

MEMORANDUM

To: Barry Creighton, Member, Alaska Mental Health Board
From: James B. Gottstein 
Date: August 22, 2005
Subject: Executive Director

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II Scope

You have asked me about the selection process for the Executive Director of the Alaska Mental Health Board (AMHB) and the Advisory Board on Alcoholism and Drug Abuse (ABADA). I understand that both the AMHB and ABADA selected a person, whom the administration has so far failed or refused to put back on the State payroll in this position. The specific question then, as I understand it is, what are the rights of the AMHB and ABADA to select their Executive Director(s)?

Since the Murkowski Administration took office there have been two other occasions in which compliance with the settlement of the Mental Health Trust Lands Litigation, *Weiss v. State*, 4 FA 82-2208 CI, has come up:

- (a) the legality of the state merging the AMHB and ABADA without amending the settlement agreement arising of the mental health trust litigation in *Weiss, et. al., v. State of Alaska*, 4FA-82-2208 CI (Settlement Agreement), which was the subject of

a Memorandum from myself to the AMHB, dated October 27, 2003, on "Modification and Enforcement Provisions of the Trust,"¹ and

- (b) whether adequate funding and opportunity of the AMHB, ABADA and the two other settlement boards to perform their settlement mandated duties are implied material terms of the Settlement Agreement (Four Board Suit).²

People may or may not find significant that I was an attorney in the Trust litigation representing people with serious mental illness and my clients opposed the settlement. Other major participants in the litigation/settlement process that are still involved are Jeff Jessee, who was the attorney for the mentally retarded and mentally defective,³ John Malone who was a representative of NAMI-Alaska, and Nelson Page, who was a representative on behalf for the Alzheimer's and Related Disorders group, all of whom supported the settlement. Our opposition was based on the value of the settlement and what were seen as structural defects. Structural defects that drew objections included the enforcement provisions, which are directly implicated in the discussion about selection of the Executive Director.

III Summary of Conclusions

AS 47.30.664(b), provides in pertinent part, "The board shall have a paid staff provided by the department, including, but not limited to, an executive director who shall be selected by the board." (emphasis added) AS 44.29.135(b) has the very similar provision, "The board shall have a paid staff provided by the department, including an executive director who shall be selected by the board."⁴ There really is no ambiguity and it appears the Administration has unlawfully refused to implement the choice of the AMHB and ABADA.⁵ It also appears that in a proper lawsuit, the Administration should be ordered to hire Executive Director(s) selected by the AMHB and ABADA.

It is also important to know whether AS 47.30.664(b) and AS 44.29.135(b) are explicitly "material terms" of the Settlement because, if so, amending either or both of them would, under the existing decision of the Alaska Supreme Court in *Weiss v. State*, 939 P.2d 380, 396-7 (Alaska 1997), allow a proper party(ies) to file suit and have the Settlement thrown out and the Mental Health Trust Lands Litigation restarted. The conclusion is these provisions are explicitly material terms of the Settlement.

¹ This is available online at <http://akmhweb.org/docs/Legal/Modandenforcemmo.pdf>.

² This is currently scheduled for oral argument September 28, 21005, before the Alaska Supreme Court in *Kenaston v. State of Alaska*, Alaska Supreme Court No. S-11600. See, <http://psychrights.org/States/Alaska/4bdSuit/4bdSuit.htm> for a description of this case. However, in light of this memo revealing that AS 47.30.664(b) explicitly mandates the department "provide for the assignment of personnel to the board to ensure the board has the capacity to fulfill its responsibilities," it appears there is no need for the Four Board lawsuit and it is anticipated a motion to dismiss the appeal will be filed.

³ This was the phraseology of the time the Alaska Mental Health Enabling Act was enacted in 1956.

⁴ The only difference being "but not limited to," in AS 47.30.664(b).

⁵ There may be circumstances in which the Administration might be entitled to refuse to implement the Executive Direction selection(s) of the AMHB and ABADA, but no such possibilities have been identified here.

