

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

In the Matter of:)	
)	OAH No. 10-0250-GUI
CRAIG E. HILL)	OAH No. 10-0387-GUI
(Consolidated Hearings))	Agency Nos. 1750-10-004
_____)	1702-10-001

I. Introduction

At its essence, this case is about Craig E. Hill’s allegedly incorrect answers to questions presented on 13 applications for licensure or applications to renew licensure submitted to the Division of Corporations, Business and Professional Licensing from 1999 – 2009, his state of mind when answering, if he answered incorrectly. Procedurally, Mr. Hill’s hearing and this decision consolidated two separate licensing actions. The first action, OAH No. 10-0250-GUI, is Mr. Hill’s challenge to the denial of his application to sit for the registered guide-outfitter qualification exam and he carries the burden of proof.¹ The second action, OAH No. 10-0387-GUI, is the division’s accusation against Mr. Hill’s class-A assistant guide license in which the division carries the burden of proof.² The 16 issues and contentions raised are identical in each matter. The division withdrew Count VII on the record, leaving 15 Counts for resolution.

The hearing presented a slightly different and fuller picture of the circumstances than had been available during the prior presentation to the Board when it first denied Mr. Hill’s application for a registered-guide outfitter. This decision concludes, nonetheless, that as to Mr. Hill’s application for a registered guide-outfitter license, Mr. Hill has not proven by a preponderance of the evidence that he meets the requirements for licensure which are more complex and place upon the licensee greater responsibility than that shouldered by a class-A assistant guide. Therefore, the Board should uphold its original decision to deny Mr. Hill’s application.

As to Mr. Hill’s class-A assistant guide license, this decision concludes that the division met its burden by establishing that it is more likely true than not true that Mr. Hill negligently misrepresented or omitted a material fact when he failed to answer “yes” to questions related to

¹ AS 44.62.460(e)(2).

² AS 44.62.460(e)(1).

his criminal conviction as alleged in Counts II, IV, V, VI, VIII, and X, as well as by proving by a preponderance of the evidence that Mr. Hill violated statutes and regulations relating to his profession as alleged in Counts XV and XVI. The division has not established by a preponderance of the evidence that Mr. Hill intentionally sought to deceive or mislead the division or this Board. Nor has the division proven by a preponderance of the evidence the remaining seven counts. Under these facts and circumstances it would be in keeping with prior Board discipline to impose disciplinary sanctions against Mr. Hill's class-A assistant guide license, but not permanent revocation or suspension. This decision recommends the Board impose:

1. a \$17,000 fine with \$10,500 suspended,
2. a three-year probationary period during which time any violation of hunting or guiding statute or regulation will result in a one-year revocation,
3. additional education on guides' legal and ethical obligations, and
4. a public written reprimand.

II. Facts

There is little factual dispute between the parties. Mr. Hill is a life-long Alaskan who has lived the majority of his life in Galena. His primary occupation is as a heavy equipment operator. He works on the north slope in the winter months. During hunting season, he earns his living doing what he loves, guiding. The division believes Mr. Hill, over the years, incorrectly answered questions on his applications regarding his criminal history and his use of illegal substances. It also contends that he has attempted to obtain a license through fraud or deceit and, on subsequent applications, has falsely denied doing so. Mr. Hill is adamant that he did not intend to mislead the division or the Board. He does not deny his criminal convictions but contends that under the circumstances his answers on the applications were either correct or reasonable based on the events as they existed or as he understood them to be at the time he completed each application. It is important to understand the sequence of events starting in 1996, when Mr. Hill committed his first criminal violation of hunting statutes and regulations, the timing of his convictions, Mr. Hill's applications, and the questions asked on each application.

1996

- September 27, 1996: Mr. Hill committed the misdemeanor offense Failure to Salvage All Edible Meat. He was convicted October 30, 1996.³

1997

- July 21, 1997: Mr. Hill filed an application for a class-A assistant guide.⁴ He disclosed the 1996 violation on his initial application for licensure and, as asked for on the application, provided a written explanation of his conviction.⁵
- July 1997: Mr. Hill received class-A assistant guide license no. 556.
- October 1997: Over the course of several days, Mr. Hill committed two misdemeanor violations: one unlawful act by a guide in violation of AS 08.54.720(a)(8) and one licensing and tag violation under AS 16.05.420.⁶ Mr. Hill was not charged with or convicted of these crimes until 2001.⁷
- November 1997: Mr. Hill was found to have in his possession 68.9 grams of marijuana and criminal charges were filed.

