

**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

ORDER REGARDING MOTION TO DISQUALIFY

I. Introduction

The respondents have moved to disqualify the staff and Commissioners of the Alaska Public Offices Commission from any participation in investigations and hearings involving any of the respondents now, and in the future. The Commission's staff (APOC) has opposed that motion, and has also moved to strike sworn statements used in support of respondents' motion.

Based on the arguments and evidence presented, the Commission should deny the motion as to itself and the staff in general, but should direct its Executive Director to refrain from conducting or supervising the pending investigation of respondents' activities.

II. Facts

No formal testimony has been taken in this matter, and most of the facts asserted are in dispute, or the conclusions that should be drawn from those facts are disputed. The following summary is presented from respondent's point of view.¹

A complaint was made against Mr. Gillam and other parties alleging illegal campaign contributions and the failure to report contributions. In February of 2010, Mr. Gillam and APOC entered into a consent decree resolving those allegations.² The consent agreement did not find that Mr. Gillam had done anything wrong. According to respondents, APOC's Executive Director, Paul Dauphinis, believed that Mr. Gillam had actually violated campaign contribution

¹ This summary is based on respondents' interpretation of factual assertions. **These are not findings of fact.**
² Respondents' Exhibit 1.

and reporting requirements, and was unhappy that the matter was resolved without a finding of wrongdoing.³

In October of 2010, another complaint was filed with APOC against Mr. Gillam.⁴ That complaint was rejected by both APOC staff and the Commission.⁵ The Acting Director at the time, Jerry Anderson, directed staff to continue investigating the allegations of the rejected complaint.⁶ This investigation, or inquiry, led to the filing of a new complaint by APOC staff against Mr. Gillam and McKinley Capital Management.⁷ According to respondents, Mr. Anderson was the driving force behind that complaint, and at least one other staff member found it to be “ridiculous.”⁸ The ultimate finding of a violation was based on a new and novel interpretation of the applicable law.⁹

Bush Planes and Mr. Gillam sought an advisory opinion from APOC that would allow the provision of air travel for candidates to attend candidate forums.¹⁰ APOC staff carefully considered the request, and issued its report supporting the request.¹¹ The Commission declined to issue the advisory opinion, and instead some Commissioners made comments suggesting a belief that Mr. Gillam was attempting to make contributions without reporting them, or that an entity not permitted by law to make contributions would be doing so.¹²

In August of 2012, a 22 page complaint was filed, with 50 attached exhibits. Respondents assert that this complaint fails to provide all of the information required by 2 AAC 560.870(b). Despite this alleged failing, it was accepted for investigation by APOC staff.

On September 10, 2012, APOC Executive Director Paul Dauphinais met with Deputy Commissioner of Administration Curtis Thayer.¹³ During that meeting, Mr. Dauphinais told Mr. Thayer that APOC needed higher receipt authority, which would allow it to spend more money. According to Mr. Thayer, the stated purpose for this additional budget authority was to “get” or “ruin” Mr. Gillam. Mr. Thayer stated that Mr. Dauphinais expressed a belief that APOC should

³ Thayer Deposition.

⁴ Respondents’ Exhibit 2.

⁵ Respondents’ Exhibit 3.

⁶ Respondents’ Exhibit 6, page 2.

⁷ *Id.*

⁸ Respondents’ Exhibit 4, pages 3 – 4.

⁹ Respondents’ Exhibit 6, page 3.

¹⁰ Exhibit 7.

¹¹ Exhibit 8.

¹² Exhibit 9.

