IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROBERT B. GILLAM; RBG BUSH PLANES, LLC; and MCKINLEY CAPITAL MANAGEMENT, LLC,	)	
Plaintiff,	)	
v.	)	
ELIZABETH HICKERSON, in her official capacity as Chair of the Alaska Public Offices Commission,	)	
Defendant.	)	Case No. 3AN-12-10793 CI

ORDER

I. Introduction

Before the court are defendant Elizabeth Hickerson, in her official capacity as Chair of the Alaska Public Offices Commission ("the APOC" or "the Commission"), and plaintiffs Robert Gillam, RBG Bush Planes, LLC, and McKinley Capital Management, LLC (referred to collectively as "Gillam"). Ms. Hickerson is represented by William Milks, and the plaintiffs are represented by Ronald Bliss, Timothy McKeever, and J.L. McCarrey III, respectively. Following a complaint from the public, the Commission initiated an investigation into Mr. Gillam's political activity in 2012, which Mr. Gillam argues is merely pretext masking a larger plot to ruin him financially. He asks the court to enjoin that investigation. The APOC moved to dismiss, and following Mr. Gillam's opposition and request to consider matters outside of the pleadings, this court

converted that motion to a motion for summary judgment. For the reasons listed below, Ms. Hickerson's motion is GRANTED.

Overview of the Alaska Public Offices Commission

The Alaska Legislature created the Alaska Public Offices Commission in 1974 to, among other things, adjudicate claims that individuals or organizations have violated Alaska's campaign finance laws. The Commission is a non-partisan body composed of five commissioners: two members from each of the two political parties whose candidate for governor received the most votes in the previous election for governor, and a fifth nominated by those first four.[1] The commissioners are limited to a single term, and their terms are staggered so that appointee-turnover alternates by party. While they serve, the individual commissioners' political activities are severely limited. The APOC commissioners elect a chairperson, and under the chairperson's guidance, the Commission appoints an executive director and employs the staff it deems necessary.[2] However, neither the executive director nor any staff member votes with the Commission. As long as three members are present to vote, the Commission has an effective quorum.[3]

The APOC may initiate its own investigations, but members of the public routinely file complaints with it. These complaints must be written, signed, and notarized under oath.[4] If the executive director determines that a complaint satisfies all formal requirements and makes out a prima facie case for a violation of Alaska's campaign finance laws, the office will accept the complaint and inform the accused—referred to as

1 AS 15.13.020(b), (c).
2 *Id.* (g), (i).
3 *Id.*
4 2 AAC 50.870 (c).

the "respondent."[5] The respondent is given 15 days to file an answer. After the answer but before the APOC hears the complaint, the executive director initiates an investigation.[6] The staff may request information from the respondent, but the respondent may object to the commissioners if the requests prove overly burdensome or inappropriate.[7] However, if the Commission overrules the objection, it may seek judicial enforcement of the request by subpoena if the respondent does not cooperate.[8] At the conclusion of the investigation, the staff prepares its report and submits it to the Commission, providing copies to all parties.[9] The respondent may file objections to the report within 15 days.

The Commission must hold a hearing no later than 45 days from the date of the respondent's objections. At the hearing, the Commission takes testimony from the individual who filed the initial complaint, and the APOC staff present evidence in support of the report.[10] The respondent is given an opportunity to refute the evidence and present his own evidence and testimony.[11] The Commission must issue its findings and decision within 10 days.[12] The respondent has 15 days to petition the Commission for reconsideration. The Commission will only reconsider its order if there was a substantial procedural error; if the order was based on fraud, misrepresentation, or a material mistake of fact or law; or if new evidence has been discovered.[13] The respondent may

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5 *Id.* at 870 (e).
6 *Id.* at 875.
7 *Id.* at 806(b), (c).
8 AS 15.13.045(d).
9 2 AAC 50.806(b), (c).
10 *Id.* at 891 (d).
11 *Id.*
12 *Id.* at (f).
13 *Id.* at (g).

appeal the Commission's final decision to the Superior Court under the Rules of Appellate Procedure.[14]

