwhack Alaska Guiding and Outfitting, has been a registered guide-outfitter in Alaska since 2008. He operates out of [REDACTED], Alaska, and assists clients in hunting Alaska big game. In 2012, Mr. Salitan organized a ten-day trip during which his clients Mr. Lenz and Mr. Ketcher, professionals from Minnesota, would hunt Dall Sheep in the Brooks Range. Each hunter was accompanied by a licensed assistant guide and a packer and Mr. Salitan remained in [REDACTED]. The assistant guides were unfamiliar with the area and were not outfitted with maps or GPS

equipment. Dr. Rich Guthrie was contracted to provide air travel to the party. Dr. Guthrie is also a registered guide and is familiar with the area.

Mr. Lenz's party and Mr. Ketcher's party hunted out of different remote camps, ██████ Creek and ██████ Creek, respectively. The two camps are about five miles apart. About seven miles from the ██████ Creek camp is ██████ Lake. At this location, a plane can land and take off from either the lake or a landing strip. ██████ Lake is unaffected by the same weather patterns that impact the ██████ and ██████ Creek camps.

Each hunter killed a legal Dall Sheep on consecutive days, one eight days after arriving in the field, and one nine. However, when the parties contacted Mr. Salitan, expecting to be picked up by plane from the landing strips at their respective camps, Mr. Salitan informed them that weather prohibited an immediate pickup from the camps.

The parties dispute how communication proceeded from this point on. The parties can agree, however, that at some point, the two hunting parties met at ██████ Creek camp and conflict arose between the party in the field and Mr. Salitan. Essentially, the party in the field, including the assistant guides, wanted to be picked up at the camp, did not believe that weather prohibited their pick up, and did not believe that Mr. Salitan presented them with any comparable alternative. Through their wives in the lower forty-eight, they contacted private aviation companies.¹ Ultimately Brooks Range Aviation picked them up at ██████ Lake on August 31. The parties agree that Mr. Salitan reimbursed Brooks Range Aviation for this service, but disputed whether Mr. Salitan was

¹ The party also contacted the Alaska State Troopers, who refused to provide assistance because they did not classify this situation as an emergency.

otherwise involved in arranging the flight. The group hiked to the lake from the camp and claim the hike took all day. The members of the party had to persuade one of the assistant guides to join them on this hike because he wanted to stay at the camp where there was food, shelter, and a landing strip.

Mr. Salitan testified that on most of the days after the parties asked for a pick up, if not all, a plane could have landed on ██████████ Lake. Mr. Salitan described the hike to the lake from ██████ Creek as easy, well-marked, and descending. It is disputed whether Mr. Salitan had suggested that the parties hike to ██████████ Lake himself – he maintains that he did. Throughout this time, Mr. Salitan was told by at least two pilots that a flight in or out of ██████ Creek would not be safe.

During this time, the party ate most of the sheep meat. During their final days in the field, they claim the remaining meat began to spoil, and one of the assistant guides threw it into a creek during their hike to ██████████ Lake. Mr. Salitan believed the meat had been consumed rather than thrown out. There were no preservatives provided to the parties in the field, and one of the sheep trophy capes “slipped,” or, in other words, was no longer of satisfactory trophy quality. Mr. Salitan provided that hunter with a replacement cape.

b. Alleged Board Member Conflicts

As discussed in more detail herein, the division of professional licensing made a six count accusation against Mr. Salitan, in part based on allegations of violations during this hunt. The fifth count of the accusation was, however, unrelated to this hunt.

