

BEFORE THE ALASKA PUBLIC OFFICES COMMISSION

ALASKA PUBLIC OFFICES COMMISSION,)
)
Complainant,)
)
v.)
)
RBG BUSH PLANES LLC, NANA)
KALMAKOFF, and MICHELLE RAVENMOON,)
)
Respondents.)
_____)

OAH No. 11-0328-APO
Agency No. 11-09-CD

COMMISSION’S RULING ON MOTIONS FOR FEES AND COSTS

Following the initial decision on the merits in this matter, the staff of the Alaska Public Offices Commission (staff) filed a Motion for Investigation and Adjudication Costs and a Motion for Award of Attorney Fees, both directed against respondent RBG Bush Planes LLC (RBG). In response to questions from the administrative law judge (ALJ), the second motion was amended in a supplemental filing made December 30, 2011. RBG opposed both motions on January 17, 2012.

In the meantime, on January 12, 2012, the commission granted an unrelated motion for reconsideration on the merits filed by respondent Kalmakoff. On February 8, 2012, the commission issued a revised final order on the merits. That order altered none of the parameters relevant to the motions for costs and fees. The commission now turns to those two pending post-hearing motions.

Except when recording the original amounts requested, all dollar figures below are rounded to eliminate cents. All rounding has been done in the direction that favors RBG.

I. Motion for Investigation and Adjudication Costs

The staff’s first motion seeks an order requiring RBG to pay 100% of investigation and adjudication costs, calculated at \$25,672.15. For the reasons explained below, the commission finds that recoverable costs total \$21,341 and that RBG is liable for a share of those costs totaling \$10,668.

A. *General Principles for Resolution*

1. Authority to Award

Alaska Statute 15.13.390(b) provides that if, after hearing the evidence, “the commission determines that the respondent engaged in the alleged violation, the commission shall assess . . . the commission’s costs of investigation and adjudication.”

2. Prevailing Party

RBG notes that costs may be awarded only if it is found to have engaged in the violation “alleged.” RBG contends that no award may be made here because it, RBG, was the prevailing party with respect to the violation alleged.

RBG takes the position that the “alleged violation” in this case was that RBG supplied transportation to the candidates without obtaining reimbursement equivalent to full charter costs of all of the flights and all of the associated waiting time. RBG notes that the commission’s final decision on the merits generally adopted a method of valuation that resulted in lower values, and lower reimbursement amounts, than the staff had advocated.

The commission disagrees with this focus on valuation details. The allegation tried at the hearing was an allegation that the air transportation provided to the candidates represented an illegal, in-kind, corporate contribution. That allegation was proved with respect to all of the air transportation at issue. Moreover, the commission upheld the staff’s general contention that air travel should be valued and reimbursed with reference to commercially reasonable market rates, as required by 2 AAC 50.250. Giving the candidates and RBG the benefit of every doubt, the commission found evidence in the record to support market values lower than the market values advocated by the staff, but the underlying violation and legal theory were those alleged from the outset. The commission entirely rejected the methodology advanced by RBG, which was to assign a value to air travel solely with reference to a share (not even a pro-rata share) of the fuel used on the journey.

In light of this background, RBG has been found to have committed the “alleged violation” within the meaning of that phrase in AS 15.13.390(b), and costs may be assessed against it.

3. Costs Related to Dismissed Parties

This case was filed against two groups of respondents. One group consisted of the two candidates who received the in-kind contributions at issue. The other group consisted of three respondents who were allegedly or potentially responsible for making the contributions.

The second group of respondents included RBG, which according to the initial complaint “would be” responsible for illegal contributions. It also included McKinley Capital Management (MCM), which the complaint said “could be” or “appears” to be responsible for the contributions as well. Finally, it included Robert B. Gillam, who controls both entities. As to Mr. Gillam, the staff suggested there might be a violation “if he contributed anything associated with the travel.”¹

These three respondents were closely related, and the lines between them appear to have been informal and difficult to discern. For example, although RBG was not a business entity and MCM was, RBG and MCM swapped services, with RBG supplying planes and MCM supplying pilots. The result was that MCM pilots flew planes on errands or activities personal to Mr. Gillam. However, so far as the evidence in this case shows, the relationship was not reduced to writing and the value thus transferred among business and personal endeavors was not quantified.