¹³ Respondents’ Exhibit 10.

not have settled with Mr. Gillam in the past. Mr. Dauphinais also indicated to Mr. Thayer that he had previously spoken with the Securities and Exchange Commission in an attempt to harm Mr. Gillam's business, McKinley Capital Management.¹⁴

According to one former staff member, the request for additional funding would not have been made without the knowledge of at least some of the Commissioners.¹⁵ APOC applies a different standard when considering Mr. Gillam's activities, or activities by related entities. Complaints against respondents are assumed to be valid, and when respondents request advisory opinions, there is an assumption that they are trying to hide something.¹⁶

Respondents note that by now the Commissioners are aware of the allegations of bias, and of the statements Mr. Dauphinais made to Mr. Thayer, but the Commission has not taken any steps to discipline Mr. Dauphinais for making those comments.

III. Discussion

A. Motion to Strike

APOC staff moved to strike portions of an affidavit from Vullnet Grevia, citing Evidence Rule 602. Staff also moved to strike statements made by Martha Transik during an employment exit interview. Respondents assert that these statements are hearsay and that Ms. Transik has not explained the basis for any statements she may have made.

Proceedings¹⁷ before the Commissioner are governed by the Administrative Procedure Act.¹⁸ Accordingly, the rules of evidence applicable in a civil court proceeding need not be followed.¹⁹ Hearsay is admissible to supplement or explain other direct evidence.²⁰ Staff's objections to the use of these statements are relevant to determining how much, if any, weight should be given to the statements, but do not justify striking them from the record.

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¹⁴¹⁴ Mr. Dauphinais denies the allegations made by Mr. Thayer. Exhibit C.

¹⁵ Respondents' Exhibit 11.

¹⁶ *Id.*

¹⁷ As noted in section III B, below, this matter is still in the investigative stage. However, rules governing the admissibility of evidence would be at least as permissive as those applicable during a formal hearing.

¹⁸ AS 44.62.330(a)(23). Procedures set out in AS 44.64.060, and regulations adopted to implement AS 44.64 may also apply.

¹⁹ AS 44.62.460(d). The parties previously agreed to use the civil rules in connection with briefing motions. That agreement is not interpreted as making the civil evidence rules applicable.

²⁰ *Id.*

B. Current Procedural Posture

It is important to note that this case is currently in the investigation phase. No investigation report has been prepared, and the Commission has not yet had an opportunity to consider whether to schedule a hearing or dismiss the complaint.²¹

By statute, the Office of Administrative Hearings is allowed to accept voluntary referrals to assist other agencies in conducting hearings and other proceedings.²² That has occurred here. APOC has asked OAH to assign an Administrative Law Judge to assist in adjudicating disputes that arise during the investigation. The assigned ALJ can provide that assistance with respect to the pending motion, but, as discussed below, the ultimate decision concerning disqualification is for the Commission to make.

C. The Commission Must Decide Whether Disqualification is Appropriate

Respondents are concerned that the commission is biased and therefore cannot fairly consider this motion and make an unbiased ruling. This is a reasonable concern, but the applicable statutes and regulations place that decision in the hands of the commission and there is no statute or regulation that allows for a binding decision from the ALJ.²³

The Commission's own regulation says that a Commissioner who may have a conflict should disclose that conflict, and that the determination of whether he or she may participate is made in accordance with the Executive Branch Ethics Act, AS 39.52.220.²⁴ Under the Executive Branch Ethics Act, the designated ethics supervisor makes the initial decision as to whether a member should be disqualified, and if there is an objection to that initial decision, the remaining members of the Commission vote on the disqualification.²⁵ Under the Administrative Procedure Act, a request to disqualify a member of the Commission would be determined by the other Commission members.²⁶ Either procedure places the final decision in the hands of the Commission, subject to any appeal to the Superior Court.²⁷

²¹ See 2 AAC 50.875(c) – (e).

²² AS 44.64.030(b).

²³ Cf. AS 22.20.020(b) & (c) (judicial officer makes the initial decision as to his or her own disqualification); AS 44.64.070(b) (ALJ makes initial disqualification determination).

²⁴ 2 AAC 50.835(b).

²⁵ AS 39.52.220(a).

²⁶ AS 44.62.450(c).

