**BEFORE THE ALASKA PUBLIC OFFICES COMMISSION**

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| ALASKA PUBLIC OFFICE COMMISSION | ) | |
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| v. | ) | |
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| RENEWABLE RESOURCES COALITION, INC. | ) | OAH No. 09-0231-APO |
| ALASKANS FOR CLEAN WATER INC., | ) | Agency Nos. 09-01-CD |
| ROBERT GILLAM, AMERICANS FOR JOB | ) | 09-04-CD |
| SECURITY, ARTHUR HACKNEY, MICHAEL | ) | 09-05-CD |
| DUBKE, and RICHARD JAMESON | ) | 09-06-CD |

**COMMISSION'S RULING ON MOTION FOR SUMMARY ADJUDICATION BY MICHAEL DUBKE**

Respondent Michael Dubke has moved for summary adjudication on two grounds. As a threshold matter, he argues that the complaint against him is procedurally defective. Secondly, he contends that there are no disputes of material fact regarding his role in the campaign for Ballot Measure 4 and that, based on that undisputed record, he did not violate either of the two statutory provisions on which the complaint against him is based. The staff of the Alaska Public Offices Commission (APOC) opposes the motion. For the reasons explored below, the second ground for the motion is well taken and the claims against Mr. Dubke are dismissed.

## I. Procedural Dismissal

The case against Mr. Dubke began on June 4, 2009, when the staff filed an investigation report in connection with a prior complaint against Robert Gillam and others. The June 4 report was referenced in, and supplied the factual detail for, a one-page complaint filed the same date against Mr. Dubke. An investigation of the complaint against Mr. Dubke ensued, resulting in a second report on August 14, 2009 that was devoted specifically to the allegations involving Mr. Dubke.

Mr. Dubke filed his original motion to dismiss on August 21, 2009, one week after the staff had issued its investigation report as to him. His motion argued that the staff's original complaint against him, filed June 4, had failed to contain the "clear . . . description of facts" and delineation of the "basis of the complainant's knowledge" required by the Commission's regulation on the contents of complaints.[1] He contended that the complaint therefore ought to be dismissed on the strength of the requirement in 2 AAC 50.452 that the "staff . . . shall reject"

[1] *See* 2 AAC 50.450(a)(4), (5).

complaints that fail to meet the standard. Although this argument occupied a substantial portion of Mr. Dubke's opening brief, the staff made no response to it at all. Despite this default on the staff's part, however, Dubke's dispositive motion may not be granted simply because part of it is unopposed.[2]

A Commission regulation, 2 AAC 50.452(c), authorizes *complainants* to seek Commission review of a staff determination *not* to accept a complaint. There is no parallel provision for review, at a respondent's request, of a staff decision that a complaint should be accepted. Notably, the only consequence of acceptance of a complaint is that a staff investigation and report ensues.

Because the regulations make no provision for such a challenge, it is uncertain whether a motion to dismiss a complaint that the staff has elected to accept, on the basis that the complaint is insufficiently detailed, can ever be entertained.[3] It seems clear, however, that it makes little sense to entertain such a motion when it is filed *after* the staff investigation is complete and the staff report has been issued. At that point, the usefulness of the complaint is largely at an end and the question becomes whether the staff report, not the complaint, makes out a violation. Thus, Mr. Dubke's procedural argument was filed after it had already become moot.

At oral argument before the Administrative Law Judge, Mr. Dubke's counsel conceded that because his motion was filed after the staff had augmented the original complaint with the staff report on the Dubke allegations (that is, the staff report of August 14, 2009), any evaluation of the sufficiency of the complaint must encompass both the complaint and that later document. A review of the 22-page August 14 staff report, which is devoted solely to the "group" allegations involving Mr. Dubke, shows that it amply describes the facts, and the basis for those facts, that form the foundation for the staff's claims. That those facts do not constitute a sustainable claim is not a basis for procedural dismissal under 2 AAC 50.452, but rather for a ruling on the merits of the case.

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[2] *See Schandelmeier v. Winchester Western*, 520 P.2d 70, 74-75 (Alaska 1974) (where opposition is absent or defective, tribunal should still examine motion to dismiss to determine if it is well taken); *Martinez v. Ha*, 12 P.3d 1159, 1162 (Alaska 2000) (summary judgment not automatic even if other party fails to respond); *Woodham v. American Cystoscope Co.*, 335 F.2d 551, 557 (5th Cir. 1964) (in light of court's duty to achieve "just" resolution, automatic granting of unopposed motion to dismiss, without evaluating existing record, is inappropriate); *cf.* 2 AAC 64.270(c) (if a motion is not opposed, an administrative law judge may issue a decision "based on the applicable law and the existing record").

