

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE BIG GAME COMMERCIAL SERVICES BOARD**

IN THE MATTER OF:)

DONALD FERNANDEZ)
_____)

OAH No. 09-0395-GUI
Agency File No. 1704-07-001

DECISION AND ORDER

I. Introduction

The Division of Corporations, Business and Professional Licensing (division) has filed an eleven count accusation to permanently revoke Assistant Guide License GUI A 6753 issued to Donald Fernandez.¹ Mr. Fernandez's license lapsed January 1, 2008. The division denied his application for renewal after it concluded that Mr. Fernandez had been convicted of certain crimes that by statute precluded him from holding a license. Mr. Fernandez's challenge to the denial of his application for renewal is the subject of a separate proceeding.²

This proceeding focuses on Mr. Fernandez's actions as an assistant guide, whether he negligently misrepresented or omitted a material fact on his applications and whether he obtained his license through fraud, deceit, or misrepresentation. The division also alleges that Mr. Fernandez does not meet the professional ethic standards for a guide found at 12 AAC 75.340. A hearing was held at Mr. Fernandez's request on October 26, 2009. The division appeared through Assistant Attorney General Karen Hawkins. Mr. Fernandez did not participate in the formal hearing on the accusation.³ After the hearing concluded, Mr. Fernandez wrote that he wished "to get this matter behind me and am no longer going to contest this issue."⁴ Alaska Statute 44.62.530 provides that when, as here, the respondent did "not appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without notice to the respondent." The evidentiary

¹ The division's accusation contains twelve counts. It withdrew Count XI on the record at hearing.

² *In re Donald Fernandez* OAH No. 09-0052-GUI.

³ Mr. Fernandez was called at the number of record which was disconnected. Donald Hart and Rhonda Marcy, Mr. Fernandez's designated representatives/assistants in this matter were called at their number of record and a message was left on the answering machine.

⁴ October 28, 2009 Fernandez Post Hearing Submission.

record consists of three exhibits and the testimony of three witnesses: Quinten Warren, Robert Carlson, and Larry Napier.

II. Uncontested Facts

A. Mr. Fernandez's Criminal History

Mr. Fernandez's criminal history dates back to 1997 when he was convicted of a class C felony, theft in the second degree and sentenced to 30 days in jail in Case No. 3AN-S97-6288CR.⁵ The sentence was originally suspended and Mr. Fernandez was placed on two years probation. While on probation he tested positive for cocaine on six occasions.⁶ On March 15, 2002, Mr. Fernandez's probation was revoked and he was sentenced to serve the remainder of his 30 day sentence.⁷

Since his 1997 conviction, Mr. Fernandez has had five more criminal convictions including two violations of state statutes or regulation relating to hunting, the provision of guide services or transportation services. His criminal history is summarized in the following table:

Date	Case No.	Charge	Disposition
11/7/97	3AN-97-06288 CR	Felony Second Degree Theft	30 days in jail and probation.
4/26/05	3AN-03-01058 CR	Two Misdemeanors: Tampering w/Evidence and Possession of Illegal Game.	\$2,000 fine w/ \$1,000 suspended; 360 days in jail w/ 270 days suspended & 3 years probation each count to be served consecutively.
3/21/06	3AN-05-04215 CR	Misdemeanor Third Degree Theft	180 days in jail with 120 days suspended & 3 years probation. ⁸
3/26/06	3AN-06-02997 CR	Misdemeanor Unlawful Evasion	120 days in jail.
10/2/06	3PA-06-02337 CR	Misdemeanor Assisting Client in the Taking of an Undersized Ram	\$5,000 fine w/ \$3,000 suspended; 10 days in jail w/ 5 days suspended & 3 years probation.
11/14/07	3PA-06-02887 CR	Felony Third Degree Misconduct Involving a Weapon	345 days in jail.

⁵ Exhibit 1 at 260 – 336; Testimony of Robert Carlson.

⁶ March 24, 2000, April 17, 2000, August 17, 2001, September 4, 2001, October 10, 2001 and October 11, 2001. Exhibit 1 at 290 - 329; Testimony of Robert Carlson.

⁷ Exhibit 1 at 329.

⁸ Exhibit 1 at 253.