The respondent has due process protections under Alaska's Administrative Procedure Act ("the APA") and the APOC implementing regulations. Under the APA, any party "may request the disqualification of a hearing officer or agency member by filing an affidavit, before the taking of evidence at a hearing, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded."[15] The Commission itself will resolve the question with a final order. As with any other final order, the respondent may appeal the order determining the issue of bias to the Superior Court. The APOC's implementing regulations contain similar provisions.[16]

Parties' Positions

Robert Gillam, together with RBG Bush Planes, LLC, and McKinley Capital Management, LLC, allege that the APOC is unconstitutionally biased against them and has specifically targeted Mr. Gillam for investigation in order to ruin him. Mr. Gillam focuses on two defendants: Paul Dauphinais, APOC's executive director, and Elizabeth Hickerson, Chair of the Commission. Mr. Gillam claims that Mr. Dauphinais has pre-determined the outcome of the investigation and that Ms. Hickerson and the other commissioners either encourage this or have allowed it to occur. Consequently, Mr. Gillam argues, the agency staff and commissioners are so biased as to make a fair proceeding impossible. Thus, he asks this court to enjoin the APOC from proceeding with the investigation and to appoint a special investigator to determine whether the

[14] AS 15.13.380(g).
[15] AS 44.62.450(c).
[16] 2 AAC 50.835.

complaint against Mr. Gillam has merit. If the investigator determines that the complaint is viable, Mr. Gillam asks that it be adjudicated by an independent administrative law judge or by the Superior Court.[17]

Ms. Hickerson has moved to dismiss the claim, arguing that the relief Mr. Gillam has requested is extraordinary and unnecessary. Because the plaintiffs introduced materials outside of the pleadings, this court has converted the motion to dismiss to a motion for summary judgment. The defendants deny the allegations of bias and insist that, even if Mr. Gillam's allegations are true, the statute that establishes the Commission also establishes a complaint procedure that allows Mr. Gillam to challenge the findings of the investigators as well as the impartiality of the individual commissioners. They also assert that Mr. Gillam's request to bypass the entire APOC is unripe because he has not yet submitted to the Commission's authority, so cannot possibly have been injured. If Mr. Gillam avails himself of the various protections in the controlling statutes and still believes he has been denied due process, he may appeal the decision to the Superior Court and even seek a new trial de novo—but only *after* the administrative process has concluded. Until then, they further posit, judicial intrusion into APOC procedure would violate the separation of powers doctrine. Finally, Ms. Hickerson points out that she and the other commissioners are entitled, as quasi-judicial officers, to a presumption of integrity that can only be rebutted by a showing of credible evidence to the contrary. Until such presumptions are rebutted, the plaintiff has not stated a claim.

[17] Plaintiffs' Combined Opp. at 13.

II. Discussion

This court grants Ms. Hickerson's motion for summary judgment for three reasons: first, Mr. Gillam has available administrative due process remedies which he must, but has inexcusably failed to, pursue; second, his injury is not assured, and so his claim is not yet ripe; and third, he has not alleged facts sufficient to overcome the presumption of integrity to which Ms. Hickerson and the other commissioners are entitled. Each one of these reasons is sufficient to support dismissal of the claims against the commissioners.

A. Exhaustion of Administrative Remedies

The Supreme Court of Alaska has stated that, "[i]n applying the exhaustion of remedies doctrine," courts must ask three questions: (1) was exhaustion of remedies required; (2) did the complainant exhaust those remedies; and (3) was the failure to exhaust excused?[18] Ordinarily, "[e]xhaustion is required if a statute or regulation provides for administrative review."[19] In this case, the relevant statutes and regulations clearly provide for administrative review of claims of bias. As noted above, the plaintiffs may file a complaint with the Commission, and the Commission will issue an order resolving the matter. Once the Commission has issued a final order, the plaintiffs may then appeal that order to the Superior Court. Mr. Gillam does not argue that he has even pursued, let alone exhausted, his administrative remedies for the bias claims. Instead, he argues that he is excused from the exhaustion requirement because (a) any

