

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
<u>DUBKE, and RICHARD JAMESON</u>)	09-06-CD

**COMMISSION’S RULING ON ARTHUR HACKNEY’S
MOTION TO DISMISS**

Respondent Arthur Hackney has moved to dismiss the complaint against him on the ground that, even if all of the allegations against him are assumed to be true, he did not violate either of the two statutory provisions on which the allegations against him are based.

Respondent Robert Gillam has joined the motion; for Mr. Gillam, it is a motion for only partial dismissal, as he is subject to a broader array of allegations, some of which are not addressed by Mr. Hackney’s arguments.

The staff of the Alaska Public Offices Commission (APOC) opposes the motion as to both respondents. The staff filed no briefing on the motion, stating only that it presents the “identical” issue as Michael Dubke’s motion for summary adjudication. If there is any difference between how the Dubke motion and this motion should be analyzed, that difference has not been explained by the staff.

For the reasons explored below, the motion is well taken and the claims against Mr. Hackney are dismissed, as are the two parallel claims against Mr. Gillam.

A. Alleged Violations

The staff alleges that Robert Gillam, Arthur Hackney, Michael Dubke, 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. This allegation was not made by Pebble Limited Partnership and the Resource Development Council, the original complainants to this case. It was developed solely by the APOC staff.

“Groups” are required to register with APOC and file reports detailing their contributions and expenditures. Because the group of which the two movants were allegedly members did not do so, the staff alleges that they are in violation of the registration and reporting requirements.

B. Procedural Posture of Motion

Mssrs. Hackney and Gillam have submitted no evidence in connection with this motion. They posit that if all of the allegations in the original complaints against them, as amended by the subsequent staff reports, are accepted as true, they violated no registration or reporting law applicable to “groups.”

The motion has been argued as though it were a motion to dismiss for failure to state a claim on which relief can be granted under Alaska Civil Rule 12(b)(6), in which the complaint in a civil court action would be tested for the sufficiency of its allegations. This is an administrative proceeding, however, in which pleading is less formal and in which the Civil Rules do not formally apply. It is probably technically more accurate to view the motion as one for summary adjudication, albeit one in which no evidence has been added to the record by the movants. 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. Central Legal Question

The controlling legal question for purposes of this motion is whether Mssrs. Hackney and Gillam’s activities with respect to Ballot Measure 4 make them members of a “group” for reporting purposes. In general, the legislature has established by definition that a “group” for these 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.”³ It is necessary to determine whether Hackney and Gillam’s roles placed them within an organization of the kind the legislature intended to describe when it wrote this definition.

D. Assumed Facts

The facts set out below should not be confused with findings of fact. They are allegations that are assumed to be true for purposes of this motion only. All are taken from the

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 AS 15.13.400(8)(B).

June 4 and August 14, 2009 staff reports. Legal conclusions from the reports—such as the conclusion that the respondents operated as a “group”—are omitted from the synopsis below.

Arthur Hackney operates Hackney and Hackney, a political communications company. Since 2005, he has been a board member of Americans for Job Security (AJS). He was a prime sponsor of Clean Water Initiative 3, which became Ballot Measure 4, registering it with APOC on January 11, 2008. Hackney was also a director of Renewable Resources Coalition, Inc. (RRC), which had been formed at Hackney’s instance as a trade organization or business league in 2005. It was set up to be a coalition of interests opposed to the Pebble Mine and to veil contributors to the anti-Pebble campaign.

Hackney was instrumental in the formation in March, 2008, of Alaskans for Clean Water, Inc. (AFCW). AFCW registered with APOC as a group immediately after its incorporation, and was the public face of the campaign for Ballot Measure 4. Hackney sat on AFCW’s board and served as an officer of the corporation. He and Gillam controlled its operations. He was in charge of day-to-day execution of the campaign against Ballot Measure 4, directing the expenditure of millions of dollars for print and broadcast advertisements. He directed approximately \$2.0 million of AFCW’s \$2.9 million in expenditures on the Ballot Measure 4 campaign. He and Robert Gillam also oversaw the hiring of Fund Raising, Inc. to raise funds for AFCW and RRC.

Robert Gillam is an Anchorage businessman. He developed the idea of using a ballot initiative to stop the proposed Pebble Mine. He paid the lawyers who drafted Ballot Measure 4 as well as predecessor ballot measures. He funded litigation to place the initiative on the ballot and helped to direct the course of the litigation. He was the direct or indirect source of 89 percent of the \$2.9 million contributed to AFCW in the course of the campaign.⁴

Mr. Gillam made three contributions to AJS in June and July of 2008 totaling \$2,000,000. Within days of each installment, AJS made slightly smaller contributions to Alaskans for Clean Water, with those contributions totaling \$1,600,000. Mr. Gillam had a prior understanding with AJS that the bulk of his contributions would be re-contributed to Alaskans for Clean Water. Accepting all allegations as true, Mr. Hackney coordinated this arrangement.

⁴ This allegation 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 6 below) apparently raise Gillam’s total to \$2,605,000.

