

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

RBG BUSH PLANES, LLC,)
)
 Appellant,)
)
 vs.)
)
 ALASKA PUBLIC OFFICES)
 COMMISSION,)
 Appellee.)
 _____) Case No. 3AN-11-13052CI

Opinion and Order on Administrative Appeal

I. Introduction

RBG Bush Planes, LLC (“Bush Planes”) appeals the decision by Alaska Public Offices Commission (“APOC”) that Bush Planes made illegal campaign contributions, in the form of airplane transportation, to two Lake & Peninsula Borough (“Borough”) Assembly candidates in 2010.¹ Bush Planes believes the decision is erroneous, that APOC abused its discretion, and that the civil penalty assessed is excessive. In addition, Bush Planes contends that it was denied due process in the proceedings before the APOC. As explained in more detail below, all aspects of APOC’s Revised Decision and Order are AFFIRMED.

¹ In the same proceeding, the candidates were found to have received illegal campaign contributions and failed to report the value of the contributions. Excerpt of Record (“Exc.”) 680-681. Neither candidate is appealing the APOC decisions.

II. Factual and Procedural Background

The prohibited campaign contributions alleged in this case are services in the form of air transportation by Bush Planes to Borough Assembly candidates Nana Kalmakoff (“Kalmakoff”) and Michelle Ravenmoon (“Ravenmoon”).²

The flights at issue in this case arise from two separate travel itineraries in September 2010. Excerpt of Record (“Exc.”) 37-43. Robert B. Gillam (“Gillam”) retains an independent consultant, George Jacko (“Jacko”), to keep in touch with Borough residents and officials regarding the Pebble Mine Project.³ Exc. 151. In September 2010, Jacko invited Kalmakoff and Ravenmoon to use seats available on Bush Planes on pre-planned trips to various Borough communities. Exc. 152. Prior to extending the invitations, Bush Planes made efforts to ensure that it would be permissible to do so, and determined that it only needed to charge the candidate passengers Bush Planes’ actual costs, which, in its view, was the cost of fuel expended. Transcript of Proceedings (“Tr.”) 130-132.

² Bush Planes is a member-managed Alaska limited liability company whose sole member is the Robert B. Gillam Revocable Trust, a trust set up for Gillam. Exc. 44-45; 225; 669. The Borough encompasses a large geographic region in Southwest Alaska and contains several small communities or villages, most of which are only accessible by small plane or boat. *Id.* at 669. Bush Planes is a holding company for the type of aircraft typically used throughout the Borough, and much of rural Alaska. *Id.* Another Gillam-controlled entity, McKinley Capital Management (“MCM”), employs pilots to fly the aircraft held by Bush Planes. *Id.* MCM is a member-managed Delaware limited liability company whose sole member is the Delaware corporation McKinley Capital Management, Inc. Mr. Gillam is the President of McKinley Capital Management, Inc. *Id.*

³ The Pebble Mine Project is a large mining operation being developed within the Borough. Gillam, a Borough resident, opposes the Project. Exc. 224-225; Transcript of Proceedings (“Tr.”) 113, 124-126.

Kalmakoff and Ravenmoon were both first-time candidates for Borough Assembly in contested races against incumbent candidates. Exc. 673-676. Kalmakoff and Ravenmoon were told in advance that they would be charged for a proportion of the fuel costs incurred. Exc. 152. Both candidates accepted, and travel on Bush Planes with one or both candidates took place on September 3-6, 2010, and on September 17-18, 2010. Exc. 670. Both candidates won their respective races in the Borough election held October 5, 2010. Appellant Brief, Exhibit A, page 3. Bush Planes sent final invoices to the candidates for reimbursement on October 25, 2010. Exc. 41-43.

First APOC Complaint

On October 28 and 29, 2010, before Kalmakoff and Ravenmoon were seated on the Assembly, the Borough filed two APOC complaints, against Jacko and Gillam, respectively, requesting an investigation into alleged campaigning and failure to file required reports. Appellant Brief, Exhibits A, B. APOC rejected the complaints, the Borough appealed, a hearing was held, and APOC affirmed its earlier rejection. Appellant Brief, Exhibits C, D, E. This is not the APOC decision being appealed in this case.