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[18] *Bruns v. Municipality of Anchorage*, 32 P.3d 362, 367 (Alaska 2001).
[19] *Winterrowd v. State, Dep't of Motor Vehicles*, 288 P.3d 446, 450 (Alaska 2012).

administrative remedy would be futile, and (b) exhaustion is not required because the claims are brought under 42 U.S.C §1983.[20] Neither argument is persuasive.

i. Futility

The Supreme Court of Alaska has indeed acknowledged that a party will not be forced to submit to a futile administrative procedure. However, the Court's notion of futility and Mr. Gillam's are at odds. In *Matanuska Electrical Association*,[21] the plaintiffs were excused from exhausting administrative remedies because the regulatory commission refused to hear the relevant claims. It was impossible for the plaintiff to exhaust administrative remedies as to claims that the agency had refused to hear in the first place, so further pursuit of those claims at the agency level was manifestly futile.[22] In this case, Mr. Gillam simply argues that, due to bias, the outcome is predetermined, and so pursuing any remedy at the agency level is futile. However, he has presented this court with no evidence suggesting that the Commission would not seriously consider his bias arguments.

When confronted with a similar situation in *Standard Alaska Productions*, the Supreme Court acknowledged the futility rule but declined to extend it to that case.[23] The complainants argued in *Standard Alaska* that the Alaska Department of Revenue had already decided their case and so any administrative remedy would be futile. The Department had received a memorandum from the Attorney General suggesting that Standard's argument was untenable. Standard insisted that the Department of Revenue would certainly act in accordance with the memorandum and deny its claim. The

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20 *See* Plaintiffs' Combined Opp. at 10.
21 *Matanuska Elec. Ass'n, Inc. v. Chugach Elec. Ass'n, Inc.*, 99 P.3d 553 (Alaska 1991).
22 *Id.* at 560–61.
23 *Standard Alaska Prod. Co. v. State, Dep't of Rev.*, 773 P.2d 201, 209 (Alaska 1989).

Department responded that it would be inappropriate to decide the matter without a formal review, and "the Department has well established procedures firmly in place for the resolution of such matters."[24] The Alaska Supreme Court observed that, while an adverse decision was very likely, there was no reason to believe that the Department would not "seriously consider" the plaintiff's arguments. It is clear that the APOC has not refused to hear Mr. Gillam's bias allegations because they were never presented. Given the absence of alleged facts, as opposed to conclusory statements, supporting the assertions of bias among the commissioners, the Supreme Court would very likely conclude that, like the Department of Revenue in *Standard Alaska*, the APOC will seriously consider Mr. Gillam's arguments if they are ever presented. The recusal procedures in this case are not futile.

ii. 42 U.S.C. §1983

Mr. Gillam also argues that the exhaustion doctrine simply does not apply to claims brought under §1983. In the abstract, that argument is correct; however, applied to the facts of this case, it is unavailing. In *Diedrich v. City of Ketchikan*, the Alaska Supreme Court recognized as controlling an opinion of the United States Supreme Court which held that plaintiffs who attempt to vindicate federal rights under §1983 in state courts cannot be forced to exhaust state administrative remedies.[25] However, the line of cases that *Diedrich* represents is readily distinguishable: those cases uniformly involved injuries that had already occurred, and the question was whether and how they could be remedied. In this case, the injury is prospective, and the question is whether and how it may be avoided in the first place. In cases like these, the more appropriate

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[24] *Id.*

[25] *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991) (citing *Felder v. Casey*, 487 U.S.131 (1988)).

rule is established by two Ninth Circuit decisions: *Flangas v. Nevada*[26] and *Stivers v. Pierce*.[27] Those cases distinguish §1983 claims where the injury results from a biased tribunal. Particularly, those cases establish that a respondent has a duty to avail himself of agency recusal procedures if they are provided for by statute.[28]

