APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID E. OLSON; ABS. ENVIRO. SERVICES, INC., an Alaska corporation for the use and benefit of David E. Olson, Plaintiffs-Appellants, v. MARK O'BRIEN; et al., Defendants-Appellees.	No. 18-35727 D.C.No. 3:11-cv-00245-JWS MEMORANDUM* (Filed Dec. 5, 2019)

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Submitted June 12, 2019**
Anchorage, Alaska
Before: TASHIMA, W. FLETCHER, and BERZON, Circuit Judges.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Plaintiffs-Appellants appeal from the district court's order granting in a motion to dismiss some of Plaintiffs-Appellants' claims, and a later order granting summary judgment in favor of Defendants-Appellees on their remaining claims. In its first order, the district court declined to dismiss Plaintiffs-Appellants' claim that "Defendants violated Plaintiffs's procedural rights in the administrative proceedings" based on issue preclusion; held that there was issue preclusion with regard to whether Plaintiffs-Appellants suffered substantive harm due to Defendant-Appellee's actions; and dismissed Plaintiffs-Appellants' state common law fraud claim for failure to plead with particularity. In its second order, the district court granted summary judgment against Plaintiffs-Appellants on all other claims. Among those claims was a claim under 42 U.S.C. § 1983 that Defendants-Appellees had violated Plaintiffs-Appellants' constitutional due process rights during proceedings before the Alaska Department of Transportation and Public Facilities.

Plaintiffs-Appellants appeal the district court's decision on their due process claim and their fraud claim. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's dismissal order and summary judgment order de novo. *See, e.g., John Doe 1 v. Abbott Labs.*, 571 F.3d 930, 933 (9th Cir. 2009).

Plaintiffs-Appellants' due process claim in their complaint is a claim under § 1983 for violation of constitutional due process. In its second order, the district court analyzed Plaintiffs-Appellants' § 1983 due process claim and granted summary judgment for Defendants-Appellees on that claim. The district court's ruling encompassed the entirety of Plaintiffs-Appellants' constitutional due process claim. To the degree it mentioned the Alaska courts' holdings, it did so to explain that any factual error made in the administrative proceedings was harmless. The district court correctly granted summary judgment on that claim.

We disagree with the district court's decision to dismiss Plaintiffs-Appellants' state common law fraud claims for failure to plead with particularity. However, we may "affirm the district court's dismissal on any ground supported by the record." *ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014). Based on the facts alleged in the complaint, there was no fraud. Under the alleged facts, there was no false representation of fact, knowledge of the falsity of the representation, intention to induce reliance, justifiable reliance, or resulting damages. See *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

DAVID E. OLSON and ABSOLUTE ENVIRONMENTAL SERVICES, INC., Plaintiffs, v. MARK O'BRIEN; et al., Defendants.	D.C. No. 3:11-cv-245-JWS ORDER AND OPINION [Re: Motion at Docket 138, 140, 147, & 149] (Filed Jul. 31, 2018)

I. MOTION PRESENTED

Before the court are four motions. The first filed is Plaintiffs David E. Olson and Absolute Environmental Services, Inc.'s ("Plaintiff") motion for partial summary judgment against defendant Mark O'Brien at docket 138. Defendant Mr. O'Brien responds at docket 163. Plaintiff replies at docket 175.

The next motion filed is Defendants Mark O'Brien, James Cantor, and Richard Welsh ("Defendants") motion for summary judgment at docket 140. Plaintiff responds at docket 166. Defendants reply at docket 174.

The third motion is a motion in limine filed by Plaintiff at docket 147. Defendants respond at docket 156. Plaintiff replies at docket 165.

The final motion is Defendants' motion in limine filed at docket 149. Plaintiff responds at docket 157. Defendants reply at docket 162.

Oral argument was requested and granted on all four motions. Oral argument was heard on July 20, 2018.

II. BACKGROUND

The background of this litigation was described at some length in the order at docket 77, and again more succinctly in the order at docket 120. There is no need to repeat it here.

III. STANDARD OF REVIEW

A. Motions for Summary Judgment

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1] The materiality requirement ensures that "[o]nly disputes over facts that might affect the outcome of

[1] Fed. R. Civ. P. 56(a).

the suit under the governing law will properly preclude the entry of summary judgment."[2] Ultimately, "summary judgment will not lie if the . . . evidence is such that a reasonable jury could return a verdict for the nonmoving party."[3] However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[4]

The moving party has the burden of showing that there is no genuine dispute as to any material fact.[5] Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, the moving party need not present evidence to show that summary judgment is warranted; it need only point out the lack of any genuine dispute as to material fact.[6] Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial.[7] All evidence presented by the non-movant must be believed for purposes of summary judgment, and all justifiable inferences must be drawn in favor of the non-movant.[8] However, the non-moving party

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[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[3] *Id.*

[4] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

[5] *Id.* at 323.

[6] *Id.* at 323-25.

[7] *Anderson*, 477 U.S. at 248-49.

[8] *Id.* at 255.

may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[9]

B. Motions in Limine

Motions in limine are motions which seek to foreclose the use of certain testimony or documentary evidence at trial. When a court rules on a motion in limine, it is necessarily a preliminary order which may be re-examined at trial if circumstances warrant reconsideration.

IV. MOTIONS AT DOCKETS 138 & 140

The majority of the claims in this case revolve around procedure. Therefore, it is important to lay out the procedural history and how it comports with or diverges from the statutory requirements.

David E. Olson is the owner of Absolute Environmental Services, an Alaska corporation ("Absolute"). North Pacific Erectors, Inc. ("NPE") contracted with the State of Alaska to perform work on the State Office Building ("SOB") in Juneau. Among other things, NPE's contract with the State required removal of asbestos from the SOB. NPE

[9] *Id.* at 248-49.

subcontracted with Absolute to accomplish the asbestos removal. Absolute encountered what it believed to be differing conditions than those assumed in bidding the work. In Absolute's view, the conditions encountered rendered removing the asbestos costlier than the contract price.

Absolute called upon NPE to present a claim for additional compensation for the asbestos work. The contract involves the procurement of services and is thus subject to the Procurement Code.[10] The Procurement Code provides the procedure for addressing any contract claim.

First, the contractor must raise a claim with the procurement officer.[11] In this case, NPE presented a claim to the procurement officer. The procurement officer denied Plaintiff's claim.

Second, the contractor may appeal the decision of a procurement officer through an administrative appeal.[12] NPE's claim involved a construction contract so the administrative appeal was to the Commissioner of the Department of Transportation and Public Facilities ("DOTPF").[13] The claim goes to arbitration if it is for less than $250,000 and the contractor requests arbitration or if the claim is for

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[10] AS 36.30.005 - .995.

[11] AS 36.30.620.

[12] AS 36.30.625.

