BEFORE THE ALASKA PUBLIC OFFICES COMMISSION

ALASKA PUBLIC OFFICE COMMISSION	)	
	)	
v.	)	
	)	
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 "GILLAM'S AND AFCW'S MOTION FOR SUMMARY ADJUDICATION PURSUANT TO AS 15.13.065(c) AND .074(b)"

Respondents Robert Gillam and Alaskans for Clean Water, Inc. (AFCW) have moved for a summary adjudication dismissing the claims against them based on Alaska Statutes 15.13.074(b) and 15.13.114, arguing that, even if all of the allegations against them are assumed to be true, they did not violate the statutory provisions on which those allegations are based. The staff of the Alaska Public Offices Commission (APOC) opposes the motion as to both respondents. The complainants have also filed briefing in opposition to the motion.

For the reasons explored below, the motion is unpersuasive and the claims will proceed to a hearing.

A. Alleged Violations at Issue

The staff alleges that Robert Gillam, by passing funds through intermediate entities, made contributions to AFCW "using the name of another," a practice the staff contends is illegal under AS 15.13.074(b). The staff alleges that AFCW, upon becoming aware that Gillam had contributed to it in violation of 15.13.074, was obliged by the terms of AS 15.13.114(a) to "immediately . . . return [the contribution] to the contributor," but failed to do so.

Resolution of both allegations turns on two purely legal questions: first, whether another statute, AS 15.13.065(b), makes AS 15.13.074(b) inapplicable to contributions in support of a ballot proposition, and second, whether AS 15.13.074(b), even if it applies, actually prohibits indirect contributions.

B. Procedural Posture of Motion

AFCW and Gillam have submitted no evidence in connection with this motion. They posit that if the assertions in the original complaint against them, as amended by the subsequent

staff investigation, are accepted as true, the alleged pass-through contributions violated no provision of law that may properly be applied in the context of a ballot proposition.

The motion seeks summary adjudication. Summary adjudication is a traditional means of resolving administrative proceedings without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts.[1] In such a motion, if an allegation in the pleadings has not been negated by any evidence, it must be accepted as true.[2] In evaluating the present motion, the factual history alleged in the staff reports will be accepted as true.

C. Assumed Facts

The facts set out below should not be mistaken for findings of fact. They are allegations that are assumed to be true for purposes of this motion only. All are taken from the June 4 and August 14, 2009 staff reports, primarily the former.[3] Legal conclusions from the reports are omitted from the synopsis below.

Alaskans for Clean Water, Inc. (AFCW) formed in March of 2008.[4] AFCW registered with APOC as a group immediately after its incorporation, and was the public face of the campaign for Ballot Measure 4.[5] Robert Gillam, in conjunction with Arthur Hackney, largely controlled AFCW's operations.[6]

Mr. Gillam is an Anchorage businessman. He was the direct or indirect source of 89 percent of the $2.9 million contributed to AFCW in the course of the campaign.[7]

Mr. Gillam made three contributions to a Virginia-based entity named Americans for Job Security (AJS) in June and July of 2008.[8] The contributions totaled $2,000,000. Within days of each installment, AJS made slightly smaller contributions to AFCW, with those contributions

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1 *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000); *cf.* 2 AAC 64.270(b), (c).

2 *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).

3 The August 14 report was devoted to respondents Hackney, Jameson, and Dubke. It is not formally a part of the allegations against Gillam and AFCW, although it is a pleading in a consolidated case to which they are parties. It provides some clarification and context for the allegations in the June 4 report.

4 June 4 report at 6.

5 *Id.*; Aug. 14 report at 5.

6 June 4 report at 6; Aug. 4 report at 12.

7 This allegation from the June 4 report is accepted for purposes of this motion, although if one were to read only the text of the report one would find allegations linking Gillam to just $2,010,000 of AFCW's income, which would represent a smaller percentage. Other contributions not described in the body of the report (*see* note 17 below) apparently raise Gillam's total to $2,605,000.