Flangas dealt with the doctrine of federal abstention, and *Stivers* asked whether the plaintiff had waived his bias claims by not pursuing recusal during the agency proceeding. In *Flangas*, the court dismissed the plaintiff-attorney's claim because he failed to seek recusal of the justices who were allegedly biased against him, and the disciplinary proceeding was still ongoing. The court did not find the "exceptional circumstances" necessary to overcome the abstention doctrine. Because the plaintiff hadn't tested the recusal procedures, the court was in no position to deem them constitutionally inadequate. In *Stivers*, the court again affirmed the importance of testing the adequacy of recusal procedures—the plaintiff would have waived his biased-tribunal claim if he had failed to test a statutory recusal scheme. Because there was no such avenue available to him, the claim was not waived. So while the string of cases that *Diedrich* represents do establish that a state cannot require an injured plaintiff to exhaust administrative remedies in front of the agency that caused the injury, *Flangas* and *Stivers* illustrate that a plaintiff may not ignore procedures reasonably designed to prevent the injury in the first place.

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[26] 665 F.2d 946 (9th Cir. 1981).

[27] 71 F.3d 732 (9th Cir. 1995).

[28] It is worth noting that these are federal circuit court cases and not necessarily binding on this court. *See Totemoff v. State*, 905 P.2d 954 (Alaska, 1995). However, the Alaska Supreme Court, typically protective of Alaskans' rights under our State Constitution, has affirmed that an administrative due process claim "turns on the mainstream constitutional and administrative law analyses in the federal cases." *Amerada Hess Pipeline v. Regulatory Commission*, 176 P.3d 667, 677 (Alaska 2008).

Abstention is a doctrine of equity, and while *Stivers* used the term "waiver," it was essentially dealing with equitable estoppel. In this case, whether Mr. Gillam may be required to pursue the statutory recusal remedy is at bottom an equitable question. The concerns animating the Ninth Circuit decisions are in that regard quite compatible with this court's concerns regarding the very serious separation of powers issues that Mr. Gillam's request entails. Absent extraordinary circumstances, a court should not intervene in an agency proceeding to resolve a claim of bias if there are established procedures in place to seek recusal of the allegedly biased individuals. Ms. Hickerson has established an absence of facts indicating unconstitutional bias,[29] and Mr. Gillam has failed to show the existence of a genuine issue of material fact to overcome her motion. Consequently, the circumstances of Mr. Gillam's claim against Ms. Hickerson are not extraordinary.

This court has determined (1) that the exhaustion doctrine applies to Mr. Gillam's claim; (2) Mr. Gillam has not exhausted administrative remedies regarding the bias claim; and (3) he is not excused from the exhaustion requirements on a futility-of-remedies theory, nor because the claim is brought under § 1983. This court will not usurp the APOC's authority to initially adjudicate the bias allegations against the commissioners.

B. Ripeness

As stated, *Diedrich* does not directly apply to this case in light of the Ninth Circuit opinions cited above. However, there is a more fundamental characteristic that distinguishes Mr. Gillam's claim: ripeness. The plaintiff's alleged injury in *Diedrich* had

[29] The standard of bias is tied up with the presumption of integrity to which Ms. Hickerson is entitled, which will be addressed below.

already occurred; it was concrete and tangible. Mr. Gillam, however, alleges that his injury will occur in the future, although he believes it is a virtual certainty. This should be enough, he argues, because the ripeness requirement is relaxed in Alaska. To support this position, Mr. Gillam cites *Thomas v. Anchorage Equal Rights Commission*.[30] In that case, landlords "sought declaratory judgment and injunctive relief against the Human Rights Commission to avoid enforcement of a statute requiring them to rent to unmarried couples in contravention of the landlords' religious beliefs."[31] The Alaska Supreme Court stated that "ripeness is an aspect of standing, and we have often noted that Alaska's standing requirements are more lenient than their federal counterpart since they favor ready access to a judicial forum."[32]

Mr. Gillam argues that this case is similar because the injury in *Thomas* had not yet occurred when those plaintiffs brought their suit, though it was virtually certain that it would. The defendants point out the obvious difference: "By law, the landlord would be subject to liability the moment he refused to rent to an unmarried couple on religious grounds."[33] There was a clear penalty awaiting the plaintiffs in *Thomas*, and the Court was unwilling to "hold that the landlords must rely on [the Equal Rights Commission's] good graces and hope for the best."[34] So while in a sense, the injury in *Thomas* was prospective and thus analogous to this case, *Thomas* is distinguishable because it involved a direct challenge to an allegedly unconstitutional law. It is not likely that our Supreme Court will rely on *Thomas* to decide the case at bar.