1998

- May 1998: Mr. Hill submitted his first renewal application for 1998/1999.⁸ He responded “no” to the following questions asking whether, since his last application, he had:
 - been convicted of a state hunting, guiding, or transportation services statute or regulation for which you were fined more than \$1,000?
 - been convicted of a felony?
 - been addicted to or excessively or illegally used ... a controlled substance?⁹
- September 1, 1998: Mr. Hill was convicted of the Class C Felony Misconduct Involving a Controlled Substance in the Fourth Degree.¹⁰ Mr. Hill received a suspended imposition of sentence (SIS) placing him on probation for one year.¹¹

³ Div. Exh. 49 at 6. Both the division and Mr. Hill submitted exhibits, some of which are duplicates. Mr. Hill’s exhibits were organized chronologically and the division’s were grouped by application. Although a document may appear in both exhibits, this decision does not contain parallel citations.

⁴ Div. Exh. 8.

⁵ *Id.* at 3.

⁶ Div. Exh. 19, 20.

⁷ *Id.*

⁸ Div. Exh. 12.

⁹ *Id.* at 2.

¹⁰ Hill Exh. 1 at 331 - 333. Misconduct involving a controlled substance requires possession of a controlled substance with the intent to deliver. AS 11.71.040.

¹¹ Div. Exh. 30, 31.

If he successfully completed his SIS, he thought it would mean that he did not have a felony conviction.¹²

1999

- August 1999: Mr. Hill, while a class-A assistant guide, knowingly advertised and represented himself to be a registered guide.¹³ He was convicted on March 29, 2002.¹⁴
- August 31, 1999: The state filed a petition to revoke Mr. Hill's SIS.¹⁵
- September 10, 1999: Mr. Hill committed an unlawful act in violation of AS 08.54.720 (transporting antlers before meat).¹⁶ Mr. Hill was convicted and sentenced October 6, 1999 to three days in jail (suspended) and fined \$2,000 with \$1,000 suspended.¹⁷
- September 24, 1999: Mr. Hill committed an unlawful act in violation of AS 08.54.720(a)(18) (taking big game with clients in the field). Mr. Hill was convicted and sentenced December 20, 1999 to three days in jail (suspended), a year of probation, and a fine of \$2,500 with \$1,500 suspended.¹⁸ The court's judgment orders Mr. Hill to "[f]orfeit Antlers and rifle to the State. Defendant may purchase back the rifle by January 31, 2000."¹⁹ The court apparently did not perceive that the 1998 felony conviction would prevent Mr. Hill from owning a firearm.
- October 1999: The division became aware, through the Attorney General's office, that Mr. Hill had a 1998 felony conviction, and the division knew that the conviction would be an issue for Mr. Hill if he sought renewal.²⁰
- December 7, 1999: The state filed a second petition to revoke Mr. Hill's SIS.²¹

2000

- March 20, 2000: Because of a probation violation, Mr. Hill's SIS was revoked and a felony conviction of record entered.²²
- April 14, 2000: Mr. Hill filed with the division the required addendum to his class-A assistant guide renewal application for 2000/2001.²³ The addendum was dated February 18, 2000. He responded "yes" to the question asking whether, within the last five years he had:

¹² Testimony of Hill.

¹³ Hill Exh. 1 at 276.

¹⁴ *Id.* at 273.

¹⁵ Div. Exh. 33 at 1.

¹⁶ *Id.* at 370.

¹⁷ *Id.* at 362.

¹⁸ *Id.* at 359.

¹⁹ *Id.* at 359.

²⁰ *Id.* at 364.

²¹ Div. Exh. 33 at 1.

²² *Id.*

²³ Div. Exh. 14. It appears Mr. Hill submitted one application in April 2000 and another in July 2000.

- been convicted of a state hunting, guiding, or transportation services statute or regulation for which you were fined more than \$1,000 or imprisoned for more than five days?