²⁷ A commissioner “may not withdraw voluntarily or be disqualified if the disqualification would prevent the existence of a quorum qualified to act in the particular case.” AS 44.62.450(c).

Since the Commission may make the decision as to whether Commission members are disqualified, it should also decide whether staff members should be disqualified.²⁸ The staff investigation is one step further removed from the adjudicative process. Staff members are employed directly by the Commission,²⁹ and the Commission supervises its own employees. It is beyond the ALJ's authority to rule that a particular staff member is disqualified from investigating a complaint.³⁰

D. Evidentiary Hearing

Both parties suggest an evidentiary hearing might be appropriate to resolve factual disputes. A hearing is not recommended.

This matter is still in the investigative stage. An evidentiary hearing at this time would interrupt and interfere with the investigation. Allowing a hearing at this time would set a precedent that would be invoked during future investigations, and could potentially invite abuse by future individuals being investigated. Individuals could insist on discovery to seek evidence of bias, and request a hearing concerning alleged bias before staff could complete an investigation. At a minimum, this would delay enforcement of campaign financing laws beyond what would be considered reasonable.

E. Whether APOC Staff Should Be Disqualified

APOC staff are investigating a complaint that asserts an improper campaign contribution was made in the form of an airplane lease allegedly at less than its fair market value. At the conclusion of that investigation, staff will issue a report and, if a hearing is scheduled by the Commission, prosecute any charges alleged. As prosecutors, staff members are not expected to be entirely neutral or detached.³¹ Instead they are permitted to be zealous enforcers of the APOC statutes and regulations. At the same time, some limits do apply, and due process concerns arise when investigators and prosecutors are motivated by improper factors.³²

Respondents' brief identifies several examples of actions taken by APOC staff which respondents believe prove bias. Differing opinions among staff as to the validity of complaints or what should be investigated, and differences between staff and the Commission, do not

²⁸ Unless that determination has already been made pursuant to AS 39.52.210.

²⁹ AS 15.13.020(i).

³⁰ If a complaint were made pursuant to the Executive Branch Ethics Act, an ALJ would conduct the hearing. AS 44.64.030(a)(32). The final decision as to whether there was a violation would be made by the Personnel Board, however, unless delegated to the ALJ.

³¹ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

³² *Marshall*, 446 U.S. at 249.

establish sufficient bias to disqualify staff members – collectively or individually – from conducting an investigation. A predisposition to suspect respondents of wrong doing is not sufficient to disqualify staff members. Allowing the subject of an investigation to derail the investigation based on the evidence presented here would hamstring APOC’s ability to investigate virtually any potential campaign violation. APOC investigators are allowed to be zealous, and they will necessarily form opinions about individuals and entities that have appeared before APOC in the past.

Respondents do assert that staff retaliated against them simply because they exercised their legal right to participate in a prior consent agreement. It would raise a due process concern if staff decided to initiate an investigation, or file a report of investigation that alleged a violation, simply to retaliate against a respondent for exercising a legal right.³³ To disqualify staff members for this type of prosecutorial vindictiveness, respondents must show both an improper motive and that no charges would be brought against respondents but for that improper motive.³⁴ Much of the evidence presented by respondents suggests that at least Mr. Dauphinais and Mr. Anderson were motivated by a belief that respondents were engaged in illegal campaign activities. That this belief may have been inaccurate does not make the motive improper. More importantly, even if some staff members are motivated by a desire to retaliate against respondents for past legal activities, the evidence does not show that there would be no investigation but for that improper motive. Absent sufficient evidence that staff are pursuing this investigation **solely** to punish respondents for prior allowable activities, staff should not be disqualified from investigating or from any future prosecution if the investigation reveals evidence to support the violations alleged in the complaint.³⁵

There is one exception to the recommendation that staff not be disqualified, and it is an important exception. Deputy Commissioner Thayer has testified under oath about statements allegedly made to him by Mr. Dauphinais.³⁶ As part of the process for preparing the state’s annual budget, Mr. Dauphinais met with Mr. Thayer to discuss APOC’s budget. Mr. Dauphinais requested additional funds for investigations. According to Mr. Thayer, Mr. Dauphinais said

there were some opportunities for further investigations could link [Mr. Gillam] to some – could link him to a mayor’s race in the borough, and if he could find

³³ *U.S. v. Wilson*, 262 F.2d 305, 314 (4th Cir. 2001).