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30 102 P.3d 937, 941 (Alaska 2004).
31 Plaintiffs Combined Opp. at 6.
32 *Thomas*, 102 P.3d at 942
33 Dauphinais Reply at 5.
34 *Thomas*, 102 P.3d at 942.

Instead, the Court would likely look to the balancing test it adopted in *Brause v. State, Department of Health and Social Services* to determine whether this case is ripe. The test addresses the central concern of ripeness, which is "whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all."[35] Thus, to determine the issue here, this court must

> balance[] the need for decision against the risks of decision. The need to decide is a function of the probability and importance of the anticipated injury. The risks of decision are measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision.[36]

In the present case, viewing the facts in the light most favorable to Mr. Gillam the scale nonetheless tips toward the Commission. Mr. Gillam argues that Executive Director Dauphinais is "out to get" him, and that Ms. Hickerson, as Chair of the Commission, "tolerates [this] conduct."[37] Whatever the strength of the factual allegations against Mr. Dauphinais, Mr. Gillam has not alleged facts sufficient to show that it is at all probable that Ms. Hickerson will completely disregard her duty as a public official to act with integrity and honesty. So, the outcome that Mr. Gillam seeks to avoid by having this court usurp the APOC's authority is at best uncertain or contingent and, indeed, may not occur at all. The need to decide the bias issues raised against the Commission and the commissioners, without further factual development, is relatively slight, especially given the administrative remedies that Mr. Gillam has never explored. On the other hand, the risk of deciding those issues is great: the plaintiffs herein seek preliminary and permanent relief that would, in any ordinary circumstance, violate the separation of powers concerns that are among the most difficult and sensitive issues a court might face.

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35 *Brause v. State, Dep't of Health and Soc. Servs.*, 21 P.3d 357, 359 (Alaska 2001).
36 *Id.*
37 Plaintiffs Combined Opp. at 4.

Mutual esteem among the judiciary, the legislature, and the executive is a necessary condition for the proper functioning of our democracy. And this case involves all three branches of our government: the APOC is an agency housed in the executive but created by the legislature and given quasi-judicial functions. Now the judiciary is asked to determine whether executive officers are competent to act with integrity, and whether the legislature adequately designed due process protections in establishing the Commission. In matters like these, it is critical to proceed with discretion. Whether the recusal scheme is constitutionally adequate to protect Mr. Gillam's due process rights is impossible to decide in the abstract; further factual development is necessary. Thus, the sensitive and difficult nature of navigating separation of powers concerns, and the obvious benefit of further factual development through the administrative process, weigh more heavily in this court's view than Mr. Gillam's need for an immediate decision on the bias allegations. Moreover, the plaintiff's ability to appeal the Commission's order directly to the Superior Court militates against the harm he fears. Having weighed the competing concerns, this court determines that the plaintiff's bias claims are not yet ripe.

C. Presumption of Integrity

Summary judgment for the Commission is appropriate based on the two procedural issues discussed above. It is also warranted because, substantively, Mr. Gillam has not alleged, let alone established, any facts sufficient to overcome the presumption of integrity the law accords to Ms. Hickerson and the other commissioners.