Ultimately, the ALJ recommended that count five of the accusation be dismissed and that dismissal was adopted by the Big Game Commercial Services Board. Count five remains relevant to this appeal because the complainant for that count was Henry Tiffany. Mr. Tiffany is both a registered guide who also leads hunts in the area of the ██████ Creek drainage and a member of the Big Game Commercial Services Board – the ultimate administrative decision-making body in this case.²

The count based on Mr. Tiffany's complaint involves allegations that Mr. Salitan interfered with a hunt Mr. Tiffany arranged in violation of an administrative regulation and a statute. On the second day of the administrative hearing before the ALJ, Mr. Tiffany provided testimony in support of the fifth count.³ In response to questioning from Mr. Salitan's counsel, Mr. Tiffany agreed that, as both a complainant in this case and a member of a related decision-making body, it would be inappropriate for him to consider either adoption of the ALJ's findings or the proposed sanction in this case should the case come before the Board. Mr. Tiffany stated that he "most certainly would" recuse himself from consideration of adopting the administrative law judge's findings or sanctions and that "[a]s a board member, I don't see how it would be appropriate for me to . . . offer an unbiased sanction recommendation."⁴ He further testified, to paraphrase, that his opinion

² Mr. Salitan also argues that another board member, Mr. Atkins, has a conflict in this case. Mr. Atkins' conflict is not clearly developed in the record. However, whether or not Mr. Atkins has a conflict does not bear on the outcome of this appeal because Mr. Tiffany's conflict alone bears upon the questions before this court, as discussed herein, and the court need not address Mr. Atkins' conflict.

³ Selections of this testimony are provided in the Appellant's Excerpt of Record, EXC 4 and EXC 5.

⁴ Appellant's Excerpt of Record, EXC 4 at 2.

of Mr. Salitan is that he is a “prick” and he shared further negative opinions about Mr. Salitan and his presence as a guide in the [REDACTED].

Mr. Salitan moved that Mr. Tiffany recuse himself from involvement in this case during a status conference prior to the hearing. The ALJ declined to make a decision at the time, saying that it would be more appropriate for the motion to accompany the ALJ’s proposed decision to the Board for their decision. The ALJ also suggested that Mr. Tiffany could *sua sponte* recuse himself.

c. Procedural History

On September 30, 2015, the Division of Corporations, Business and Professional Licensing filed a six count Accusation against Mr. Salitan. Counts III and IV were related to the hunt detailed above and followed a 2014 complaint filed by Mr. Lenz and Mr. Ketcher. Count V regarded Mr. Tiffany’s complaint. The Division alleged a violation of thirteen guiding laws and regulations. The Big Game Commercial Services Board is the administrative agency charged with decision-making in this case. It referred the case to the Alaska Office of Administrative Hearings so that a hearing officer, not the Board, would preside over the evidentiary hearing in this matter.

A three-day hearing was held on March 23-25, 2016 and was presided over by hearing officer Stephen Slotnick, an administrative law judge. On May 10, ALJ Slotnick issued a proposed decision. He proposed that the Board dismiss Counts I, II, and V. Count VI was dismissed before the hearing. With regard to Counts III and IV, the ALJ proposed that the Board find against Mr. Salitan in some, but not all, respects.

Regarding Count III, the ALJ inferred from two regulations that a guide should have a reasonable alternative plan for bad weather. The ALJ determined that because the clients requested to be transported out of the field, if Mr. Salitan had a reasonable alternative available to comply with that request and that alternative had not been repudiated by the clients, he was required to act upon the request. In making this finding, it was important to the ALJ that even Mr. Stevenson, Mr. Salitan's expert, testified that he would have started working on an alternative option right away. Additionally, the ALJ found that any fault attributable to Mr. Salitan's assistant guides was attributable to him. The ALJ found that a hike to, and pick up from, ██████████ Lake was a reasonable pick-up alternative in this case. He found that this option had not been appropriately communicated to the clients and that Mr. Salitan was responsible to take action in accordance with this plan, even if his clients and assistant guides were somewhat oppositional.

Based on these findings, the ALJ recommended a fine of \$500 with \$250 suspended, one year of probation, and a reprimand for Mr. Salitan's violation of Count III. The ALJ considered a number of things, including: (1) the number of things that Mr. Salitan did correctly; (2) that it was not immediately obvious that delay to act was error; (3) that the clients reacted especially negatively to the delay and the outcome may have been different with different clients; (4) the breach of contract only implicated the client's subjective level of comfort, not their safety; and (5) Mr. Salitan understands that he erred. It also considered the errors that Mr. Salitan made in planning and executing the hunt,

including lack of communication with clients, lack of control over his assistant guides, and the absence of maps or GPS in the field.