Second APOC Complaint

On or around January 1, 2011, APOC Staff initiated its own inquiry into the September 2010 trips on Bush Planes' aircraft by Kalmakoff and Ravenmoon. Exc. 33; 39. As a result of its inquiry, APOC Staff filed a Complaint against MCM, Bush Planes, Gillam, Kalmakoff, and Ravenmoon on July 7, 2011. Exc. 32-34. Pre-hearing proceedings ensued, leading to, among other things, the

submission of the pre-hearing Staff Report on August 5, 2011, and dismissal of MCM and Gillam from the proceedings. Exc. 154-204. The Staff Report concluded that Bush Planes had violated AS 15.13.074(f) by providing the use of a plane to candidates for public office at less than a commercially reasonable rate. Exc. 155; 159. Kalmakoff and Ravenmoon were accused of violating AS 15.13.114(a) by failing to pay the equivalent value of the commercially reasonable air travel back to Bush Planes. *Id.*

APOC Hearing on the Complaint Against Bush Planes and Candidates

A hearing on the APOC complaint against Bush Planes, Kalmakoff, and Ravenmoon was heard by an ALJ on December 1, 2011. Tr. 92-513. Because the determination of whether the flights were campaign contributions and, if so, the amount that may have been either donated or received, turned on the issue of “commercially reasonable” rate, the central focus at the hearing was valuing the travel services provided to the candidates. Exc. 222; Tr. 103. Three theories were advanced: cost to charter an airplane (Staff position pre-hearing); actual cost (Bush Plane/candidates’ position); and, cost for a seat on a similar flight (*i.e.*, seat value) (Staff position at hearing). Exc. 217-245; Tr. 470-473. With regard to its actual costs to fly the candidates, Bush Planes maintains that it only incurred fuel costs. Exc. 237, Appellant Brief 3-6.

The related issue of allocation of value was also addressed. APOC Staff advanced the positions that there should be no allocation of value between campaign and non-campaign purposes, and that no allocation of value could be made between candidates. Exc. 159; 229. In other words, both candidates

should each pay the entire cost for all of the travel. On the other hand, Bush Planes and the candidates argued that value of the air travel should be allocated based on purpose and between candidates. Exc. 233-241. For example, if the travel was 50% for Jacko's community outreach, and 50% for the candidates' campaigning, then Bush Planes should only be found to have made a campaign contribution for 50% of the total value, and the candidates should only be asked to reimburse the campaign contribution. And if, of the 50% allocated to campaign purposes, Kalmakoff campaigned 25% and Ravenmoon campaigned 75%, then they would be found to have accepted unreported campaign contributions in those respective amounts.

APOC Decisions and Orders

The evidentiary record was closed December 7, 2011, and on December 16, 2011, the Administrative Law Judge ("ALJ") issued a Decision and Order with the following rulings: (1) proper valuation of the services provided by Bush Planes is based on seat value; (2) allocation of value based on both purpose and candidates' proportion of use is appropriate; (3) Ravenmoon should have paid Bush Planes \$1,140, and Kalmakoff should have paid Bush Planes \$1,545; and, (4) Bush Planes is assessed a civil penalty of \$25,500. Exc. 249-261. A Revised Decision and Order issued February 8, 2012, adjusted the amount owed by Kalmakoff to \$1,685, with all other rulings intact. Exc. 668-683.

APOC's rulings were based on the ALJ's determination that Bush Planes made a contribution in violation of AS 15.13.074(f). APOC used the regulations at 2 AAC 50.250(c) and 2 AAC 50.250(a)(3)(G), as well as a 2006 advisory

opinion, AO 06-03-CD (“Perez opinion”), to define air travel as an in-kind contribution, and to determine the “commercially reasonable” rate of the air travel in this particular case. The civil penalty for the illegal contribution was imposed under AS 13.15.390, and the ALJ considered APOC’s Mitigation Criteria (rev. Sept 2010) in making his assessment.⁴

Bush Planes appeals, arguing that APOC’s decisions must be overturned because the relevant law and regulations were ambiguous and vague. In addition, it contends APOC abused its discretion and violated its due process when it considered an invalid complaint, when it failed to consider Bush Planes’ valuation theory, and when it calculated an excessive civil penalty. Bush Planes also argues APOC’s imposition of the penalty in light of Gillam’s history with APOC was an improper application of APOC’s policies.