The Alaska case most on point is *Amerada Hess Pipeline v. Regulatory Commission*,[38] in which the Alaska Supreme Court affirmed the trial court in a per

[38] 176 P.3d 667 (Alaska 2008).

curiam opinion.[39] The Court acknowledged two distinct standards of agency bias: "the *Cinderella* standard of 'prejudgment in some measure' or the far more deferential [to the agency] 'irrevocably closed decision maker mind' standard" of *FTC v. Cement Institute.*[40] The main difference between the two cases was that, in *Cinderella*, the chairman of the FTC made public statements critical of Cinderella Charm School while its case was pending before the chairman. Those comments had already created a "constitutionally impermissible appearance of outcome-determinative prejudgment."[41] In *Cement Institute*, however, there was no record of public impropriety, and while "the Court assumed *arguendo* that the FTC had formed a prejudgment opinion of illegality, [it] found that this did not suggest the commissioners' minds were 'irrevocably closed' to testimony, cross-examination, and argument."[42] Cases like *Cinderella* "can best be viewed as responses to egregious official obnoxiousness which gratuitously undermines public trust, rather than as across-the-board standards for all agency prejudgments of arguably adjudicative facts."[43] Thus, the appropriate standard for Ms. Hickerson and the other commissioners' potential bias is not the *Cinderella* standard, but the *Cement Institute* standard, which asks whether they have, as decisionmakers, irrevocably closed minds regarding the investigation into Mr. Gillam's conduct.

Mr. Gillam has not established, however, that any commissioners harbor bias against him. This court determined above that there is no reason to conclude that Ms. Hickerson and the other commissioners would fail to seriously consider the plaintiff's

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[39] *Id.* at 669.
[40] *Id.* at 674 (citing, respectively, *Cinderella Career & Finishing School v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) and *FTC v. Cement Institute*, 333 U.S. 683 (1948)).
[41] *Amerada Hess*, 176 P.3d at 674.
[42] *Id.* at 675.
[43] *Id.* at 676.

arguments in a recusal hearing, nor is there any reason to believe that the commissioners' minds are irrevocably closed on the larger issues in the investigation. The allegations Mr. Gillam puts forth—that the commissioners tolerate Mr. Dauphinais' allegedly biased behavior—are insufficient to show even that the commissioners have prejudged the matter in some measure. As to Ms. Hickerson and her fellow commissioners, therefore, Mr. Gillam has not rebutted the presumption of integrity, and so summary judgment must be granted.

Mr. Gillam's arguments blur the line between institutional and individual bias claims, suggesting perhaps that the comparatively stronger allegations (addressed separately by this court) against Mr. Dauphinais infect the entire Commission. However, courts have primarily recognized institutional bias claims where the agency or its officers stood to reap a pecuniary windfall from an outcome adverse to the complainant.[44] Mr. Gillam does not allege that the APOC, its staff, or its commissioners stand to benefit in any tangible way from an adverse decision. Nor has he established that any particular commissioners harbor any personal animus against Mr. Gillam. The plaintiffs seek to impute Mr. Dauphinais' purported bias to the commissioners. That might, perhaps, be done by "cit[ing] to facts suggesting a practical likelihood that the commissioners [are] . . . dominated by the opinions" of Mr. Dauphinais.[45] There are no such facts to be found anywhere in the record.

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[44] *See e.g.*, *Gibson v. Berryhill*, 411 U.S. 564 (1973) (Board of Optometry, made up of private optometrists, could not constitutionally rule on a matter when the practical effect of a negative ruling would be to eliminate half the competition in the market); *United Church of the Med. Ctr. v. Med. Ctr. Comm.*, 689 F.2d 693 (7th Cir. 1982) (Medical Center Commission could not constitutionally decide whether conditions existed that would revert property from United Church of the Medical Center back to Medical Center Commission).

[45] *Amerada Hess*, 176 P.3d at 676.

III. Conclusion

For the reasons listed above, Defendant Hickerson's motion for summary judgment is GRANTED.

Dated at Anchorage, Alaska this 23rd day of May, 2013

[redacted]

Kevin M. Saxby
Superior Court Judge

I certify that on 5-22-13 a copy of the above was mailed to each of the following at their addresses of record:

J. McCarrey
W. Hilks
R. Bliss
S. Kendall
J. PTacin

[redacted]

Administrative Assistant

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROBERT B. GILLAM; RBG BUSH PLANES, LLC; and MCKINLEY CAPITAL MANAGEMENT, LLC,	)	
Plaintiff,	)	
v.	)	
PAUL DAUPHINAIS, in his official capacity as Executive Director of the Alaska Public Offices Commission,	)	
Defendant.	)	Case No. 3AN-12-10793 CI