He responded “no” to the questions asking whether, within the last five years, he had:

- been convicted of a felony?
 - been addicted to or excessively or illegally used ... a controlled substance?²⁴
- April 2000: Mr. Hill provided the division with copies of the charging documents and judgments for his 1999 criminal convictions, but not the 1998 felony conviction.
 - July 6, 2000: Mr. Hill submitted his renewal application for 2000/2001 dated March 18, 2000 and resubmitted the addendum. He responded “yes” to the question asking whether, within the last five years he had:
 - been convicted of a state hunting, guiding, or transportation services statute or regulation for which you were fined more than \$1,000 or imprisoned for more than five days?

He responded “no” to the following questions asking whether, within the last five years, he had:

- been convicted of a felony?
- been addicted to or excessively or illegally used ... a controlled substance?²⁵

When asked to explain the “yes” answer he wrote “[a]ready submitted for April.”²⁶

- July 19, 2000: The division informed Mr. Hill that his license would not be renewed because of his two 1999 convictions, and that under AS 08.54.605, he would not be eligible to reapply before December 2004.²⁷
- September 18, 2000: The division received a copy of the court’s SIS and subsequent order revoking SIS dated April 7, 2000.²⁸ The record does not indicate who provided these documents to the division.
- August 2000: Mr. Hill, through his attorney, appealed the denial of his application to renew.²⁹

24

Id.

25

Div. Exh. 13 at 2.

26

Id. at 4.

27

Hill Exh. 1 at 319 (July 19, 2000 letter from division to Hill).

28

Id. at 341 - 346.

29

Id. at 311 - 315.

- 2000, date uncertain: Mr. Hill submitted his first application for a registered guide-outfitter license, but he did not meet the eligibility requirements.³⁰

2001

- July 17, 2001: Mr. Hill was convicted and sentenced for his October 1997 offenses. He was fined a total of \$11,000 with \$8,000 suspended, sentenced to 60 days in jail with 57 suspended, and received a three year suspension of his guide license.³¹

2002

- March 29, 2002: Mr. Hill was convicted for his August 1999 offense of knowingly representing and advertising himself as a registered guide. He was sentenced to 45 days in jail with 45 days suspended and was given the option of paying a \$999 fine or performing 160 hours of community service in lieu of fine.³²
- April 2002: The division filed a motion for summary adjudication and amendment of accusation in Mr. Hill's appeal of the denial of his renewal application. The motion argued that Mr. Hill had barrier crimes preventing him from licensure as a matter of law, and argued in the alternative that should summary adjudication be denied, the accusation would be amended to include Mr. Hill's failure to answer "yes" when asked about his felony conviction on his 2000 application.³³ Mr. Hill testified that his attorney at the time did not inform him that the division intended to amend the accusation.
- October 4, 2002: Mr. Hill voluntarily dismissed his appeal after his attorney explained he was statutorily precluded from obtaining a license.³⁴

2003

- July 2003: Mr. Hill took sport fishing clients in the field without having a business license which is a misdemeanor.³⁵ He was fined \$200 with \$200 suspended and sentenced to 10 days in jail with 10 days suspended.³⁶

2004

³⁰ Testimony of Hill.
³¹ Hill Exh. 1 at 290 - 289.
³² *Id.* at 273.
³³ *Id.* at 219 – 221.
³⁴ Testimony of Hill.
³⁵ Hill Exh. 1 at 270.
³⁶ *Id.* at 268.

- December 2004: Mr. Hill submitted a renewal application for 2004/2005.³⁷ He responded “no” to the following questions asking whether, since the date of his last application, July 2000, he had:
 - been convicted of a state hunting, guiding, or transportation services statute or regulation for which you were fined more than \$1,000 or imprisoned for more than five days?
 - been convicted of a felony within the last 10 years [sic]?
 - been addicted to or excessively or illegally used ... a controlled substance?³⁸
- December 27, 2004: The division reinstated Mr. Hill’s license.³⁹

2005

- July 1: Big Game Commercial Services Board came into existence.
- November 1, 2005: Mr. Hill filed an application for a registered guide license.⁴⁰ He answered “no” to the following questions:
 - Had he been convicted of a felony with the past 10 years?
 - Within the past five years had he:
 - been convicted of a state hunting, guiding, or transportation services statute or regulation for which he was fined more than \$1,000 or imprisoned for more than five days?
 - been addicted to or excessively or illegally used ... a controlled substance?⁴¹
- December 2005: The division informed Mr. Hill that the Board would proceed with the scheduled January 2006 examinations, suspended new applications for the registered guide examinations and cancel the April, July, and October 2006 examination dates.