On March 25, 2008, Gillam gave \$10,000 directly to AFCW.⁵ On August 6, he gave an additional \$250,000 directly to AFCW.⁶

On May 30, 2008, RRC's board voted to give \$150,000 per month to AFCW, if they could raise that amount. 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. 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. Gillam either presumed or expected that his contributions to RRC would go to AFCW. There is no allegation that RRC made subsequent donations to AFCW after the initial \$150,000, however.

Arthur Hackney received and disbursed approximately \$2.0 million of AFCW's funds in connection with the campaign. In the words of the staff's allegation, he "would simply produce advertisements, buy media time, do whatever else a political consultant does, and submit an invoice to AFCW."⁷ These expenditures were not pre-approved or budgeted. Consultations about them were limited to Hackney, Gillam, consultant Michael Dubke, and RRC president Richard Jameson.

Hackney and Gillam were both involved in strategy discussions related to the campaign, including a "post-mortem" analysis about what went wrong. Gillam was a key figure in strategy development, and gave instructions to Hackney and Dubke about ad placements.

Some Fund Raising, Inc. services rendered to RRC were paid for by Hackney from AFCW's funds. There is no allegation by the staff that the services were campaign-related.

Gillam paid an invoice that Fund Raising, Inc. had submitted to Hackney. There is no express allegation by the staff that the services were campaign-related, but such a claim may be implicit.

E. Whether the Facts Can Support a Finding that Hackney and Gillam Were Part of a Group for Purposes of Reporting

The staff's view that Hackney and Gillam were members (along with Dubke and Jameson) of a "group" for reporting purposes rests on their concerted action to arrange the

⁵ The staff at one time alleged that this contribution was passed through RRC, but that allegation appears to have been dropped and apparently it would not be accurate.

⁶ No other direct contributions are alleged in the text of the report. A pie chart on page 11 of the June 4 report shows a total of \$855,000 in direct contributions from Gillam, however. 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.

⁷ 1st Staff Report at 17.

financial underpinnings of the campaign and their central role in planning and executing campaign strategy. For Gillam, the primary function in the joint enterprise was as chief financier of the campaign, the source of nearly all of its funds. While some of these funds were contributed directly, about two-thirds were steered through intermediate entities to conceal the fact that they came from Gillam. For Hackney, the primary function was as the chief disbursing officer of these funds; there is no allegation that Hackney himself put any funds into the venture. Significantly, Hackney disbursed funds for the campaign only in his capacity as an officer of AFCW, the entity that had registered as a group to support Ballot Measure 4.

As has been discussed in connection with the prior ruling on Michael Dubke's motion for summary adjudication, the fundamental assumption behind the staff's theory of the case is that the statutory definition of "group" requires 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 itself. Hackney and Gillam argue that a group must, at a minimum, have an identifiable pool of assets. In the ruling on Mr. Dubke's motion, it has been held that 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.

In Dubke's case, the narrower definition of "group" was dispositive of the claims against him. The staff regards the group issues in connection with Dubke to be identical to those for Hackney and Gillam.

Before accepting this concession, it is appropriate to acknowledge that Gillam and Hackney had more central roles in the campaign than Dubke. Unlike Dubke, Gillam contributed money to the effort, and indeed his contributions were massive both in absolute terms and as a percentage of the total effort. Hackney—though like Dubke not a financial contributor—was responsible for a much larger share of the campaign's spending than Dubke. Accepting all allegations as true, both Hackney and Gillam participated deliberately in an effort to use intermediaries to conceal the full extent of Gillam's financial backing for the campaign.

With that acknowledged, the narrower definition of "group" remains dispositive of these claims. The single pool of common assets that emerges from the facts is the pool held by AFCW. That is the pool from which Hackney paid for the campaign's advertising and other

activities, and that is the pool into which Gillam's "pass-through" contributions to the campaign were ultimately directed. AFCW did register and report as a "group."⁸

It is unremarkable that Hackney directed AFCW's spending, since he was one of its officers. It is also unremarkable that Gillam's views on campaign strategy carried great weight with AFCW; he was its main benefactor. That these individuals were important to AFCW does not turn them into a "group" independent of AFCW.

Accordingly, Hackney and Gillam were not required to register or report on behalf of a group under AS 15.13. This conclusion does not establish that the alleged conduct summarized above, if proven, was legal in all respects for all persons and entities involved. It addresses only the allegations that Mssrs. Hackney and Gillam committed a violation by failing to register and report as a group.

F. Conclusion

The staff has alleged that Arthur Hackney and Robert Gillam violated AS 15.13.040-050 by failing to register and report on behalf of a "group." The staff's allegations, even if accepted as true, establish that Hackney and Gillam's combination lacked a key element needed to create a "group" for purposes of AS 15.13. For this reason, both claims against Mr. Hackney are dismissed, as are the two claims against Mr. Gillam premised on failure to register and report on behalf of a "group."

DATED this 18th 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 18th 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, 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, Executive Director, of the Alaska Public Offices Commission, and Elizabeth Hickerson, Chair; and to William Milks, AAG.

By: Signed _____
Linda Schwass/Kimberly DeMoss

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

⁸ 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.