

motion to enforce this agreement prior to trial. He apparently never did although the record was not clear. Finally, even if Haeg had been successful and enforced a deal that called for "open sentencing", he would have faced the same judge in a situation he later found himself after he was convicted at trial, who would have likely imposed the same severe sentence. Written Decision and Award at 4.

Simply put, there was support in the record for the findings on this issued by the Written Decision. For these reasons, Haeg's argument must be rejected.

B. Allegations of Time Prejudice.

Haeg next argues he was prejudiced by the failure of Cole to advise Haeg of a plea agreement that never existed. Arguments about whether he had a plea agreement or the type of agreement and whether it was enforceable are all factual issues which are not reviewable. 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 and Award at 2-4.

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.") For these reasons, Haeg's argument must be rejected.

C. Allegations of Information Prejudice.

Haeg next argues he was prejudiced by giving an interview to law enforcement before he had a plea agreement, and then the use of statement in the presentation of charges by the State.

Arguments about whether he should have given an interview prior to receiving a plea agreement are all factual issues which are not reviewable. 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 acknowledged there was a rational basis advising a client to cooperate with law enforcement without a plea agreement. Written Decision at 1-2.

Cole determined that Haeg had little to no defense to the several hunting violations which could lead to Haeg losing his guide license and business for five years, an outcome Haeg repeatedly refused to accept. In order to engage in damage control and show good faith, Cole advised Haeg to cooperate with law enforcement officials and advise them of the extent of his criminal activity. Ultimately, Haeg changed course when he fired Cole and hired Robinson and demanded to present his case for a jury trial. As was noted at the hearing, when a person changes course in the middle of his or her case, unintended consequences can and do occur. Haeg ultimately walked away from an offer to settle his case which would have allowed him to begin guiding in the fall of 2005, in favor of going to trial in an attempt to receive a complete acquittal from a McGrath jury. His decision resulted in him losing his right to be a guide for five years which now forms the basis for his anger against Cole and the system.

This argument is simply an attempt to appeal the factual determination made by the fee arbitration panel. This determination 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.”) For these reasons, Haeg’s argument must be rejected.

D. Allegations of Financial Prejudice.

See Cole’s Argument in Section 2-3 supra. Again Haeg had the opportunity to attempt to enforce any CR 11 agreement he believed the State broke by having Robinson file the appropriate motion. Nothing Cole did while representing Haeg precluded him from directing his attorney to file this motion. The factual findings on this issue cannot be appealed.

E. Allegations of Timing Regarding Immunity Agreement.

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.”) Haeg argued this point before the fee arbitration panel and their decision expressly rejected it by noting that the panel was “presented no other evidence to support a finding that Mr. Cole’s representation of Mr. Haeg was so deficient that no fee is due” and the panel “finds no basis for referral to discipline counsel.” Written Decision at 4.

Additionally, the testimony was that both Cole and Fitzgerald believe that the statements by Haeg and Zellers to law enforcement officials could not be used against them at trial. Cole wrote a letter emphasizing that point to Leaders. Exhibit 1. Haeg then ultimately fired Cole after the arraignment. Haeg, through Robinson, then had every opportunity to then file a motion to preclude the use of his statement at trial, and/or file a motion to dismiss. As noted at the hearing, however, was that the State made a deal with Zellers to testify which made the issue

moot, because at that point, the State could present Zeller's testimony to support all the charges without referring to Haeg's statement. There was no proof presented at the fee arbitration hearing that the State used Haeg's statement in its case in chief and, if it did, why Robinson did not challenge it in light of Cole's letter to Leaders.

The arbitration panel's factual determination not to find any violation cannot be appealed and was supported by the evidence.

F. Allegations Regarding Cole's Failure to Challenge the Search Warrant.

Next Haeg appears to allege Cole violated his oath of loyalty and advocacy by failing to challenge the validity of the search warrants which were issued for the seizure of evidence at his cabin, at his house, and for his airplane. 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 and Award at 2.

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 Cole should have challenged the search warrant was a factual determination that was addressed at the fee arbitration hearing. This determination can be appealed.

