

IN THE SUPERIOR COURT OF THE STATE OF ALASKA AT KENAI

DAVID S. HAEG

Appellant,

v.

BRENT R. COLE,

Appellee.

Superior Court No.: 3KN-06-844 CI
Alaska Bar Case No. #2006F007

ADMINISTRATIVE APPEAL FROM THE ALASKA BAR ASSOCIATION
THIRD JUDICIAL DISTRICT AT ANCHORAGE

APPELLEE'S BRIEF

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INTRODUCTION

This is an appeal from an adverse fee arbitration award against Haeg after three days of hearings held in accordance with Bar Rule 40. Haeg, as a pro per litigant, has filed a fifty-five page brief which makes numerous allegations not relevant in an appeal of an arbitration award. In an appeal of an arbitration award, factual determinations cannot be appealed or reviewed by the appellate court. A. Fried Miller, Attorney at Law v. Purvis, 921 P.2d 610, 617 (Alaska 1996, AS 09.43.120 and AS 09.43.130 set forth strict limitations regarding the limits of an appeal from a decision by an arbitration panel. Haeg's brief, either ignores these statutory limitations, or provides no evidence in support of any of his arguments which fall within the

narrow scope of issues which may be appealed. The arbitration panel did make a clerical mistake in its award and this should be corrected to reflect the appropriate award of \$1,689.19 rather than \$2,689.19. In all other respects, this Court should affirm award of the fee arbitration committee.

FACTS

Haeg violated a number of fish and game laws by being involved in shooting at and killing nine wolves from an aircraft outside an area where he had been given a permit to conduct such hunts. Tr. 61-62. Exhibit 5 and 6. At the time, Haeg was a registered guide in Alaska and his shooter, Tony Zellers, was a registered assistant guide. Tr. 99. After killing the wolves, Haeg took some of the carcasses to his lodge located in the area. While flying in the area, Trooper Gibbens came across this kill zone. He landed and during the course of the investigation, found unique ski tracks in the snow consistent with Haeg's aircraft. Haeg and Zellers had met with Trooper Gibbens earlier in the month and he observed this unique ski track in McGrath. Additionally, Trooper Gibbens found particular shells which were consistent with shells Zellers told him they intended to use when they went aerial wolf hunting. Exhibit 5, 6, 11, and 15, Tr. 43.

The Troopers served a search warrant on Haeg's lodge and found several wolf carcasses. Exhibit 11 and 15. They then served search warrants on Haeg's home and for his aircraft. The Troopers seized Haeg's aircraft. Tr. 121. The Troopers also found evidence that Haeg and/or Zellers falsified wolf sealing records indicating how and where they killed their wolves. Tr. 80-81, 196.

As a registered guide, Haeg was subject to the provisions of AS 08.54.605. Tr. 234. At the time, this statute required the Division of Occupation Licenses to refuse to grant a license for five years to any guide who was convicted of violating a state hunting statute or regulation and receiving a jail sentence of more than five days or a fine of \$1,000. AS 08.54.605(a)(1). He was also subject to AS 08.54.720 which prescribes penalties for guides who commit specific game violations. Specifically, he was subject to the provisions of AS 08.54.720 (a)(1), (8), and (15). Any conviction under AS 08.54.720(a)(8) carried a minimum one year license suspension under AS 08.54.720(e), while any conviction of AS 08.54.720(a)(15) subjected Haeg to a minimum three year license suspension under AS 08.54.720 (f).

Haeg hired Cole on or about April 9, 2004. Tr. 41. Haeg signed a written plea agreement agreeing to pay Cole \$200.00 per hour to represent him in his dealing with the State. Exhibit 10. At the time he hired Cole, he had not been charged with any crimes and his spring bear hunting season was fast approaching. Tr. 243. He repeatedly informed Cole that he had worked for many years to establish his business and could not lose his guide license for five years because of these violations of Alaska's laws. Tr. 45-46, 99, 236, 239, 299. He was told from the beginning that he should expect that the aircraft used in illegally hunting the wolves would be forfeited and that he was likely going to lose his license to guide for a period of time. Tr. 46, 50, 99, 100, 237, 251. He was also told that in all likelihood, if he challenged the State's case, plead not guilty, and lost, the Court would impose a sentence of greater than five days or \$1000 fine. Tr. 239. This would cause him to lose his right to apply for his guide license for at least five years under AS 08.54.605. He was repeatedly told that he should avoid any situation that would lead to open

sentencing because of this concern. Tr. 55, 257-8, 261, 299, 322.

In order to avoid potential felony charges, and the cancellation of his spring bear hunts, which were weeks away, and to demonstrate that he was interested in an amicable resolution of his case which would limit any license revocation, Haeg was advised to and agreed to give a full statement detailing his involvement in these illegal activities. He also noted five other wolves that were killed from his aircraft outside the permit area through a map which was forwarded to law enforcement. He then gave an in depth interview with Trooper Gibbens and the assistant district attorney assigned to handle the case. TR. 16, 249. The interview was taped, but must have malfunctioned because the State never produced an understandable recording of this interview. Tr. 18, 272. Zellers likewise agreed to cooperate and gave a full tape recorded statement outlining both persons' criminal involvement in these violations. Tr. 18, 75-76. Cole later confirmed in a letter to Leaders that this statement could not be used against Haeg. Exhibit 1.