IV Analysis

A. Structure of the Settlement

Because of the way Settlement approval came about, with the opponents raising various serious problems, the state making various representations and even statutory changes in response, as well as the Alaska Superior and Supreme courts making various rulings as a result of these objections, the terms of the Settlement are contained in a number of documents. These include the Settlement Agreement,⁶ various pieces of legislation⁷ and the Alaska Superior⁸ and Supreme courts⁹ approvals. These pieces of legislation include Chapter 48, SLA 1987,¹⁰ Chapter 66 SLA 1991,¹¹ Chapter 5, FSSLA 1994¹² as amended by Chapter 1, SSLA 1994,¹³ and Chapter 6, FSSLA 1994¹⁴ as amended by Chapter 2, SSSLA 1994.¹⁵

Article I of the Settlement Agreement provides:

I. BASES OF SETTLEMENT

1. Dismissal with prejudice of the plaintiffs' claims as provided in part VI of this agreement is made in consideration of Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 47, 49, 50 and 51, of HB 201, Sections 1 and 2 of HB 371, and the terms of this agreement, and form the bases of the settlement. The provisions of HB 291 and HB 371:¹⁶

- (a) reconstitute the trust established by the Alaska Mental Health Enabling Act of 1956 with a combination of original and substitute trust land totaling approximately 930,000 acres;
- (b) provide a cash payment of \$200 million dollars to be deposited into a newly created mental health trust fund which the plaintiffs consider as additional compensation for the land or interests in land not returned to trust status;
- (c) establish a Trust Authority to oversee trust assets, administer the mental health trust income account, and ensure an integrated, comprehensive mental health program for the state; (d) require the principal of the trust fund to be retained perpetually for investment, and sale proceeds, royalties, and other

⁶ Available on the Internet at <http://akmhweb.org/docs/TrustSettlementAgreement.pdf>.

⁷ Codifications of these statutes are available on the Internet at <http://www.touchngo.com/lglcntr/akstats/statutes.htm> and <http://www.legis.state.ak.us/folhome.htm>.

⁸ Available on the Internet at <http://akmhweb.org/docs/finalapproval.pdf> and <http://akmhweb.org/docs/dismissalordr.pdf>.

⁹ Available on the Internet at <http://www.touchngo.com/sp/html/sp-4816.htm>.

¹⁰ Available on the Internet at <http://akmhweb.org/docs/Ch48SLA1987.pdf>.

¹¹ Available on the Internet at <http://akmhweb.org/docs/Ch66SLA1991.pdf>.

¹² Available on the Internet at <http://akmhweb.org/docs/Ch5FSSLA1994.pdf>.

¹³ Available on the Internet at <http://akmhweb.org/docs/Ch1sssla1994.pdf>.

¹⁴ Available on the Internet at <http://akmhweb.org/docs/Ch6fssla1994.pdf>.

¹⁵ Available on the Internet <http://akmhweb.org/docs/Ch2SSSLA1994.pdf>.

¹⁶ HB 201, was enacted as Chapter 5, FSSLA 1994, and HB 371 was enacted as Chapter 6, FSSLA 1994. Chapter 5, FSSLA 1994 was amended by Chapter 1, SSLA 1994 and Chapter 6, FSSLA 1994 was amended by Chapter 2, SSSLA 1994,

income from the management of trust land which is attributable to principal to be deposited into the fund;

- (e) authorize the Trust Authority to spend net income of the fund and income from the management of land not otherwise attributable to principal in fulfillment of the Authority's purpose to ensure an integrated, comprehensive, mental health program; and
- (f) make effective certain improvements in the state's mental health program enacted under Ch 66 SLA 1991 including the process of establishing a coordinated and comprehensive mental health program for the state of Alaska.

(emphasis added).

Article VI, Section 5, of the Settlement Agreement provides:

5. Modification and Future Enforcement. By this agreement, the parties stipulate to a mutual dismissal of all claims and defenses, and acknowledge that the trust is reconstituted in accordance with *State v. Weiss*, 706 P.2d 681 (Alaska 1985). The provisions of Sections 2 through 9, 12 through 40 (a) and (b), 41, 43, 46, 47, 49, 50 and 51 of HB 201 and Sections 1 and 2 of HB 371 constitute material terms upon which the plaintiffs have agreed to a dismissal and acknowledged that the trust is reconstituted. If the Legislature materially alters or repeals any of those provisions, the plaintiffs' sole remedy is a new action alleging that the mental health trust has not been adequately reconstituted and to seek such relief as may be appropriate in light of the plaintiffs' claims. In light of the dismissal of each parties' claims, no modification of this agreement may be made except in writing signed by all the parties. Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes.