Regarding Count IV, under a relevant regulation and statute, the ALJ determined that a guide has an ethical duty to salvage all meat of animals taken by clients if a failure to do so would be criminally negligent, or when the person fails to perceive a substantial and unjustifiable risk that the meat will spoil. The ALJ found that Mr. Salitan knew that two rams had been killed on August 8 and 9, respectively, that the meat could easily spoil, and that he could have easily retrieved the meat and trophies by hiking into the camp from ██████████ Lake. Based on these findings, the ALJ concluded that Mr. Salitan violated the applicable regulations by not inquiring about the condition of the meat or taking steps to ensure that the meat was salvaged. Based on these findings, the ALJ recommended a \$500 fine and a reprimand for the violation of Count IV.⁵

After the proposed decision was issued, both parties timely filed proposals for action pursuant to AS 44.64.060. On June 7, ALJ Slotnick sent a letter to the Big Game Commercial Services Board detailing his proposals for action. In this letter, the ALJ acknowledged that Mr. Salitan's proposal for action accurately noted a factual error that the ALJ had found. He suggested that the Board remand the decision back to the ALJ so that he could correct his findings accordingly. This letter noted that, under AS 44.64.060(f), the Board had until the next regularly scheduled meeting to act on the

⁵ The reprimand for both counts reads: "Mr. Salitan, during a hunt that took place in 2012, you failed to adequately plan for a change in circumstance and did not facilitate removing the clients, the meat, and the trophies from the field in a timely manner after the hunt ended and bad weather set in. Your conduct in that hunt fell below the standard of care that the Board has established for licensed registered guides. You are admonished to exercise greater care in future hunts."

decision or the proposed decision would become final by operation of law. The Board was next scheduled to meet on July 6.

The Board met on July 6 and took up Mr. Salitan's case. Neither Mr. Salitan nor his counsel were present at this meeting. During its discussion of this matter, the Board entered an off-record executive session⁶ lasting fifty-three minutes upon Mr. Tiffany's motion in order to discuss Mr. Salitan's case.⁷ The contents of the session are not included in the appellate record. Six of the nine board members participated in the executive session. These included Vrem, Metz, Tiffany, Atkins, Jackson, and Jones. However Mr. Jones' participation terminated at some point during or after the executive session. Mr. Jones called present at roll call for the executive session, but was present telephonically as he was halibut fishing. When the Board took roll call after the executive session but before voting, Mr. Jones was no longer present.

After the executive session ended, a board member moved that the board decline to adopt the ALJ's proposed decision and remand the case to the ALJ to "consider other options and present the case at a follow-up meeting."⁸ As the vote proceeded, five out of

⁶ See AS 44.62.310(c)(2), providing that subjects that "tend to prejudice the reputation and character of any person" may be discussed in a closed executive session, despite the requirement that all meetings of a governmental body of a public entity of the state are open to the public. The person in question is able to request a public discussion under this statute.

⁷ After the chairperson requested a motion to move into executive session, Mr. Tiffany moved "to go into executive session for the purpose of discussing . . . subjects that tend to prejudice the reputation and character of any person" pursuant to AS 44.62.310(c).

⁸ Appellant's Excerpt of Record, EXC 1 at 9.

the five present board members voted to approve the motion.⁹ Mr. Tiffany was one of these members.¹⁰

After the proposed decision was remanded, the ALJ issued a forty-one page Corrected Decision After Remand. The decision was received by the Board on July 18, 2016 and adopted by the Board on July 22, 2016. Relevantly, the corrected decision found that Mr. Salitan did not violate a statute, contrary to the ALJ's first proposed decision, in accordance with the facts Mr. Salitan brought to the ALJ's attention in his proposal for action. On July 22, when adopting this decision, the Board entered executive session again for about an hour. Mr. Tiffany was absent from this meeting.¹¹ Five members voted to adopt the proposed decision.