Cole represented Haeg throughout the summer and into the fall. This representation included ongoing review of discovery, continued negotiation of a possible plea agreement, and counseling on future guiding actions. Tr. 253. Cole sent a monthly bill to Haeg reflecting his time in the case. In August through October, the parties discussed a number of different scenarios to resolve this case. Tr. 254-63.

On November 4, 2004, the State filed an information and an arraignment/change of plea/sentencing was scheduled for November 9, 2004 in McGrath. Exhibit 5. On November 8, 2004, the State filed an Amended Information. Exhibit 6. Both Informations set forth Haeg and

Zellers' total criminal activity based upon their individual statements to law enforcement and the investigation conducted by law enforcement. Prior to the arraignment/sentencing, and on the evening of November 8, 2004, the parties reached an understanding on all the terms of a sentence that would be imposed on Haeg. Because further approval was needed, the parties cancelled the change of plea/sentencing portion of the hearing. Tr. 58. Haeg pled not guilty the next day preserving all of his rights to contest this matter. Tr. 270.

Settlement efforts thereafter were unsuccessful, primarily because Haeg refused to enter any plea agreement which required the forfeiture of his aircraft. Tr. 72, 105-106, 273. He thereafter fired Cole and hired Mr. Chuck Robinson who represented Haeg through the pre-trial, trial, and sentencing stage of these proceedings. Tr. 59, 90, 128. Haeg has steadfastly refused to pay the remainder of Cole's bill.

Zellers ultimately pled no contest and agreed to testify against Haeg at Haeg's trial. Tr. 68, 83. Zellers' testimony independently recounted the criminal activity of both individuals. Tr. 68, 83. It is unclear whether Haeg's statement was used in the State's case in chief. Tr. 68. Haeg, through his attorney, could have filed motions to dismiss charges, motions to suppress evidence seized in the course of the search warrants, and motions to suppress the use of his statement to law enforcement at trial. Tr. 281. Haeg requested Robinson file a motion to enforce a Criminal Rule ("CR") 11 agreement but Robinson stated he could not do so. Tr. 170. As predicted, Haeg was convicted on numerous violations of criminal law which subjected him to open sentencing by the trial judge. Tr. 279.

Haeg subpoenaed Cole to his sentencing hearing. Tr. 287. Cole contacted Robinson and

informed him that calling him as a witness would waive the attorney-client privilege and that Cole's testimony could be very detrimental to Haeg's case and ultimate sentence. Tr. 286-7 Robinson agreed. Tr. 287. Cole indicated he was available telephonically to testify if necessary. Robinson agreed to this arrangement. Cole was not called to testify telephonically at Haeg's sentencing. Tr. 287.

Haeg has since filed grievances with the Bar against Cole, grievances against the sentencing judge, and accused Trooper Gibbens of committing perjury at his trial. Tr. 40, 53, 68. In this case, he has again requested Cole be referred to criminal authorities and the Alaska Bar Association. He also seeks referral of two of the sitting fee arbitration committee members in this case for "corruption, bias, partiality, collusion, & conspiracy" without any real proof other than they signed an opinion that rejected his arguments. His actions and words at the fee arbitration hearing resulted in committee members expressing concern about their safety. Tr. 208. He claims conspiracies abound to deprive him of his right to be a guide in Alaska, causing he and his family to suffer innumerable financial and emotional hardships, although he has admitted that he knowingly and intentionally violated Alaska's game laws by shooting nine wolves from an airplane without legal authority.

At the fee arbitration hearing, Haeg did not challenge that he entered into a written fee agreement with Cole. Tr. 41. Haeg did not challenge that he agreed to pay \$200/hour for services Cole rendered as his attorney. Haeg did not challenge the time sheets submitted showing the time Cole spent representing him on the case. Tr. 48. He only challenged one travel expense for travel to McGrath which Cole acknowledged was a clerical error and should be

adjusted. Tr. 232. Finally, Haeg acknowledged that he refused to pay the remaining balance on Cole's bill which amounted to \$2,059.19. Rather, Haeg argued, and the parties sat through a three day hearing considering, whether Cole's representation of Haeg was so deficient, that he breached his ethical duty of loyalty to Haeg requiring the reimbursement of all fees paid to Cole. Tr. 93, 295-6.

The fee arbitration award unanimously rejected Haeg's arguments in a clear and succinct written decision. See Fee Arbitration Decision and Award. The fee arbitration decision instead awarded Cole an amount that was earned but not paid less the clerical error for the travel expense. Unfortunately, the panel made a clerical error and awarded Cole \$1,000 more than he was entitled to receive under the terms of his contract with Haeg. This clerical error should be changed in accordance with AS 09.43.130. In all other respects, the written decision should be affirmed.