(emphasis added).

B. Are AS 47.30.664 and AS 44.29.135(b) Explicitly Material Terms of the Settlement?

To determine whether AS 47.30.664 and AS 44.29.135(b) are explicitly material terms of the Settlement it is necessary to track their history.

AS 47.30.664 was first enacted through Section 6, Chapter 48, SLA 1987 as follows:

* Sec. 6. AS 47.30 is amended by adding new sections to read:

* * *

Sec. 47.30.664. OFFICERS AND STAFF. (a) The board, by a majority of its membership, shall annually elect a chair and other officers it considers necessary from among its membership.

(b) The board will have a paid staff provided by the Department of Health and Social Services, including, but not limited to, an executive director who shall be selected by the board from candidates provided by the department. The executive director is in the partially exempt service and may hire additional employees in the classified service of

the state. The executive director and the staff of the board shall be directly responsible to the board in the performance of their duties.

(emphasis added). As originally enacted in Chapter 48 SLA 1987 then, the Executive Director was selected by the board "from candidates provided by the department [of health and social services]."

However, in Section 38 of Chapter 66 SLA 1991, AS 47.30.664(b) was amended by deleting "from candidates provided by the department" from the end of the first sentence, adding the third sentence, and, in the last sentence, deleting "and the staff" preceding "of the board" and substituting "the director's duties" for "their duties" to make it read as it currently does:

(b) The board shall have a paid staff provided by the department, including, but not limited to, an executive director who shall be selected by the board. The executive director is in the partially exempt service and may hire additional employees in the classified service of the state. The department shall provide for the assignment of personnel to the board to ensure the board has the capacity to fulfill its responsibilities. The executive director of the board shall be directly responsible to the board in the performance of the director's duties.

That "from candidates provided by the department" was deleted in Chapter 66 SLA 1991 shows that the AMHB selecting its own Executive Director was specifically negotiated.

This section became effective through Section 50, Ch. 5 FSSLA 1994, which is one of the sections that are explicitly made material terms. Thus, the right of the AMHB to select its own Executive Director was not only specifically negotiated as part of the Settlement, but also explicitly a material term with all of the consequences that such a designation carries.

AS 44.29.135(b) has a shorter history. It was enacted in §23, Ch. 66 SLA 1991 in its current form:

(b) The board shall have a paid staff provided by the department, including an executive director who shall be selected by the board. The executive director is in the partially exempt service and may hire additional employees in the classified service of the state. The department shall provide for the assignment of personnel to the board to ensure the board has the capacity to fulfill its responsibilities. The executive director of the board shall be directly responsible to the board in the performance of the director's duty.

This section was one of a series of sections (§§16-25) in Ch. 66 SLA 1991 which brought ABADA into the Trust and Settlement in light of the trial court's decision that "chronic alcoholics with psychosis" were beneficiaries of the Trust.¹⁷ This was part of the settlement negotiations and through this ABADA obtained parity with the AMHB. It likewise became effective through §50, Ch. 5 FSSLA 1994 and thus a material term.

¹⁷ See, e.g., page 10 of the trial court's decision granting final approval to the settlement, which can be found on the Internet at <http://akmhweb.org/docs/finalapproval.pdf>.

C. Enforceability

The objectors to the Settlement pointed out that because the parties had already stipulated (agreed) that the Trust was reconstituted (the first underlined portion of Article VI, Section 5, of the Settlement Agreement above), that the plaintiff's sole remedy of alleging the trust had not been reconstituted (the second underlined portion above) was meaningless.

To deal with this, and at least partially based on representations by the State, the Superior Court's December 14, 1994, ORDER of dismissal provides in pertinent part:

The following sections of Chapter 5, FSSLA 1994, as amended by Chapter 1, SSSLA 1994, are incorporated into and material to the settlement agreement: Sections 2 through 9, 12 through 40(a) and (b), 41, 43, 46, 49, 50, and 51. Chapter 6, FSSLA 1994, as amended by Chapter 2, SSSLA 1994, is also material to the settlement agreement. In the event the Legislature materially alters any of these legislative enactments, the plaintiffs may seek relief from the judgment dismissing this case, pursuant to Alaska Civil Rule 60(b)(6), and file a new action reasserting all of their claims including their original claims and the claim that the mental health lands trust has not been adequately reconstituted. This dismissal with prejudice will not bar these claims.