2006

- January 2006: Mr. Hill took the Registered Guide Exam and Game Management Unit Certification Exam.⁴² Mr. Hill passed the Game Management exam but failed the Guide Exam.⁴³
- February 2006: The division informed Mr. Hill that the Board had placed a moratorium on accepting application or requests for examinations.⁴⁴

³⁷ Hill Exh. 1 at 264, 265.

³⁸ *Id.* at 265 .

³⁹ *Id.* at 263.

⁴⁰ *Id.* at 253 - 259. At this time, the applications for registered guide and registered outfitter were separate.

⁴¹ *Id.* at 253.

⁴² *Id.* at 243.

⁴³ *Id.* at 241, 239.

⁴⁴ *Id.* at 239.

- July 2006: The Board reopened the application process without determining whether applicants such as Mr. Hill who straddled this time period would need to meet the new requirements or would be grandfathered in under the old requirements.
- August 2006: Mr. Hill filed a 2006/2007 renewal application for an assistant guide license.⁴⁵ He answered “no” to the following questions asking whether, since his last license was issued, December 2004, he had:
 - been convicted of a felony within the last 10 years [sic]?
 - secured or attempted to secure a license through deceit, fraud, or intentional misrepresentation?⁴⁶

The application no longer asked about the illegal use of use controlled substances.

- August 25, 2006: Mr. Hill’s class-A assistant guide license was renewed.⁴⁷
- October 31, 2006: The division informed Mr. Hill that he would be allowed to sit for the December 2006 qualification examination if he submitted an updated application, fee, and hunt records by November 24, 2006.⁴⁸ Because of his work schedule, Mr. Hill was unable to meet the deadline.

2007

- January 25, 2007: The division received the updated application for a registered guide-outfitter license and evaluation forms.⁴⁹ Mr. Hill answered “no” to questions asking whether he had:
 - been convicted of a felony within the last 10 years?
 - secured or attempted to secure a license through deceit, fraud, or intentional misrepresentation?⁵⁰

Like the assistant guide application, the guide outfitter application no longer asked about the use of controlled substances.

- February 16, 2007: The division reviewed the state court system’s online data base and discovered Mr. Hill’s 2001 misdemeanor convictions for his 1997 criminal acts.⁵¹
- February 23, 2007: The Board tabled Mr. Hill’s application for licensure as a registered guide-outfitter pending further investigation by staff.⁵²

⁴⁵ *Id.* at 228 - 230.

⁴⁶ *Id.* at 229, 230.

⁴⁷ *Id.* at 224.

⁴⁸ *Id.* at 216.

⁴⁹ *Id.* at 197 - 216.

⁵⁰ *Id.* at 200.

⁵¹ *Id.* at 189 - 196.

⁵² *Id.* at 188.

- February 26, 2007: The division informed Mr. Hill that the Board was conducting further investigation into his criminal background and he would not be permitted to sit for the March examination.⁵³
- March 2007: The Board denied Mr. Hill’s application for a registered guide-outfitter license because under AS 08.54.600(a)(2) he did not satisfy the requirements for licensure when he failed to disclose the felony conviction on his class-A assistant guide license application.⁵⁴
- April 2007: The division informed Mr. Hill that his 2004/2005 class-A assistant guide license renewal was in error. The division explained that Mr. Hill should have answered “yes” when asked if he had been convicted of a felony within the past 10 years and that at that time he was barred under AS 08.54.605(a)(1)(B) because it had been less than five years since his conviction. Finally the division noted that the “Board may deny issuance, suspend, or revoke the license of a person who has obtained or attempted to obtain a license . . . by fraud or deceit.”⁵⁵
- Summer 2007: A division employee explained to Mr. Hill that his SIS was a felony conviction that must be reported.⁵⁶
- July 2007: The division instructed Mr. Hill that he could submit a new application and criminal background check for a registered guide-outfitter license and “the division will pull the” supporting information filed with his denied application as support for his resubmitted application.⁵⁷
- August 2007: Mr. Hill resubmitted his registered guide-outfitter application.⁵⁸ Mr. Hill answered “yes” when asked if he had been convicted of a felony and “no” to when asked if he had secured or attempted to secure a license through deceit, fraud, or intentional misrepresentation. The application instructed that an applicant must explain his “yes” answers. Mr. Hill provides no written explanation.
- August 13, 2007: Mr. Hill supplied a criminal background report.⁵⁹
- December 2007: The Board considered Mr. Hill’s resubmitted application for registered guide-outfitter. The division submitted a memo noting:
 - that Mr. Hill failed to provide a written explanation in support of his “yes” answer;
 - that because he was a convicted felon, Mr. Hill could not possess a firearm; and