ORDER

I. Introduction

The court now addresses the plaintiff's claims against the Alaska Public Offices Commission ("the APOC") Executive Director Paul Dauphinais. Mr. Dauphinais is represented by John Ptacin. The procedural posture for this motion is identical to Ms. Hickerson's motion. This court's previous order outlines the relevant provisions of the APOC statutory and regulatory scheme, as well as Alaska's Administrative Procedure Act ("APA"). Of particular importance, that order details the various due process protections available to Mr. Gillam at the agency level. This court finds that, while the allegations against Mr. Dauphinais are considerably stronger than the allegations against the commissioners, Mr. Gillam must first test the adequacy of the agency's recusal procedures before a ruling by the Superior Court on the matter is appropriate. Thus, Mr. Dauphinais' motion is GRANTED, so that the APOC has the opportunity to

conduct full and fair recusal proceedings preliminary to any investigation in which Mr. Dauphinais may participate.

The three issues at play in this court's previous order are at play here, and the respective analyses are the same. The issues are whether failure to exhaust, ripeness, or the presumption of integrity provide adequate grounds to dismiss Mr. Gillam's claim against Mr. Dauphinais. As this is a motion for summary judgment, the court "draw[s] all reasonable inferences in the nonmovants' favor and view[s] all facts in the light most favoring them."[1] Mr. Gillam's allegations against the commissioners, even under this deferential standard, were insufficient to rebut the presumption of integrity. The allegations against Mr. Dauphinais, however, are more troubling.

Mr. Gillam claims that Mr. Dauphinais initiated the investigation, *Natwick v. Gillam, et al.*, which is the subject of this suit, in violation of the regulatory procedure established for accepting complaints from the public.[2] Mr. Gillam alleges that, shortly after receiving the complaint, Mr. Dauphinais "met with a state official to discuss funding of the APOC," at which point Mr. Dauphinais requested a "substantial" increase in APOC funding.[3] According to Mr. Gillam,

> [Mr. Dauphinais] stated as the basis for this request that, if additional funds were made available, the APOC could 'get' Gillam and could 'ruin' Gillam, destroy him financially and personally, and could cause Gillam, who makes his living as an investment manager, such difficulties with a federal regulatory agency that his entire business might well be destroyed.[4]

Allegations such as these are serious, and Mr. Gillam provided several affidavits from witnesses substantiating them.

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1 *Brady v. State*, 965 P.2d 1, 8 (Alaska 1998).
2 Complaint at 5 (discussing 2 AAC 50.870).
3 *Id.* at 6.
4 *Id.*

II. Discussion

All three issues before the court are intertwined. Whether a party may be required to exhaust administrative remedies requires the court to ask (1) is exhaustion required; (2) did the complainant exhaust available remedies; and (3) is the exhaustion requirement excused?[5] As noted in the prior order, the exhaustion requirement applies in this case, and Mr. Gillam does not claim to have pursued any remedies at the agency level. Under extraordinary circumstances indicating agency bias, a party may be excused from exhausting administrative remedies if it appears that a violation of due process rights is imminent. However, "[a]dministrative agency personnel are presumed to be honest and impartial until a party shows actual bias or prejudgment."[6] Thus, before Mr. Gillam may be excused from agency remedies because the tribunal is unconstitutionally biased, he must rebut the presumption of integrity. Yet even assuming, *arguendo*, that the allegations against Mr. Dauphinais are sufficient to rebut the presumption, it is this court's judgment that, based on the ripeness balancing test from *Brause*, intervention into agency procedure is nonetheless improper at this time.

The balancing test from *Brause* requires the court to weigh the plaintiff's need for decision against the risk of decision.[7] In Mr. Gillam's case, the items on his side of the balance are the probability that he will be forced to submit to an unconstitutionally biased agency hearing and the importance of the financial or reputational injury that could result. At the outset, this court observes that the effect of this order is only to require Mr. Gillam to test the agency's recusal procedures. The only injury this court considers, then, is the potentially biased *recusal* hearing, which itself may be appealed.