(emphasis added). The Superior Court's December 14, 1994, Order is also quite clear that if "the Legislature materially alters" any of the specified sections, which includes AS 47.30.664(b) and AS 44.29.135(b), as set forth above, the plaintiffs can re-start the litigation with all of their original claims.¹⁸ This was reaffirmed by the Alaska Supreme Court as follows:

The superior court noted in its decision granting final approval that "nothing in HB 201, the Settlement Agreement, or this decision can prevent a future legislature from passing legislation affecting the trust, but there are remedy provisions if this happens and deterrents exist." The court stated that, in the event of such legislative action, the class can move for relief from judgment under Civil Rule 60(b)(6).

Weiss v. State, 939 P.2d 380, 396-7 (Alaska 1997).¹⁹

The objectors expressed skepticism that Civil Rule 60(b)(6)²⁰ was an appropriate enforcement mechanism, which the Alaska Supreme Court addressed as follows:

This rule, however, does not contradict the well-established practice of using Rule 60(b)(6) "to return the parties to the status quo" after "one party fails to comply" with a settlement agreement. A material change of the settlement agreement by the legislature would thus present one of the narrowly defined situations that clearly present "other reason[s] justifying relief" under Rule 60(b)(6).

Weiss II, supra, 939 P.2d at 397, citations omitted.

¹⁸ However, the passage of time could jeopardize the Trust's claim to certain land. See, the last two sentences in footnote 107 of the Superior Court's final approval decision, which is available on the Internet at <http://akmhcweb.org/docs/finalapproval.pdf>.

¹⁹ Again, this decision is available on the Internet at <http://www.touchngo.com/sp/html/sp-4816.htm>.

²⁰ Civil Rule 60(b)(6) allows a judgment to be expunged for "any other reason justifying relief from the operation of the judgment." Civil Rule 60 is available on the Internet at <http://www.state.ak.us/courts/civ2.htm#60>.

In the Four Board Suit, in arguing that the Civil Rule 60(b) remedy does not apply to anything other than legislative amendments to the relevant statutes (those which are "material terms"), and citing the last sentence of Article VI, Section 5, of the Settlement Agreement that, "Nothing in this section shall limit any party's right to enforce this agreement or applicable state statutes," the State said that "specific performance"²¹ is available for other breaches.²² The plaintiff expressed skepticism about the court's ability to order the Legislature to appropriate adequate funds for the Four Boards to perform their settlement mandated duty, but there would appear to be no reason why specific performance could not be granted here. In other words, the Administration could be ordered by the court to comply with AS 47.30.664(b) and AS 44.29.135(b) and hire the person they selected to be their Executive Director.

D. Role of the Trust

The Superior Court's December 6, 1994, Decision granting final approval to the Settlement Agreement, states in pertinent part:

For as long as any legislators remember this lawsuit or have heard of its impact on state land, the threat of litigation alone will be a powerful deterrent. [Fn 108]

* * *

[T]he Trust Authority will exist as an advocate for the trust. The Trust Authority can be expected to actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority also may be in a position to influence the governor to veto any legislation which makes a material change in this settlement. Given the notoriety of this case, it is unlikely the legislature could override such a veto.

Fn 108 The institutional memory of the legislature may not be long, but one function of the Trust Authority is to serve as a reminder of the trust obligations owed to the beneficiaries.

The Alaska Supreme Court also relied on the Trust being a watchdog to protect the Settlement from encroachment:

The trial court also relied on the expectation that the Trust Authority, as an advocate for the trust, will

actively oppose any attempt by the legislature to make a material change in the terms of the settlement and remind the legislature of the possibility of another long and costly lawsuit against the State. The Trust Authority may also be in a position to influence the governor to veto any legislation which makes a material change in this settlement.

Weiss II, supra., 929 P.2d 396-7.

²¹ "Specific enforcement" is where a court orders a party to comply with an agreement.