On appeal from this decision, Mr. Salitan argues that the Board's review of the ALJ's proposed decision deprived him of his right to due process under both the state and federal constitutions. Because, he argues, Mr. Tiffany participated in the initial off-record executive session and non-adoption vote and had a conflict of interest, he was deprived of his right to an impartial tribunal. Mr. Salitan requests that this court vacate the Board's decision and the discipline imposed. In the alternative, he requests that this court reverse the Board's decision and hold a trial de novo. Mr. Salitan additionally argues that the

⁹ AS 44.62.500(b) provides that, except as otherwise provided in AS 44.64.060(e), for a hearing conducted by the office of administrative hearings, the agency may adopt the proposed decision in its entirety, or may reduce the proposed penalty and adopt the balance of the proposed decision.

¹⁰ Mr. Atkins was another voting member, however, the absence of just Mr. Tiffany would have eliminated the quorum as only four out of nine Board members would have voted, so any conflict Mr. Atkins may have had is moot.

¹¹ Mr. Atkins, *see supra*, footnote 2, abstained from voting.

Board abused its discretion because its findings were not supported by substantial evidence, and argues for reversal on this ground as well.

The Board argues that, even if Mr. Tiffany had a conflict of interest, this conflict did not violate Mr. Salitan's rights or otherwise impact the outcome of his case and that the Board's action was required by statute. It argues that the Board's decision should be affirmed. It contends that the Board had sufficient evidence to support each of its decisions against Mr. Salitan.

III. STANDARD OF REVIEW

Alaska Statute 44.62.570(b) allows the superior court appellate inquiry into administrative agency decisions when an appellant alleges that they were not provided a fair hearing. The standard of review of a legal question hinges upon whether the issue involves the application of agency expertise. With regard to questions of law involving agency expertise, courts apply the reasonable basis standard and will defer to the Board's interpretation of its own regulations as long as the determination has a reasonable basis in law and fact.¹² When questions of law do not call upon agency expertise, courts apply the substitution of judgment test.¹³ Under this test, a reviewing court is permitted to substitute its own judgment for that of the agency, even if the agency's decision had a reasonable basis in law.¹⁴

¹² *State, Bd. of Marine Pilots v. Renwick*, 936 P.2d 526, 530 (Alaska 1997); *Storrs v. State Med. Bd.*, 664 P.2d 547, 554 (Alaska 1983).

¹³ *State, Div. of Ins. v. Schnell*, 8 P.3d 351, 355 (Alaska 2000); *Boyd v. State, Dep't of Comm. & Econ. Dev., Div. of Occupational Licensing*, 977 P.2d 113, 115 (Alaska 1999).

¹⁴ *Boyd*, 977 P.2d at 115.

The Board argues that, because this appeal concerns disciplinary statutes and regulations authorizing the Board to exercise its discretion in sanctioning license holders, the court should apply the reasonable basis test. However, the Board's application of its regulations to the facts of Mr. Salitan's case are not at issue on this appeal. Whether an agency's procedures afforded a litigant due process is a question of law that does not call upon the particular expertise of the Big Game Commercial Services Board or interpretation of its regulations. Accordingly, this court substitutes its judgment for that of the Board in this case.

IV. ANALYSIS

In most cases, it is within the superior court's discretion to determine whether to hold a de novo trial regarding an issue on appeal from an administrative agency.¹⁵ A de novo trial is rarely warranted.¹⁶ However, a de novo trial is required when administrative agency procedures are so lacking that they deny due process to litigants and may be granted if justice requires.¹⁷

Due process must be maintained in administrative proceedings as well as judicial proceedings.¹⁸ It has further been established that disciplinary proceedings regarding a

¹⁵ AS 44.62.570(d); Appellate Rule 609(b). See *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 46 (Alaska 2007).

¹⁶ *Yost v. State, Div. of Corps., Bus. And Prof'l Licensing*, 234 P.3d 1264, 1274 (Alaska 2010); Appellate Rule 520(c) (providing that an appellate court may affirm, modify, vacate, set aside, or reverse any judgment, decree, decision or order of a court lawfully brought before it for review. The court may remand the case to direct such entry or require further proceedings as justice requires.).

¹⁷ *Alaska Pub. Interest Research Grp.*, 167 P.3d at 46.