[13] AS 36.30.625(a).

more than $250,000 and both parties agree to arbitration.[14] Otherwise, the case is heard under AS 36.30.630.[15] In this case, the claim was for more than $250,000 and the parties did not agree to arbitration so it was designated for a hearing. DOTPF Chief Contracting Officer Mark O'Brien was assigned to review the appeal of the procurement officer's decision. Mr. O'Brien determined that a hearing was justified. He assigned private attorney William Bankston to act as the hearing officer.

Third, a hearing officer's role is to "recommend a decision to the commissioner . . . , based upon the evidence presented. The recommendations must include findings of fact and conclusions of law."[16] Mr. Bankston conducted a hearing from December 1-5, 2008. On January 16, 2009, Mr. Bankston issued a recommendation for an award of $158,821 to Plaintiff. Mr. Bankston did not submit final briefing from the hearing with his recommendation. On January 20, 2009, Mr. O'Brien asked Mr. Bankston for the briefing.

On January 26, 2009, Mr. O'Brien emailed Mr. Bankston and asked: "If a simple walkthrough at the prebid would have revealed the dimples, does this failure to participate in the prebid waive their claim

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[14] AS 36.30.627(a)(1).

[15] AS 36.30.627(a)(2).

[16] AS 36.30.675(a).

on the issue?"[17] Later, when the dispute eventually reached it, the Alaska Supreme Court noted the remainder of the communication:

> [DOTPF] acknowledges that the deputy commissioner's "decision referred to [the] incorrect information" from an email exchange between O'Brien and the hearing officer. O'Brien inquired of the hearing officer:
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> > During the prebid conference were other bidders offered the opportunity to observe the embossed pan deck at an alternate location? I see reference to an "alternate location" but I couldn't tell if that was offered at the prebid, or whether it was assumed that a contractor could have asked on their own to view it at an alternate location.
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> The hearing officer responded that
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> > [f]rom the evidence all bidders were offered a site inspection. The site inspection would not

[17] *N. Pac. Erectors, Inc. v. State, Dep't of Admin.*, 337 P.3d 495, 501 (Alaska 2013).

> have revealed the embossed pan deck because it was covered with fire proofing. All bidders were offered the chance to inspect pan deck that was not covered, which was at another location in the S[tate] O[ffice] B[uilding], so not technically the site, and the inspection had to be at a different time of the day and after normal office hours.

> Thus it is undisputed that, based on this exchange, the deputy commissioner incorrectly stated that the Department had affirmatively offered participants at the prebid meeting an opportunity to view an uncovered pan deck.[18]

Nonetheless, after this correspondence and still on January 26, 2009, Mr. O'Brien emailed Chief Assistant Attorney General for Transportation James Cantor and expressed concern over Mr. Bankston's decision. He noted:

> I received this recommended decision, but I have some real heartburn with its conclusion.

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[18] *Id.*

> * * *
>
> I'm thinking I may need to either reject or remand this back. The key issue for me is "duty to inspect." The contractor did not attend the prebid. At the prebid, the contractors were offered the opportunity to view an area of similar work where the fireproofing had been removed. This inspection would have clearly shown the dimpled pan (change condition in dispute). Only one of the Contractors at the prebid choose to view the uncovered area. What I read puts the burden on the contractor to prove that they conducted a reasonable site inspection. If a reasonable site inspection would have revealed the condition, then the contractor cannot establish entitlement.

Mr. O'Brien, while restating the incorrect fact, was actually concerned about the legal standard used in the decision; specifically, the "duty to inspect."

Mr. Cantor assigned Assistant Attorney General Richard Welsh to assist Mr. O'Brien. Mr. Cantor also supervised Assistant Attorney General Jeff Stark, who represented the Department in the appeal. An ethical wall was put in place to separate Mr. Cantor and Mr. Stark as advocates from Mr. Welsh as an

advisor to DOTPF (Mr. O'Brien, Commissioner von Scheben, and Deputy Commissioner Richards).

Fourth, the Commissioner "may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action."[19] On March 5, 2009, DOTPF Commissioner von Scheben remanded the claim to Mr. Bankston. On May 8, 2009, Mr. Bankston issued his second recommendation finding in favor of Plaintiff.

On or about June 4, 2009, Plaintiff moved for Commissioner von Scheben to recuse himself. On June 11, 2009, Commissioner von Scheben recused himself and designated Deputy Commissioner Richards to make a final determination on the claim.

On June 24, 2009, Deputy Commissioner Richards received a draft final decision. The draft was written by Mr. Welsh. Mr. Welsh and Mr. O'Brien communicated about the decision. Neither Mr. Welsh nor Mr. O'Brien attended the hearing, listened to a recording of the hearing, or read a transcript of the hearing prior to drafting the final decision. Deputy Commissioner Richards did not attend the hearing, listen to a recording of the hearing, read a transcript of the hearing, or review any material other than Mr. Welsh's draft final decision. Deputy Commissioner Richards did ask Mr. O'Brien some questions

[19] AS 36.30.675(b).

regarding the draft. On June 25, 2009, Deputy Commissioner Richards signed and issued a final decision against NPE.[20]

NPE appealed the final decision of Deputy Commissioner Richards to the superior court sitting as an intermediate appellate court.[21] The appeal contained both substantive and due process claims.

The superior court allowed discovery and:

> [H]eld a limited trial de novo to consider North Pacific's procedural arguments regarding (1) the timing of the deputy commissioner's decision, (2) the decision-making role of the deputy commissioner, (3) the role of Department of Transportation and Public Facilities staff in the decision, (4) the alleged deprivation of a hearing, and (5) the alleged ex parte contact. After trial, the superior court made thorough findings of fact on the agency appeals process, the agency's

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[20] The Commissioner "may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action." AS 36.30.675(b). "A decision by the commissioner of administration or the commissioner of transportation and public facilities after a hearing under this chapter is final." AS 36.30.380.

[21] See AS 36.30.685.

> factual error, communications between the deputy commissioner and the staff, and the lack of bias in the agency decision-making process. Finally, the superior court concluded that the agency decision was not procedurally flawed.[22]

The superior court affirmed Deputy Commissioner Richards' final decision. The superior court rejected NPE's due process claims but noted some issues. "While the superior court was 'troubled' by some of the procedural issues, it ultimately held that the final agency decision 'was not legally flawed' and the State's 'resolution of the legal questions raised by [North Pacific] was reasonable.'"[23] In addition, "The superior court further found that North Pacific had 'not proved by a preponderance of evidence that [the deputy commissioner], [Chief Contracting Officer] O'Brien and [the assistant attorney general] were individually or collectively personally biased against [North Pacific].'"[24] Regarding the communication between Mr. O'Brien and Mr. Bankston, "the court concluded that there was no traditional ex parte contact because the communication did not involve a party to the case. The superior court further concluded that the erroneous factual finding that was likely caused by the exchange did not

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[22] *N. Pac. Erectors, Inc. v. State, Dep't of Admin.*, 337 P.3d 495, 502 (Alaska 2013).