[3] It is arguable that such a motion, if filed very early, ought to be allowed. An inadequately detailed complaint can hamper a party's ability to prepare its initial answer under 2 AAC 50.458.

## II. Dismissal on the Merits

### A. Mr. Dubke's Alleged Violations

The staff alleges that Michael Dubke, Robert Gillam, Arthur Hackney, and Richard Jameson formed a "group"—as that term is defined in Alaska's campaign finance statutes—for the purpose of influencing the outcome of the Ballot Measure 4, which appeared on the ballot on August 26, 2008. "Groups" are required to register with APOC and file reports detailing their contributions and expenditures. Because the group of which Mr. Dubke was allegedly a member did not do so, the staff alleges that he is in violation of the registration and reporting requirements.

### B. Nature of Summary Adjudication

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[4] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that the moving party must prevail, the evidentiary hearing is not required.[5] A dispute of material fact is not created by a party merely asserting, in argument, that one exists; if the moving party has laid out a set of facts and supported them with evidence, the party resisting summary adjudication must likewise support any competing version of the facts with evidence.[6] However, if an allegation in the pleadings has not been negated by any evidence, it must be accepted as true.[7] Moreover, in evaluating a motion for summary adjudication, if there is room for differing interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom adjudication may be granted.[8]

### C. Central Legal Question

The controlling legal question for purposes of this motion is whether Mr. Dubke's activities with respect to Ballot Measure 4 make him a member of a "group" for reporting purposes. In general, the legislature has established by definition that a "group" for these

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4 *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).

5 *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

6 *See* 2 AAC 64.250(b).

7 *E.g., Odsather v. Richardson,* 96 P.3d 521, 523 n.8 (Alaska 2004); *Barry v. University of Alaska,* 85 P.3d 1022, 1026 & n.6 (Alaska 2004).

8 *Samaniego v. City of Kodiak,* 2 P.3d 78, 82-83 (Alaska 2000).

purposes is "any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election."[9] It is necessary to determine whether Mr. Dubke's work placed him within an organization of the kind the legislature intended to describe when it wrote this definition.

### D. Undisputed Facts

Mr. Dubke has submitted a body of evidence supporting the facts as he views them. In some respects, the factual history Mr. Dubke has established differs from the history alleged by the staff in its reports. In connection with this motion, however, the staff has challenged almost none of the facts that Mr. Dubke has adduced, and in most cases has pointed to no evidence that might contradict them and thus render them disputed.

Michael Dubke is a political and advertising consultant based in Alexandria, Virginia.[10] He is the sole owner of The November Company.[11]

Mr. Dubke began doing paid work in connection with opponents of Pebble Mine development in mid-2007, investigating public attitudes toward the project.[12] His work on Pebble issues ceased by October of that year.[13] In February of 2008, through The November Company, he began working on Pebble issues again, doing more polling and consulting, including advice on setting up an entity to run the anticipated ballot measure campaign.[14] His client for these initial projects was the Renewable Resources Coalition.

During the campaign for Ballot Measure 4 that followed its approval by the Lieutenant Governor on March 11, 2008, The November Company did paid work for Alaskans for Clean Water. Alaskans for Clean Water, formed in March of 2008, was the entity conducting the campaign for Ballot Measure 4. The November Company's work included direct mail, get-out-the-vote efforts, surveys, and other campaign activities.[15] The work for this organization spanned May through August and resulted in billings in the neighborhood of $600,000.[16] The

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9 AS 15.13.400(8)(B).
10 Dubke Ex. 1 at 2-3, 6.
11 *Id.* at 7.
12 *Id.* at 29.
13 Dubke Aff't, ¶ 12.
14 Dubke Ex. 2 at 646-51; 2nd Staff Report Exhibit at 70-72.
15 Dubke Ex. 1 at 31.
16 Dubke Ex. 2 at 636-45.

staff alleges that there was minimal oversight for this work, and that allegation has not been negated.