III. Discussion

A. Standards of Review

Appeals to the superior court of APOC determinations are brought under the Administrative Procedure Act (“APA”), AS 44.62. Under the APA, the superior court review extends to the following three questions: “(1) whether the agency has proceeded without, or in excess of jurisdiction; (2) whether there was a fair hearing; and (3) whether there was a prejudicial abuse of discretion.” AS 44.60.570(b).

⁴ The Mitigation Criteria used are now APOC regulations, 2 AAC 50.855-.865 (effective Dec. 22, 2011), but they were not technically regulations when the ALJ considered their applicability to Bush Planes in this case.

Courts in Alaska apply one of four standards of review when presented with an administrative appeal:

(1) the 'substantial evidence' test applies to questions of fact; (2) the 'reasonable basis' test applies to questions of law involving agency expertise; (3) the 'substitution of judgment' test applies to questions of law where no expertise is involved; and (4) the 'reasonable and not arbitrary' test applies to questions about agency regulations and the agency's interpretation of those regulations.

Lakloey, Inc. v. Univ. of Alaska, 157 P.3d 1041, 1045 (Alaska 2007) (citing *Handley v. State*, 838 P.2d 1231, 1233 (Alaska 1992)).

APOC is a state agency created to enforce Alaska's campaign finance laws. AS 15.13.020. Alaska's campaign finance laws apply to state elections campaigns and are comprehensive in scope. The statutes govern various aspects of state elections including contributions, expenditures, and communications for the purposes of influencing the nomination or election of candidates for public office and for the purpose of influencing the outcome of a ballot proposition or question. AS 15.13.010. Pursuant to AS 15.13.030(9), APOC has promulgated regulations at 2 AAC 50, to implement and clarify the statutory provisions.

In this case, the ALJ, on behalf of APOC, concluded that Bush Planes made impermissible campaign contributions to two candidates; however, this legal conclusion turns on the disputed factual determination of the value of the air transportation, which must be evaluated based on whether substantial evidence supports the findings that were made. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support the . . .

conclusion.” *Lopez v. Adm’r, Pub. Emps. Ret. Sys.*, 20 P.3d 568, 570 (Alaska 2001). It is not the court’s job to choose or weigh evidence, but rather, only to decide whether such evidence exists. *Id.*

Whether a violation of due process occurred is a question of law that is reviewed independently by this court. *D.M. v. State, Div. of Family & Youth Servs.*, 995 P.2d 205, 207 (Alaska 2000).

Finally, the APOC’s application of its Mitigation Criteria (rev. Sept. 2010) to implicate Bush Planes’ principal, Gillam, personally, was akin to interpreting regulations. Questions about agency regulations and the agency’s interpretation of those regulations are reviewed under the ‘reasonable and not arbitrary’ standard.

B. Whether APOC properly determined Bush Planes made an impermissible campaign contribution

Under AS 15.13.074(f) a company that is neither a “group” nor “non-group entity” may make a contribution to a candidate. A “contribution” under the statute is defined, in part, as “services for which a charge is ordinarily made [. . .].” AS 15.13.400(4). With specific regard to services, a commission regulation, 2 AAC 50.250(c), provides that if services are provided “at a charge that is less than the normal charge . . . in the market,” and the lower rate is not offered to all campaigns, then there is a contribution consisting of the “difference between the normal charge . . . and the amount charged.” Another regulation, in effect at the time the flights in question were made, provides that no contribution occurs if a service is rendered to a candidate for payment “at a commercially reasonable

rate within a commercially reasonable time,” or if the service is offered at the same rate to all candidates for a particular office. 2 AAC 50.250(a)(3)(G).