[23] *Id.*

[24] *Id.* at 503.

substantially impact the agency decision."[25] Finally, the superior court acknowledged that the argument that Mr. O'Brien, Mr. Welsh, and Deputy Commissioner Richards failed to review the record had "more than a little surface appeal" but the argument was rejected for two reasons: "(1) 'the oral testimony was not the entire record,' and the agency decisions were based on the hearing officer's decision and the available exhibits; and (2) the 'problem is that to enforce an adequate role by the final decision maker would almost always require exploration into the deliberative process.'"[26] Thus, the superior court determined that NPE was "provided a hearing process that complie[d] with due process."[27]

NPE then appealed the superior court decision to the Alaska Supreme Court. The Alaska Supreme Court affirmed the decision of the superior court and the final decision of DOTPF. The Court provided two reasons for affirming: (1) the State had no duty to disclose and (2) NPE "is barred from recovery for any alleged differing site condition because it did not substantially comply with the damages and records provisions of the contract."[28]

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[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 509.

The more pertinent analysis for this case is that the State has no duty to disclose. The Court held that NPE:

> [C]ould have requested photos or an inspection of an exposed pan deck, spoken to other contracting companies that had previously performed asbestos abatement for the Department in Juneau, or researched conditions of similar buildings in the area. Indeed, one of the other bidders for this abatement subcontract had worked in the same building and was aware of the dimpled condition of the pan deck. We conclude that North Pacific could have conducted research on its own and was not dependent on the Department as the only reasonable avenue for acquiring information on the surface of the pan deck. Accordingly, we hold that the State had no duty to disclose information regarding the pan deck surface.[29]

The Alaska Supreme Court did not reach the procedural issues because it was unnecessary. "While the deputy commissioner made a factual error, and the 'clarification' email between the hearing officer

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[29] *Id.* at 506.

and the agency raises some concerns, we do not need to reach the procedural issues because we reject North Pacific's superior knowledge argument as a matter of law and because North Pacific is barred from recovery for its differing site condition claim."[30]

A. 42 USC § 1983[31]

42 U.S.C. § 1983 provides procedural due process protections. The required elements of a successful 42 U.S.C. § 1983 claim are: "(1) a violation of rights protected by the Constitution or created by federal statue, (2) proximately caused (3) by conduct of a 'person' (4) acting under color of state law."[32] The analysis is case dependent. "Due process is a flexible concept that varies with the particular situation."[33] "The base requirement of the Due Process Clause is

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[30] *Id.* at 509.

[31] Plaintiff also argues violation of Due Process under the 14th Amendment to the United States Constitution and Article I, Section 7, of the Alaska Constitution. The Procedural Due Process Clause of the 14th Amendment applies only to States. The lawsuit is not against the State of Alaska, it is against the Defendants, therefore 42 U.S.C. § 1983 is the proper federal law for this case. Article I, Section 7, of the Alaska Constitution may apply, but other than invoking the provision (although the Plaintiff does so incorrectly by citing to Section 7 of the Alaska Constitution), Plaintiff makes no further mention of the Alaska Constitution. Thus, the focus of the analysis is on 42 U.S.C. § 1983.

[32] *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

[33] *Shinault v. Hawks*, 782 F.3d 1053, 1057 (9th Cir. 2015) (internal citation omitted).

that a person deprived of property be given an opportunity to be heard at a meaningful time and in a meaningful manner."[34] Importantly, 42 U.S.C. § 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred."[35] "In § 1983 cases, it is the constitutional right itself that forms the basis of the claim."[36]

After establishing that there is a protected interest at stake, the Ninth Circuit uses the *Mathews v. Eldridge* three-part balancing test to determine "whether a pre-deprivation hearing is required and what specific procedures must be employed at that hearing given the particularities of the deprivation."[37] The Mathews factors are: (1) the private interest affected and the injury threatened by the action, (2) the risk of error in using the procedure and the value of additional safeguards, and (3) the financial and administrative burden of additional process and the interest in efficient adjudication.[38] Administrative hearings are not afforded precisely the same process as is involved in a court hearing.

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[34] *Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1082 (9th Cir. 2010) (quoting Brewster v. Bd. Of Educ., 149 F.3d 971, 984 (9th Cir. 1998)).

[35] *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal citations omitted); *Crumpton*, 947 F.2d at 1420.

[36] *Crater v. Galaza*, 508 F.3d 1261, 1269 (9th Cir. 2007).

[37] *Yagman v. Garcetti*, 852 F.3d 859, 864 (9th Cir. 2017) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1979)).

[38] *Id.*

"Due process in the administrative context does not demand that every hearing comport to the standards a court would follow, but rather that the administrative process afford an impartial decision-maker notice and the opportunity to be heard, procedures consistent with the essentials of a fair trial, and a reviewable record."[39] Due process violations in an administrative hearing "should be alleged with particularity and a showing of prejudice."[40]

Plaintiff alleges the denial of due process and a fair hearing in violation of 42 U.S.C. § 1983. Those violations involve: (1) usurping the final administrative decisions-making authority, (2) disregarding the hearing officer's recommended decision, (3) denying an impartial decision-maker, (4) disregarding testimony presented at the hearing (changing findings of fact without reviewing

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[39] *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010) (citing *Keiner v. City of Anchorage*, 378 P.2d 406, 409–10 (Alaska 1963)); see also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73, (1936) (Brandeis, J., concurring) ("The inexorable safeguard which the due process clause assures is, not that a court may examine whether the findings as to [specific facts] are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.").

[40] *Id.* (citing *Keiner*, 378 P.2d at 409).

transcripts), (5) disregarding legal arguments presented, and (6) incorporating and relying upon false factual propositions never presented in evidence.[41]

First, usurping the final administrative decision-making authority and disregarding the hearing officer's recommended decision can be addressed jointly because they both deal with statutory authority. As an initial matter, the hearing officer does not have final decision-making authority. A hearing officer "shall recommend a decision to the commissioner . . . , based upon the evidence presented. The recommendations must include findings of fact and conclusions of law."[42] The final decision is made by the Commissioner. The Commissioner "may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action."[43] On March 5, 2009, DOTPF Commissioner von Scheben remanded the claim to Mr. Bankston, as he is statutorily authorized to do. On May 8, 2009, Mr. Bankston issued his second recommendation. On or about June 4, 2009, NPE moved for Commissioner von Scheben to recuse himself. Plaintiff asked for the recusal; Plaintiff cannot sustain a due process violation created by its own request. On June 11,

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[41] Complaint, p. 11, ¶ 72.

[42] AS 36.30.675(a) (emphasis added).

[43] AS 36.30.675(b).