With respect to Mr. Gillam, the staff simply did not perfect a case; the August 5, 2011 staff report that crystallized the staff’s final allegations for hearing included no allegations against him. Mr. Gillam immediately moved to be dismissed as a respondent. Notwithstanding opposition from the staff, the commission granted dismissal on September 15, 2011. With respect to MCM, the staff included an allegation in the staff report but the commission likewise issued an early dismissal, in MCM’s case by means of summary adjudication. A critical element in the summary adjudication was an oral stipulation made by counsel for RBG and MCM in response to questions from the commission chair at oral argument on September 15, 2011. That stipulation clarified the relationship between RBG and MCM in a manner that, until that time, had been genuinely unclear, and ensured that RBG would not later contend that any of the transportation services at issue were, in fact, rendered by its affiliate rather than by RBG.

The cost of investigating the relationship between RBG, MCM, and Mr. Gillam, in order to ascertain which of them actually furnished services to the candidates, was necessary to

¹ Memorandum to APOC Commissioners attached to complaint of July 7, 2011 (emphasis added).

developing and proving the ultimately successful case against RBG. This cost, which was a relatively small portion of the total, may fairly be attributed to the contributor ultimately found responsible. However, the cost of evaluating Gillam's and MCM's successful dispositive motions did not advance the case against RBG or the candidates and should not be attributed to any other respondent.

4. Costs Related to Candidate Respondents

As noted in the preceding section, this case was brought against two groups of respondents: the closely-related, co-owned alleged contributors on the one hand, and the candidates receiving the contributions on the other. It is not practical to separate the intertwined costs of investigation and adjudication attributable to each of these two branches of the case, but one may say broadly that the two groups were equally responsible for the costs. The commission will therefore assign fifty percent of the costs to the contributor side of the case and thus to RBG.

No actual award of investigation and adjudication costs will be made with respect to the fifty percent attributable to the candidate respondents. In keeping with its findings at pages 13 and 14 of the Revised Decision and Order, and in keeping with its discretion under AS 15.13.400(e), the commission did not invite a motion for costs against the candidate respondents, and none was filed.

5. Overall Eligibility of Staff Time

The staff has sought to recover for its own time expenditure connected with investigation and adjudication of this case, which it estimates at 260.5 hours. The motion uses a rate of \$42.50 per hour, which is the blended rate that has been calculated for other tasks for which staff time is billable, such as responding to public records requests.²

RBG contends that no staff time may be part of the award because the staff has not proved that any of it fell outside regular business hours. RBG contends that staff time spent during regular hours is time the state would have had to pay for anyway, and therefore is not truly a cost of this case.

The commission disagrees. If an investigation requires the staff to devote time to a particular matter, the state is deprived of the services of the staff for other matters. Thus, the cost of staff time, even during regular hours, is a real cost.

² Affidavit of Paul Dauphinais, ¶ 4.

B. *Specific Cost Categories*

1. Office of Administrative Hearings

Early in the course of the case, counsel for RBG requested that the commission designate a hearing officer.³ The commission designated the Office of Administrative Hearings (OAH) to perform the hearing officer function. OAH charges as of the time of the present motion totaled \$12,709.⁴

In keeping with the principles above, this total must be reduced by the cost of adjudicating the successful dispositive motions of MCM and Gillam. As the parties were informed in a notice on December 23, 2011, the billable time attributable to these motions amounted to 14.2 hours, or \$2,016.⁵ RBG suggests that this amount should be further reduced by time spent addressing the unopposed Motion to Remove Dismissed Parties from Case, a caption-reform motion that was ruled upon in a two-sentence order in November. RBG is correct. One tenth of an hour was billed to this motion, resulting in a further reduction of \$14. After subtracting these two amounts, the net adjudication cost in this category is \$10,679, for which RBG is fifty percent responsible.