Additionally, nothing Cole did precluded Haeg from filing a motion to suppress evidence seized pursuant to the search warrants after he fired Cole and hired Robinson. Haeg was free to

file a motion to suppress prior to trial. He apparently never did although the record was not clear. Finally, even if Haeg had wanted to challenge the statements contained within the probable cause portion of the search warrant, he would have lost all leverage in settling his case without losing his guide license for five years.

Simply put, there was support in the record for the findings on this issued by the Written Decision. For these reasons, Haeg's argument must be rejected.

G. Allegations Regarding Haeg's Right to Recover His Aircraft.

Haeg next argues that he was not properly advised that he had a right to recover his seized aircraft which breached a duty of loyalty and advocacy. Haeg argued this point before the fee arbitration panel and their decision expressly rejected it by noting that the panel was "presented no other evidence to support a finding that Mr. Cole's representation of Mr. Haeg was so deficient that no fee is due" and the panel "finds no basis for referral to discipline counsel." Written Decision and Award 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.")

Additionally, this argument is not legally correct. AS 16.05.190 and AS 16.05.195 allow the seizure and forfeiture of any aircraft used in or in aid of a violation of this chapter or regulation upon the conviction of the offender of a violation of Alaska's fish and game laws or guiding laws. AS 12.36.020 precludes the return of seized property if the property is in custody in connection with an official investigation of a crime or is subject to the forfeiture laws of the

state. Haeg was not precluded from engaging in his livelihood after the forfeiture of his aircraft as he was able to demonstrate by conducting his 2004 spring bear hunts with his other aircraft. Additionally, by contesting the seizure of his aircraft, he would have lost his ability to negotiate a lesser loss of his guide license which he was facing.

Simply put, there was support in the record for the findings on this issued by the Written Decision. For these reasons, Haeg's argument must be rejected.

H. Allegations Regarding Cole's Refusal to Obey Subpoena.

Haeg next argues that Cole's failure to obey a subpoena evidences his breach of his duty of loyalty and advocacy. Haeg argued this point before the fee arbitration panel and their decision expressly rejected it by noting that the panel was "presented no other evidence to support a finding that Mr. Cole's representation of Mr. Haeg was so deficient that no fee is due" and the panel "finds no basis for referral to discipline counsel." Written Decision and Award 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.")

Additionally, Cole did not represent Haeg at that time—Robinson did. Cole owed no duty of loyalty or advocacy to Haeg at that time. Cole did contact Robinson and discuss his potential testimony with Robinson and advised Robinson that his testimony would not necessarily be favorable for Haeg and he would truthfully answer any questions presented by Leaders. Robinson agreed. Cole asked that in light of this, he not have to travel to McGrath, but

rather be available telephonically. Robinson agreed. Cole stood by to testify telephonically but was never called.

Again there was support in the record for the findings on this issued by the Written Decision and Award. For these reasons, Haeg's argument must be rejected.

I. Miscellaneous Arguments.

As noted above, Haeg's arguments from pp. 32-44 are simply re-hashing of the same arguments raised in pp. 3-31. Cole incorporates his arguments set forth in Sections A-H to address these same issues.

J. Allegations of Corruption of the Fee Arbitration Panel.

Finally, Haeg alleges corruption on the part of the fee arbitration panel and requests referral of the two lawyer members of panel to the discipline counsel for "corruption, bias, partiality, collusion, and conspiracy." Haeg brief at 54. A review of the basis for these claims is simply that he disagrees with the written decision issued by the panel. His argument is again without merit and should be denied.

First Haeg claims that the written order is obviously incorrect because it awarded money to Cole when he never asked for money and had written it off. Again, Haeg's argument is misguided. By filing a petition for fee arbitration, Haeg put not only the fees he paid Cole at issue, but he also put at issue the fees he failed to pay. In this case he previously admitted not paying \$2,062.19 in his petition for arbitration for fee dispute. Haeg did not dispute the reasonableness of Cole's hourly rate or the amount of time charged for the legal services. Written Decision and Award at 1. The panel received the billing statements into evidence and

determined that Cole charged \$13,389.00 and Haeg only paid \$11,329.81, a difference of \$2,059.19. The Panel noted, and Cole agreed, that this amount should be reduced by \$370 for a clerical error related to a flight expense. Thus Haeg owed Cole \$1689.19, or exactly \$1,000 less than the fee arbitration panel awarded. This correction can and should be made to the Decision and Award. See AS 09.43.130 (a)(1). In all other respects, the award should be affirmed.