2009, Commissioner von Scheben recused himself and designated Deputy Commissioner Richards to make a final determination on the claim. On June 25, 2009, Deputy Commissioner Richards signed and issued a final decision against NPE.[44] Deputy Commissioner Richards consulted with Mr. O'Brien and asked questions regarding the draft. "The superior court determined . . . that the involvement of institutional subordinates did not taint the agency's neutrality or 'overstep any statutory assignments of authority.'"[45] Plaintiff presents no evidence and cites no case law that indicates that the involvement of subordinates in the decision-making process is a violation of a Constitutional right under 42 U.S.C. § 1983. In contrast to Plaintiff's argument, the case law supports the use of subordinates in the decision-making process.[46]

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[44] The Commissioner "may affirm, modify, or reject the hearing officer's recommendation in whole or in part, may remand the matter to the hearing officer with instructions, or take other appropriate action." AS 36.30.675(b). "A decision by the commissioner of administration or the commissioner of transportation and public facilities after a hearing under this chapter is final." AS 36.30.380.

[45] *N. Pac. Erectors, Inc. v. State, Dep't of Admin.*, 337 P.3d 495, 503 (Alaska 2013).

[46] See, e.g., *Oceana, Inc. v. Pritzker*, No. 2017 WL 2670733, at *4 (N.D. Cal. June 21, 2017) ("[A] decision-maker can be deemed to have "constructively considered" materials that, for example, were relied upon by subordinates or materials upon which a report that was considered rely heavily."); *Earth Resources Co. of Alaska v. State, Dept. of Revenue*, 665 P.2d 960, 962 n.1. ("[D]ue process protections do not require an agency head to hear and decide each case. The Commissioner is permitted to

Second, Plaintiff presents no evidence to demonstrate a denial of an impartial decision-maker. Plaintiff's assertion is essentially that Mr. O'Brien, Mr. Welsh, and Mr. Cantor, as government employees, cannot be impartial in assessing any action involving the government. The extension of the theory is that no administrative issue could ever be reviewed because government employees are necessarily involved in every administrative appeal. "The superior court further found that North Pacific had 'not proved by a preponderance of evidence that [the deputy commissioner], [Chief Contracting Officer] O'Brien and [the assistant attorney general] were individually or collectively personally biased against [North Pacific].'"[47] Plaintiff points to Mr. O'Brien's statement in an email to Mr. Cantor describing Mr. Bankston's recommendation and noting, "I have some real heartburn with its conclusion." Plaintiff argues that the heartburn is over a decision that goes against the State which Mr. O'Brien must oppose because, as a government employee, he does not want decisions to go against the State. But, Plaintiff provides no proof to support this assertion. Instead, a plain reading of the email

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make intra-agency delegations and to rule otherwise would rob the Department of its effectiveness."); Richard J. Pierce, ADMINISTRATIVE LAW TREATISE § 8.6 at 726-27 (5th ed. 2010) ("The role of a typical agency's staff is much greater than the role of the staff of a trial court or of an appellate court." An agency head "can, and often must, defer to trusted subordinates.").

[47] *Id.* at 503.

reveals a far more plausible conclusion. Mr. O'Brien notes, "I'm thinking I may need to either reject or remand this back. The key issue for me is 'duty to inspect.'" On the face of the email it is evident that Mr. O'Brien has heartburn from the possibility of rejecting or remanding the recommendation; in particular, based on the "duty to inspect." The email does not demonstrate bias against Plaintiff. Plaintiff presents no new evidence here to demonstrate bias. The State specifically established an ethical wall to separate Mr. Cantor and Mr. Stark as advocates from Mr. Welsh as an advisor to DOTPF (Mr. O'Brien, Commissioner von Scheben, and Deputy Commissioner Richards) demonstrating effort to remove bias from the decision-making process.

Third, Plaintiff alleges that Defendants disregarded testimony presented at the hearing (changing findings of fact without reviewing transcripts). Plaintiff provides no evidence pointing to any findings of fact that were changed. Plaintiff never demonstrates how any of Plaintiff's alleged, but never specified, changes resulted in prejudice against Plaintiff. Plaintiff has failed to allege these purported violations "with particularity and a showing of prejudice."[48]

Fourth, Plaintiff presents no evidence to establish disregard for legal arguments presented. The alleged due process violations were examined by the superior

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[48] *Id.* (citing *Keiner*, 378 P.2d at 409).

court in a hearing de novo. Where, "the superior court concluded that the agency decision was not procedurally flawed."[49] The decision to permit a hearing de novo on these issues is the appropriate remedy. "[A] party is 'entitled to a trial de novo, in whole or in part, if he [has] been denied the opportunity to present to the [Board] relevant and material evidence supporting his claim....'"[50] Plaintiff presents no alleged legal arguments that were disregarded.

Finally, Plaintiff complains of the incorporation and reliance upon false factual propositions never presented in evidence. "[T]he deputy commissioner incorrectly stated that the Department had affirmatively offered participants at the prebid meeting an opportunity to view an uncovered pan deck."[51] The factual error that the Department had affirmatively offered participants at the prebid meeting an opportunity to view an uncovered pan deck did not impact the final decision and was thus a harmless error.[52] The Alaska Supreme Court

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[49] *N. Pac. Erectors, Inc. v. State, Dep't of Admin.*, 337 P.3d 495, 502 (Alaska 2013).

[50] *Nash v. Matanuska-Susitna Borough*, 239 P.3d 692, 699 (Alaska 2010).

[51] *N. Pac. Erectors, Inc.*, 337 P.3d at 502.

[52] "Unless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must

provided two reasons for affirming: (1) the State had no duty to disclose and (2) NPE "is barred from recovery for any alleged differing site condition because it did not substantially comply with the damages and records provisions of the contract."[53]

The duty to disclose holding, the only holding that could conceivably have been impacted by the factual error, was not in any way based on the factual error. As the Alaska Supreme Court explained, Plaintiff had many different resources independent from the State to acquire information regarding the surface of the pan deck. Thus, "the State had no duty to disclose information regarding the pan deck surface."[54] The Alaska Supreme Court acknowledged the factual error, but also properly dismissed that concern because it had no impact on the final decision.[55] The Alaska Supreme Court ultimately

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disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61.

[53] *Id.* at 509.

[54] Id. at 506.

[55] The Alaska Supreme Court held in *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1025 (Alaska 2005) that "when an administrative proceeding fails to conform to the minimum requirements of procedural due process, the superior court may not review the case on the agency record but must instead remand for a new agency hearing or grant a trial de nova as needed to cure the procedural defect." The Alaska Supreme Court, in line with its own mandate, reviewed the administrative decision and the trial de novo on the alleged procedural violations and held that no procedural violation impacted the correct final decision.

held that it did "not need to reach the procedural issues because [it] reject[ed] North Pacific's superior knowledge argument as a matter of law and because North Pacific is barred from recovery for its differing site condition claim."[56] The inclusion of the factual error was harmless and does not constitute a violation of 42 U.S.C. § 1983.