¹⁸ *Button v. Haines Borough*, 208 P.3d 194, 208–09 (Alaska 2009); *State v. Lundgren Pac. Const. Co.*, 603 P.2d 889, 896 (Alaska 1979).

person's guide license must comport with due process.¹⁹ A fundamental requirement of due process is the "opportunity to be heard at a meaningful time and in a meaningful manner."²⁰ Included in this procedural due process right is the requirement that an impartial tribunal hear one's case.²¹ A tribunal is not impartial if it includes a biased decision-maker or when its procedures create the probability or appearance of unfairness.²²

Administrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudice.²³ To show bias, a party must show that the decision-maker had a predisposition to find against a party or that the decision-maker interfered with the orderly presentation of the evidence – for example, by prejudging facts.²⁴ A personal bias or personal prejudice, either in favor of or against a person, will disqualify a decision-maker when it is strong enough and when the bias has an unofficial source.²⁵

¹⁹ *Herscher v. State, Dep't of Commerce*, 568 P.2d 996, 1002 (Alaska 1977) (finding a proprietary interest in the hunting guide's license is of sufficient importance to warrant protection under constitutional requirements relating to due process of law); see also AS 44.62.380(3); AS 44.62.390(c) (establishing that someone in Mr. Salitan's position has a right to a hearing).

²⁰ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotations omitted).

²¹ *Yost*, 234 P.3d at 1246.

²² *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

²³ *Goldberg*, 397 U.S. at 271.

²⁴ *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007).

²⁵ *Amerada Hess Pipeline Corp. v. Regulatory Comm'n of Alaska*, 176 P.3d 667, 673–74 (Alaska 2008); 2 Richard Pierce, Jr., *Administrative Law Treatise* § 9.8, at 648–49 (4th ed.2002). The Alaska cases on point establish that suspicion or allegation that a person will act in a biased manner will not amount to a due process violation. The party alleging bias must point to some substantive fact. See, e.g., *AT & T Alascom v. Orchitt*, 161 P.3d 1232, 1246 (Alaska 2007) (concluding that, in a worker's compensation case involving a union, the hearing officer's position as vice president of the Alaska Chapter of the American Federation of Labor, on its own, is insufficient to show actual or probable bias); *Bruner v. Petersen*, 944 P.2d 43, 49 (Alaska 1997) (allegations that the decision-maker, the dean of the nursing program, could not be impartial in reviewing a decision of a committee because she had a close and supportive working relationship with faculty members who make up the committee, do not constitute actual or probable bias in and of themselves); *Voigt v. Snowden*, 923 P.2d 778, 782 (Alaska 1996) ("Had Voigt continued to

3AN-16-07948CI
Salitan v. Alaska Big Game Commercial Services Board

In addition to those procedural protections guaranteed by the state and federal constitutions, Alaska's Administrative Procedure Act sets forth procedural requirements for the Board.²⁶ To argue that Mr. Tiffany's participation does not violate the state or federal constitutions, the Board primarily relies upon AS 44.62.450. This statute governs the conduct of contested administrative hearings and, in relevant part, provides:

A hearing officer or agency member shall voluntarily seek disqualification and withdraw from a case in which the hearing officer or agency member cannot accord a fair and impartial hearing or consideration. A party may request the disqualification of a hearing officer or agency member by filing an affidavit, before 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. If the request concerns an agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing officer when the officer hears the case alone. *An agency member may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.*²⁷

It is the last portion of this statute that is in contention here. The State argues that the statute required Mr. Tiffany's participation in this case and absolves the Board of any action that would otherwise appear biased. Mr. Salitan argues that, in as much as it was applied in this case, the application of this statute to permit Mr. Tiffany's involvement in Mr. Salitan's case constituted a deprivation of Mr. Salitan's right to an impartial tribunal.

harbor concerns that the selected hearing officer would not be fair and impartial, he would have had the right to object to the choice of hearing officer."); *Tachick Freight Lines, Inc. v. State, Dep't of Labor, Employment Sec. Div.*, 773 P.2d 451, 453 (Alaska 1989) (predisposition to find against a party or interference with presentation of evidence not established simply because hearing officer asked "pointed" questions of that party).