B. *Mr. Fernandez's Applications and Guiding Activities*

Mr. Fernandez has filed three applications with the division. All applications require the applicant certify that the information contained on the application is true and correct. Mr. Fernandez filed his first initial Assistant Guide License Application on June 22, 2005 (First Initial Application).

The First Initial Application asked several questions related to the fitness of the applicant. Mr. Fernandez answered in the affirmative when asked if he had been convicted of felony within the last ten years noting and identified his 199[7] conviction.⁹ He answered “no” to the question asking if he had been convicted of a state hunting, guiding, or transportation services statue or regulation within the last five years for which he was fined more than \$1,000 or imprisoned for more than five days even though two months earlier he had been sentenced to serve 90 days for possession of illegal game.

Mr. Fernandez's application was forwarded for further investigation and no further action was taken by the division. The division obtained the court records associated with the 1997 conviction, summarized the information and forwarded the documentation to the division's investigative unit. Mr. Fernandez was asked to contact the Investigator assigned to his application.¹⁰ No further action was taken on the First Initial Application and the record does not reveal whether Mr. Fernandez ever contacted the Investigator as requested.

On June 5, 2006, Mr. Fernandez filed his second application for an Assistant Guide License (Second Initial Application).¹¹ As with his First Initial Application, Mr. Fernandez revealed his 1997 felony conviction and failed to reveal his conviction for Possession of Illegal Game when asked if he had been convicted of a state hunting, guiding, or transportation services statue or regulation within the last five years for which he was imprisoned for more than five days.¹² The 2006 application form contained questions not asked on the 2005 application form including:

⁹ Mr. Fernandez identifies 1998 as the year of his felony. The Judgment is dated November 1997. Exhibit 1 at 341 – 348.

¹⁰ Exhibit 1 at 255.

¹¹ Exhibit 1 at 245 – 253.

¹² Exhibit 1 at 245. The question presented on the First Initial Application was broader, asking if the applicant was “fined more than \$1,000 or imprisoned for more than five days?” Exhibit 1 at 346.

- “Are you aware of any investigations against you in any state, jurisdiction or in Canada?”¹³
- Are you now or within the last five years have you been addicted to or have you undergone treatment for the use of narcotics or drugs or excessive use of intoxicating liquors?”¹⁴

Mr. Fernandez answered in the negative. The division issued Mr. Fernandez Assistant Guide License No. GUI A 6753 effective June 19, 2006 through December 31, 2007.¹⁵

In September 2006, Mr. Fernandez was working for Guide James Bailey as an Assistant Guide. Larry Napier, from Ohio, had contracted with Mr. Bailey for a guided sheep hunt and an optional grizzly on a trophy basis. Mr. Napier testified regarding his agreement with Mr. Bailey and the events surrounding the hunt.¹⁶

He agreed that he would pay Mr. Bailey \$8,500 for the sheep hunt and if he shot a trophy bear, Mr. Napier would pay an additional \$5,000. When Mr. Napier arrived for the hunt, Mr. Bailey insisted he pay the entire amount, including the trophy fee, up front. Mr. Napier was reluctant but this was his trip of a lifetime, so he remitted the full \$13,500 up front. He estimated that, with travel, the hunt cost him over \$15,000.

Mr. Fernandez was left at the camp as Mr. Napier’s guide. They headed out to locate sheep. When they came across a ram, Mr. Fernandez insisted it was legal because it had a full curl. Mr. Napier disagreed but began to feel pressure from Mr. Fernandez “to take the shot.” They spent the night out, and the next morning Mr. Napier shot the ram. When they finally reached the ram, Mr. Napier did not believe it was a full curl, but Mr. Fernandez continued to insist that it was. He also told Mr. Napier that even if it was not a full curl, the ram was still legal because the ram was over eight years old so even if it was not a full curl, it was legal on that basis.

The plan was to pack the meat, horns and cape out to a lake where Mr. Bailey would be waiting with the plane. They packed the horns, cape and most of the salvageable meat but left behind a salvageable quarter, the neck, ribs, and meat along the back bone. It is a violation of 5

¹³ Exhibit 1 at 245.

¹⁴ Exhibit 1 at 246.

¹⁵ Exhibit 1 at 244.