During the same period, The November Company also did about $44,000 of work for Robert Gillam.[17] This work involved an effort to uncover who was behind a website seeking to discredit Mr. Gillam, research about Northern Dynasty and others involved in the Pebble Mine debate, and public relations work with a national rather than Alaska focus.[18]

Mr. Dubke did not do fundraising for Alaskans for Clean Water or Renewable Resources Coalition, and collected no contributions for them.[19] He may have had a role in evaluating a village consortium for *its* ability to help raise money for the campaign.[20]

Until March 31, 2008, when he resigned, Mr. Dubke was president of Americans for Job Security (AJS), [21] an organization based in Virginia that has existed for many years and that has not historically been focused exclusively on Alaska issues. Dubke had no role as an officer or board member of AJS after his resignation, although he has remained a paid consultant for the organization, without direct management authority but with an oversight role.[22] After his resignation, Mr. Dubke did not routinely receive notice of contributions to AJS and did not see its bank statements.[23]

Robert Gillam made three contributions to AJS in June and July of 2008 totaling $2,000,000.[24] Within days of each installment, AJS made slightly smaller contributions to Alaskans for Clean Water, with those contributions totaling $1,600,000.[25] Viewing the evidence in the light most favorable to the staff, one may infer from the sequence of financial transactions that Mr. Gillam had a prior understanding with AJS that the bulk of his contributions would be re-contributed to Alaskans for Clean Water. Additionally, a subsequent e-mail exchange copied to Mr. Dubke indicates that participants regarded the AJS contributions as "your [Gillam's]

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17 *Id*. at 652-4.

18 Dubke Ex. 1 at 42.

19 Dubke Aff't ¶ 3. The staff appears to dispute this issue at pages 9-10 of its opposition, citing Doc. 73 to original Complaint in 09-01-CD. Doc. 73 does not negate Mr. Dubke's statement. The staff has also cited "RRC 1661-62" on this issue, but these documents have not been made part of the record. *See* staff's Notice Re Citations in Briefing (Nov. 4, 2009).

20 Doc. 74 to original Complaint in 09-01-CD.

21 Dubke Ex. 1 at 15; Dubke Aff't ¶ 7.

22 *E.g.*, Dubke Aff't ¶ 8. AJS requires a countersignature by a consultant on checks greater than $2,500 written by its president, and Mr. Dubke appears to have been the sole authorized countersignator in the spring of 2008. Dubke Ex. 1 at 23-24; Ex. A to AJS Response to Complaint. This authority does not appear to have been used in connection with any funds transfers at issue in this case, since those transfers were accomplished by wire.

23 Dubke Ex. 1 at 37-38; Dubke Aff't ¶ 7-9.

24 AJS 150-52 (Complaint 09-01-CD "Attachment References" binder).

25 2nd Staff Report Exhibit at 12-14.

money."[26] Viewing the evidence in the light most favorable to the staff, it may be inferred that Dubke was contemporaneously aware of Mr. Gillam's contributions to that organization and that he facilitated the execution of one of them.[27] The staff has not alleged, and no evidence shows, that he solicited the contributions.

It is a close question whether, for purposes of summary adjudication, it must be assumed that Mr. Dubke had a role in arranging a pass-through of funds from Gillam through AJS to Alaskans for Clean Water. The staff has generally alleged that the operation was "coordinated by . . . Dubke,"[28] among others, but it did not significantly explore the alleged coordination when it deposed Mr. Dubke and seems never to have asked him the direct questions that might shed light on any coordinating role he might have played. Dubke, for his part, has not explicitly denied a coordinating role under oath, although he has sworn that he had no "say" in directing AJS donations during the relevant period.[29] This question need not be further resolved to reach the legal conclusion in Part II-E.

Viewing the evidence in the light most favorable to the staff, Mr. Dubke had an important role in proposing political ideas and strategy in connection with the ballot proposition and related efforts.[30] He also helped to coordinate the campaign's "ground activities."[31]

### E. Whether the Facts Can Support a Finding that Dubke Was Part of a Group for Purposes of Reporting

The staff's view that Mr. Dubke was a member of a "group" for reporting purposes rests on five premises that are borne out by some evidence: that he gave significant political, media relations, and structural advice to the other key players in the Ballot Measure 4 effort;[32] that he took direction from Gillam in carrying out his media work;[33] that he had some knowledge of or role in the alleged pass-through of funds from Gillam through AJS to Alaskans for Clean Water; that his company was paid about $600,000 in campaign funds; and that he helped to coordinate

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26 *Id.* at 80.

27 *See* Dubke Ex. 1 at 37-41; 2nd Staff Report Exhibit at 22, 24.