²⁶ See AS 44.62.330(19).

²⁷ Emphasis added.

3AN-16-07948CI

Salitan v. Alaska Big Game Commercial Services Board

Page 14 of 19

The constitutionality of the portion of this statute requiring the participation of agency members with a conflict of interest has not been squarely addressed by Alaska's courts, but a court assumes the constitutionality of a duly enacted law.²⁸ The Board relies upon three attorney general opinions as additional support.²⁹ Opinions of the Attorney General are entitled to some deference, but are not controlling.³⁰

In 1979, the Office of the Attorney General issued an opinion regarding the application of AS 44.62.450 to a set of facts similar to those in this case. There, an association of pilots requested a review of pilot fees before the Board of Marine Pilots – a seven member board.³¹ Two of the Board members had conflicts of interest – one was a pilot and stood to materially benefit from an approval of the action before the Board and the other represented shipping interests in the area who also had a “direct interest” in the case.³² These members' votes were needed to constitute a quorum. Citing AS 44.62.450(c), the Opinion states that (1) the statute is a sound rule that comports with due process notions; (2) the composition of the board contemplates conflicts of interest; and (3) that, in the interest of a fair and impartial hearing, members with conflicts should

²⁸ *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 260 (Alaska 2004).

²⁹ See 2006 Alaska Op. Atty. Gen. 1 (Alaska A.G.) 2006 WL 3473503 (mentioning that an agency member may not be disqualified if it would prevent the board from having a quorum to act, while also stating that “it may be unreasonable to require parties to an administrative proceeding to trust that someone who served as a witness in the proceeding would also serve as a fair and impartial decision maker in considering that matter”); 1998 Alaska Op. Atty. Gen. 48 (Alaska A.G.) 1998 WL 1108875 at *5 n .11 (The “Administrative Procedure Act places a value on maintaining a quorum of a board or commission to act in a case.”); 1979 Alaska Op. Atty. Gen. (Alaska A.G.) 1979 WL 22755.

³⁰ *Cissna v. Stout*, 931 P.2d 363, 368 (Alaska 1996).

³¹ 2006 Alaska Op. Atty. Gen. 1 (Alaska A.G.) 2006 WL 3473503 at *3.

³² *Id.*

recuse themselves unless their participation is necessary for a quorum.³³ It advised that “it was proper for the two members . . . to refuse to voluntarily disqualify themselves from the hearing” and that “they would not have been susceptible to a motion to disqualify . . . given the fact that their absence would have rendered the board unable to act.”³⁴

Here, Mr. Salitan followed the procedures set forth in AS 44.62.450(c). He objected to Mr. Tiffany’s participation in any proceedings against him. The Board concedes that Mr. Tiffany “clearly” had a conflict of interest, at least by virtue of his testimony against Mr. Salitan. However, it argues that this conflict of interest is not fatal to the Board’s decision. It explains that six of the nine board members were present before the executive session and only five were present when the executive session closed, or at the time of the vote. The Board argues that at this time, all five members present were required to vote in order for there to be a quorum, and Mr. Tiffany was not permitted to recuse himself either *sua sponte* or based on Mr. Salitan’s objections, pursuant to AS 44.62.450. It further argues that the Board action does not result in an appearance of impropriety because the Board followed the ALJ’s recommendation, the July 6 non-adoption decision resulted in a change in a factual finding in favor of Mr. Salitan, and that, if the Board had not acted when it did, the ALJ’s incorrect factual finding would have become final by virtue of AS 44.64.060(e).³⁵ The Board finally asks that the court presume that the Board followed guidance provided by the ALJ during the

³³ *Id.*

³⁴ *Id.*

³⁵ In conjunction with AS 44.64.060(f), this statute instructs that the Board should act on the ALJ’s proposed decision within forty-five days of the date the proposed decision is served or at the next regularly scheduled meeting, or the administrative law judge’s proposed decision is the final agency decision.

executive session during its July 6 meeting and its decision to remand was based on the ALJ's advise.