³⁴ *Id.*

³⁵ *U.S. v. Wilson*, 262 F.2d at 316.

³⁶ Mr. Dauphinais submitted an affidavit denying the accuracy of Mr. Thayer’s testimony.

the influencing of an election, then the Securities and Exchange Commission would come in and that was a violation for McKinley Management.^[37]

Mr. Thayer was left with the impression that the purpose of the investigation into Mr. Gillam's activities was to get Mr. Gillam in trouble with the Securities and Exchange Commission, rather than investigate possible campaign contribution violations.³⁸ Mr. Dauphinais allegedly said that he intended to ruin Mr. Gillam,³⁹ and put him or his company out of business.⁴⁰

Alaska's Constitution guarantees the right to "fair and just treatment" during an investigation.⁴¹ This provision was intended to protect reputational interests which could be damaged by unfair or unjust executive investigations.⁴² If, as alleged by Mr. Thayer, Mr. Dauphinais was willing to use his position to conduct APOC investigations in an effort to ruin Mr. Gillam, or to cause problems in connection with the Securities and Exchange Commission, then there would be a risk that future investigations conducted by or supervised by Mr. Dauphinais would be conducted unfairly. There is a risk that they would be conducted to serve Mr. Dauphinais' alleged personal interests rather than to enforce the election campaign financing statutes.

Mr. Dauphinais denies making any of these statements attributed to him. However, the issue to be decided is not whether Mr. Dauphinais is *actually* biased or would *actually* conduct an unfair investigation, but whether the probability of that bias is too high.⁴³ The U.S. Supreme Court has held that a procedure that would tempt the average person to judge a case unfairly creates too high a risk and is a violation of due process.⁴⁴ Similarly, in the context of this investigation, if there is substantial evidence that would suggest to the average person that the investigator is actually biased, the risk of unfairness is too high. To require less than substantial evidence of bias would routinely permit individuals to derail or delay investigations. To require more would place too high a burden on the person being investigated. It would be rare for a person to have sufficient information to prove bias by a preponderance of the evidence without

³⁷ Exhibit 10, page 9.

³⁸ Exhibit 10, page 10.

³⁹ Exhibit 10, page 11.

⁴⁰ Exhibit 10, page 12.

⁴¹ Alaska Constitution Article I, section 7.

⁴² *Keller v. French*, 205 P.3d 299, 303 – 304 (Alaska 2009), citing *O'Leary v. Superior Court*, 816 P.2d 163, 172 (Alaska 1991).

⁴³ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

⁴⁴ *In re Murchison*, 349 U.S. 133, 136 (1955). This test asks whether the average person would be tempted, and not whether the average person would succumb to that temptation.

the ability to conduct discovery. In addition, proof would often require an evidentiary hearing. That process would also cause delays in the investigation.

In this case, respondents have presented the sworn testimony of Mr. Thayer. Mr. Thayer's statements are not self-serving, and there is no apparent reason for him to have fabricated them.⁴⁵ He also has contemporaneous notes that are consistent with his testimony. Assuming Mr. Thayer misunderstood Mr. Dauphinais' statements, something was said leaving Mr. Thayer with the impression that Mr. Dauphinais was strongly biased against Mr. Gillam. This is substantial evidence, and is sufficient to show that the probability of unfairness is too high to be permitted under Alaska's guarantee of fair and just executive investigations.⁴⁶

It is recommended that the Commission instruct Mr. Dauphinais to take no part in conducting or supervising the current investigation of respondents.