⁵³ *Id.* at 185.
⁵⁴ *Id.* at 184.
⁵⁵ *Id.* at 178.
⁵⁶ Testimony of Hill.
⁵⁷ Hill Exh. 1 at 167; *see also, Id.* at 171.
⁵⁸ Div. Exh. 44.
⁵⁹ Div. Exh. 50.

- that in its view Mr. Hill violated AS 08.54.710(a)(3) when he answered “no” to the question had he ever secured or attempted to secure a license through deceit, fraud, or intentional misrepresentation.⁶⁰
- December 2007: The Board tabled the application pending a written explanation from Mr. Hill as to how he would guide when he cannot carry a firearm and explaining Mr. Hill’s criminal convictions.⁶¹

2008

- January 2008: Mr. Hill filed a class-A assistant guide renewal application for 2008/2009. Mr. Hill answered “yes” when asked if he has been convicted of a felony and provided the following explanation: “SIS – 1998 working on getting it straightened out for registered guide app. test.”⁶² Mr. Hill again answered “no” to the questions asking if he had attempted to secure a license through deceit, fraud, or intentional misrepresentation.⁶³
- February 12, 2008: A licensing examiner discussed Mr. Hill’s class-A assistant guide license renewal application with the then Board Chair and was instructed to renew Mr. Hill’s license.⁶⁴
- March 2008: The Board denied Mr. Hill’s resubmitted registered guide-outfitter application under AS 08.54.710(a)(3) for failure to supply the information requested by the Board.⁶⁵
- July 14, 2008: Mr. Hill received a Board letter informing him that his registered guide-outfitter application had been denied “due to the number of times you have omitted material facts on your Class-A applications and Registered Guide-Outfitter examination applications.”⁶⁶
- July 17, 2008: Mr. Hill gave his notice of defense and requested a hearing.
- July 23, 2008: Mr. Hill’s notice of defense was received and no action taken because it was mistakenly filed in an abandoned application file.⁶⁷

2009

- March 2009: Mr. Hill submitted another application for registered guide-outfitter.⁶⁸ He answered “yes” when asked if he had ever been convicted of a felony and “no” when asked if he had ever attempted to secure a license through

⁶⁰ Hill Exh. 1 at 138.

⁶¹ *Id.* at 135 - 136.

⁶² *Id.* at 132.

⁶³ *Id.* at 132.

⁶⁴ *Id.* at 129.

⁶⁵ *Id.* at 128.

⁶⁶ *Id.* at 118.

⁶⁷ Testimony of Karl Marx, Licensing Examiner; Hill Exh. 1 at 89.

⁶⁸ Hill Exh. 1 at 990-180.

deceit, fraud, or intentional misrepresentation.⁶⁹ He provided the written explanation previously requested.⁷⁰

- July 2009: Upon assurances from the division that Mr. Hill's March 2009 application would be taken up by the Board at its December 2009 meeting, Mr. Hill voluntarily dismissed his notice of defense and request for hearing.⁷¹
- November 2009: Because Mr. Hill had heard nothing more from the division, he called to check on his March 2009 application.⁷²
- November 17, 2009: The division generated a letter informing Mr. Hill that his application was incomplete and would not be considered at the December 2009 Board meeting or thereafter until he provided examination fees, an updated client list, a criminal report, a written explanation of his "yes" answer, and an explanation of and how he would conduct his business if he cannot possess a firearm as a convicted felon.⁷³ Much if not all of this information had been received with Mr. Hill's August 2007 application and was also submitted with his March 2009 application, the application under consideration.
- November 18, 2009: The division generated a letter informing Mr. Hill that it mailed hunter recommendation forms to his prior clients.⁷⁴
- November and December 2009: Hunter recommendation forms were returned with glowing recommendations for Mr. Hill's guiding abilities.⁷⁵
- December 3, 2009: Mr. Hill provided a second written explanation as to how he would guide when he cannot carry a fire arm and explaining his criminal convictions.⁷⁶
- December 4, 2009: Mr. Hill provided a recent criminal history report.⁷⁷
- December 11, 2009: Mr. Hill's application was considered complete by the licensing examiner and forwarded to investigations.⁷⁸ His application was not considered by the Board at its December meeting.