8 June 4 report at 16.

totaling $1,600,000.[9] Accepting all allegations as true, Mr. Gillam had a prior understanding with AJS that the bulk of his contributions would be re-contributed to AFCW.[10]

On May 30, 2008, the board of respondent Renewable Resources Coalition (RRC) voted to give $150,000 per month to AFCW, if they could raise that amount.[11] RRC did not have sufficient funds on hand to make any such donations, but RRC had broached to Gillam the idea that he could "give[] us $100,000" to fund a contribution to AFCW.[12] Three days after the board vote, Gillam gave $350,000 to RRC, and two days after that RRC made a $150,000 contribution to AFCW.[13] Gillam either presumed or expected that his contributions to RRC would go to AFCW.[14] There is no allegation that RRC made subsequent donations to AFCW after the initial $150,000, however.[15]

AFCW retained the contributions that Gillam funneled to it through AJS and RRC.[16]

Gillam also made direct contributions to AFCW that were reported to APOC as such. The total of these contributions was $855,000.[17]

D. Whether AS 15.13.074(b) Applies to Ballot Propositions

Alaska Statute 15.13.074(b) provides: "A person or group may not make a contribution anonymously, using a fictitious name, or using the name of another." The staff alleges that Robert Gillam violated AS 15.13.074(b) by arranging for $1.75 million of contributions from him to be routed through and reported as contributions from AJS and RRC. The claim against AFCW is derivative of that allegation. The first step in evaluating both claims is to determine whether AS 15.13.074(b) can be applied at all to Gillam's contributions.

The argument that it cannot be so applied rests on AS 15.13.065(c), which reads, in relevant part:

> Except for reports required by AS 15.13.040 and 15.13.110 and except for the requirements of AS 15.13.050, 15.13.060, and 15.13.112 – 15.13.114, the provisions of AS 15.13.010 – 15.13.116 do not apply to limit the

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9 *Id.* at 16, 22.

10 *Id.* at 24.

11 *Id*. at 21.

12 *Id.*

13 *Id.*

14 *Id.* at 16, 20; Aug. 14 report at 16.

15 A separate allegation that Gillam passed a $10,000 contribution through RRC in March of 2008 appears to have been dropped and apparently it would not be accurate.

16 June 4 report at 36-37.

17 Although the text of the report is not clear on this allegation, a pie chart on page 11 of the June 4 report shows a total of $855,000 in direct contributions from Gillam. Documents in the record (RG 50-54 together with AFCW 79) bear out the $855,000 figure, with the direct contributions made by a series of checks between March 25 and August 26, 2008.

> authority of a person to make contributions to influence the outcome of a ballot proposition.

In this case there is no dispute that Gillam's contributions were "to influence the outcome of a ballot proposition." AS 15.13.074 is one of the provisions not excepted from the general exclusion in § 065(c).

Two competing interpretations of § 065(c) have been advanced in the present case. Before addressing either of them, however, it will be helpful to note and eliminate a third possible reading, which is advocated by neither party.[18]

The third reading would be that § 065 simply makes every provision between AS 15.13.010 and 15.13.116 inapplicable to ballot measures, apart from the six it specifically enumerates. A review of the unenumerated provisions of chapter 13 quickly reveals that this cannot be so, however, for a number of them expressly address ballot propositions. The references to ballot propositions outside the enumerated set include AS 15.13.010(b) and (d) (applicability), 15.13.020(e)(3) (commissioners not to contribute), and 15.13.084(1)(B) (anonymous expenditures).

The parties are evidently mindful of this fact and of the fact that AS 15.13.065(c) does not say "do not apply to contributions to influence the outcome of a ballot proposition" but rather says "do not apply *to limit the authority of a person to make* contributions to influence the outcome of a ballot proposition." They propose less sweeping readings of § 065(c). The movants read § 065(c) to make all provisions of chapter 15.13 up to 15.13.116—except the six listed ones—inapplicable insofar as they restrict *whether, how, or how much* a person may contribute to influence a ballot proposition. The staff and complainants read it only to make those provisions inapplicable insofar as they restrict *whether or how much* a person may contribute.

The staff's interpretation is a plausible reading of the actual words of § 065(c). The "authority of a person to make contributions" certainly goes to *whether* contributions can be made. When the verb "limit" is added to the beginning of that phrase, it becomes clear that *how much* may be contributed is also within the legislature's contemplation in this provision. The movants would expand this further to cover prohibitions on making contributions in certain ways, such as anonymously or in cash; they argue that prohibiting a person from contributing in

[18] The Commission notes, however, that counsel for Gillam and AFCW's presentation and demonstrative exhibits at oral argument before the Commission appeared to suggest that the Commission adopt the third reading.

this manner limits the person's "authority" to contribute as they wish. The staff responds that being subject to restrictions on the timing, reporting, and manner of contributing leaves one with the authority to contribute, and to do so without contribution limits.