F. The Current Evidence Does Not Support Disqualifying Any Commissioner

All parties agree that an impartial tribunal is an essential component of due process. The parties disagree over whether respondents have demonstrated that the Commission is biased.

The allegation that the Commissioners are all biased is based primarily on the following: In 2012, Bush Planes sought an advisory opinion that it would be permissible to offer to provide travel for all candidates for a particular office to attend a nonpartisan debate. The Commission rejected a staff opinion that this conduct would be permitted by state law, and in doing so made comments to the effect (1) that allowing this would give Mr. Gillam influence over the person who is elected without his contribution being reported; (2) that the transportation might be offered in a way that favored one candidate over another; (3) that the transportation might be offered to attend an event that not all candidates would want to attend; (4) that providing transportation would not be neutral but instead a way of providing an otherwise prohibited campaign contribution to one or more candidates; (5) that the request was coming from someone who had been fined for attempting to skirt the rules before; (6) that providing the transportation

⁴⁵ Staff notes that Mr. Thayer is the former treasurer of Alaskans for Clean Water, an organization funded largely by Mr. Gillam, and a personal friend of one of the attorneys representing respondents. Those connections do not significantly detract from the credibility of his deposition testimony. On the other hand, these connections may have influenced Mr. Thayer's understanding of what Mr. Dauphinais actually said. Mr. Dauphinais was allegedly making statements concerning illegal activities by a person who Mr. Thayer may have viewed favorably. In that situation, a miscommunication or misunderstanding would not be surprising.

⁴⁶ This does not mean that bias has been proven by a preponderance of the evidence; only that the risk of bias is higher than what should be permitted to ensure that respondents rights to a fair investigation are fully protected.

to all candidates would allow Mr. Gillam to hide the fact that he made a financial contribution to those candidates.

Respondents also suggest that the Commission's failure to discipline APOC staff members for improper activities shows that the Commission condones those actions, which is also an indication of bias. Finally, respondents assert that the Commission was aware that Mr. Dauphinais intended to ask for a budget increase for the purpose of ruining Mr. Gillam, and must have supported that goal since it allowed him to make that budget request.

The Commission was allowed to consider granting Bush Planes' request for an advisory opinion.⁴⁷ Even though the transportation Bush Planes wanted to provide may have been entirely legal, the Commission had an obligation to question that request, and the right to be skeptical. From the transcript of the meeting, it appears that Bush Planes was asking to do something unusual, and individual Commissioners were concerned that the public might be misled or that a person's influence in the campaign might be hidden. APOC staff and Bush Plane's attorney addressed those concerns. Based on their statements, the Commission could have been satisfied that Bush Plane's request should be approved. However, the Commission might not have been fully satisfied, and even if they thought Bush Plane's requested activity was appropriate, it had no obligation to grant the advisory opinion.⁴⁸ The failure to grant this request does not show bias.

The failure to discipline Mr. Dauphinais is also not evidence of bias. First, the Commission may have imposed discipline. Personnel actions are normally kept confidential, and there is no requirement that that type of action be disclosed in opposing the pending motion. Second, Mr. Dauphinais denied making the statements attributed to him.⁴⁹ If the commission believes his denial, there is no basis for discipline. Finally, the Commission could disapprove of Mr. Dauphinais' actions and still not choose to discipline him for that. Respondents may believe that is a poor management decision, but a poor management decision does not prove bias.

The evidence presented by respondents of Commissioner bias is weak at best. But even if it were accepted that some bias existed, all of the evidence presented shows that the bias comes from the Commissioners' prior dealings with respondents in various APOC related proceedings.

⁴⁷ AS 15.13.030(10).

⁴⁸ It is harder to undo an advisory opinion, and other entities might use an opinion to justify conduct beyond what the Commission might have been comfortable approving.