B. 42 U.S.C. § 1981

Plaintiff alleges a violation of 42 U.S.C. § 1981. That statute states in its entirety:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Plaintiff's only argument appears to be that 42 U.S.C. § 1981 "is inconsistent with the requirements of equal protection, in that it protects a subset of

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[56] *Id.* at 509.

citizens within racial minority groups from certain types of civil rights violations while leaving other citizens for no reason other than a racial distinction, unprotected." Plaintiff cites no authority to support this argument. Furthermore, Plaintiff provides no evidence whatsoever that a violation of 42 U.S.C. § 1981 occurred. Plaintiff has no claim under 42 U.S.C. § 1981.

C. 42 U.S.C. § 1985

Plaintiffs assert a conspiracy claim under 42 U.S.C. § 1985. A conspiracy claim under 42 U.S.C. § 1985(3) requires allegations of: (1) a conspiracy, (2) for the purpose of depriving a person or class of equal protection or privileges and immunities; (3) an act in furtherance thereof; and (4) injury or deprivation of rights.[57] Plaintiff provides no evidence to support a claim under 42 U.S.C. § 1985(3). Plaintiff asserts, as it did under 42 U.S.C. § 1981, that 42 U.S.C. § 1985 "is inconsistent with the requirements of equal protection, in that it protects a subset of citizens within racial minority groups from certain types of civil rights violations while leaving other citizens for no reason other than a racial distinction, unprotected."[58] Plaintiff provides no case law to support this assertion. Plaintiff provides no evidence

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[57] *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

[58] Plaintiff's Memo. in Op. of Mot. for Summary Judgment, p. 27.

that indicates a violation of 42 U.S.C. § 1985. Plaintiff's claim under 42 U.S.C. § 1985 fails.

D. Conversion

Plaintiff claims "conversion of property by fraudulent procedure and fraudulent attorneys' fee award." A claim of conversion has the following elements: (1) possessory interest in the property; "(2) that the defendant[s] interfered with the plaintiffs right to possess the property; (3) that the defendant[s] intended to interfere with plaintiffs possession; and (4) that the defendants['] act was the legal cause of the plaintiffs loss of the Property."[59] Plaintiff does not cite a single case to support the conclusion that even a wrongfully prevailing party has committed conversion. Furthermore, the Alaska Supreme Court reviewed the substantive claims and determined that the final decision was correct and the State was the prevailing party.

E. The tort of intentional interference with a business expectancy

The tort of intentional interference with a prospective business opportunity, has six elements: "(1) an existing prospective business relationship between it and a third party; (2) defendant's knowledge of the relationship and intent to prevent

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[59] *Silvers v. Silvers*, 999 P.2d 786, 793 (Alaska 2000).

its fruition; (3) failure of the prospective relationship to culminate in pecuniary benefit to the plaintiff; (4) conduct of the defendant interfering with the prospective relationship; (5) damages caused by the defendant; and (6) absence of privilege or justification for the defendant's conduct."[60] Plaintiff appears to assert that the "existing prospective business relationship" is the contract that existed between Plaintiff and the State. But, the relationship is not prospective, the relationship was completed. The dispute was over payment under the contract at the completion of the contract. There is no prospective business opportunity to support a tort claim.

F. Prima Facie Tort

Plaintiff concedes that there is no cause of action for prima facie tort.

G. Punitive Damages

Defendants are granted summary judgment on all of Plaintiff's claims, therefore punitive damages are not available.

H. Qualified Immunity

---

[60] *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 717 (Alaska 2003).

Defendants are granted summary judgment on all Plaintiff's claims on substantive grounds, therefore qualified immunity analysis is unnecessary.

V. MOTIONS AT DOCKETS 147 & 148

The court has granted summary judgment to Defendants. It follows that the motions in limine are moot.

VI. CONCLUSION

Defendants' motion for summary at docket 140 is GRANTED. Plaintiff's motion for partial summary judgment at docket 138 is DENIED. The motions in limine at dockets 147 and 149 are DENIED as moot.

The Clerk of Court will please enter judgment for Defendants.

DATED this 31st day of July 2018.

/s/ JOHN W. SEDWICK

SENIOR JUDGE,
UNITED STATES
DISTRICT COURT

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID E. OLSON and ABSOLUTE ENVIRONMENTAL SERVICES, INC., Plaintiffs-Appellants, v. MARK O'BRIEN; et al., Defendants-Appellees.	No. 14-35795 D.C.No. 3:11-cv-00245-JWS MEMORANDUM* (Filed Aug. 15, 2016)

Appeal from the United States District Court
for the District of Alaska
John W. Sedwick, District Judge, Presiding

Argued and Submitted August 3, 2016
Anchorage, Alaska

Before: FISHER, PAEZ, and HURWITZ, Circuit Judges.

Plaintiffs David E. Olson and Absolute Environmental Services, Inc. ("Plaintiffs") appeal the dismissal of their claims against Mark O'Brien, James Cantor, and Richard Welsh on res judicata

grounds. We reverse and remand for further proceedings.

1. In evaluating whether res judicata bars litigation in federal court after related state court litigation, we "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). In Alaska, "[t]he elements necessary to the doctrine's application are (1) a final judgment on the merits, (2) from a court of competent jurisdiction, (3) in a dispute between the same parties (or their privies) about the same cause of action." *Conitz v. Alaska State Comm'n for Human Rights*, 325 P.3d 501, 507 (Alaska 2014) (internal quotation marks omitted). In addition, res judicata does not apply where the party against whom it is asserted "lacked [a] 'full and fair opportunity to litigate his claims.'" *Id.* at 508 (quoting *Beegan v. State, Dep't of Transp. & Pub. Facilities*, 195 P.3d 134, 139 (Alaska 2008)).

Plaintiffs did not have a full and fair opportunity to litigate their claims in the prior state court proceeding. The prior proceeding was an administrative appeal of a construction contract dispute. Alaska Stat. § 36.30.627; Alaska R. App. P. 609(b). Although the superior court held a limited trial de novo to investigate alleged improprieties in the decision-making process of the Department of Transportation and Public Facilities ("DOTPF"), the

scope of the court's inquiry was limited to reviewing the decision of the DOTPF to deny additional compensation under the contract. Plaintiffs could have brought their additional damages claims in a separate suit; we are not persuaded, however, they would have had a full and fair opportunity to litigate those claims within their administrative appeal. *See Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 256 (Alaska 2000) (holding that the superior court did not abuse its discretion in bifurcating a litigant's claims into an administrative appeal and a separate § 1983 claim); *see also J & S Servs., Inc. v. Tomter*, 139 P.3d 544, 548-49 (Alaska 2006) (holding that an unsuccessful bidder for a state contract was permitted to file a claim against agency officials separate from its administrative appeal, but not discussing res judicata). Thus, the district court erred in dismissing Plaintiffs' claims on res judicata grounds.