A canon of statutory interpretation is that statutes should be read, where possible, to give effect to every word the legislature wrote into the provision.[19] It is important to recognize that both the staff's and the movants' readings of § 065(c) leave the subsection with some superfluous language. This is because some of the specifically excepted provisions simply cannot be construed to "limit the authority of a person to make a contribution" in the first place, and thus there was no need to list them as express exceptions. An example is AS 15.13.050, which acts only to regulate how groups should be named and to require registration before expenditures—not contributions—can be made. Likewise, AS 15.13.112 is solely about the uses of campaign contributions; it has no bearing on whether, in what amount, or in what manner a person may make contributions. Yet even though the core language of § 065 ("the provisions of AS 15.13.010 – 15.13.116 do not apply to limit the authority of a person to make contributions to influence the outcome of a ballot proposition") cannot be read to affect provisions about how contributions will be *used*, the legislature still made AS 15.13.112 an exception to the language about making contributions. Since § 065(c) is not a particularly tightly-drafted provision and will contain some superfluous language regardless of which of the two candidates for its construction is chosen, the rule that statutes should be read to give meaning to every word does not favor either the staff's or the movants' interpretation.

There is little legislative history to elucidate the intent behind the phrase at issue. The language of § 065(c) dates from the 1996 legislative session, during which it seems to have received little independent attention. It first appeared in a committee substitute in the Senate Judiciary Committee about a week before final passage in the Senate, without any discussion explicitly devoted to it.[20] A brief mention of § 065(c) in the Attorney General's bill review letter to Governor Knowles (sent to assist the governor in deciding whether to veto or sign the legislation, and therefore integral to the legislative history), summarized the subsection as establishing that the law "would not limit the amount of contributions that a group could make to

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[19] *E.g., In re Adoption of Missy M.,* 133 P.3d 645, 650 (Alaska 2006).

[20] § 9, CSSB 191 (JUD) (April 22, 1996). There is some discussion that the new committee substitute on that date was intended to bring the Senate bill closer to a prior House bill, but none of the parallel House bills of 1996 seems to have had language parallel to § 065(c), so far as the ALJ can determine; nor did Initiative Petition 95 CFPO, the impetus for all of these bills. Since none of the parties to this case has explored the legislative history, it is possible that additional research on their part would turn up additional material.

influence the outcome of a ballot proposition."[21] This summary is most in keeping with the staff's reading, to the effect that § 065(c) was essentially a provision to prevent the contribution caps from applying to ballot initiatives, but it is not directly at odds with the movants' broader reading.

The search for the correct interpretation of § 065(c) does not end with its own language or its legislative history, however. As the Alaska Supreme Court has held, "'[w]hen a statute or regulation is part of a larger framework or regulatory scheme, . . . [it] must be interpreted in light of the other portions of the regulatory whole.'"[22] AS 15.13 is a complex chapter that provides a rich context in which to interpret § 065.

As a starting point, it bears noting that the movants' reading is a far-reaching one. Not only would it take ballot measures out of the coverage of AS 15.13.074(b)'s prohibition on contributions in the name of another, but it would remove them from coverage of:

> AS 15.13.074(e), which permits no cash contributions over $100; and
>
> AS 15.13.076 together with .074(a), which combine to require that contributions must go to campaign treasurers.

The last exemption would be particularly odd, since § 065(c) expressly excepts from the exclusion AS 15.13.060—a provision requiring groups to *have* campaign treasurers to receive "all" contributions—and yet contributors would not be restricted from contributing outside this channel. The staff's reading avoids this problem, since it would leave intact the provisions governing the *manner* of making contributions but would simply read § 065(c) to eliminate restrictions on authority of persons to make contributions at all, and to make them in any amount they choose.

A further anomaly caused by the movants' reading is that it would eliminate 15.13.074(b)'s prohibition on making contributions "in the name of another," and yet would leave in place—by virtue of the explicit reference in § 065 to AS 15.13.040—requirements created by AS 15.13.040(b), (j), and (p) that contributions received by groups or made by nongroup entities be reported by identifying "the true source of the funds" of each contribution. The staff's reading again avoids this problem, since it allows all provisions governing the manner of making or reporting contributions to remain applicable.

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[21] Letter from Attorney General Botelho to Governor Knowles re HCS CSSB 191 (FIN) am H (May 21, 1996) (AGO File 883-96-0048), at 7.

[22] *FDIC v. Laidlaw Transit, Inc.*, 21 P.3d 344, 351 (Alaska 2001) (quoting prior authority).

