# 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 SUPPLEMENTAL MOTION FOR SUMMARY ADJUDICATION BY McKINLEY CAPITAL MANAGEMENT, LLC

Respondent McKinley Capital Management, LLC (MCM) has filed a motion (1) joining in the two arguments of RBG Bush Planes LLC (RBG) in the motion for summary adjudication by that respondent and (2) adding a third argument specific to its own situation. By separate order, the Commission has already denied of RBG's motion, and accordingly this order will not revisit the arguments in that motion.

MCM's separate argument is that MCM did not provide any service at all to the candidates, but instead provided a service (furnishing pilots) to RBG. Based on the record as supplemented by stipulations at oral argument, MCM's motion is granted.

#### A. Nature of Summary Adjudication

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.<sup>1</sup> 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.<sup>2</sup> In evaluating a motion for summary adjudication, if there is room for differing

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

<sup>&</sup>lt;sup>2</sup> 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).

interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom adjudication may be granted.<sup>3</sup>

#### B. Whether MCM Provided Services Only to RBG

MCM's argument is simply that RBG was the owner of the planes and the provider of any transportation in the planes. Just as the fuel company who sold fuel for the flights provided fuel to RBG, not to the candidates, MCM contends that it merely provided pilots to RBG, and that it should not be deemed to have provided piloting services to the individual passengers on the plane. MCM has established by uncontroverted affidavit that it supplies pilots to RBG as part of a barter arrangement.<sup>4</sup>

The administrative law judge initially recommended denial of MCM's motion because the written record contained evidence that MCM pays all costs for RBG planes, including maintenance, insurance, and hangar costs.<sup>5</sup> From that evidence, one could infer that the planes are essentially operated by MCM, and that it was MCM that provided the transportation to the candidates. At oral argument before the Commission, however, all counsel conceded that there is a true-up of expenses between RBG and MCM, so that RBG ultimately bears the operating costs for the aircraft even if MCM initially pays some of those expenses.

Moreover, counsel for RBG, Gillam, and MCM stipulated that RBG, and not MCM, provided all of the transportation services at issue in this case. Although RBG contends that the value of pilot services and other non-fuel costs should not be considered in valuing the transportation, RBG concedes that if these were components of the transportation they were furnished by RBG and were not separately provided by MCM.

Because the record is now clear that the transportation provided to respondents Kalmakoff and Ravenmoon was provided entirely, and solely, by RBG as the entity that owned, operated, and controlled the aircraft, MCM is entitled to dismissal.

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<sup>&</sup>lt;sup>3</sup> Samaniego v. City of Kodiak, 2 P.3d 78, 82-83 (Alaska 2000).

Second Affidavit of Diane Wilke, ¶ 2.

Exhibit 6 to staff opposition (excerpt from Deposition of Diane Wilke).

### C. Conclusion

The motion for summary adjudication is granted. McKinley Capital Management, L	LC
is dismissed as a respondent in this matter.	
DATED thisth day of September, 2011.	
BY ORDER OF THE COMMISSION	
By: Christopher Kennedy Administrative Law Judge	
The undersigned certifies that on September 19, 2011, this order was distributed by <b>e-mail attachmen</b> the following: Timothy McKeever and Scott Kendall, counsel for Gillam and RBG; John Ptacin, Assistant Attorney General), counsel for the APOC staff; J.L. McCarrey, counsel for McKinley Capital; William Ingald and Peter Maasen, counsel for Ravenmoon and Kalmakoff. Courtesy copies of this order were provided to Pau Dauphinais, APOC Executive Director, and Elizabeth Hickerson, APOC Chair.	son
<u>Signed</u> Kimberly DeMoss	
[This document has been modified to conform to the technical standards for publication.]	

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

#### ORDER DENYING RECONSIDERATION

The APOC staff moved on September 28, 2011 for reconsideration of the commission's order granting summary adjudication and dismissal to respondent McKinley Capital Management, LLC (MCM). Commissioners Hickerson, Kirk, and King have deliberated the motion.

The commission determines that is has authority to grant reconsideration of the challenged order.

The commission granted summary adjudication to MCM on the basis that the evidence in the record showed that MCM bartered pilot services, in bulk, to RBG Bush Planes LLC (RBG), rather than furnishing pilots to the individual passengers who traveled on the various flights directed by RBG. Hence, the evidence showed that MCM supplied no services to—and therefore can have made no in-kind contribution to—passengers Kalmakoff and Ravenmoon. Instead, it was RBG that furnished transportation (including seats on the plane, piloting, and all other components) to the two passengers.

In seeking reconsideration, the staff has supplied no affidavits, testimony, or other evidence that the arrangement between RBG and MCM was a sham.<sup>6</sup> The staff has not

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In key respects, the staff has relied on argument and briefing for evidentiary support. *See*, *e.g.*, footnote 6 to Motion for Reconsideration. Elsewhere, the staff's evidentiary citations are not on point.

contended that it requires further discovery, and has sought no continuance to develop additional evidence.<sup>7</sup> As the record stands, MCM is entitled to dismissal.

In reaching this conclusion, the commission acts on the specific factual record before it. The commission does not rule out that, on a different record, a supplier of a component of a service might be deemed to have made a contribution directly "to" the consumer of that service.

DATED this 19<sup>th</sup> day of October, 2011.

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By: <u>Signed</u>
Christopher Kennedy
Administrative Law Judge

The undersigned certifies that on October 19, 2011, this order was distributed by **e-mail attachment** to the following: Timothy McKeever and Scott Kendall, counsel for Gillam and RBG; John Ptacin, Assistant Attorney General, counsel for the APOC staff; J.L. McCarrey, counsel for McKinley Capital; William Ingaldson and Peter Maasen, counsel for Ravenmoon and Kalmakoff. Courtesy copies of this order were provided to Paul Dauphinais, APOC Executive Director, and Elizabeth Hickerson, APOC Chair.

Signed	
Jessica Ezzell	

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

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<sup>&</sup>lt;sup>7</sup> *Cf.* Alaska R. Civ. P. 56(f).