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5 *Bruns v. Municipality of Anchorage*, 32 P.3d 362, 367 (Alaska 2001).
6 *AT&T Alascom v. Orchit*, 161 P.3d 1232 (Alaska 2007).
7 *Brause v. State, Dep't of Health and Soc. Servs.*, 21 P.3d 357, 359 (Alaska 2001).

And, the importance of that particular injury weighs much less, for example, than a falsified public report or biased investigation might. Thus, the potential reputational or financial harm that Mr. Gillam fears might result from the report or the hearing on the merits is not particularly germane to this order. Moreover, because this court has determined that the Commission itself is capable of executing its duty with integrity, the probability that the injury will occur as Mr. Gillam anticipates is correspondingly low. On the other hand, the risks of deciding that the APOC or Mr. Dauphinais may have no further involvement in the *Natwick* complaint are, as noted in the prior order, considerable. The court is reluctant to override the authority of coequal branches of state government unless justice requires it, and that has not yet been shown.

Additionally, further factual development will be valuable should a court need to address the issues again on appeal. For example, Mr. Dauphinais denies that the conversation which forms the basis for much of Mr. Gillam's complaint occurred as Mr. Gillam claims. The APOC has the time, resources, and expertise to quickly investigate this matter. Witnesses' recollection and availability will be less forthcoming the more a judicial proceeding is protracted. And in the interim, the facts giving rise to the initial complaint may become obscured. Likewise, the commissioners deny that Mr. Dauphinais pursued his alleged bias with their encouragement, approval, or even knowledge. Allowing the commissioners the opportunity to consider and rule on the matter and then inspecting that administrative record is preferable, in this court's view, to hauling the commissioners into court at the outset as a means to test their impartiality. As noted above, the only certainty this order produces is that Mr. Gillam must at least attempt to have the APOC hear the bias allegations before seeking judicial

review. Whether the APOC will act with the integrity the court presumes it has in the underlying investigation will be clearer after such a hearing.

III. Conclusion

In summary, this court acknowledges that Mr. Gillam has stated a stronger claim against Mr. Dauphinais than against Ms. Hickerson. A reviewer might well find that Mr. Dauphinais' recusal is necessary to protect Mr. Gillam's rights. On the other hand, the allegations could be completely unfounded. However, the APOC is the appropriate tribunal to make at least that initial determination, not the Superior Court. For those reasons, Mr. Dauphinais' motion for summary judgment is GRANTED.

Dated at Anchorage, Alaska this 24th day of May, 2013

[redacted]

Kevin M. Saxby
Superior Court Judge

I certify that on 5-29-13 a copy of the above was mailed to each of the following at their addresses of record:
Joe Carey
W. Wilks
R. Blasi
S. Kendall
J. Ptacin

[redacted]
Administrative Assistant

EXC 475

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROBERT B. GILLAM; RBG BUSH PLANES, LLC; and MCKINLEY CAPITAL MANAGEMENT, LLC,

PLAINTIFFS,

v.

PAUL R. DAUPHINAIS, in his official capacity as Executive Director of the Alaska Public Offices Commission; and ELIZABETH HICKERSON, in her official capacity as Chair of the Alaska Public Offices Commission

DEFENDANTS.

Case No. 3AN-12-10793 CI

JUDGMENT

IT IS ORDERED that judgment is entered as follows:

Judgment is entered in favor of Defendant Elizabeth Hickerson and Defendant Paul Dauphinais. Plaintiffs' complaint was dismissed pursuant to summary judgment orders granting the motions filed by Defendants Hickerson and Dauphinais.

Dated: 7/9/13

[redacted]
KEVIN SAXBY
Superior Court Judge

I certify that on 7-11-13 a copy of the above was mailed / ~~faxed / handed~~ to each of the following:
☐ DA ☐ PD
☐ OPA ☐ DOC
[redacted]
Judicial Assistant / ~~In-Court Clerk~~

Ab Ptacin
J. McCarrey III
Ab W. Hicks
R. Bliss
S. Kendall/T. McKeever

JUN - 4 2013

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