

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE ALASKA PUBLIC OFFICES COMMISSION**

ALASKA PUBLIC OFFICES COMMISSION,)
)
Complainant,)
)
v.)
)
ROBERT BYRON GILLAM, McKINLEY)
CAPITAL MANAGEMENT, LLC, RBG BUSH)
PLANES LLC, NANA KALMAKOFF, and)
MICHELLE RAVENMOON,)
)
Respondents.)
_____)

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

**COMMISSION’S RULING ON
MOTION TO DISMISS ROBERT B. GILLAM**

Robert B. Gillam, one the five respondents in this matter, has moved that he be dismissed as a respondent before hearing. The basis for the motion is that the staff report filed on August 5, 2011 did not articulate any basis to find a violation by Mr. Gillam, recommending only that the other four respondents be found to have violated provisions of AS 15.13. The staff has opposed the motion, indicating in its briefing that it intends to prove a violation against Mr. Gillam that is not mentioned in the report.

Because the motion relies on a few materials outside the pleadings to establish a factual predicate, it is technically a motion for summary adjudication. However, no fact relevant to this motion is in dispute.

For the reasons explored below, the motion is well taken and the claim against Mr. Gillam is dismissed.

A. Allegation Against Gillam

At the core of this case is an allegation that respondents Kalmakoff and Ravenmoon, who were candidates for assembly seats in the Lake and Peninsula Borough, received air transportation at below-market rates to conduct campaign activities. The transportation was provided in a plane owned by RBG Bush Planes LLC and piloted by an employee of McKinley Capital Management, LLC. On the contributor side of this transaction, the complaint that opened this proceeding made the following allegation:

When a candidate pays only for fuel and does not pay the fair market value for a flight (i.e., the price of a charter flight), the difference between the fuel cost and the cost of a charter would be a prohibited contribution. It could be a prohibited corporate contribution from McKinley Capital or RBG Bush Planes. It appears that McKinley Capital at least bore the expense of the pilot, thus accruing a prohibited contribution. And RBG Bush Planes is a Limited Liability Company under an Alaska Charter that is also precluded from making in kind contributions to a candidate. Moreover, because Mr. Gillam had already contributed the individual maximum of \$500 per candidate per year to both candidates, if he contributed anything associated with the travel, it was a prohibited individual contribution. Thus, some combination of RBG Bush Planes, Robert Gillam, and McKinley Capital violated campaign finance laws.¹

In short, the allegation against Gillam was conditional upon it being found that he, as opposed to one or both of the LLCs, had contributed something associated with the travel.

B. Staff Report

After investigation, the staff filed its report a month after the complaint was lodged.

With respect to contributor-side violations, the staff report concluded:

Respondent McKinley Capital Management, LLC violated AS 15.13.074(f) by providing pilots who were employees of that firm to fly candidates on campaign trips without charge. In addition, Respondent RBG Bush Planes, LLC violated AS 15.13.074(f) by providing an aircraft at less than a commercially reasonable or normal market rate.²

The report said nothing about a violation by Mr. Gillam, and it recommended no finding against him. Substantial fines were recommended for the two LLC respondents, but none was recommended as to Mr. Gillam. The report did contain a sentence recommending that the commission order Gillam to take an APOC course on campaign disclosure.³ The report did not explain the basis for such an order or indicate from which violation it would be an outgrowth (indeed, an order to attend classes is not among the sanctions authorized by statute for a violation of AS 15.13, whether by an entity or by an individual).⁴

C. Effect of Staff Report

A staff report in an APOC proceeding sets out the allegations the staff will prosecute. By Commission regulation, in cases where there is no proposed settlement to present, if the staff “considers the evidence to support a violation of the law,” the staff must recommend in the

¹ Explanatory memorandum attached to Complaint, July 7, 2011.

² APOC Staff Report: 11-09-CD (Aug. 5, 2011) at 2.

³ *Id.* at 6.

⁴ *See* AS 15.13.390.

report “findings, conclusions, and a penalty assessment.”⁵ The regulation gives the staff no other option if it believes a violation to have occurred; the staff is not permitted, for example, to conclude privately that a violation has occurred but to omit it from the report.

If the case proceeds to a hearing, the role of the staff is to “present the investigation report,” with the burden to prove any violations alleged therein by a preponderance of the evidence.⁶ The staff has not been given any role other than to present the recommendations in the report, proving any recommended findings of violation.

Accordingly, if the staff completes an investigation report and recommends no finding of violation against a respondent, the staff may not present a case against that respondent at hearing. To allow the staff to present a case on other allegations would render the report essentially a meaningless exercise, would make hearings unpredictable and chaotic, and would violate the letter and spirit of the Commission’s hearing regulations.⁷

In the present case, when the staff elected to file a report alleging no violation by Mr. Gillam and recommending no finding against him, it elected not to prosecute a case against him.

D. Commission’s Option to Reinstate

A staff report is only a recommendation. The Commission may decline to follow the course set out in the report. In particular, the Commission may require the staff to go back and re-investigate or re-analyze allegations it has elected not to pursue. Thus, in the recent case of *Hackney v. Alaskans Against the Mining Shutdown*,⁸ this commission rejected a staff recommendation of dismissal of one allegation (“Allegation D”) and required the staff to go back and prepare a new report regarding that allegation.⁹ Likewise, in this case the Commission could reject the existing staff report as to Gillam and could send the case back for further investigation.

With respect to the present motion to dismiss, the staff has filed an opposition. Since the staff is currently precluded from prosecuting a case against Mr. Gillam at hearing—having

⁵ 2 AAC 50.460(c).

⁶ 2 AAC 50.470(c).

⁷ This structure is in keeping with the Administrative Procedure Act, AS 44.62.330-640 (APA), which governs APOC proceedings. In an APA proceeding, the agency party presents the charges set forth in an accusation. In the present case, the staff has argued that the complaint was an APA accusation. If this is so (the issue is debatable, since complaints are often filed by private individuals and since in this case it merely triggered an investigation, not a hearing), then the staff report functions as an amended accusation. The purpose of an amended accusation is to give a party “adequate and timely notice of the charges against him.” *Skvorc v. State Personnel Bd.*, 996 P.2d 1192, 1199 (Alaska 2000) (discussing amended accusations in the parallel context of Title 39). A party does not have adequate and timely notice of charges omitted from the amended accusation, and therefore such charges may not be heard, absent further amendment.

⁸ No. 09-07-CD.

⁹ Order of Remand (Feb. 5, 2010).

omitted any violation by Gillam from its report—the staff is effectively asking the Commission to remand the case to it to prepare a new report. However, the staff has not made out a case for doing this.

The staff continues to maintain strongly that below-market transportation services by RBG Bush Planes and McKinley Capital represented prohibited entity contributions. The staff has not contended that these companies are sham entities or that a case can be proven for piercing the corporate veil. The staff contends that the *entire* unreimbursed value of these services—in McKinley’s case, the pilot’s time; in RBG’s case, the use of the plane—was contributed by those entities. No basis has been suggested to separate out some portion of those services as a contribution by someone else, and not by the limited liability companies.

If the entire unreimbursed value of the alleged below-market services was contributed by these LLCs, it follows that there was nothing left for Mr. Gillam to contribute personally.

E. Conclusion

Robert B. Gillam is dismissed as a respondent in this proceeding.

DATED this 15th day of September, 2011.

BY ORDER OF THE COMMISSION

By: Signed
Christopher Kennedy
Administrative Law Judge

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