28 2nd Staff Report at 15. Ordinarily, if not fully negated by uncontroverted evidence, an allegation must be taken as true in the context of a motion for summary adjudication by the opposing party.

29 Dubke Aff't ¶ 8.

30 2nd Staff Report Exhibit at 70-74.

31 RRC 1147 (Complaint 09-01-CD "Attachment References" binder).

32 2nd Staff Report at 19-20.

33 *Id.* at 20. The evidentiary support for this allegation is thin—a single e-mail found in the 2nd Staff Report Exhibit at 74. It is not, in fact, clear that this e-mail was a direction to anyone rather than simply an expression of desire, nor that Dubke was its target.

the "ground activities" of the campaign.[34] The fundamental assumption behind the staff's theory of the case is that the statutory definition of "group" is "extremely broad,"[35] requiring only a coordination of *political* efforts by two or more people, coupled with collection or disbursement of moneys from any source. The staff's paradigm requires no financial organization or identifiable pool of assets attributable to the group. In seeking summary adjudication, Mr. Dubke argues that a group must, at a minimum, have an identifiable pool of assets.

At the outset, one must note that the staff's reading of the definition of "group" would have extraordinary repercussions for campaign reporting. Paid consultants, pollsters, grassroots organizers, campaign attorneys, and many others who join in a political effort would need to report as part of a group. With this in mind, it will be helpful to begin by examining the full text of the statutory definition of "group."

The definition sets up the general parameters of a group and then, after a semicolon, addresses four types of groups with or without the special status of candidate-controlled groups. It is reprinted below with extra line breaks added for easier reading and discussion of the different parts. "[G]roup" means:

> (A) every state and regional executive committee of a political party; and
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> (B) any combination of two or more individuals acting jointly who organize for the principal purpose of influencing the outcome of one or more elections and who take action the major purpose of which is to influence the outcome of an election;
>
> a group that makes expenditures or receives contributions with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate shall be considered to be controlled by that candidate;
>
> a group whose major purpose is to further the nomination, election, or candidacy of only one individual, or intends to expend more than 50 percent of its money on a single candidate, shall be considered to be controlled by that candidate and its actions done with the candidate's knowledge and consent unless, within 10 days from the date the candidate learns of the existence of the group the candidate files with the commission, on a form provided by the commission, an affidavit that the group is operating without the candidate's control;

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[34] *See* staff opposition brief at 9-10. Note that some detailed allegations in the brief about the importance of Dubke's role are not supported by any evidence or by the documents cited, or are accompanied by citations to documents that were never made part of the record.

[35] Staff opposition brief at 4.

> a group organized for more than one year preceding an election and endorsing candidates for more than one office or more than one political party is presumed not to be controlled by a candidate;
>
> however, a group that contributes more than 50 percent of its money to or on behalf of one candidate shall be considered to support only one candidate for purposes of AS 15.13.070, whether or not control of the group has been disclaimed by the candidate[.][36]

The staff regards all of the text after the first semicolon in subparagraph (B) to be irrelevant to interpreting the basic definition at the beginning of (B). To be sure, the text after the first semicolon is devoted to particular subsets of the broader class of groups, and since the subsets all relate to candidate elections rather than ballot propositions, they have no *direct* application to this case. They do, however, provide an important contextual clue to what the legislature meant by "organize" in the main definition—a clue to what degree of organization would constitute a "group." The first group described in the ensuing clauses can "make[] expenditures" and "receive[] contributions." The second has a pool of assets—"its money"—that can be identified precisely enough that one can determine percentages of the pool. The third is organized in such a way that one can determine a time when it became organized. The fourth, like the second, has "its" money, a fund that can be quantified and divided by percentages.

These textual clues indicate that the legislature envisioned that a group would have, and would dispose of, its own assets.[37] There is no indication that the legislature contemplated groups so amorphous that they would involve only a collection of individuals working in concert to a common end, each using his own assets or (as in Dubke's case), helping others to direct their assets and receiving some of them as pay.

Other provisions of AS 15.13 are consistent with this view. AS 15.13.112 speaks of "contributions held by a . . . group." AS 15.13.114 contemplates that groups can "accept[] a contribution." AS 15.13.135 contemplates that a group can "make an independent expenditure." AS 15.13.074 envisions that a group can "make a contribution."