2010

- January 2010: Mr. Hill was informed that he could sit for the March 2010 examinations but his application would be voted on by the Board after the

⁶⁹ *Id.* at 100.
⁷⁰ *Id.* at 108.
⁷¹ *Id.* at 85, 86.
⁷² Hill Testimony.
⁷³ Hill Exh. 1 at 69.
⁷⁴ *Id.* at 67.
⁷⁵ *Id.* at 37 - 41 and 46 - 66.
⁷⁶ *Id.* 42 - 45.
⁷⁷ Div. Exh. 49.
⁷⁸ Hill Exh. 1 at 26, 30.

investigator has completed his review.⁷⁹ However, because of his work schedule, Mr. Hill opted to sit for the December 2010 examinations.⁸⁰

- March 8, 2010: The division received Mr. Hill’s application to renew his assistant guide license for 2010/2011.⁸¹ He answered “yes” when asked if he had ever been convicted of a felony and “no” when asked if he has ever attempted to secure a license through deceit, fraud, or intentional misrepresentation.
- March 9 – 11, 2010: The Board denied Mr. Hill’s application for a registered guide-outfitter license, reasoning that he had omitted material facts on his applications. The division then filed an accusation against Mr. Hill’s class-A assistant guide license.
- Mr. Hill timely appealed and the matter proceeded to hearing.

III. Discussion

This Board was statutorily constituted in 2005 for “the purposes of licensing and regulating the activities of providers of commercial services to big game hunters in the interest of the state’s wildlife resources”⁸² To that end, the legislature provided that the “board shall . . . (2) authorize the issuance of registered guide-outfitter . . . licenses after the applicant for the license satisfies the requirements for the license; [and] (3) impose appropriate disciplinary sanctions on a licensee under AS 08.54.600 – 08.54.790”⁸³

Mr. Hill has a class-A assistant guide license. He seeks a registered guide outfitter license. In general, the division has the burden to prove by a preponderance of the evidence the allegations set forth in its second amended accusation, seeking to deprive Mr. Hill of his existing license, and Mr. Hill has the burden to prove by a preponderance of the evidence that he satisfies the requirement for a registered guide-outfitter license.⁸⁴ To prove something by a preponderance of the evidence is to establish that something is more likely than not true, or, that there is a greater than 50 percent chance it is true.⁸⁵

It is Mr. Hill’s position that he has done nothing to warrant the imposition of discipline by the Board and that he should be given permission to take the qualification examination so he may satisfy the requirements for a registered guide-outfitter license. He also argues that the

⁷⁹ *Id.* at 26.

⁸⁰ *Id.* at 23.

⁸¹ *Id.* at 15-18.

⁸² AS 08.54.591. Prior to 2005, this Board’s duties were performed by predecessor boards with different names such as: the Guide Licensing and Control Board, the Guide Board, and the Big Game Guide Board.

⁸³ AS 08.54.600(a) (emphasis added).

⁸⁴ AS 44.62.460(e).

Board is required, under AS 08.54.710(a) to impose discipline in a timely manner and it has not done that in this case.⁸⁶

The division contends that Mr. Hill has engaged in behavior that supports a permanent revocation of licensure, which would make him ineligible for any Board issued license. Because Mr. Hill’s ability to hold a registered guide-outfitter license is tied to his class-A assistant guide license, the division’s amended accusation will be addressed first, followed by Mr. Hill’s appeal of the division’s denial of his application for a registered guide-outfitter license.⁸⁷