2. Defendants argue, in the alternative, that collateral estoppel bars Plaintiffs' claims. Because the district court dismissed the case on res judicata grounds, it did not reach this issue. We therefore remand for the district court to determine in the first instance whether some or all of Plaintiffs' claims are barred by collateral estoppel.

REVERSED and REMANDED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID E. OLSON; ABS. ENVIRO. SERVICES, INC., an Alaska corporation for the use and benefit of David E. Olson, Plaintiffs-Appellants, v. MARK O'BRIEN; et al., Defendants-Appellees.	No. 18-35727 D.C.No. 3:11-cv-00245-JWS ORDER (Filed Jan. 13, 2020)

Before: TASHIMA, W. FLETCHER, and BERZON, Circuit Judges.

Plaintiffs-Appellants filed a petition for rehearing and rehearing en banc on December 19, 2019 (Dkt. Entry 38). The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Berzon have voted to deny the petition for rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is **DENIED**.

APPENDIX E

Exhibit B, Case 3:11-cv-00245-JWS Document 139-1 Filed 03/23/18

North Pacific Erectors v. Alaska - Project 2007-022206144 - Recommended Decision

Cantor, James E (LAW)
From: Cantor, James E (LAW)
Sent: Tuesday, January 27, 2009 9:25 AM
To: Welsh, Richard E (LAW): OBrien, Mark A (DOT)
Cc: Cantor, James E (LAW)
Subject: FW: North Pacific Erectors v, Alaska - Project 2007-022206144 - Recommended Decision
Attachments: DECISION 1-16-09 pdf

Mark, I am forwarding your email to Rick Welsh. As usual, Rick will be isolated by an ethical wall from Jeff Stark. Thank you. Jim

From: OBrien, Mark A (DOT)
Sent: Monday, January 26, 2009 3:36 PM
To: Cantor, James E (LAW)
Subject: FW: North Pacific Erectors v. Alaska - Project 2007-022206144 - Recommended Decision

Hi Jim,

I received this recommended decision, but I have some real heart burn with its conclusions. While I hate to spend any more of DOA's money on legal fees, I guess I'm going to need you to assign someone to help me out. (Jeff Stark is representing DOA.)

I'm thinking I may need to either reject or remand this back. The key issue for me is "duty to inspect". The contractor did not attend the prebid. At the prebid, the contractors were offered the opportunity to view an area of similar work where the fireproofing had been removed. This inspection would have clearly shown the dimpled pan (change condition in dispute). Only one of the contractors at the prebid choose to view the uncovered area.

What I read puts the burden on the contractor to prove that they conducted a reasonable site inspection. If a reasonable site inspection would have revealed the condition, then the contractor cannot establish entitlement.

This bid contained the standard AIA 4.2 language:

4.2 Visit to Site:
Tnc submission of a bid by the CONTRACTOR is considered a representation that the CONTRACTOR has visited and carefully examined the site and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of the Contract Documents.

Thanks Mark

From:Charlene F. Vozar[mailto: cvozar@bankston.to]
Sent: Friday, January 16, 2009 4:55 PM
To: OBrien, Mark A (DOT)
Cc: William Bankston
Subject: North Pacific Erectors v. Alaska - Project 2007-022206144 - Recommended Decision

Letter and Hearing Officer's Recommended Decision

APPENDIX F

Exhibit C, Case 3:11-cv-00245-JWS Document 139-1 Filed 03/23/18

MEMORANDUM
State of Alaska Department of Law

TO: Mark O'Brien, Chief Contracts Officer, Department of Transportation and Public Facilities
FROM: David T. Jones, Senior Assistant Attorney General, Opinions, Appeals, and Ethics Section, Anchorage

DATE: April 26, 2006
FILE NO.: 661-06-0040
TEL. NO.: (907) 269-5169
SUBJECT: Ethics Act's Restrictions on Contacting Hearing Decision Makers

You asked whether the Alaska Executive Branch Ethics Act's restrictions on contacting final decision makers in administrative hearings apply to appeals of right-of-way issues. Those restrictions apply only to the final stage of each right-of-way appeal process.

The Ethics Act's restrictions generally prohibit a public officer from attempting to influence the outcome of an administrative hearing by contacting

the final decision maker unless the contact is made part of the administrative record:

> Except for supplying information requested by the hearing officer or the entity with authority to make the final decision in the case, or when responding to contacts initiated by the hearing officer or the individual, board, or commission with authority to make the final decision in the case, a public officer may not attempt to influence the outcome of an administrative hearing by directly or indirectly contacting or attempting to contact the hearing officer or individual, board, or commission with authority to make the final decision in the case assigned to the hearing officer unless the
>
> (1) contact is made in the presence of all parties to the hearing or the parties' representatives and the contact is made a part of the record; or
>
> (2) fact and substance of the contact is promptly disclosed by the public officer to all parties to the hearing and the contact is made a part of the record.[1]

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[1] AS 39.52.120(e).

This provision's references to "hearing officer," "authority to make the final decision in the case," "administrative hearing," and "record" suggest that the legislature intended to apply the restrictions only to those stages of administrative appeals that are final and include formal hearings. That suggestion finds support in another statute that the legislature adopted at the same time.

The legislature adopted the Ethics Act's provision in 2004 as part of legislation changing administrative hearing procedures.[2] In that same legislation, the legislature adopted definitions of " administrative hearing" and "hearing officer," although the legislature did not expressly apply those definitions to the Ethics Act's provision restricting contacts with final decision makers. Rather, the provision containing these definitions states that it applies to the Alaska Statutes' chapter establishing the Office of Administrative Hearings (chapter 64 of title 44).[3] Nonetheless, because the Ethics Act does not define "administrative hearing" or "hearing officer,"[4] and the Ethics Act's provision on contacts with final decision makers was part of the same legislation adopting these definitions, the definitions are

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[2] *See* Sec. 59, ch. 163, SLA 2004.

[3] *See* AS 44.64.200.

[4] *See* AS 39.52.960.

instructive in interpreting the Ethics Act's provision.[5]

The definitions that the legislature adopted in 2004 suggest that the legislature intended to address relatively formal administrative proceedings. The definition of "administrative hearing" excludes informal, preliminary stages of administrative review processes:

> "administrative hearing" means a quasi-judicial hearing before an agency; it does not include an informal conference or review held by an agency before a final decision is issued or a rate-making proceeding or other nonadjudicative public hearing.[6]

Likewise, the legislature defined "hearing officer" as "an individual who presides over the conduct of an administrative hearing and who is retained or employed by an agency for that purpose."[7] Although it may be inferred, this definition does not expressly require that a hearing officer be "retained or employed by an agency" solely or primarily for the

---

[5] *See Bullock v. State, Dep't of Cmty. And Reg'l Affairs,* 19 P.3d 1209,1214-15 (Alaska 2001) (statutes enacted at same time construed *in pari materia*); 2B Norman J. Singer, *Statutes and Statutory Construction* § 51.03 at 237-39 (6th ed. 2000) (same).