¹⁶ The following paragraphs describing the September 2006 hunt are based on Mr. Napier’s unchallenged testimony given at hearing.

AAC 92.220(e) to transport horns before the last load of salvageable meat.¹⁷ Failure to salvage edible meat is a misdemeanor offense.¹⁸

As they approached the lake, Mr. Napier and Mr. Fernandez noticed two planes: one was Mr. Bailey's and the other belonged to the Alaska State Troopers. Mr. Bailey called Mr. Fernandez on the radio and told him that the Troopers were looking to serve him with a warrant so he and Mr. Napier should stay in the mountains and hide. Mr. Bailey told them where to leave the meat and that he would come back for it. Mr. Napier thought the whole thing was "crazy." They hiked to a cabin where they waited for several days. Eventually the Troopers arrived at the cabin and served an arrest warrant on Mr. Fernandez. After seeing the horns, the Troopers concluded that the ram was not legal.

On October 2, 2006, Mr. Fernandez pled no contest to taking an undersized ram. He was ordered to pay a \$5,000 fine with \$3,000 suspended and to serve ten days in jail with five days suspended.¹⁹ Mr. Fernandez was also charged with wanton waste of game but those charges were dismissed.

In October 2007, division investigator Quinten Warren sent Mr. Fernandez a letter informing Mr. Fernandez that he was under investigation.²⁰ On November 14, 2007, Mr. Fernandez was sentenced to 345 days in jail for Felony Misconduct Involving a Weapon. This charge was brought when Mr. Fernandez's probation officer observed him on a hunting program carrying a weapon.²¹ On December 2, 2007, Mr. Fernandez sent Mr. Warren a fax in response to Mr. Warren's letter acknowledging that he was under investigation.²²

On January 7, 2008, the division received Mr. Fernandez's application to renew his Assistant Guide License for the period from January 1, 2008 through December 31, 2009

¹⁷ "Antlers or horns may not be transported from the kill site until all edible meat salvaged in accordance with (d) of this section has been transported to the departure point from the field. However, antlers or horns may be transported simultaneously with the final load of edible meat salvaged." 5 AAC 92.220(e) "[E]dible meat' means, in the case of a big game animal, except a black bear, the meat of the ribs, neck, brisket, front quarters as far as the distal joint of the radius-ulna (knee), hindquarters as far as the distal joint of the tibia-fibula (hock), and the meat along the backbone between the front and hindquarters...." 5 AAC 92.90(17).

¹⁸ AS 16.30.010. "[E]dible meat' means, in the case of big game animals, the meat of the ribs, neck, brisket, front quarters as far as the distal joint of the radius-ulna (knee), hindquarters as far as the distal joint of the tibia-fibula (hock), and that portion of the animal between the front and hindquarters" AS 16.30.030 (3).

¹⁹ Exhibit 1 at 239.

²⁰ Testimony of Quinten Warren.

²¹ Testimony of Robert Carlson.

²² Testimony of Quinten Warren.

(Renewal Application).²³ The application was signed December 31, 2007. As with his other applications, Mr. Fernandez certified that the information on his renewal application was “true and correct.”²⁴ However, unlike his prior initial applications, Mr. Fernandez was forthcoming with his criminal history and provided a sworn statement explaining the two felony and five misdemeanor convictions and his explanation of the events surrounding the convictions.

There is a question on the renewal application that asks if the applicant is “aware of any investigations against [the applicant] in any state, jurisdiction or in Canada?”²⁵ Mr. Fernandez responded “no.” He was also asked whether, since his last license was issued, had he “been convicted of a felony or other crime (convictions include: suspended imposition of sentence, no contest, nolo contendere, etc.)” and had he “been convicted of a state or federal hunting, guiding, or transportation services statute or regulation for which [he was] imprisoned for more than five days”²⁶ Mr. Fernandez responded “yes” to each question and submitted an affidavit acknowledging his seven criminal convictions and explaining the circumstances surrounding each conviction.²⁷

III. Discussion

This case is governed by the Administrative Procedure Act (APA)²⁸ and by the statutes and regulations governing licensure of Big Game Guides and Transporters.²⁹ Alaska Statute 08.54.710(d) provides that “[t]he board *shall* permanently revoke a transporter license or any class of guide license if the board finds after a hearing that the license was obtained through fraud, deceit, or misrepresentation.” Therefore, if the board finds that Mr. Fernandez obtained his license through fraud, deceit, or misrepresentation it has no discretion and must permanently revoke the license.³⁰ A person whose license is revoked may not engage in the provision of big game hunting services or transportation service during the period of revocation.³¹ Therefore, if

²³ Exhibit 1 at 215 – 223.