RBG further contends that time spent overseeing the discovery disputes involving multiple parties should not be attributed to RBG. Since the discovery disputes were settled, there is little ALJ time attributable to this function, and a review of the pleadings indicates that at least fifty percent of each discovery dispute related to matters relevant to the RBG case. Accordingly, ALJ charges will not be further reduced on this basis.

2. Deposition Costs

The staff moved for an award of \$1,580.50 in deposition and interview costs connected with the investigation and adjudication of the case.

RBG contends that these items were not appropriate costs because the staff was seeking (in part) to find out the relationship between Mr. Gillam, RBG, and MCM, and corporate counsel had offered access to documents to explore that relationship without the necessity of a deposition.⁶ The commission notes that depositions and interviews can be a more effective and

³ Letter from Timothy McKeever to Paul Dauphinais, Aug. 18, 2011.

⁴ OAH bills the commission for administrative law judge time at a rate of \$142 per hour. Paralegal assistance, legal research costs, and most other incidentals are incorporated in this rate.

⁵ This allocation is generous to RBG, since it includes some time spent on RBG's unsuccessful motion for summary adjudication that cannot be separated out.

⁶ See Affidavit of Scott Kendall, ¶ 4.

efficient way of understanding both corporate formalities and the realities that may underlie or contradict them. The formal and informal discovery conducted appears to have been appropriate in scope and method for a matter of this importance, with the single exception noted below.

RBG asks that the \$162.50 appearance fee of a court reporter at the interview of George Jacko be disallowed, since Mr. Jacko was not sworn, no deposition occurred, and the event was not contemporaneously transcribed. Since the interview could have been recorded without paying a court reporter to run the recorder, the commission agrees with RBG that the expenditure was unnecessary.

3. Staff Time

The 260.5 hours of staff time recorded on this case, valued at \$11,071.15, falls into several categories, each of which RBG has challenged as partly or wholly unrecoverable.

RBG objects to 3.75 hours (\$159) devoted to “inquiry” before the complaint was issued. RBG appears to base its argument on 2 AAC 50.460, in which a complaint comes before an investigation. Thus, RBG reasons, anything that happens before a complaint is filed cannot be “investigation” under the cost recovery statute, AS 15.13.400(b)(2). The commission disagrees. The fact that investigation costs may not fall within the investigation phase referenced in 2 AAC 50.460 does not mean that they are not “costs of investigation” within the meaning of AS 15.13.400(b)(2), an independent legal provision that is neither referenced in, nor part of the authority for, 2 AAC 50.460. Applying common sense, the fact-gathering that enabled the staff to prepare a complaint was an investigation (albeit not one of the kind described in 2 AAC 50.460(a)(2)), and its cost is recoverable.

RBG objects to 13.75 hours (\$589) of staff time spent preparing counsel for, or attending, depositions and interviews in early August of 2011. In RBG’s view, only the attorney was required to be present and anyone else present was just “watching the attorney at work.”⁷ The commission disagrees. This is an agency that has an investigative staff. When the staff helps the attorney prepare, and when a staff member attends investigative events conducted by the attorney, the staff adds value and makes the investigation more effective and efficient.

RBG objects to 19.75 hours (\$839) recorded for defending depositions. 7.75 hours of this time was spent preparing for the depositions and the balance was spent attending them. The charges relate to depositions of staff members, and the attendance is attendance by the actual

⁷ Opposition to Staff’s Motion for Investigation and Adjudication Costs, at 12.

witness. RBG contends that only an attorney may charge for these events because “one of the fundamental tasks of counsel is to defend depositions.”⁸ Moreover, RBG contends that attendance at depositions can only be charged at \$25 per day as provided in Alaska Administrative Rule 7. The commission disagrees with both contentions. Witnesses must prepare for and attend their own depositions; this cannot be delegated to counsel. And a court administrative rule adopted for a different purpose cannot and does not modify or override the meaning of “costs of . . . adjudication” in AS 15.13.400. The actual cost of staff time in this category is a cost of adjudication.