[6] Sec. 3, ch. 163, SLA 2004; AS 44.64.200(1).

[7] Sec. 3, ch. 163, SLA 2004; AS 44.64.200(4).

purpose of presiding over administrative hearings. Nonetheless, the definition does suggest involvement in a relatively formal process.

These definitions - and the references in the Ethics Act's provision to "authority to make the final decision in the case" and "record" - suggest that the restrictions on contacts do not apply to informal, nonfinal reviews. That conclusion is consistent with the purpose of the 2004 legislation, which was to "increase the separation between the adjudicatory functions of executive branch agencies and the agencies' investigatory, prosecutory, and policy-making functions,"[8] since the initial stages of administrative appeal processes commonly serve as opportunities for agencies to reconsider their own actions, whereas the final stages tend to be more formal adjudicatory hearings.

Based on this analysis, the restrictions on contacts do not apply to the preliminary stages of appeals regarding right-of-way issues; the restrictions apply only to the final stage of each appeal process.

The final stages of the right-of-way appeal processes differ according to the type of appeal involved. There are separate processes for appeals concerning relocation assistance services[9] and for appeals

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[8] Sec. 1, ch. 163, SLA 2004.

[9] *See* 17 AAC 81.010 - 17 AAC 81.020.

concerning permits and privileges for signs, encroachments, driveways, highway usage, and similar matters.[10] Both of these processes permit an aggrieved party to request review of a decision affecting that party.[11] Under both processes, upon receipt of a request for review, the appropriate regional director appoints an administrative review officer to consider the appeal and there is no requirement for a formal hearing at that stage.[12] Thereafter, however, the processes diverge.

For relocation assistance matters, the administrative review officer issues a written decision, which the aggrieved party may appeal to a three-person relocation appeals board that the director of statewide design and engineering services impanels.[13] The board conducts a formal hearing and issues a decision that constitutes the department's final decision on the matter.[14]

For right-of-way permits and privileges, the administrative review officer recommends a decision to the regional director, who makes a written decision that an aggrieved party may appeal to an administrative review panel that the chief engineer

---

[10] *See* 17 AAC 85.010 - 17 AAC 85.990.

[11] 17 AAC 81.020(a) and 17 AAC 85.020.

[12] 17 AAC 81.020(a) and 17 AAC 85.030.

[13] 17 AAC 81.020(a) and (b).

[14] 17 AAC 81.020(b), (c), and (d).

impanels.[15] The panel may hear the appeal or the chief engineer may appoint a hearing officer to hear the appeal and recommend a decision to the panel.[16] The panel or hearing officer conducts a formal hearing.[17] Alternatively, if the chief engineer determines that the appeal may be decided as a matter of law or that the facts are not in dispute, the chief engineer may decide the appeal without a hearing.[18] The decision of the panel or the chief engineer constitutes the department's final decision.[19]

Despite their differences, both right-of-way appeal processes are subject to the Ethics Act's restrictions on contacts only in their final stages - when an aggrieved party appeals an administrative review officer's relocation assistance decision to a relocation appeals board or appeals a regional director's decision to the chief engineer. The Ethics Act's restrictions on contacts do not apply to the administrative review officer's review under either appeal process or to the regional director's review under the permits and privileges appeal process.

cc: Chief Assistant Attorney General Jim Cantor

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[15] 17 AAC 85.030 - 17 AAC 85.040.

[16] 17 AAC 85.040(c).

[17] 17 AAC 85.040(e).

[18] 17 AAC 85.040(k).

[19] 17 AAC 85.050.

APPENDIX G

Exhibit B, Case 3:11-cv-00245-JWS Document 142-2 Filed 03/23/18

Welsh, Richard E (LAW)
From: Welsh, Richard E (LAW)
Sent: Thursday, May 21, 2009 1:26 PM
To: OBrien, Mark A (DOT)
Subject: North Pacific Erectors: Recommendation 5/21/09

Mark,

Having had an opportunity to review this matter, I have concluded the hearing officer's (H.O.) contains a number of fundamental errors. Among other things, I am concerned these errors may have the following potential effects:

• Create uncertainty as to what the State must disclose to potential bidders.

o For instance, H.O.'s embrace of the "special knowledge" doctrine (pp. 15-19) suggests that before awarding a contract, the State must ferret out the prospective bidders' means and methods and then ensure it has divulged all relevant information so the bidder can profitably perform the job.

• Potentially shift contractual burdens (pp. 19-24).

o Arguably, the H.O. absolves the contractor of its duty to conduct a site investigation, as articulated in the Information to Bidders and §4.2 of the contract.

• Create some dubious breach of contract claim for failure investigate (p. 24).

o Although procurement officer's investigation revealed: (1) contractor performed no site inspection; (2) our consultant, who oversaw 5 prior remediation projects at SOB, was not aware of anything unusual w/embossed ceiling pan; and (3) none of 5 prior projects resulted in any complaint re embossed ceiling pan, H.O. concludes State's investigation was so deficient as to constitute breach of contract. Instead, it appears the H.O. would require the procurement officer (who was contractually bound to respond to claim within 7 days, *see* contract §15.1, and did so on the 7th day - Feb. 16, 2007) to perform a costs comparison of bids for a different remediation project w/in SOB, even though the other project involves different variables and, apparently, the State did not receive the 5th floor bids until sometime after Feb. 16, 2007.

• Relieve contractors of obligation to properly prove claims for increased costs resulting from differing site condition (DSC) (pp. 25-28). Here, the contract unambiguously provides:

> CONTRACTOR will be required to keep an accurate and detailed record to indicate the actual 'costs of the work' done (defined in §10.4] under the alleged differing site condition. Failure to keep such a record shall be a bar to any recovery by reason of such alleged differing site conditions.

However, because the State allegedly failed to properly investigate the DSC claim, the H.O. concludes AESI is absolved of this express requirement.

To summarize, my research to date suggests the recommended decision contains a number of legal errors. In the short term, I recognize it could be cost effective for the State to simply pay the H.O.'s recommended damage award. However, by doing so, the State would be creating bad precedent. In short, I believe we should exercise the commissioner prerogative under AS 36.30.675(b) by rejecting this proposed decision. Instead, my current thinking is that we may be able to: (1) accept the H.O.'s findings of material fact and, with those facts (2) reach alternative conclusions of law. Unfortunately, given my current work load and the time consuming requirements of this effort, it will likely take me a number of weeks to complete this task, if you were to agree with this recommendation.

