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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

DAVID HAEG,)	
)	
Applicant,)	
)	
vs.)	
)	CASE NO. 3KN-10-1295 CI
STATE OF ALASKA,)	
)	
Respondent.)	
_____)	

DECISION ON MOTION TO REINSTATE MASTER GUIDE LICENSE

Background: On September 30, 2005, David Haeg ("Haeg") was sentenced in district court following his conviction by a jury of certain criminal charges. Prior to the criminal charges Haeg held a master guide license issued by the Alaska Big Game Commercial Services Board. His sentence included revocation of his master guide license for five years. Court form CR-64 (2/05), entitled "Judgment - Fish and Game," was used. Separate judgments were entered with the 5-year revocation for each of Counts I - V. On appeal, the Alaska Court of Appeals held in pertinent part:

[W]e conclude that [Judge Murphy] meant to suspend the license for a specified period of time rather than to revoke it permanently. **We therefore order the district court to modify the judgments in this case to show that Haeg's guide license was suspended for five years.**

Haeg v. State, not reported, 2008 WL 4181532 *11 (Alaska App. 2008) (emphasis added).

On remand, on January 26, 2009, the sentencing court entered five amended judgments stating that the defendant's guiding license was suspended for 5 years, effective September 30, 2005.

When the five years expired, Haeg sought reinstatement of his master guide license. The Big Game Commercial Services Board ("Big Game Board") within the Division of Occupational Licensing did not reinstate his license, and instead informed Haeg that he would need to apply anew for a new guide license.

Haeg claimed, without dispute, that he earned a living for himself and his family through his Master Guide license.

APPLICABLE LEGAL STANDARDS

In the Haeg decision the Court of Appeals discussed a suspension and a revocation under AS 08.54.720(f)(3) given the authority in AS 12.55.015(c). AS 08.54.720(f) authorizes the court to order the "board" (meaning the Big Game Board) to "suspend" or "to permanently revoke" a guide license, depending upon the offense.

AS 01.10.040 (a) addresses how language used in statutes should be interpreted, which is according to the common and approved usage unless the Legislature has provided a definition or the terms are technical, in which case the special meaning applies.

Technical words and phrases and those that have acquired a peculiar and appropriate meaning, whether by legislative definition or otherwise, shall be construed according to the peculiar and appropriate meaning.

AS 01.10.040. Chapter 08.54 does not provide a definition of the words suspend, suspension, revoke, or revocation. The ordinary and customary meaning of the verb "suspend" includes "5. to bring to a stop, usu. for a time: to suspend payment. 6. to cause to cease for a time from operation or effect, as a law, privilege, or service: *to suspend ferry service*. 7. to debar, usu. for a limited time, from office, membership, school attendance, etc., esp. as a punishment." Random House Webster's College Dictionary, 1991. The meaning of the noun "suspension" is similar. The ordinary and customary meaning of the

verb "revoke" includes "1. to take back or withdraw, annul or cancel; *to revoke a license.*"

The meaning of the noun "revocation" is similar.

Black's Law Dictionary, Eighth Edition, defines "revocation" in pertinent part as follows: "An annulment, cancellation, or reversal, usu. of an act or power." Black's Law Dictionary defines "suspension" as follows:

1. The act of temporarily delaying, interrupting, or terminating something <suspension of business> <suspension of a statute>. ...
3. The temporary deprivation of a person's powers or privileges, esp. of office or profession; esp., a fairly stringent level of lawyer discipline that prohibits the lawyer from practicing law for a specified period, usu. from several months to several years <suspension of the bar license>. • Suspension may entail requiring the lawyer to pass a legal-ethics bar examination, or to take one or more ethics courses as continuing legal education, before being readmitted to active practice.

Case law in other jurisdictions has distinguished between the meaning and effect of suspension versus revocation. For example, the owner of an adult cabaret in Washington challenged a city decision to revoke the cabaret license based on a determination that it was a public nuisance. The owner argued the license revocation was a prior restraint on protected expression, namely, nude dancing. The owner also argued the statute was overbroad and vague. The appellate court agreed that a law is overbroad if it "sweeps within its prohibitions" activities that are constitutionally protected. However, the court found that the statutory standards of conduct for adult cabarets did not sweep any protected expressions within the prohibitions. The court addressed the distinction between suspension and revocation of a license:

In issuing the revocation here, the Examiner considered license suspension as an option and considered that there was a moratorium on issuance of new licenses. But the Examiner ultimately decided not to grant a suspension primarily because Heesan did not produce any explanation to warrant suspension. Instead, the Examiner noted, Heesan had acted in a systematic way to permit unlawful conduct.