Despite the Board's arguments, as it is has been applied in this case, AS 44.62.450(c) is at odds with Mr. Salitan's constitutional right to have his case decided by an impartial decision-maker.³⁶ Mr. Tiffany had an explicit, not assumed, personal bias against Mr. Salitan – one that he acknowledged and that is otherwise apparent from the record. Although the record does not establish that Mr. Tiffany used his position on the Board to act on this bias, Mr. Tiffany's participation as a complainant, witness, and then voting Board member creates at the very least an appearance of impropriety.

Although the record indicates that the ALJ and the chair of the Board spoke at some point before the decision was remanded, it is otherwise silent as to the extent the ALJ was involved in the Board's consideration of Mr. Salitan's case. The court will not assume the contents of the executive session, the ALJ's level of participation, if any, in the executive session, the substance of his conversation with the chair of the Board, if any, or any motivation behind the Board's remand.

In addition, the Board's procedures did not cure any concerns about bias. The Board considered Mr. Salitan's case without Mr. Salitan or his counsel present and off the record.³⁷ The off-record executive session lasted almost an hour. Based on the closed nature of the proceedings and the extent of Mr. Tiffany's conflict, regardless of the Board's rationale for entering the closed session, the court cannot know the extent to

³⁶ The court makes no findings as to the constitutionality of the statute as it may be applied in other cases.

³⁷ See *Keiner v. City of Anchorage*, 378 P.2d 406, 409 (Alaska 1963).

3AN-16-07948CI

Salitan v. Alaska Big Game Commercial Services Board

Page 17 of 19

which Mr. Tiffany participated, whether his hearing testimony was regarded by other Board members, whether his conflict created just an appearance of impropriety, or if his negative feelings against Mr. Salitan were in fact acted upon during the Board's consideration of his case. Finally, understanding the statutory pressure to act on the ALJ's proposed decision at this July 6 meeting, the Board does not explain why it did not anticipate Mr. Tiffany's conflict and either reschedule the meeting for a date when more members could attend, arrange for more telephonic participation, or postpone the vote until Mr. Jones was within range of telephone service again.

Despite the fact that Mr. Salitan does not complain about the procedures afforded during the hearing itself, the appropriate remedy in this case is a de novo trial before the Superior Court. Even if the due process violation did not require a de novo trial, it is also required in the name of justice. A remand of this case to the Board for a reconsideration of the ALJ's proposed decision will not cure the due process violation.³⁸ In fact, it would leave Mr. Salitan in the same position he is now in.³⁹ The court agrees with Mr. Salitan that, in this case, the appearance of impropriety created by Mr. Tiffany's participation at the outset cannot be satisfactorily eliminated at this point.⁴⁰

³⁸ See *Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 46 (Alaska 2007) ("If the process provided by agency regulations conforms to due process, but the agency has not adhered to the required process in a particular case, the remedy is not a trial de novo but a remand to the agency.").

³⁹ Mr. Tiffany did not participate in the Board's action adopting the ALJ's proposed decision after remand and was, in fact, absent from that meeting altogether. Mr. Atkins abstained from voting. It is that decision that Mr. Salitan appeals from.

⁴⁰ Although apparently only two of the nine current Board members were Board members at the time of this decision, Mr. Tiffany remains on the Board. See <https://gov.alaska.gov/services/boards-and-commissions/roster/?board=042>.

3AN-16-07948CJ

Salitan v. Alaska Big Game Commercial Services Board

Because it orders that Mr. Salitan's case be set for a de novo trial before the Superior Court on the grounds that the Board's action did not afford Mr. Salitan procedural due process, it does not reach Mr. Salitan's argument that the ALJ's decision was not supported by sufficient evidence.


V. CONCLUSION

Because the Board's action violated Mr. Salitan's right to due process, its decision is REVERSED. Mr. Salitan's remedy is a de novo trial before the Superior Court. The parties should contact the court within thirty days of the issuance of this Order in order to schedule a trial setting conference.

Dated at Anchorage, Alaska this 27th day of February 2018.



Erin B. Marston
Superior Court Judge

I certify that on 2/27/18
a copy of this notice was mailed to:
 McGrady
Auth
K. DiCarlo, Judicial Assistant