Rick Welsh

APPENDIX H

Exhibit D, Case 3:11-cv-00245-JWS Document 141-4 Filed 03/23/18

Welsh, Richard E (LAW)
From: OBrien, Mark A (DOT)
Sent: Monday, June 08, 2009 4:48 PM
To: Welsh, Richard E (LAW)
Subject: RE: North Pacific Erectors' Request to Recuse you and the Commissioner
Rick,
I think we should take the high road and recuse Leo. Leo can delegate it to Frank Richards. I don't see any reason to take me off the case, but if you think it would make for a cleaner process, I would be happy to have you work directly with Frank. Let me know what you think. Thanks Mark

From: Cantor, James E (LAW)
Sent: Friday, June OS, 2009 2:05 PM
To: OBrien, Mark A (DOT); Welsh, Richard E (LAW)
Subject: FW: North Pacific Erectors' Request to Recuse you and the Commissioner

Mark, Please continue to work with Rick on issues relating to the commissioner's office decision making process and decision. Thanks. Jim

James E. Cantor

Chief Assistant Attorney General
Transportation Section
State of Alaska Department of Law
1031 West Fourth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 269-5165 (direct dial)
(907) 279-5832 (fax)

From: OBrien, Mark A (DOT)
Sent: Friday, June 05, 2009 10:33 AM
To: Cantor, James E (LAW)
Subject: Fwd: North Pacific Erectors' Request to Recuse you and the Commissioner
Let's talk.

Begin forwarded message:
From:"Bohna, David F (DOT)"
<david.bohna(@alaska.gov>
To:"OBrien, Mark A (DOT)"
<mark.obrien@alaska.gov>
Subject: North Pacific Erectors' Request to Recuse you and the Commissioner

This just came in via fax and I thought you would want to see it. I am hoping you can open this up.

David

APPENDIX I

Exhibit E, Case 3:11-cv-00245-JWS Document 142-5 Filed 03/23/18

OBrien, Mark A (DOT)
From: OBrien, Mark A (DOT)
Sent: Monday, June 15, 2009 2:58 PM
To: Welsh, Richard E (LAW)
Subject: RE:NPE

Sounds good Rick. Will do.

Do you think we should completely ignore Marston or send him something that says we have reviewed your letter and the recusal order stands.

From: Welsh, Richard E (LAW)
Sent: Monday, June 15, 2009 2:53 PM
To: OBrien, Mark A (DOT)
Subject: NPE

Mark,

I made one punctuation correction, revised two footnote citations, and renamed the Word document to reflect it is my final draft. I'll have the courier return the two binders to your office this week. If Frank has any questions, I'll be back in the office after vacation on July 6. Alternatively, he can try

emailing me before then, but I can't make any promises as to how quickly I can respond.

As a reminder, when issuing the decision, don't forget to (1) attach a copy of the hearing officer's revised decision (which was served on 5/21 but still bears the date of 5/8); (2) serve all parties/attorneys of record; and (3) have the DOT &PF person mailing the order sign the certificate on the last page.

I'll be in the office till Wednesday. When a decision finally issues, please provide me with a blind copy.

Rick

APPENDIX J

Exhibit G, Case 3:11-cv-00245-JWS Document 139-1 Filed 03/23/18

OBrien, Mark A (DOT)

From: OBrien, Mark A (DOT)

Sent: Thursday, June 25, 2009 2:22 PM

To: Jones, Vern O (DOA)

Subject:

RE: North Pacific Erectors Claim Appeal - Final Decision

Not very often we have to throw out the Hearing Officer's Decision and write our own. We just couldn't live with his conclusions. Mark

From: Jones, Vern O (DOA)

Sent: Thursday, June 25, 2009 11:50 AM

To: OBrien, Mark A (DOT)

Subject: RE: North Pacific Erectors Claim Appeal - Final Decision

Right on!

From: OBrien, Mark A (DOT)

Sent: Thursday, June 25, 2009 10:57 AM

To:'terry@marstonelison.com'; 'dbruce@baxterbrucelaw.com'; Stark, Jeff P (LAW)

Cc: Bill Bankston

Subject: North Pacific Erectors Claim Appeal - Final Decision

Please see attached Final Decision. Thanks Mark

APPENDIX K

Exhibit H, Case 3:11-cv-00245-JWS Document 139-1 Filed 03/23/18

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

NORTHERN PACIFIC ERECTORS, INC., Appellant, v. STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION; DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, Appellees.	Case No. 3AN-09-09085CI

NOTICE THAT MARK O'BRIEN IS EMPLOYED BY THE ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES

This Court issued an order on January 27, 2011, regarding Northern Pacific Erectors' Motion to Compel. On page two of that order this Court stated that "[i]n particular, [NPE] suspects that Mark O'Brien, the ***Department of Administration***

(DOA) Chief of Contracts, played an improper role, influencing Richards." (Emphasis added.)

This statement contains a material error. Mr. O'Brien is not employed by the Department of *Administration.* Mr. O'Brien is employed as the Chief of Contracts for the ***Department of Transportation and Public Facilities.***[1]

In this case, there is no dispute that Mr. O'Brien *did* participate with Mr. Richards in the issuing of the final decision, and did influence Mr. Richards. Given that Mr. O'Brien was employed by DOT&PF to advise the commissioner's office on contract matters, Mr. O'Brien's participation would be entirely appropriate, unless some evidence exists that Mr. O'Brien's participation was wrongful, such as *ex parte* contact or actual bias. Here, no evidence exists that Mr. O'Brien's participation was wrongful. In short, the fact that Mr. O'Brien was employed as the Chief of Contracts for DOT&PF disposes of the question of whether Mr. O'Brien's participation was improper.

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[1] Counsel for DOT&PF did not participate in the proceedings that gave rise to this limited trial de novo, and does not know whether this error was a typographical error or whether the Court actually misunderstood which agency employed Mr. O'Brien. Given the importance of the fact that Mr. O'Brien does not work for DOA, however, it seemed appropriate to correct the record.

DATED this 31st day of January, 2011.

JOHN J. BURNS
ATTORNEY GENERAL
By: /s/ M.A. Paton Walsh
For: Stephen C. Slotnick
Assistant Attorney General
Alaska Bar No. 9011113

CERTIFICATE OF SERVICE

The undersigned certifies that on January 31, 2011, a copy of the foregoing was mailed via USPS, first class postage prepaid, addressed to:

PAUL J. NANGLE
PAUL J. NANGLE & ASSOCIATES
101 CHRISTENSEN DRJVE
ANCHORAGE, AK 99501

JEFF STARK
1031 W. 4TH AVE. SUITE 200
ANCHORAGE, AK 99501

DANIEL G. BRUCE
BAXTER BRUCE & SULLIVAN, P.C.
P.O. BOX 32819
JUNEAU, AK 99803-2819

The undersigned also certifies that on January 31, 2011, a copy of the foregoing was sent via electronic mail and mailed via USPS, first class postage prepaid, addressed to:

TERRY R. MARSTON II
MARSTON ELISON
ANDERSON PARK BUILDING
16880 NW 79th ST
REDMOND, WA 98052-4424
e-mail: terry@marstonelison.com

/s/ Keri Hile
Keri Hile, Law Office Assistant