Heesan Corp. v. City of Lakewood, 75 P.3d 1003, 1007 (Wash.App. Div. 2 2003).

In contrast to the result in the revocation setting in the Heesan case, the Alaska Court of Appeals remanded the Haeg case for the sentencing judge to impose a suspension rather than a revocation of Haeg's master guide license. The Alaska Supreme Court has identified such a license as deserving constitutional due process of law protection. In Herscher v. State, Dept. of Commerce, 568 P.2d 996 (Alaska 1977), the Alaska Supreme Court held:

We find that Herscher's proprietary interest in the hunting guide license is of sufficient importance to warrant protection under constitutional requirements relating to due process of law. In Frontier Saloon, Inc. v. Alcoholic Beverage Control Board, 524 P.2d 657, 659-660 (Alaska 1974), we held:

It has long been recognized that an interest in a lawful business is a species of property entitled to the protection of due process. . . . This interest may not be viewed as merely a privilege subject to withdrawal or denial at the whim of the state Neither may this interest be dismissed as de minimis. A license to engage in a business enterprise is of considerable value to one who holds it. (footnote and citations omitted)

In addition, in Alaska Board of Fish and Game v. Loesche, 537 P.2d 1122 (Alaska 1975), we considered a due process claim by Loesche relating to the suspension of his guide license. While we found it unnecessary to adjudicate the full scope of protections required by due process of law, by implication we found the requirements of adequate notice and opportunity for a hearing were required. 537 P.2d at 1125.

Herscher v. State, Dept. of Commerce, 568 P.2d at 1002.

In another state in another context an appellate court noted that the driver's license statute in that state authorized post-suspension examination prior to terminating suspension of a license. In addressing the nature of the procedural due process for the licensee, the court cited specific statutory authority:

FN4. Section 13101 provides: "When used in reference to a driver's license, 'revocation' means that the person's privilege to drive a motor vehicle is terminated and a new driver's license may be obtained after the period of revocation."

Section 13102 provides: "When used in reference to a driver's license, 'suspension' means that the person's privilege to drive a motor vehicle upon a

highway is temporarily withdrawn. The department may, before terminating any suspension based upon a physical or mental condition of the licensee, require such examination of the licensee as deemed appropriate in relation to evidence of any condition which may affect the ability of the licensee to safely operate a motor vehicle."

....
By its enactment of various provisions of the Vehicle Code, the [California] Legislature has carefully delineated, according to the seriousness of the offenses, the disabilities that are to be suffered by those convicted of drunk driving. As relevant here, these disabilities include suspension or revocation of a driver's license for various periods of time. Under this statutory scheme, neither a prior record of drunk driving nor a past refusal of insurance nor a prior suspension or revocation of a driver's license disqualifies a citizen from owning or driving a vehicle provided the legal disability has been cured and the citizen holds a valid driver's license. (See §§ 13101, 13102[.]) Accordingly, plaintiff implicitly argues that the past legal transgressions of citizens, even though cured in the eyes of the Legislature, should disqualify them from renting cars.

However, we think this detailed statutory scheme reflects a careful balance struck by the Legislature between the dangers of drunk driving and the recognition that driving a car may be "essential in the pursuit of a livelihood." (*Bell v. Burson* (1971) 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90, 94; *Rios v. Cozens* (1972) 7 Cal.3d 792, 796, 103 Cal.Rptr. 299, 499 P.2d 979.) We see no reason to disturb this carefully considered balance.

Osborn v. Hertz Corp., 205 Cal.App.3d 703, 710-11, 252 Cal.Rptr. 613, 617 (Cal.App. 3 Dist. 1988).

Haeg argues that suspended attorneys are not required to retake the bar examination, and he should therefore not be required to apply anew or take the guide examination again. It is true that suspended attorneys as well as disbarred attorneys normally need not re-take the bar examination. See Alaska Bar Rule 29. Except for interim suspensions based on convictions that are reversed or set aside (Alaska Bar Rule 26(f)), disbarred and suspended lawyers are subject to conditions before their license to practice law is reinstated. Suspended attorneys seeking reinstatement must file a verified petition for reinstatement containing certain information. Alaska Bar Rule 29(b). The first requirement for the petitioner is a verified statement that the suspended/disbarred attorney has met the

terms and conditions of the order imposing suspension or disbarment. Alaska Bar Rule 29(b)(1). The Alaska Supreme Court has acknowledged and approved conditions for reinstatement of suspended attorneys. For example, in one such recent case, the court wrote:

The Disciplinary Board of the Alaska Bar Association, based on its adoption of an area hearing committee's findings of fact and conclusions of law and a final report of recommended sanctions, recommended that attorney Wexley William Shea be suspended from the practice of law for 25 months and be subject to certain conditions for reinstatement.