²² At the trial court, the state explicitly said specific performance was available. See, e.g., page 2 of Reply to Plaintiff's Opposition to the State of Alaska's Cross Motion for Summary Judgment, which can be found on the Internet at <http://psychrights.org/States/Alaska/4bdSuit/StateReply.pdf>. It backs off of this considerably to the Supreme Court where it only talks about "standard remedies" being available. See, e.g., pages 14-15 of the Brief of Appellee, State of Alaska, which is available on the Internet at <http://psychrights.org/States/Alaska/4bdSuit/OppBrief.pdf>.

It does not appear the Trust is fulfilling the expectation that it will defend the Settlement with respect to this challenge by the Administration. This is short-sighted in the extreme because it is similarly vulnerable to these types of encroachments.²³ The Settlement should be defended against encroachments regardless of transient political and personnel issues.

V Potential Litigation

A. Proper Parties

In order to bring a suit, a party must have "standing," which essentially means a legally sufficient interest in the subject matter of the litigation. Obvious parties who meet this criteria are the AMHB, ABADA, the person selected to be Executive Director, and the beneficiaries of the Trust. It is highly doubtful that AMHB and ABADA will be allowed to bring such a suit, because state law requires that they be represented by the Attorney General's office or someone authorized by the Attorney General.

The Defendant should be someone in State government who can be ordered to hire the AMHB's and ABADA's selection for Executive Director. Obvious candidates are the Governor and the Commissioner of the Department of Health and Social Services.

B. Remedies

(1) Declaratory Judgment

Alaska's Declaratory Judgment Act, AS 22.10.020(g), provides:

(g) In case of an actual controversy in the state, the superior court, upon the filing of an appropriate pleading, may declare the rights and legal relations of an interested party seeking the declaration, whether or not further relief is or could be sought. The declaration has the force and effect of a final judgment or decree and is reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against an adverse party whose rights have been determined by the judgment.

A Declaratory Judgment that the state must hire the Executive Director(s) selected by AMHB and ABADA ought to be obtainable.

(2) Specific Performance

As set forth above, if a lawsuit were to be properly filed and pursued, specific performance requiring the Administration to hire the Executive Director selected by the AMHB and ABADA should be granted. However, courts rarely act quickly and I understand the person selected to be Executive Director has just let it be known he will not be reapplying for the position. Thus, specific performance around this particular breach of the Settlement has become moot. Thus, the following is only relevant should the situation arise again. That the person selected has declined to wait any longer is not surprising and since any future situation would also likely be time sensitive with respect to specific performance, it seems that a preliminary

²³ The last Administration was supportive of the Trust and its goals. This Administration is antagonistic.

injunction would have to be obtained. These are, generally speaking, granted on the basis of the likelihood of ultimately prevailing and the harm to the respective parties:

The showing required to obtain a preliminary injunction depends on the nature of the threatened injury. If the plaintiff faces the danger of "irreparable harm" and if the opposing party is adequately protected, then we apply a "balance of hardships" approach in which the plaintiff "must raise 'serious' and substantial questions going to the merits of the case; that is, the issues raised cannot be 'frivolous or obviously without merit.' " If, however, the plaintiff's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the plaintiff the heightened standard of a "clear showing of probable success on the merits."

State, Division of Elections v. Metcalfe, 110 P.3d 976, 978 (Alaska 2005). The easiest of these factors to analyze is likelihood of success on the merits. As the foregoing suggests, the unlawfulness of the Administration's actions seems quite clear. If so, a preliminary injunction should be granted.

The other factors of irreparable harm to the plaintiff(s) and adequate protection for the defendant are not so easy to say. The irreparable harm to the beneficiaries may be easier because the Settlement should be administered properly continuously. There is probably not irreparable harm to the selected Executive Director because he could be paid any salary he missed.

It is pretty hard to see much harm to the State from being required to hire the selected Executive Director. However, in *Metcalfe, supra*, the Alaska Supreme Court ruled that there was no way to adequately protect the State from the harm of being prevented from administering its election laws, thus requiring a "clear showing of probable success on the merits." Even if this is required, the foregoing analysis suggests this showing can be made.

(3) Damages

The person selected by the AMHB and ABADA might be entitled to damages and other elements of economic damages, if any, suffered as a result of the Administration's unlawful refusal to hire him.