RBG objects to 1.75 hours (\$74) spent in consultation with the Department of Law prior to the filing of the complaint for the same reason it objects to the 3.75 hours of pre-complaint staff time already discussed. On the same basis, the commission disagrees.

RBG objects to 14.25 hours (\$605) spent preparing the complaint, for the same reason. The commission regards this as a cost of adjudication, and disagrees.

RBG objects to 6 hours (\$255) purportedly spent drafting the staff report but recorded after the staff report was already filed. While the commission surmises that this time has simply been mis-coded, it agrees with RBG that there is no basis in the record to assess this time as a cost.

RBG objects to the remaining 53.75 hours (\$2,284) billed for preparation of the staff report and exhibits, contending that the time is excessive for such a report. The commission finds that the time is reasonable for the work product developed.

Finally, RBG objects to 129.5 hours (\$5,504) recorded by the staff in a category entitled “other” on the basis that it is not adequately justified. By means of the Executive Director’s affidavit and other context, one can tell that 86.1 of these hours were spent on final preparation for and attendance at the hearing. This consisted of two components: first, the prosecutorial component, consisting of 46.25 hours of preparation and attendance by Mr. Dauphinais, Mr. Anderson, and one paralegal; and second, the event support component, consisting of just under 40 hours of set-up, recording, and similar services by two other staff members. The commission finds the resources committed to each component to be reasonable and necessary in the context of this hearing. The remaining 43.4 hours entered in the “other” category are scattered over several months and the record does not reveal what they were for. These will be excluded.

⁸ *Id.* at 13.

In sum, the commission finds 211.1 hours of staff time to be adequately substantiated and 49.4 hours to be inadequately supported in the record. The value of the allowable staff time, before allocation among parties, is \$8,971.

4. Commissioner Per Diem

Each commissioner was paid \$50 in per diem to attend the December 1, 2011 hearing, which did not coincide with a regular commission meeting. There is no dispute that the resulting \$200 in expenditure is an appropriate cost of adjudication, for which RBG is fifty percent responsible.

5. Hearing Costs

Because of the number of counsel and parties involved, it was necessary to find an alternative to the commission's small regular hearing room.⁹ The ALJ was able to locate rent-free space, but use of the space imposed some incidental costs, notably for parking and transportation. These costs added up to \$74,¹⁰ which will be added to the total adjudication cost for which RBG is fifty percent responsible. The commission agrees with RBG that an additional \$37 incurred for refreshments during the 11-hour hearing should not be deemed an adjudication cost, and this item has been excluded.¹¹

II. Motion for Award of Attorney Fees

The staff's second motion, as amended, seeks an order requiring RBG to pay 100% of attorney fees, which were calculated at \$44,752.66. The fee claim is based on 221 hours of attorney time and six hours of paralegal time. For the reasons explained below, the commission finds that recoverable attorney fees total \$38,200 and that RBG is liable for a share of those fees totaling \$19,100.

A. General Principles for Resolution

1. Authority to Award

Alaska Statute 15.13.390(b) provides that if, after hearing the evidence, "the commission determines that the respondent engaged in the alleged violation, the commission shall assess . . . reasonable attorney fees."

⁹ See Amended Notice of Hearing, Nov. 9, 2011. Although the staff took the lead in making the request for alternative space, the request was presented as a joint one and no party objected to that characterization. In connection with this motion, counsel for RBG has affirmed that he "agreed with" the request. Affidavit of Scott Kendall, ¶ 6.

¹⁰ See Ex. E to Motion for Investigation and Adjudication Costs.

¹¹ The refreshments were made available to all participants, and they appear to have been enjoyed by all.

2. Prevailing Party

As discussed in Part I-A-2 above, RBG was found to have “engaged in the alleged violation” and is therefore subject to an award of fees against it.