In re Shea, 251 P.3d 357 (Alaska 2011) (held; affirmed). Similarly, with regard to another suspended attorney, the court held:

We also accept the Disciplinary Board's recommendations for conditions of reinstatement. To be reinstated, Brion must complete twelve hours of Bar Association continuing legal education classes relating to law-office management and accounting. During the two years following his reinstatement, Brion also must: (1) retain an office manager (who may not be a relative or a person with a direct financial interest in his practice) with appropriate law-office experience to assist in billing, case management, and trust account management; (2) hire a licensed and insured certified public accountant to oversee all general and trust accounts of the firm and to provide annual written reports to the Bar; and (3) establish a mentor relationship with an attorney approved by the Bar Association and consult with that mentor bi-weekly, for no less than fifteen minutes per meeting, about case management issues.

In re Disciplinary Matter Involving Brion, 212 P.3d 748, 756 (Alaska 2009).

Alaska is not unique in conditioning the reinstatement of suspended or revoked lawyers. A conditional reinstatement was imposed on appeal in a recent proceeding in Wisconsin. The court rejected the referee's rejection of the lawyer's petition for reinstatement following his 1992 petition for voluntary revocation of his license (because of embezzlement) and held:

¶ 49 IT IS ORDERED that the petition for reinstatement is granted and the license of David V. Jennings III to practice law in Wisconsin is conditionally reinstated effective the date of this order.

¶ 50 IT IS FURTHER ORDERED that the conditions set forth in this order, including compliance with the current Continuing Legal Education requirements, are imposed on the license of David V. Jennings III to practice law in Wisconsin. If he fails to comply with the conditions required by this order and absent a showing to this court of his inability to do so, the license of David V. Jennings III to practice law in Wisconsin shall be suspended until further order of the court.

In re Disciplinary Proceedings Against Jennings, __ N.W.2d __, 2011 WL 2474282, 11 (Wis. 2011). In its review of a referee's recommendation to reinstate a lawyer's license to practice after a suspension, the Supreme Court of Wisconsin held:

¶ 13 After review of the record we conclude that Selmer has established by clear, satisfactory, and convincing evidence that he has satisfied all the criteria for reinstatement. Accordingly, we adopt the referee's findings of fact and conclusions of law and we agree with the referee's recommendation that Mr. Selmer's license to practice law in Wisconsin be reinstated. We conclude further that he should be required to pay the costs of this reinstatement proceeding.

¶ 14 IT IS ORDERED that the petition for reinstatement of the license of Scott E. Selmer to practice law in Wisconsin is granted, effective the date of this order, subject to compliance with current continuing legal education requirements.

¶ 15 IT IS FURTHER ORDERED that within six months of the date of this order Scott E. Selmer pay to the OLR the costs of this proceeding. If the costs are not paid within the time specified, and absent a showing to this court of his inability to pay the costs within that time, the license of Scott E. Selmer to practice law in Wisconsin shall be suspended until further order of the court.

In re Disciplinary Proceedings Against Selmer, 698 N.W.2d 695, 697 (Wis. 2005). In another case the Supreme Court of Wisconsin imposed an additional two-year suspension of an attorney's license to practice law for failure to comply with court-imposed conditions following his reinstatement of a previous suspension of his license to practice law. See In re Disciplinary Proceedings Against Wright, 428 N.W.2d 549 (Wis. 1988).

Cases involving the suspension or revocation of licenses to practice medicine provide insights by analogy. For example, a doctor in Pennsylvania appealed a Medical Board rejection of his petition for reinstatement of his revoked license to practice medicine.

In its decision the Commonwealth Court of Pennsylvania distinguished between a suspended license to practice and a revoked license. The court held:

[Doctor] Pittenger's reliance upon *Brown v. State Board of Pharmacy*, ... 566 A.2d 913 (1989) is misplaced. In *Brown* we were presented with a situation in which a holder of a suspended license to practice pharmacy petitioned for reinstatement of his license. In rendering our determination, we interpreted provisions of the Pharmacy Act similar to the relevant provisions of the MPA in this case. We determined that because the license was "susceptible to revival," the applicant possessed a property right which was entitled to due process protection. We further determined that imposition of a waiting period for application for renewal or reissuance of a license imposed a burden which was unconstitutional if applied retroactively to impede an applicant's right to petition the Board for license reinstatement. However, Pittenger fails to grasp the distinction between *Brown* and the matter *sub judice*. In *Brown*, ... 566 A.2d at 915, we distinguished between suspension and revocation of a professional license, stating:

Undoubtedly, the holder of a valid and existing professional license has a property interest in such license. "[T]he right to practice a profession, once acquired, does constitute a property right in the license." *Brady v. State Board of Chiropractic Examiners*, ... 471 A.2d 572, 575, *appeal dismissed*, ... 483 A.2d 1376 (1984). Once that license has been revoked, however, "through a procedure consistent with the individual's due process guarantees, that individual is stripped of whatever property interest he possessed in the license." *Keeley v. State Real Estate Commission*, ... 501 A.2d 1155, 1158 (1985).

It is undisputed that Pittenger's license was revoked. In *Keeley*, this court previously determined:

[W]hen a license or privilege is revoked, it is extinguished and the former possessor is returned to the same position he occupied had the license or privilege never been issued. The term "revoke" is defined as "[t]o annul or make void by recalling or taking back; to cancel, rescind, repeal or reverse." *Black's Law Dictionary* 1188 (5th Ed.1979). Therefore, once the license has been voided or annulled, any property rights or interest stemming from that license are likewise voided or annulled. ... 501 A.2d at 1158.

As such, Pittenger possesses no commensurate property right in a medical license which has been revoked consistent with due process of law.

As to Pittenger's argument of an unconstitutional retroactive application by the Board of Section 43(b), it is a well-settled principle that application of subsequent legislative revision involving procedural rather than substantive change is not improper. *Brown; Long v. County of Delaware*, ... 490 A.2d 20 (1985). Having

determined that Pittenger possesses no property right in the revoked medical license, no substantive rights are affected. In this case, Section 43(b) of the MPA did not alter Pittenger's substantive rights, it merely fixed a time period when Pittenger may apply for reinstatement of the license.

Pittenger v. Department of State, Bureau of Professional and Occupational Affairs, ... 596 A.2d 1227, 1229-30 (Pa.Cmwlth. 1991) (footnotes omitted). The context in the Brown case, cited in Pittenger, involved whether the Board could lawfully apply against pharmacist Brown a statute enacted shortly after his suspension. The statute imposed a 10-year waiting period before a petition for reinstatement by a pharmacist convicted of certain criminal charges could be considered. The court found retroactive application of the statute to Brown to be unconstitutional.

The North Carolina Court of Appeals reviewed a Medical Board rejection of a physician's quest to have his license reinstated. The court held:

we disagree with the Board's contention that, under the Medical Practice Act, the Board has complete statutory discretion to deny or limit permission to resume the practice of medicine once a physician's right to practice has been terminated "by any action or for any period of time." N.C.Gen.Stat. Sec. 90-14(a) lists thirteen grounds upon which the Board may "deny, annul, suspend, or revoke" a license to practice medicine.

In re Magee, 362 S.E.2d 564, 567 (N.C.App. 1987). The trial court had directed the Board of Medical Examiners to establish rules and procedures relating to reinstatement of licenses automatically suspended under North Carolina statutory law. The Board balked, but the appellate court found the trial court order was proper.

Haeg cites cases and propositions concerning double jeopardy, common sense, avoiding absurd results, and the rule of lenity with sundry examples in other contexts. The Alaska Court of Appeals has held:

As we have stated: "If a statute establishing a penalty is susceptible of more than one meaning, it should be construed so as to provide the most lenient penalty."^{FN43}

FN43. *State v. Andrews*, 707 P.2d 900, 907 (Alaska App.1985), *opinion adopted by State v. Andrews*, 723 P.2d 85, 86 (Alaska 1986); *see also Wells v. State*, 706 P.2d 711, 713 (Alaska App.1985) ("It is well established that, in accordance with the rule of lenity, ambiguities in penal statutes must be resolved in favor of the accused.").

State v. Stafford, 129 P.3d 927, 933 (Alaska App. 2006).

THE SENTENCE BY JUDGE MURPHY

District Court Judge Murphy considered the Cheney criteria and announced the sentence after hearing testimony from witnesses and sentencing arguments. The court imposed a combination of active and suspended jail time on nine counts, fines, court surcharges, forfeiture of the PA 12 airplane, the guns involved, the ammo, and hides, a 5-year revocation of the guide license, and 7 years of probation. The amended judgments show a suspension of the guiding license for 5 years from September 30, 2005.