⁴⁹ Knowing that a budget increase would be requested is not the same as knowing all of Mr. Dauphinais' motivation for making that request.

Reference was made to prior proceedings in the Commission meeting discussed above. In addition, there is no reason for any Commissioner to be aware of the existence of any of the respondents except from their involvement in prior proceedings. Bias that arises from prior official dealings with a person does not require disqualification.⁵⁰

“The concept of ‘personal’ bias or prejudice puts the emphasis on an attitude toward persons and does not involve an attitude about issues of fact, law, policy, or discretion.”⁵¹

To be disqualifying, personal bias must have a prior unofficial source. Thus, for instance, a decisionmaker would be disqualified if her bias were the product of a prior personal altercation with a party. Bias that has its source only in a prior official relationship between the decisionmaker and the party is not necessarily disqualifying. The Court recognizes that a decisionmaker often develops strong feelings for or against a party based on her official dealings with the party or on her official exposure to the evidence concerning the party’s behavior. The Court acquiesces in bias of this type both because it is inevitable and because the Court believes that a decisionmaker can overcome feelings toward a party that are formed in the course of performing her official duties.^[52]

Of course, if the bias from prior official dealings is strong enough to prevent the decisionmaker from overcoming his or her feelings, then disqualification is appropriate. Here, however, the Commission has entered into a consent agreement and provided favorable rulings in favor of some of the respondents in the past. This shows that the Commission can overcome any feelings of bias that might exist.

There is a presumption that the Commissioners, acting as decision makers, will serve with “honesty and integrity.”⁵³ Respondents have not rebutted that presumption and have not shown that the Commissioners cannot overcome any feelings about respondents they may have formed from past dealings with the respondents. Thus, the motion to disqualify the Commissioners from participation is denied.

G. Executive Branch Ethics Act

Respondents’ motion is focused on constitutional protections that may preclude the participation of APOC staff or Commissioners. Although respondents’ motion is mostly denied, it is important to note the other protections that exist. The legislature has enacted the Executive

⁵⁰ See *Williams v. Williams*, 252 P.3d 998, 1010 (Alaska 2011) (to prove judicial bias, claimant must show judge formed opinion based on extrajudicial sources).

⁵¹ Kenneth Culp Davis & Richard Pierce, Jr. *Administrative Law Treatise*, Volume II, §9.8 at 68 (3rd ed. 1994) (hereafter, Davis & Pierce) §9.8 at 75.

⁵² Davis & Pierce, §9.8 at 77 – 78. See also, *Hanson v. Hanson*, 36 P.3d 1181, 1184, (Alaska 2001).

⁵³ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Branch Ethics Act, AS 39.52. This act prohibits taking or withholding official action to affect any matter in which the public officer has a personal or financial interest.⁵⁴ To the extent any APOC Commissioner or employee may have a personal interest in a matter being considered, he or she is required to disclose the potential violation.⁵⁵ In addition, a public officer may not take action if the action, or inaction, is “based on an improper motivation.”⁵⁶ Both during the investigatory stage and during any hearing that may result from that investigation, it is important that all staff and Commissioners remain cognizant of any obligations they might have under AS 39.52.⁵⁷

IV. Conclusion

As discussed above, neither the Commission nor the APOC staff as a whole should be disqualified. However, there is a risk that the Executive Director might have made sufficiently intemperate statements as to lead a reasonable person to believe he may be biased against Mr. Gillam and the other respondents. The Commission should direct him to have no involvement in the current investigation.

DATED this 27th day of November, 2013.

Signed

Jeffrey A. Friedman

Administrative Law Judge

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

⁵⁴ AS 39.52.120(4).

⁵⁵ AS 39.52.210 & 220.

⁵⁶ 9 AAC 52.020.

⁵⁷ *See also* 2 AAC 50.835(b) (Commissioner with a conflict of interest, an appearance of impropriety, or who is otherwise unable to participate in an unbiased manner must state the nature of the problem on the record).