It is uncontested in this case that Bush Planes is neither a “group” nor “non-group entity” as those terms are defined in AS 15.13.400. Exc. 667-678. It is also undisputed that air travel is a service for which a charge is ordinarily made, and that Bush Planes did not offer the same service to all the candidates for Borough Assembly. Exc. 675. However, under the regulation, if Bush Planes flew the selected candidates at a “commercially reasonable rate within a commercially reasonable time,” then no contribution occurred.⁵ The ALJ reasoned that if the partial fuel reimbursement Bush Planes obtained from the candidates was less than the “normal charge . . . in the market” and the “commercially reasonable rate” for the transportation the candidates received, then a contribution in violation under the law occurred. *Id.*

Where an agency interprets its own regulation, a deferential standard of review properly recognizes that the agency is best able to discern its intent in promulgating the regulation at issue. *Usibelli Coal Mine, Inc. vs. State*, 921 P.2d 1134, 1147 (Alaska 1996) (internal quotations omitted). APOC concluded that commercially reasonable in this case would be “the lowest market price that a commercial operator would charge for a single seat on an existing flight in a comparable aircraft covering the leg in question.” Exc. 672-673. APOC took into account that commercial flights are not generally available in this region of the

⁵ No argument has been raised that the amount charged by Bush Planes (fuel costs) did not occur within a commercially reasonable time.

State, and that air travel is generally accomplished by use of personal or chartered aircraft, recognizing that aircraft used by Bush Planes for the flights in question---DeHavilland DHC-2 Beaver and two Piper PA-31-350 Navajo Cheiftains---offered the added benefits of being faster, safer, and more comfortable. Exc. 671. APOC's valuation was more than Bush Plane's request of actual costs (by which it meant costs to fuel the planes only), and less than Staff's assessment, which was based on charter value to rent an equivalent aircraft.

In the absence of a regulation defining the term "commercially reasonable," both Bush Planes and APOC turned to the *Perez* Opinion. The *Perez* Opinion dealt with an incumbent governor's use of a State plane for both official purposes and re-election campaigning. To avoid an impermissible contribution by the State to the campaign, APOC advised that the cost of the campaign-related travel be reimbursed at a commercially reasonable rate. The opinion went on to hold:

[W]e provide the following method as commercially reasonable: an unrestricted, nondiscounted first class fare for any traveler who participates in the secondary or collateral campaign activity. If first class commercial travel is unavailable, payment should be at the fare for unrestricted, nondiscounted coach commercial travel. Charter rates for a comparable aircraft would be appropriate if commercial travel is unavailable to the particular destination. We do not preclude other methods, however, and leave the option open to the campaign and affected state agency to propose a rate for reimbursement that can be defended as commercially reasonable.

Exc. 3-4.

The language quoted above puts parties on notice that charter rates are the starting point for valuing travel where commercial flights are unavailable. Further, the language above indicates that APOC, while open to alternate interpretations, is the decisionmaker. Here, APOC considered the alternate positions of charter rates, fuel costs, and seat fare for an existing charter. Exc. 671-674. Based on the factual context and weighing the credibility of all the evidence, the ALJ allocated value of the contributions to each candidate based on the seat fares of the segments of travel the candidates used. *Id.* This is a reasonable interpretation of “commercially reasonable rate.”

Bush Planes also contends that because “commercially reasonable rate” is subject to agency interpretation, it is ambiguous and, therefore, unenforceable under *APOC v. Stevens*, 205 P.3d 321 (Alaska 2009). *Stevens* involved income reporting requirements by a State legislator. As a state senator, Stevens was required to submit a financial disclosure form to APOC reporting income from all sources. *Id.* at 323. In 2005, while a senator, he became a board member for compensation, plus stocks, but opted to defer all payment to a later date. *Id.* at 322. Accordingly, Stevens did not report the deferred compensation package as 2005 income. *Id.* APOC believed he was in violation of the reporting requirements and assessed a civil penalty. *Id.* at 323. At issue were definitions of “income” and “asset.” *Id.* at 324-325. The Court found that both Stevens’ and APOC’s interpretations of the reporting requirements could be upheld and were, therefore, ambiguous. *Id.* at 325-326.