Another anomaly the movants' reading would create within the chapter relates to anonymous contributions. The movants are adamant that § 065(c) makes AS 15.13.074(b) prohibition on making "a contribution anonymously" inapplicable to ballot propositions. Yet § 065(c) explicitly preserves the applicability of AS 15.13.114(b), which provides that an "anonymous contribution is forfeited to the state unless the contributor is identified within five days of its receipt." It would seem extraordinary for the legislature to go out of its way to legalize anonymous contributions to ballot measure campaigns, and yet in the same sentence to ensure that those legalized contributions would be subject to forfeiture. Again, the staff's interpretation leaves both the prohibition and forfeiture provisions applicable to ballot measure campaigns, and thus creates no anomaly.

Most fundamentally, the movants' interpretation does not square with the overall purpose of campaign finance reporting with respect to ballot propositions. That purpose is to assist the electorate in making a "[p]roper evaluation of the arguments made on either side … by knowing who is backing each position."[23] An interpretation of § 065(c) that guts AS 15.13 of the requirement that contributions be reported in the name of those who actually make them would make the reporting function a paperwork exercise, rather than one that furthers this purpose.

In sum, when its full context is considered, AS 15.13.065(c) cannot be interpreted as the movants have proposed. Such an interpretation would yield an absurd result.

Even if § 065(c) were ambiguous, however, that ambiguity has been resolved. The legislature has expressly given the Alaska Public Offices Commission the authority "to . . . clarify" AS 15.13 through regulations.[24] This is a somewhat unusual charge to an executive branch agency; many agencies are tasked only with adopting regulations necessary to "implement" their statutes. Carrying out that charge, the Commission has already addressed any ambiguity in § 065(c) and has come down, formally and explicitly, on the side of the interpretation now advocated by the staff. It did so almost nine years ago in 2 AAC 50.352 where, among other things, it provided that those making contributions to support ballot propositions "may not make (A) anonymous contributions; or (B) contributions using the name of another . . . ."[25] Thus, the Commission eliminated any doubt as to whether AS 15.13.074(b)'s

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23 *Messerli v. State,* 626 P.2d 81, 87 (Alaska 1981).
24 AS 15.13.030(9).
25 2 AAC 50.352(b)(2).

prohibitions on those activities would be applied in the context of ballot propositions, notwithstanding any ambiguity of AS 15.13.065(c).

The Alaska Supreme Court has held, in the recent case of *APOC v. Stevens,*[26] that "people should not be required to guess" which side of an ambiguous line their conduct falls on when they may be subject to "serious civil penalties."[27] The movants rely heavily on *Stevens* in seeking dismissal of the civil penalty claims against them on the basis of ambiguity. However, the applicability of AS 15.13.074(b) is clear on the face of chapter 15.13, when read in its entirety, and in any event is made crystal clear by 2 AAC 50.352. Because any person, certainly one planning a multimillion dollar program of contributions, could readily ascertain the applicability of this provision, the principle of *APOC v. Stevens* has no application to this case. AS 15.13.074(b) may be applied in accordance with 2 AAC 50.352.[28]

E. Whether AS 15.13.074(b) Prohibits Contributions Made Through a Conduit and Reported in the Name of the Conduit

The movants also contend that AS 15.13.074(b)'s prohibition on contributions "using the name of another" does not encompass contributions made by prior arrangement through a conduit entity. They support this argument with a single case, *United States v. O'Donnell,* an unpublished interlocutory order by a federal trial court in connection with a criminal prosecution.[29] The defendant in *O'Donnell* was alleged to have prevailed on his employees and others to make contributions to a presidential campaign, which he then reimbursed, thereby avoiding a statutory cap on contributions. One of the counts in the case alleged that this conduct violated 2 U.S.C. § 441f, which provides in part that "No person shall make a contribution in the name of another person . . . ." The *O'Donnell* judge dismissed the count on the basis that § 441f, when interpreted in context, does not prohibit "indirect contributions made through a conduit,"[30] or in any event is not a sufficiently unambiguous prohibition of the same to support a criminal prosecution.[31]

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[26] 205 P.3d 321 (Alaska 2009).

[27] *Id*. at 325-6.

[28] Because of this conclusion, it is unnecessary to address whether AFCW's alleged conduct would also be illegal under AS 15.13.040(b)(2), even if AS 15.13.074(b) did not apply.

[29] *United States v. O'Donnell,* No. CR 08-00872 SJO, Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Indictment (C.D. Cal., June 8, 2009) (attached to Gillam and AFCW's motion).

[30] *Id.* at 4.