STANDARD OF REVIEW ON APPEAL

The usual rule applied by the Alaska Supreme Court is to give great deference to the arbitrator's findings of both fact and law. As a matter of both policy and law, the court is generally "loathe to vacate an award made by an arbitrator." Department of Pub. Safety v. Public Safety Employees Ass'n, 732 P.2d 1090, 1093 (Alaska 1987). The proper standard of review of an arbitration award depends on the basis of the arbitration. For arbitrations conducted pursuant to the Alaska Uniform Arbitration Act (UAA), the standard of review is highly deferential. Breeze v. Sims, 778 P.2d 215, 217 (Alaska 1989). An Alaska Bar Association fee arbitration dispute incorporates provisions of the UAA. Alaska Bar Rule 40(a)(2).

AS 09.43.120 and AS 09.43.130 define the superior court's power to review and either vacate or modify an arbitration award. Anchorage Medical and Surgical Clinic v. James, 555 P.2d 1320, 1321 n.3 (Alaska 1976). Under AS 09.43.120, a superior court may only review or vacate an arbitration award if (1) the award was procured by fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of a party; (3) the arbitrators exceeded their powers; (4) the arbitrators refused to postpone the hearing upon sufficient cause being shown for postponement or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of AS 09.43.050, as to prejudice substantially the rights of a party; or (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under AS 09.43.020 and the party did not participate in the arbitration hearing without raising the objection.

Additionally, under AS 09.43.130, a reviewing court may only modify an award if (1) there was an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to in the award; (2) the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) the award is imperfect in a matter of form not affecting the merits of the controversy. This Court's authority to review the fee arbitration award in this case is statutorily limited to the situations noted above.

On the other hand, factual determinations made by the fee arbitration panel are not subject to review. See e.g. Breeze v. Sims, 778 P.2d 215 (Alaska 1989) ("Whether there was a

fee limit, and whether that limit was exceeded were questions for the arbitration panel to decide. These findings are not subject to judicial review even if the factual determinations were grossly in error.”); A. Fred Miller, Attorneys at Law, P.C., v. Purvis, 921 P.2d 610, 617 (Alaska 1996) (“We reaffirm, therefore, that appeals on the merits from Committee decisions will not be allowed.”) Both statutory restrictions and Alaska case law clearly limit the right of either an attorney or a dissatisfied client from appealing an adverse ruling by a fee arbitration panel. Id., at 616. (“Finally, we find unpersuasive the position of petitioner and the Association that the unappealability of Committee determinations is unfair to lawyers. If that is unfair, it is at least equally unfair, for the client similarly has no appellate right.”)

LEGAL ARGUMENTS

1. SUMMARY

A review of Haeg’s appeal brief reveals that his concerns can be summarized as follows: the fee arbitration panel erred in failing to determine that Cole breached his duty of and advocacy and loyalty to Haeg by not enforcing a Criminal Rule 11 agreement (Haeg’s brief 3-8); by not enforcing an immunity agreement (Haeg’s brief at 10-24); by not moving to suppress the search warrants (Haeg’s brief at 24-26); by not advising him about getting back his aircraft (Haeg’s brief at 26-29); and by not honoring a subpoena for Haeg’s sentencing (Haeg’s brief at 29-31).¹ Haeg then argues that the fee arbitration panel was corrupt by citing references to the panel’s written decision that he disagrees with (Haeg’s brief at 45-54).

Haeg’s arguments in his Brief from pp 3-44 are simply an attempt to appeal the factual determinations made, or not made as the case may be, by the fee arbitration panel. As noted

above, factual determinations are not appealable. The remaining arguments regarding the corruption of the panel members are simply disguised arguments for Haeg's disagreement with the written decision, without any proof of fraud or corruption as required under case law. There is no basis for overturning the fee arbitration award.

2. ANALYSIS

A. Allegations of Cole's Deceit and Perjury Regarding Enforcement of a Criminal Rule 11 Agreement.

Haeg's first argument alleges that Cole did not advise or enforce a CR 11 Agreement between the parties. He raised these same issues before the fee arbitration panel at the hearing. This argument formed the basis for his request that this should be referred to Discipline Counsel. The fee arbitration panel rejected this contention. Written Decision at 4.

This decision cannot be appealed since it is based on a factual determination found against Haeg and in favor of Cole. A. Fred Miller, Attorneys at Law, P.C., v. Purvis, 921 P.2d 610, 617 (Alaska 1996) ("We reaffirm, therefore, that appeals on the merits from Committee decisions will not be allowed.") Whether there was a meeting of the minds before November 8, 2004, and what the terms and conditions were, if any, were all factual determinations that was addressed at the fee arbitration hearing. None of these determinations can be appealed.

Additionally, whether Cole should have advised Haeg to move to enforce any agreement or should have done so was moot because Haeg fired Cole and hired Robinson. Robinson's investigator interviewed Cole about the alleged CR 11 agreement and Haeg was free to file a

¹ Pages 32-44 of Haeg's brief appear to be similar arguments to those contained in page 3-31.