

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

ALASKA PUBLIC OFFICES COMMISSION,)
)
Complainant,)
)
v.)
)
ROBERT GILLAM, RBG BUSH PLANES, LLC,)
AND MCKINLEY CAPITAL MANAGEMENT,)
LLC,)
)
Respondents.)
_____)

OAH No. 12-0747-APO
Agency No. 12-08-CD

**MEMORANDUM
and
ORDER DISMISSING CASE**

The genesis of the referral in this matter was an email from Executive Director Dauphinais to former Chief Administrative Law Judge Terry Thurbon dated October 15, 2012.¹ That email states, “APOC has a hearing pending regarding some issues in...APOC case #12-08 CD Natwick v. Gillam, RBG Bush Planes, and McKinley Capital. The respondent has requested a hearing officer and the Commission has approved that request.” On October 16, the Alaska Public Offices the Alaska Public Offices Commission (Commission) and the Office of Administrative Hearings (OAH) entered into a Memorandum Agreement for Adjudication Services for matters referred to OAH.² The agreement is not specific to any particular matter, and on its face contemplates multiple referrals.

Following these preliminaries, on October 16 the Commission (under the signature of Executive Director Dauphinais) filed a Case Referral Notice regarding APOC No. 12-08-CD, based on a hearing request dated October 3, 2012.³ The matter was docketed in OAH as APOC v. Gillam, et al., OAH No. 12-0747-APO, and assigned to an administrative law judge. A case planning conference was conducted on November 2, 2012.

¹ ROA 4.
² ROA 2.
³ ROA 1.

Following the case planning conference, the ALJ issued an order, stating “[t]his matter is currently in the investigative stage, and has been referred to [OAH] so that an ALJ would be available to address any issues that arise during the investigative process that the parties cannot resolve among themselves.”⁴ The Respondents shortly thereafter wrote to the Chief Administrative Law Judge, expressing a number of concerns regarding the role and authority of the ALJ in the matter, and requesting clarification.⁵ The Chief Administrative Law Judge responded, noting that “the adjudication services [OAH] provides to other state agencies are part of those agencies’ neutral adjudicatory functions, not of any other function the agencies may carry out.”⁶

It is not clear, in light of the documents in the record, whether the Chief Administrative Law Judge was informed or was aware, prior to referral of the matter to OAH, that the matter in question was in the investigative stage and was not, as was stated in the initial email from Executive Director Dauphinais, “pending” a hearing. In fact, the investigative stage was to determine whether a hearing would be required. No hearing was pending at the time of the referral.

Rather, the status of the matter was this: in the course of an investigation, Staff requested the production of certain documents. The Respondents objected, and rather than attempting to obtain the documents by means of an administrative subpoena with recourse to the superior court,⁷ Staff (at the request of the Respondents) sought and obtained approval from the Commission to use the services of an administrative law judge to consider and rule on those objections. An ALJ was assigned for that purpose, and the ALJ considered and ruled on those objections.⁸

The ALJ’s ruling disposing of the Respondents’ objections to Staff’s requests for discovery concluded the only matter that had been submitted to OAH for resolution.

⁴ Dkt. 9 (November 2, 2012).

⁵ ROA 661-664.

⁶ ROA 778-779.

⁷ See AS 15.13.045(d). 2 AAC 50.875(b) states that the Commission may conduct an investigation “as provided in AS 15.13.045” expressly provides authority to “request” written and sworn statements. The regulation does not expressly state that the subpoena authority set forth in AS 15.13.045(d) applies to investigations. The administrative law judge expresses no opinion as to whether AS 15.13.045(d) provides the Commission with authority to issue administrative subpoenas in the course of an ongoing investigation. See also AS 15.13.045(b), (c).

⁸ Dkt. 35 (January 13, 2013).

The Respondents' objection to the ongoing investigation and any subsequent enforcement action, based on alleged bias on the part of staff and commissioners, is a separate matter. It was brought before the ALJ in the form of a motion for disqualification.⁹ In ruling on the motion, the ALJ characterized the Commission's referral as a request for OAH "to assign an Administrative Law Judge to assist in adjudicating disputes that arise during the investigation." The ALJ added, "The assigned ALJ can provide that assistance with respect to the [motion to disqualify], but...the ultimate decision concerning disqualification is for the Commission to make."¹⁰ The ALJ recommended that the Commission deny the request to disqualify commissioners and staff, but that the Commission direct Executive Director Dauphinais to have no further involvement in the investigation.¹¹ The Commission issued an order denying the motion to disqualify staff and commissioner, but scheduling a limited evidentiary hearing with respect to the executive director.¹²

This matter was reassigned on June 3, 2014. Initially, the presently-assigned ALJ accepted the previously-assigned ALJ's characterization of the referral as encompassing any issues that might arise during the course of the investigation and based on that characterization indicated his willingness to provide assistance to the Commission in the conduct of the scheduled evidentiary hearing.¹³ The ALJ has since concluded that in doing so, the ALJ erred.

The previously-assigned ALJ's order following the case planning conference and subsequent ruling on the motion to disqualify characterize the initial referral and assignment as for assistance in "addressing" or "adjudicating" any disputes that might arise during the course of the investigation, without limitation.¹⁴ In the presently-assigned ALJ's considered view, this was incorrect. OAH's memorandum for services contemplates separate referrals for each distinct matter for which the Commission wishes to obtain the assistance of an ALJ. With that understanding of the memorandum, the referral notice dated October 16, 2012 is limited to the specific matter in dispute at the time, namely, the Respondents' objections to certain requests for

⁹ Dkt. 42 (August 22, 2013). The Respondents had previously filed a complaint for injunctive relief in the superior court, based on those same allegations. Gillam, et al. v. Hickerson, No. 3 AN 12-10793 CI. The superior court dismissed the complaint, and that case is presently on appeal to the Alaska Supreme Court.

¹⁰ Dkt. 35, p. 4 (January 8, 2013).

¹¹ *Id.*, p. 11.

¹² Dkt. 65 (April 1, 2014).

¹³ *See* Letters to Chair Kirk, dated July 24 & 30, 2014.

¹⁴ *See also* Dkt. 36, p. 2 (January 18, 2013) (Order Regarding Motion for Clarification characterizes the referred proceedings as perhaps "more in the nature of ALJ-assisted dispute resolution through which the parties can cooperatively complete the investigative stage.").

documents. No hearing on any other matter was yet contemplated by the Commission, and thus the referral did not extend to the limited evidentiary hearing that the Commission subsequently ordered. The subject matter of that hearing is unrelated to the matter referred for hearing on October 16, 2012.

In the absence of a referral and assignment of an ALJ to assist the Commission in the matter referred, the ALJ lacks authority to take any action in connection with that matter. The ALJ therefore will not take any further action regarding the limited evidentiary hearing absent assignment by the chief administrative law judge. To this point, the only matter that has been referred to the Office of Administrative Hearings and assigned to an ALJ has been resolved.

Therefore,

IT IS HEREBY ORDERED:

1. This case is **DISMISSED**.
2. The Office of Administrative Hearings' file in this matter is **CLOSED**.

DATED August 13, 2014.

Signed _____
Andrew M. Hemenway
Administrative Law Judge

Appeal Rights

This is a final decision for purposes of appeal rights. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after it is distributed.

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