The present case is distinguishable from *Stevens*. The statutes in question are not ambiguous. Under AS 15.13.074(f), corporations are prohibited from contributing to election campaigns, and under AS 15.14.400(4), a contribution is a service for which a charge is usually assessed. In addition, the terms used in the regulations --- “commercially reasonable rate” and “normal charge for the . . . services in the market” --- both suggest that value is based on the open market. The *Perez* Opinion only clarifies the terms, and nowhere does it suggest that partial, actual costs (*i.e.*, fuel only) would be appropriate valuation for air travel in Alaska.⁶ Thus, under the applicable legal authorities, Bush Planes’ interpretations of “commercially reasonable” and “normal charge” could not be upheld.

C. Whether APOC abused its discretion and violated Bush Plane’s Due Process

Bush Planes makes additional claims that APOC abused its discretion and in so doing violated Bush Planes’ due process: first, by bringing a complaint following an independent Staff inquiry; second, by considering the seat fare valuation method for the first time at the hearing; and, finally, in calculating the civil penalty. The Alaska Constitution provides that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Alaska Const.

⁶ The Opinion does state at the outset that, among many possibilities for assessing commercially reasonable rate, “[o]ne obvious method might be to determine the state’s actual costs and reimburse those costs,” but it clearly went on to specifically proscribe three preferred methods, in order of priority, for valuing air travel for purposes of campaign contributions. Exc. 3-4.

art. I, § 7. Bush Planes is entitled to due process when faced with the possibility of owing a monetary penalty.

1. The Complaint

Bush Planes maintains APOC abused its discretion and violated its due process because the Complaint heard in December 2011 was filed following an independent Staff inquiry, in violation of 2 AAC 50.450-.460. APOC says that Staff may file its own complaint, under AS 15.13.045(a) and 2 AAC 50.870(a). Due process requires that any action involving deprivation of life, liberty or property by adjudication must be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Philip J. v. State*, 264 P.3d 842, 846 (Alaska 2011) (internal quotation and alteration omitted). The independent APOC inquiry in this case led to the filing of a Complaint, followed by the mandatory Staff Report, pre-hearing discovery and motion practice, and formal evidentiary hearing before an ALJ, and therefore, did not violate Bush Planes' due process in this instance.

2. The Valuation Method Argued at the Hearing

Bush Planes also alleges that APOC violated its due process at the evidentiary hearing by failing to disclose that it intended to argue that the flights should be valued based on a seat fare rate until the very day of the hearing. Bush Planes feels its' due process was denied because it was unable to gather evidence to rebut this "new" theory. It is true that due process can be denied when a litigant is found to be in violation of charges of which they had not been accused. *Skvorc v. State*, 996 P.2d 1192 (Alaska 2000).

In this case, the allegation that Bush Planes made an improper campaign contribution by failing to charge a commercially reasonable rate for airplane travel in the Borough has never changed. The method by which “commercially reasonable rate” was measured was always going to be the topic of the evidentiary hearing, and Bush Planes was put on notice with the filing of the Complaint against it that only charging the allocated fuel costs was considered unreasonable by APOC. It appears that all the evidence bearing on APOC’s ultimate decision was presented and the parties had an opportunity to rebut it. The record remained open for seven days following the December 1, 2011, hearing, and no additional or rebuttal evidence was submitted by Bush Planes. APOC’s method for determining “commercially reasonable rate” in the context of rural Alaska where planes are commonly chartered was fair. In fact, using a charter rate based on seat value of a plane already chartered for another purpose was more favorable to Bush Planes than the charter cost method. Bush Planes was not prejudiced by APOC’s ruling; thus, no due process was denied.

3. Calculation of the Civil Penalty

Bush Planes believes that the penalty ordered is excessive, and that in assessing an excessive penalty, APOC abused its discretion.⁷ In assessing the

⁷ Bush Planes includes costs and fees with the civil penalty to come up with the ratio of 49:1. Appellant Brief at 38-40. But, costs and fees are separate from the civil penalty assessment, mandated under a separate statute subsection, and they were ordered separately from the violation/penalty issue by the ALJ. AS 15.13.390(b)(2),(3); Exc. 261-318; 335-667; 686-698. Other than to include them with the excessive civil penalty argument, Bush Planes has raised no real dispute regarding the costs and fees. See Appellant Brief at 1-2. Therefore, the court will not consider them here.