3. Full Versus Partial Fees

RBG contends that the phrase “reasonable attorney fees” should be construed to mean partial attorney fees, similar to those awarded under Civil Rule 82. RBG cites no statutory context, prior interpretations, or legislative history that would support this construction, and none appears to exist. On the contrary, at the time the fee provision was added to AS 15.13.390 in 1996, the Alaska Supreme Court had a long and consistent history of interpreting identical language to mean full reasonable attorney fees.¹² The legislature can be assumed to have known this when it chose that language again in the commission’s statute, and to have intended to achieve the same outcome that had been achieved by the identical language in prior statutes.¹³ Moreover, the attorney fee provision is embedded with a sister provision that, as all parties agree, calls for full recovery of the commission’s costs of investigation and costs of adjudication. Read together, the apparent legislative purpose was to shift the burden caused by misconduct from the state fisc to the violators who caused the state to incur the expense. Recovery of full reasonable attorney fees is consistent with this purpose. The commission interprets AS 15.13.390(b)(3) to authorize an award of the full attorney fees attributable to a party’s violation.

4. Fees Related to Dismissed Parties

For the same reasons discussed at length in Part I-A-3 above, attorney fees attributable to the successful dispositive motions of MCM and Robert Gillam should not be part of the total fees divisible among other respondents. Thus, no portion of the attorney time of the staff’s counsel in responding unsuccessfully to those motions will be awarded against RBG. However, as likewise explained in Part I-A-3, attorney time involved in working out the relationship between Mr. Gillam and the two entities he controlled may fairly be attributed to RBG, and will not be eliminated from the total.

¹² Some of those cases were collected in footnote 11 of *Dawson v. Temanson*, 107 P.3d 892 (Alaska 2005), which reads: “See *Bobich v. Stewart*, 843 P.2d 1232, 1237 (Alaska 1992) ([W]hen interpreting a state statute that expressly calls for an award of reasonable attorney’s fees to successful plaintiffs, we have held that full fees should be awarded to claimants as long as those fees are reasonable.’); *Jackson v. Barbero*, 776 P.2d 786, 788 (Alaska 1989) (construing clause in lease authorizing ‘reasonable attorney’s fees’ to mean full reasonable fees); *Boyd v. Rosson*, 713 P.2d 800, 802 (Alaska 1986), *modified on reh’g*, 727 P.2d 765 (Alaska 1986) (interpreting statute authorizing ‘a reasonable attorney fee’ for foreclosure of liens to provide for full reasonable fees).”

¹³ See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580-81, 583 (1978).

5. Fees Related to Candidate Respondents

For the reasons discussed in Part I-A-4, fifty percent of attorney fees should be allocated to the candidate respondents as a group. The remaining fifty percent are fairly attributable to the alleged contributor group, and thus to RBG.

6. Rate

The staff's fee motion values the time of its single attorney, John Ptacin, at \$200 per hour, a market rate developed through a review of rates charged by attorneys of similar experience in the private sector.¹⁴ On the occasions when it bills agencies for its time, the Department of Law uses a cost-based rather than market-based rate that is somewhat lower; in Mr. Ptacin's case that rate appears to be \$149.86 per hour.¹⁵ With respect to the Public Offices Commission, the time is not actually billed at all but instead is covered by general funds.

RBG does not challenge the accuracy of the market rate, but it argues that the phrase "reasonable attorney fees" in the statute should be construed to mean the actual cost of the lawyer to the state rather than what the attorney's time would be worth in the market. The Alaska Supreme Court has indicated that "reasonable attorney fees" ought not to be construed so restrictively, however, holding that "when attorneys charge an unusually low fee or no fee at all except that which might be awarded by the court, the proper approach to determining actual reasonable fees is to objectively value the attorney's services."¹⁶ The commission will use the hourly market value determined by the Attorney General.

B. *Objections to Specific Fee Components*

RBG contends that the staff's counsel, Mr. Ptacin, recorded 33 hours working on discovery issues in July of 2011 "which primarily, if not exclusively, addressed arguments against respondents (and non-respondents) other than [RBG]."¹⁷ A review of the pleadings from that period shows that, on the contrary, the proposed discovery related to the core of what would eventually become the case against RBG, although at that time it was unclear whether RBG,

¹⁴ Affidavit of John M. Ptacin in Support of Motion for Attorney's Fees, ¶¶ 5-6. The rate has been approved by the Attorney General.