The fact that Cole waived or did not ask for the amount that Haeg refused to pay does not evidence corruption or fraud, it simply evidences a determination of what was at issue between the parties at the fee arbitration hearing: whether Haeg was required to pay the fees he contracted with Cole to pay. The panel ruled against Haeg and in favor of Cole and determined that Haeg was required to pay the fees he contracted to pay. Written Decision at 1-4. This decision is not reviewable, except to the extent conceded in this brief. Whether Cole seeks to have this decision confirmed, *which he does not intend to do*, was a decision that was not before the panel. The panel properly resolved the issue before it and nothing about its decision supports a claim of fraud or corruption.

Second, a party that contends that an arbitration award was procured by fraud or any other undue means must specifically set forth evidence to support this claim other than simple disagreement with the factual determinations that were made. This point has been reaffirmed by the Alaska Supreme Court on several occasions. For instance in Alaska State Housing Authority v. Riley Pleas, Inc., 586 P.2d 1244, 1247-8 (Alaska 1978), the Court noted:

ASHA's next claim of error is that several items of the award were procured by fraud and undue means which are statutory grounds for vacating an award under AS 09.43.120 (a)(1). In reviewing this aspect of ASHA's appeal, it is evident that the essence of its claim

is that the arbitrators made gross errors in determining the facts. ASHA, however, cites no authority for its contention that the "fraud or other undue means" standard of the statute authorizes review for gross errors. We hold that it does not.

There is a substantial difference between procurement of an award by fraud or other undue means and an award in which the arbitrators have allegedly made large mistakes. The former instances connote affirmative wrongdoing by a party to the arbitration and often by an arbitrator; gross error carries no such connotation. Moreover, fraud or undue means in the procurement of an award does not require a review on the merits of the controversy; a review for gross errors is a review on the merits.

Later, the Supreme Court reiterated this standard in Law Offices of Vincent Vitale, P.C. v.

Tabbytite, 942 P.2d 1141, 11147 (Alaska 1997).

Tabbytite's argument in her brief on appeal is an almost verbatim reproduction of the argument she made in opposition to the motion to confirm the award before the trial court. No instance of fraud is specified in this argument. Fraud, in fact, is not mentioned. Fraud, even in an initial pleading, must be averred with particularity. Alaska R. Civ. P. 9(b). It follows that a confirmation award may not be resisted merely by reciting without specificity that fraud existed. Further, at the motion stage, evidentiary support for particular fraud claims must be presented. See, e.g., Alaska R. Civ. P. 56(c); McHugh v. Church, 583 P.2d 210, 217 (Alaska 1978). We conclude therefore that Tabbytite did not present a legally sufficient claim of fraud as a defense to the motion to confirm.

Haeg's brief is devoid of any specific evidence of fraud or undue means. His argument is completely focused on his argument that the written decision contains gross errors. Case law notes that this argument cannot be sustained on appeal and must be rejected.

CONCLUSION

Haeg filed a petition for arbitration of fee dispute. When he did so, he placed the entire issue of fee payment before a fee arbitration panel and agreed to be bound by its decision with limited rights on appeal. The panel issued a decision which was supported by the record and within its powers with the exception of one clerical error.

Haeg's appeal is generally an attempt to overturn the factual determinations which were made against him. These factual determinations may not be appealed. There was no evidence of fraud or undue means presented in Haeg's brief. Therefore, with the exception of the clerical error, the Decision and Award by the fee arbitration panel dated August 26, 2006 should be affirmed.

DATED this 16th day of April, 2007, at Anchorage, Alaska.

MARSTON & COLE, P.C.

By: 

Brent R. Cole

AK State Bar No. 8606074