The legislative history of AS 15.13.400(8), insofar as it addresses the issue, further confirms that the legislature contemplated that groups would "organize" sufficiently to have an identifiable pool of assets. At one hearing, Legislative Legal Counsel Jack Chenoweth was asked how "group" is defined. After paraphrasing the basic definition he explained, "We're

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[36] AS 15.13.400(8).

[37] This does not mean that they would be corporations or partnerships. Unincorporated associations with little or no formal governance can have and use assets, and can even open bank accounts.

talking, generally, PACs."[38] Chenoweth was asked if a husband and wife could be a group. He responded that they could if they "set themselves up that way," thus suggesting that something more than routine cooperation would be required.[39] On another occasion, Senators Leman and Duncan had a colloquy to the effect that the Democratic Party would need to organize in order to be a "group;" although the exchange is jocular, it confirms an assumption that group status entails some organization.[40]

In 2001, the Commission adopted a regulation, 2 AAC 50.290, that provides some additional gloss to the statutory definition of "group." It is not to the contrary. Subsection (a) of that regulation states that raising, collecting, soliciting, or disbursing money, or directing, coordinating, or controlling those activities, makes a combination a "group." This statement does not rule out that the money must be raised for or disbursed from an identifiable pool. Indeed, subsection (c) of the same regulation refers to a group's "indebtedness," a concept that is not consistent with a combination so amorphous as to have no identifiable pool of assets.

Importantly, an interpretation of the term "group" that requires sufficient organization to create an identifiable pool of assets avoids potentially significant constitutional concerns. The Alaska Supreme Court has held that those interpreting the law "should if possible construe statutes so as to avoid the danger of unconstitutionality."[41] In general, statutes are unconstitutionally vague if they do not give "adequate notice of what conduct is forbidden" or if they are "drawn so imprecisely that it encourages arbitrary and discriminatory enforcement."[42] The boundaries of a statutory prohibition cannot be so fuzzy that people "of common intelligence must necessarily guess at its meaning."[43]

The staff's approach to the "group" definition runs a significant risk of producing unconstitutional results. To the staff, Mr. Dubke is a member of the alleged "group" because his company performed $600,000 in services for a $2.9 million campaign, he advised on strategy, and he had a role in helping others contribute. In combination, the staff concludes that this is a "significant enough role[] to be considered part of the group."[44] The staff offers no satisfactory standard for determining how much of this kind of work makes a person's role "significant

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38 Senate State Affairs Committee Minutes, 3/12/96 (SB 191).
39 *Id.*
40 Senate State Affairs Committee Minutes, 3/19/96 (SB 191).
41 *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 192 (Alaska 2007) (quoting prior authority).
42 *State v. O'Neil Investigations, Inc.*, 609 P.2d 520, 531 (Alaska 1980).
43 *Id.* (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).
44 1st Staff Report at 14.

enough" to oblige that person to ensure that group reporting has taken place. A decision that Dubke was in violation for failing to so report would place all others who perform services for or advise campaigns in an uncertain situation regarding their obligations.

The process of pooling resources into an identifiable set of "group" assets, in contrast, offers something much closer to a bright line for distinguishing when one must begin group reporting. People generally know when they contribute to a common fund, set up an association bank account, or disburse from a pool that has the money of multiple contributors.[45] By adopting an interpretation of "group" that entails sufficient organization to produce such an identifiable pool, the Commission would honor the Alaska Supreme Court's instruction to construe statutes so as to steer away from risks of unconstitutionality.

For all of these reasons, the AS 15.13 group registration and reporting requirements should be interpreted to apply only when a combination of two or more individuals have organized sufficiently to produce an identifiable pool of assets belonging to the combination. It is undisputed that the group of which Michael Dubke was alleged to be a member had no such pool of common assets. Accordingly, Mr. Dubke was not required to register or report on behalf of a group under AS 15.13.

## III. Conclusion

The staff alleges that Michael Dubke violated AS 15.13.040-050 by failing to register and report on behalf of a "group." Because the undisputed facts, viewed in the light most favorable to the staff, establish that he was not a member of a "group" for purposes of AS 15.13, both allegations against Mr. Dubke are dismissed.

DATED this 18th day of November, 2009.

BY DIRECTION OF THE COMMISSION

By: *Signed*
Christopher Kennedy
Administrative Law Judge

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

[45] This ruling should not be construed to require that the assets pooled be monetary. In some circumstances, a pooling of nonmonetary assets could be an element of forming a group.