\$25,500 civil penalty, APOC was acting under the authority contained in AS 15.13.390. AS 15.13.390(a) states that “[a] person who violates a provision of this chapter [. . .] is subject to a civil penalty of not more than \$50 a day for each day the violation continues as determined by the commission, subject to the right of appeal to the superior court.”

APOC computed the civil penalty based on 255 days using a start date of October 25, 2010 (the day Bush Planes sent final invoices to candidates in commercially unreasonable amounts), and accruing through July 7, 2011 (the date of the filing of the Complaint by APOC against Bush Planes). Using this time period of 255 days, multiplied by the maximum penalty of \$50, and considering that Bush Planes committed two separate violations (one for each candidate), APOC calculated a penalty of \$25,500 ((255 x 50) x 2).

Bush Planes maintains that unlike in cases where the complaint theoretically provides the first “notice” to a party that a violation may have been committed, here, Bush Planes first had notice of a possible violation when it learned that APOC was making inquiries prior to the filing of a complaint. Bush Planes states that it was “a violation of Bush Planes’ due process rights to essentially ‘run the clock’ against Bush Planes while it was unaware that the APOC was considering that it committed a violation.” Appellant Brief at 42.

The statute under which APOC calculated the penalty, AS 15.13.390(a), provides that a \$50 per day penalty accrues “for each day the violation continues as determined by the commission, subject to a right to appeal by the superior court.” Since the statute permits APOC to determine the number of days a

reporting violation has lasted, APOC did not abuse its discretion. In addition, because APOC did not allow the violation to continue accruing into the time when the underlying violation was being administratively determined, the constitutional tolling doctrine was not implicated and Bush Planes' due process was not denied. See e.g., *VECO Int'l. Inc. v. APOC*, 753 P.2d 703, 717 (Alaska 1988) (under the "constitutional tolling" doctrine, substantial penalties should not accrue while validity of said penalties being judicially determined).

AS 15.13.390(e) gives the court discretion to suspend and set aside the penalties upon findings that the violation was first-time or not part of a pattern, was inadvertent, quickly corrected, and had no adverse impact on the campaign of another. But because Bush Planes made contributions to candidates who each won their respective, contested, elections, it would be difficult to find that the contributions had no adverse impact on the campaign of another. This court declines to exercise its discretion to suspend and set aside the penalties imposed against Bush Planes.

The legal standard for deciding that a penalty is excessive and violates due process is one of obvious unreasonableness. *VECO*, 753 P.2d at 716. The purpose of imposing a penalty against a company that is not authorized to make campaign contributions is to deter prohibited campaign contributions and encourage donations through proper channels that ensure election transparency and fairness. The maximum daily fine allowed under the statute (\$50) is designed to increase as long as the violation continues. This is not unreasonable, and is related to the goal of preventing unauthorized companies

from making prohibited campaign contributions. Under this legal standard, a large penalty, such as the one that resulted in this case, is not excessive.

D. Whether APOC properly applied its Mitigation Criteria when imposing the penalty

APOC considered its Mitigation Criteria (rev. September 2010), when it imposed the full amount, as calculated under AS 15.13.390(a). The only Criteria APOC applied was the respondent's length of experience and filing history. Here, APOC looked to Mr. Gillam's personal history before APOC. Bush Planes argues that this was an abuse of discretion because Mr. Gillam had already been dismissed from the original Complaint. Exc. 196-199. As explained in footnote 2, *supra*, Mr. Gillam controls Bush Planes. Therefore, it was reasonable and not arbitrary for APOC to attribute a certain amount of Mr. Gillam's business sophistication to Bush Planes.

IV. Conclusions

For the reasons stated above, all aspects of the administrative decision below are affirmed.

Dated this 13th day of November, 2013, in Anchorage Alaska.

Signed

Hon. Catherine M. Easter
Superior Court Judge

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