[31] *Id.* at 5-7.

Several factors prevent *O'Donnell* from being persuasive authority with respect to Alaska's prohibition on contributions "using the name of another." First, although the language of 2 U.S.C. § 441f briefly parallels Alaska's campaign finance law, the federal chapter in which § 441f appears is utterly different in many respects, and the *O'Donnell* court's construction of § 441f turned explicitly on language in the other, non-parallel sections of the federal chapter. Second, the trial judge in *O'Donnell* seems to have overlooked a Third Circuit Court of Appeals decision finding § 441f's prohibition to encompass contributions through "straw donors,"[32] and he deliberately held counter to longstanding Ninth Circuit *dicta* on the issue.[33] Third, the decision is interlocutory, not final, perhaps even subject to reconsideration by the same judge.

More fundamentally, however, *O'Donnell* is simply beside the point. The Commission, again exercising the legislative charge to "clarify" chapter 15.13 by regulation, has eliminated any uncertainty that may have existed as to whether 15.13.074(b) encompasses contributions made through a straw donor or conduit. At 2 AAC 50.258(b), the Commission has established that "[a] person . . . may not . . . advance . . . other persons for contributions to a . . . group . . . in the . . . other person's name, or in a name other than the original source of the contribution." This is precisely the kind of pass-through arrangement the staff has alleged.

F. AFCW's Liability

AFCW's violation, if any, is derivative of a violation proven against Gillam. If Gillam has made a contribution in violation of AS 15.13.074, AFCW can in turn be in violation of AS 15.13.114(a), which provides that a "group . . . that receives and accepts a contribution given in violation of AS . . . 15.13.074 shall immediately, upon discovery that the contribution is prohibited, return it to the contributor." Note that § 114 is one of the sections expressly excepted from the exclusion in AS 15.13.065(c).

Because the theory of liability against Gillam under AS 15.13.074 is potentially sound, the derivative allegation against AFCW under AS 15.13.114(a) cannot be dismissed.[34]

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[32] *United States v. Hsia,* 176 F.3d 517, 521, 524 (D.C. Cir. 1999). *Hsia* uses § 441f to support a holding that when another section of the federal law asks for identification of the "person who makes a contribution," it "is *not* a demand for a report on the person in whose name money is given; it refers to the true source of the money." *Id*. at 424 (italics in original). *O'Donnell* cites *Hsia* but overlooks its relevance to § 441f.

[33] *See Goland v. United States,* 903 F.2d 1247, 1251 (9th Cir. 1990) (§ 441f "prohibits the use of 'conduits' to circumvent [contribution limit] restrictions").

[34] The staff has also alleged in its June 4, 2009 report that AFCW's receipt and acceptance of pass-through contributions was also a violation of 2 AAC 50.258. Although § 258 may bear indirectly on violation of other provisions that could be applied to AFCW, it is not possible for a recipient of a contribution to violate § 258.

G. Conclusion

The prohibition against contributions in the name of another in AS 15.13.074(b) applies to contributions in support of ballot propositions. The prohibition encompasses indirect contributions by means of a conduit or intermediary. Accordingly, if the staff's factual allegations are true, Mr. Gillam made improper contributions to AFCW through AJS and RRC, and by failing to return the contributions AFCW potentially violated AS 15.13.114. The allegations cannot be dismissed and the claims should go to a hearing, at which the staff must prove them. The motion for summary adjudication is denied.

DATED this 19th day of November, 2009.

BY DIRECTION OF THE COMMISSION

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Certificate of Service: The undersigned certifies that on the 19th day of November, 2009, a true and correct copy of this document was emailed or faxed to:
♦ Scott Kendall and Timothy McKeever, counsel for respondents Alaskans for Clean Water, Inc. and Robert Gillam;
♦ Matthew Singer and Charles Dunnagan, counsel for complainants Pebble Limited Partnership and Renewable Resources Coalition;
♦ Douglas Pope and Jonathon Katcher, counsel for Arthur Hackney;
♦ Jeffrey Feldman and Kevin Cuddy, counsel for Michael Dubke;
♦ Peter Maasen, counsel for Richard Jameson and Renewable Resources Coalition, Inc.; and
♦ Thomas Dosik, Assistant Attorney General, counsel for the APOC staff.
Copies of this document were provided by the same means to Holly Hill, APOC Executive Director, Elizabeth Hickerson, APOC Chair, and William Milks, AAG, legal advisor to the Commission.

By: *Signed*
Linda Schwass/Kimberly DeMoss

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