²⁴ Exhibit 1 at 217.

²⁵ Exhibit 1 at 216.

²⁶ *Id.*

²⁷ Exhibit 1 at 215 – 223.

²⁸ The APA, found in AS 44.62, is made applicable by AS 44.62.330(a)(21).

²⁹ See AS 08.01, AS 08.54, and 12 AAC 75.

³⁰ AS 08.54.710(d).

³¹ Alaska Statute 08.54.710(g) provides that a “person whose license is suspended or revoked under this section may not engage in the provision of big game hunting services or transportation services during the period of license suspension or revocation.”

the board permanently revokes Mr. Fernandez's license he may not obtain a license in the future by any means.

The division has accused Mr. Fernandez of 11 Counts including:

- Obtaining his Assistant Guide License through fraud, deceit, or misrepresentation when he marked the "no" box on his second initial application when asked if he was "aware of any investigations against [him] in any state, jurisdiction or in Canada."³²
- Obtaining his Assistant Guide License through fraud, deceit, or misrepresentation when he failed to reveal on his Second Initial Application that he had "been convicted of a state or federal hunting, guiding, or transportation services statute or regulation for which he was imprisoned for more than five days?"³³
- Obtaining his Assistant Guide License through fraud, deceit, or misrepresentation when he failed to acknowledge on his Second Initial Application when asked if, with in the last five years he had been addicted to or undergone treatment for the use of narcotics.³⁴

"Fraudulent misrepresentation is found where the licensee: (1) made a false representation of fact; (2) knew or believed that the representation was false, did not have confidence in the representation, or knew that the basis for the representation was not as stated or implied; (3) intended that the claimant rely on the representation; (4) that the claimant justifiably relied on the representation; and, (5) that the claimant was damaged as a result of the reliance."³⁵ The term "deceit" means a fraudulent and deceptive misrepresentation used by one or more persons to deceive and trick another person who is unaware of the true facts and is damaged as a result of the deceitful conduct.³⁶

Mr. Fernandez does not contest the accusations. He failed to report his conviction for Possession of Illegal Game, a violation of a state hunting statute for which he was to serve 90 days. This conviction occurred just months before his First Initial Application and 14 months before he filed his Second Initial Application. The conviction was fresh and it is not reasonable to believe it slipped his mind. Rather, it is more likely than not that Mr. Fernandez intentionally

³² Count III.

³³ Count VII.

³⁴ Count IX.

³⁵ *Grinnell v. Erkins*, OAH 07-0240-RES at 6 (2008) citing to *Jarvis v. Ensminger*, 134 P.3d 353 (Alaska 2006); *see also* Restatement of Torts 2nd §526.

³⁶ *Id.*

failed to reveal the conviction and was hoping the division would not discover his conviction. This was deceitful and through this deceit, Mr. Fernandez obtained an Assistant Guide License. The uncontested evidence is sufficient to support a finding that it is more likely than not that Mr. Fernandez obtained his Assistant Guide License through fraud, deceit, or misrepresentation. Accordingly, his Assistant Guide License No. GUI A 6753 should be permanently revoked. Having found that Mr. Fernandez's conduct requires permanent revocation of his license, it is not necessary to address the remaining allegations of misconduct.

IV. Conclusion and Order

Mr. Fernandez obtained his Assistant Guide License No. GUI A 6753 through fraud, deceit, or misrepresentation. Under AS 08.54.710(d) his license is permanently revoked and pursuant to AS 08.54.710(g) he may not engage in the provision of big game hunting services or transportation services during the period of revocation.

DATED this 2nd day of November, 2009.

By: Signed _____
Rebecca L. Pauli
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 08.54.600. The Big Game Commercial Services Board, in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 14th day of December, 2009.

By: Signed _____
Signature
Paul Johnson _____
Name
Chairman, Big Game Commercial Services Board
Title

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