ANALYSIS

AS 08.54 authorizes the court to order the Board to suspend or to revoke a hunting guide license. Here the sentencing court initially ordered a revocation of Haeg's license for five years. The Court of Appeals remanded on the suspension versus revocation point, writing:

We therefore order the district court to modify the judgments in this case to show that Haeg's guide license was suspended for five years.

The Court of Appeals did not direct the sentencing judge to order the Board to change the license status of the defendant from revoked to suspended. Nor, on remand, did the sentencing court remand to the Board or order the Board to change the status accordingly. The change from revoked to suspended status was effected directly by the Amended Judgments. It is clear that the Court of Appeals intended the revocation to be changed to a

suspension ab initio, as of the date of the original sentence in 2005. And it is clear that the sentencing judge did so on remand.

Under the law of Alaska Haeg has constitutionally protected property interests in his suspended master hunting guide license. See Herscher, supra. His rights are not limited by the due process protection at issue in Herscher.

Unlike a revocation setting, the court finds that Haeg as the holder of a suspended guide license cannot be required to go through a new application/examination process to get his license back. Termination of the suspension or reinstatement of a suspended license (whether that be a driver's license, license to practice law, or license to practice medicine) can be subject to reasonable conditions, but only to a limited degree consistent with not treading upon the constitutionally protected property interest Haeg has in his suspended license.

On reflection the State agreed with the argument by Haeg that it would not be proper for the Board to preclude reactivating his license based on his conviction and sentencing in 2005 when he voluntarily surrendered his license in 2004 as a result of the same incident.

The State provided a photocopy of Haeg's Master Guide license. Exhibit 2 to the State's June 10, 2011 Opposition to the pending motion ("Exh. 2"). The license shows that it was issued on November 13, 2003, with an expiration date of December 31, 2005. The license number is # 146.

Haeg filed a license renewal application with the Big Game Board dated October 21, 2010, roughly three weeks after the expiration of his suspension. Exh. 3. Haeg also filed a license renewal application dated October 29, 2010, with the same information. Exh. 5.

The State provided a November 4, 2010, response letter to Haeg from Big Game Board Licensing Examiner Karl Marx which states that "the master guide-outfitter license" which you previously held "lapsed 9/30/2005." Exh. 4. The letter brings to Haeg's attention that AS 08.54.670 applies because Haeg failed to renew his license for four consecutive years, and the Department may therefore not issue a license "unless the person again meets the qualifications for initial issuance of the license." The State also provided a November 4, 2010, letter from Don Habeger, Director Corporations, Business, & Professional Licensing ("Habeger"), informing Haeg that the Department was unable to process his license renewal based on AS 08.54.670. The letter informs Haeg he will need to submit an "initial license application[.]" Exh. 6.

By letter of December 28, 2010, to Haeg, Habeger took the position that AS 08.54.670 is not inconsistent with AS 08.74.710(e). Habeger explains that the Department and the Board are separate entities; each with its own duties under AS 08.01. Habeger concludes that Haeg is "no longer eligible for a Master Guide license renewal per AS 08.54.670, AS 08.01.100(d) and AS 08.54.610(b)."

Haeg's license # 146 did not "lapse" on September 30, 2005, it was suspended by court order. The district court judgment did not impose any conditions on reinstatement of the guide license following expiration of the five years. Bearing in mind the tension between AS 08.54.670 and 08.54.710(e), common sense, the avoidance of double jeopardy and absurd results, and the rule of lenity, the court finds that it would be an impermissible imposition on Haeg's protected property interests in his Master Guide license to permit the Board or the Department to deny reinstatement of Haeg's license # 146 based on the provisions of AS 08.54.670, AS 08.01.100(d), or AS 08.54.610(b). The guide license held by Haeg was

suspended by the sentence in the criminal case, so he could not lawfully renew the license until the period of suspension terminated. The suspension period has run. No conditions for reinstatement were imposed by the sentencing court. Haeg is therefore entitled to reinstatement of his Master Guide license # 146 forthwith.

ORDERS

For the reasons set forth above, the court orders the Big Game Board and the Division of Occupational Licensing, Department of Commerce and Economic Development to reinstate Master Guide license # 146 to David Haeg without further ado, forthwith.

Dated at Kenai, Alaska, this ^{5th} 5 day of July, 2011.

Carl Bauman
Carl Bauman
SUPERIOR COURT JUDGE

CERTIFICATION OF DISTRIBUTION	
I certify that a copy of the foregoing was mailed to the following at their addresses of record: <i>faxed</i>	
<i>Haeg, Peterson</i>	
Date <u>7-5-11</u>	<i>Roberts</i> Clerk