¹⁵ *Id.*, Exhibit A ("Cost of Suit for Matter AN2011102401").

¹⁶ *Krone v. State, Dep't of Health and Soc. Serv.*, 222 P.3d 250, 257 (Alaska 2009); *cf. Cleaver v. State, Commercial Fisheries Entry Comm'n*, 48 P.3d 464, 470 (Alaska 2002) (no criticism of Superior Court fee award to state where "market rate" was used to set the "fee" for a state attorney); *Atlantic Richfield Co. v. State, Dep't of Revenue*, 723 P.2d 1249, 1252 (Alaska 1986) ("We find no error in the state's use of the Department of Law [market] study to fix the hourly rate for assistant attorneys general.").

¹⁷ Opposition to Motion for Award of Attorney Fees, at 17.

MCM, or the person who controlled both entities would be deemed responsible for the events being investigated. The hours are therefore an appropriate part of the total that will be allocated in accordance with Part II-A-5 above.

RBG also objects to the inclusion of time spent opposing dismissal of MCM and Gillam, which RBG correctly totals at 40 hours. A close examination of the billing records indicates that 20 hours recorded in late September were exclusively devoted to seeking reconsideration of the dismissal of MCM after the basis for that dismissal was already in the record. This work did not relate to any party other than MCM and must be removed from the total. Earlier in the case, an additional 20 hours between August 29 and September 15 was devoted to a combination of opposing dismissal of Gillam, opposing dismissal of MCM, and opposing dismissal of RBG. The single page of opposition to dismissal of Gillam clearly accounted for little of this time, and by far the most substantial component of the briefing produced related directly to matters central to the case against RBG. The commission will disallow 10 of the 20 hours billed during this earlier period.

RBG contends that the 51.5 hours it says were recorded by Mr. Ptacin in the last two weeks of November to prepare for the hearing is “patently unreasonable for a hearing that was completed in a day.”¹⁸ The commission disagrees. The hearing was long enough to be equivalent to two days of court trial time, and Mr. Ptacin was the sole attorney litigating against a number of able counsel on the other side. Moreover, the time recorded during the period in question encompassed other tasks, including witness interviews, settlement negotiations, and preparation of a trial brief. The billings during this period were reasonable.

In sum, the 221 hours of attorney time recorded on this matter will be reduced to 191 hours for purposes of this fee calculation.

III. Calculation of Award

The table below summarizes the two awards that result when the general principles and specific rulings above are applied:

¹⁸ *Id.* at 18-19.

Item	Amount Claimed	Exclusions	Net	RBG pct	RBG Portion
ALJ time	\$12,709	\$2,030	\$10,679	50	\$5,338
Deposition costs	1,580	163	1,417	50	708
Staff time	11,071	2,100	8,971	50	4,485
Comm'r per diem	200	0	200	50	100
Hearing costs	111	37	74	50	37
Attorney fees	44,752	6,552	38,200	50	19,100
Total	\$70,418	\$10,882	\$59,536	50	\$29,768

IV. Order

Concurrently with payment of the civil penalty assessed in item IV-E of the commission's Revised Decision and Order After Reconsideration entered February 8, 2012, RBG Bush Planes LLC shall pay investigation costs, adjudication costs, and attorney fees in the amount of \$29,768.

All members of the commission concur in this Order.

DATED this 7th day of March, 2012.

BY ORDER OF THE COMMISSION

By: Signed
Christopher Kennedy
Administrative Law Judge

NOTICE

A party may request reconsideration of the order by filing a petition under AS 44.62.540 within 15 days after delivery or mailing of the decision. Send the petition requesting reconsideration to the following address:

Office of Administrative Hearings
550 W. 7th Ave Ste 1600
Anchorage, AK 99501

At the same time, send a copy of the petition to the opposing parties' legal counsel, or to the opposing party if not represented by counsel.

Judicial review of this order may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days after the order is mailed or otherwise distributed.

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