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Big Game Commercial
Services Board's
regulation

of

transporters

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In your January 30, 1992, memorandum, you asked two questions regarding the Big Game Commercial Services Board's authority to discipline and regulate transporters and requested our comments on a third matter. Each request is addressed in turn in this memorandum.

Question One

Question number one is actually three questions, as follows:

1(a) Can the board take disciplinary action against a transporter if a client whom the transporter dropped off for a hunt is convicted of trespass due to his or her land use during the hunt?

1(b) When a client asks to be dropped off in a specific location and is later convicted for trespass, can the board take disciplinary action against a transporter for not ensuring that the client had permission to use the land?

1(c) Can the board take disciplinary action against a transporter when the transporter decides to drop off the client on private land, does not tell the client that the land is private, and the client is convicted of trespass?

The short answers to these questions are no, no, and a qualified yes.

Discussion

Transporters are regulated under AS 08.54. AS 08.54.505(b) sets out the grounds for discipline of transporters. These grounds include engaging in unethical or

unsafe activity, or conviction of violation of laws relating to hunting or provision of big game commercial services.¹ Subsection (d)(2) requires that the board discipline transporters if the transporter has been convicted of certain law violations.

Subsection (c) prohibits the board from disciplining transporters for the transporter's employee's violations of law unless the transporter participated in or aided the violation.

The statutes applicable to guide-outfitters and transporters are very detailed. These statutes specify those situations in which a licensee may be disciplined for the conduct of others. For example, AS 08.54.505(c) limits the board's authority to discipline a transporter for acts of an employee as follows:

The board may not revoke, suspend, or deny renewal of a transporter license . . . for a violation of a federal or state statute or regulation relating to game or provision of big game commercial services committed by an employee of the licensee . . . unless the licensee . . . participated or aided in the violation.²

¹ AS 08.54.520(a) describes those violations of law. Subsection (a)(1) prohibits a transporter from knowingly failing to report a client's or employee's violation of fish, game, or big game commercial services (BGCS) law. Subsection (a)(2) provides that it is unlawful for a transporter to knowingly commit or aid the commission of a violation of the BGCS laws, or state fish or game law. This subsection also makes it unlawful to permit violation of the BGCS laws, or state fish or game laws without attempting to prevent it and reporting it. Subsection (a)(3) prohibits unlicensed commercial services activities. Subsection (a)(4) prohibits transporter obstruction of hunting by persons who are not transporter clients. Subsections (a)(5), (a)(6), and (a)(10) concern assistant guides and guides and therefore do not apply to transporters. Subsection (a)(7) and (a)(8) prohibit guiding or advertising guiding without a license. Subsection (a)(9) prohibits unlicensed transporter services. Subsection (a)(11) prohibits unlicensed commercial services activity.

² Similarly, AS 08.54.520(a)(2)(B) provides that it is unlawful for a transporter or guide to knowingly permit a violation of the BGCS laws, or state fish and game laws that the

However, the board's authority to discipline guides is not similarly limited under AS 08.54.540.

AS 08.54.505 does not provide that a transporter may be disciplined for violations of the laws concerning trespass. The types of law violations that trigger disciplinary action are violations of federal or state statutes or regulations relating to hunting or provision of big game commercial services. In our opinion, trespass-like offenses do not fit into this category.

In fact, the one statute allowing discipline for trespass-like offenses is limited to guides. AS 08.54.520(a)(6) provides that it is unlawful for a person who holds any class of guide-outfitter license to knowingly enter or remain on state, federal, or private land without prior authorization during the course of providing guide-outfitting services. A commonly used rule of statutory construction, *expressio unius est exclusio alterius*, provides that, where a law specifies that one group is covered by the law, other groups not mentioned are excluded from the statute's prohibitions. 2A Norman J. Singer, Sutherland Statutory Construction • 47.23 (5th ed. 1992). Thus, the board may not discipline transporters under the circumstances set out in AS 08.54.520(a)(6). It appears that transporters do not have an express statutory duty to determine whether a hunter has secured prior authorization to enter private land.

Although it is a close question, we think the board may adopt a regulation requiring a transporter to determine that a hunter is authorized to hunt on private lands before the transporter deposits the hunter on those lands. Although AS 08.54.520(a)(6) does not make it unlawful for a transporter to enter on private land without prior authorization, there is no express statutory prohibition against requiring transporters to secure evidence of this authorization from the hunters they transport. AS 08.54.310 authorizes the board to establish performance standards for providers of BGCS and to regulate the activities of these providers. Transporters are providers of BGCS.³ Because there is no statutory prohibition or conflict
(..continued)
guide or transporter knows or reasonably believes is or will be committed without attempting to prevent it and reporting it.

³ AS 08.54.590(4); 08.54.470.

between this type of regulation and the statutes applicable to transporters, we think the board has authority to adopt this type of regulation as a performance standard. However, we suggest that, if the board wants to adopt this type of regulation, it consider seeking a statutory change making clear its authority to do so.

Therefore, the answers to questions 1(a) and 1(b) are "no."⁴ Under current statutes and regulations, the board may not take disciplinary action against a transporter if a transporter client is convicted of trespass due to land use during the hunt. Similarly, the board may not take disciplinary action against a transporter for not ensuring that the client has permission to use the land, when the client asks to be dropped off in a specific location.

However, the answer to question 1(c) is a qualified yes, because it may be possible to show that the transporter engaged in unethical activity under the circumstances set out in this question. AS 08.54.505(b)(1) provides that the board may discipline a transporter if the transporter

engaged in unethical activity, unsafe activity, or activity that adversely affects the natural resources of the state when the activity is related to the purposes of providing big game commercial services

AS 08.54.590(14)(A) defines unethical activity as

deception or misrepresentation involving prospective or actual clients either before, during, or following the provision of big game commercial services, including misrepresentations through private or public advertising of the type, duration, cost, or conditions of the services.⁵

⁴ However, if the board adopts a regulation requiring transporters to secure land use authorizations from clients, these answers could change.

⁵ We note that 12 AAC 38.650 further defines "unethical activity" for guide-outfitters. However, this regulation does not appear to apply to transporters.

A transporter may be disciplined for engaging in unethical activity if staff could demonstrate that the transporter made a misrepresentation to a hunter that the hunter could lawfully hunt on the private land where he or she was dropped off. Although the law on misrepresentation is complex, under certain circumstances it may be possible to establish negligent misrepresentation based on the transporter's failure to disclose information. These circumstances are

where a party who knows material facts is under a duty, under the circumstances, to speak and disclose his information, but remains silent.

Bubbel v. Wien Air Alaska, Inc., 682 P.2d 374, 380 (Alaska 1984); Bevins v. Ballard, 655 P.2d 757, 760-761 (Alaska 1982); and 37 Am. Jur. 2d •• 146, 216 (1968).⁶

Whether or not the transporter has made a misrepresentation is a complex legal determination that will depend in large part on the facts of each individual case. Thus, these cases will be difficult to prosecute. Unfortunately, in many cases the crucial issues will amount to a "swearing contest" between the transporter and the client. The transporter will swear that he did not drop the client off on private land or that the client told the transporter he or she was authorized to use the private land, and the client will claim the opposite of what the transporter alleges. These cases will also consume the

⁶ It is possible that the courts could interpret AS 08.54.590(14) as requiring an intentional, rather than a merely negligent, misrepresentation. In State, Real Estate Comm'n v. Johnston, 682 P.2d 383, 385-86 (Alaska 1984), the court held that

'misrepresentation' as used in AS 08.88.460(a) was intended to encompass only intentional wrongdoing, not innocent or negligent wrongdoing.

If this were the case, then it would be much more difficult to prove that the transporter committed a misrepresentation. Similarly, it would be difficult to prove that the transporter engaged in deception, as this requires proof of an intent to deceive. 37 Am. Jur. 2d • 188 (1968).

assigned investigator's time, as each case will require a careful investigation.⁷

Question Two

The second question you asked is, What is the scope of the board's authority to adopt regulations governing transporters? We would be better able to provide an answer if the board advised us exactly what regulations it proposes to adopt. Because we have not been provided this information our advice is accordingly broad.⁸

AS 08.54.320 authorizes the board to adopt regulations required or reasonably necessary to administer AS 08.54. AS 08.54.310 sets out the board's duties and powers. Two subsections of this statute specifically address transporters. AS 08.54.310(a) provides, in pertinent part:

The board shall

. . . .

(5) prohibit . . . transporting . . . activities that are unsportsmanlike, unethical, unsafe, against principles of game conservation, degrading to a profession subject to this chapter, or that adversely affect natural resources[.]

AS 08.54.310(a) provides:

The board shall

. . . .

(7) authorize issuance of transporter licenses.

⁷ In a discipline action against the transporter, it is not sufficient to merely rely on the client's conviction for trespass.

⁸ See discussion of regulations concerning land use authorization on pages 3-4, infra.

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Other statutes specifically addressing transporters include AS 08.54.400, concerning licensure, AS 08.54.505, regarding discipline, and AS 08.54.590(13), defining transporter services.

The above-referenced statutes and AS 08.54.320 allow the board to adopt regulations reasonably necessary to administer discipline of transporters, license transporters, and enforce the prohibitions set out in AS 08.54.310(a)(5). The board's general authority to adopt regulations must be exercised in harmony with the statutes specifically applicable to transporters.

Request Three

You also indicate that the board would like our comments on the attached Federation of Natives Resolution #91-54.

We believe it is appropriate for the board to take public comments from entities such as the Alaska Federation of Natives (AFN). It is clear from Resolution #91-54 that AFN understands a statutory change is necessary to accomplish AFN's goals set out in the resolution. We agree that a statutory change is necessary for these purposes. We do not address the policy issue of the desirability of this statutory change, as this is more appropriate for the board's consideration.

SJF:jp:prm

cc: Members, Big Game Commercial Services Board
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