A. *Class –A Assistant Guide License*

Alaska Statute 08.54.710(a) provides that the board “*may* impose a disciplinary sanction in a timely manner . . . if the board finds that a licensee . . . (3) has negligently misrepresented or omitted a material fact on an application. . . .”⁸⁸ Subsection (d) of that same statute 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.”⁸⁹ Therefore, if the Board finds that Mr. Hill obtained his license “through fraud, deceit, or misrepresentation,” it has no discretion and must permanently revoke the license. If the Board finds only that Mr. Hill negligently misrepresented or omitted material facts on his application, the Board has the discretion to impose discipline ranging from civil fines, remedial education, or reprimand up to and including permanent revocation.⁹⁰

The fact that “misrepresentation” appears in both branches of the statute—the branch giving the board discretion and the branch giving the board no discretion—requires some attention to how these two branches can be harmonized. The most plausible explanation is that where “misrepresentation” appears in subsection (d), the mandatory branch of the statute, it should be read as the kind of misrepresentation associated with fraud and deceit, *i.e.*, intentional misrepresentation. “A person acts ‘intentionally’ if he desires to cause consequences of his act

⁸⁵ See *Dairy Queen of Fairbanks, Inc. v. Travelers Indemnity Co. of America*, 748 P.2d 1169, 1170-72 (Alaska 1988).

⁸⁶ AS 08.54.710(a) (the Board “may impose a disciplinary sanction in a timely manner. . .”).

⁸⁷ AS 08.54.605(a)(2) precludes a person from receiving or renewing a license if the person has had a license suspended or revoked. See also AS 08.54.710(g) (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).

⁸⁸ AS 08.54.710(a)(3) (emphasis added).

⁸⁹ AS 08.54.710(d) (emphasis added).

⁹⁰ AS 08.54.710(c).

or he believes consequences are substantially certain to result.”⁹¹ Merely negligent misrepresentation is handled separately in (a)(3), and leads to a broader range of disciplinary options.⁹² Negligence is the failure to act as a reasonable person would given the same facts and circumstances.⁹³

In short, if the division establishes that Mr. Hill intentionally misrepresented facts and thereby obtained a license, revocation is the only possible result. If it establishes that a misrepresentation occurred but more likely than not was made through negligence, the Board must look more closely at the circumstances to decide whether, and to what degree, the licensee should be disciplined.

1. Counts I and III – Illegal Use of a Controlled Substance

In Counts I and III, the division alleges that Mr. Hill misrepresented a material fact on his 1998/1999 and 2000/2001 assistant guide renewal applications submitted May 20, 1998 and March 18, 2000, respectively, when he answered “no” to the questions whether he had ever illegally used a controlled substance. The division reasons that because Mr. Hill was convicted of misconduct involving a controlled substance he “used” a controlled substance. If the division’s rationale were adopted then a person who is taking a bottle of wine to a dinner party is “using” alcohol and the only question would be whether it is a legal or illegal use. Karl Marx, licensing examiner, testified that until very recently, the division would not have considered Mr. Hill’s arrest and conviction for misconduct involving a controlled substance as reportable under this question.

⁹¹ *In re L.H.*, OAH No. 07-0325-PFD at 4 (October 30, 2007) citing BLACK’S LAW DICTIONARY p. 560 (Abridged 6th ed. 1991) (discussing whether a permanent fund applicant intended to claim or maintain a property tax exemption).

⁹² This construction is in keeping with *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386-87 (Alaska 1984), in which the Alaska Supreme Court reviewed a case in which the Superior Court had construed the word “misrepresentation” in another real estate statute to mean “intentional-type wrongdoing, not negligent or innocent wrongdoing.” The Superior Court had applied this construction because the word appeared in close juxtaposition with “fraud” and “deceit.” The Supreme Court agreed with this way of construing the word when found in that context.

⁹³ *Lyons v. Midnight Sun Transp. Services, Inc.*, 928 P.2d 1202, 1203 (Alaska 1996); Alaska Pattern Jury Instruction 03.03A, Negligence Defined – Adult.

As advanced by the division, the word “used” is overly technical and not appropriate.⁹⁴ The question asks whether the applicant has “been addicted to or excessively or illegally used alcohol or a controlled substance?” It is found on the application under the heading “Personal History Questions.” A reasonable person answering this question would understand the division to be asking if the individual had been addicted to or excessively imbibed or illegally imbibed a controlled substance, not whether the applicant had ever possessed a controlled substance.⁹⁵

As conveyed by the context of the question and the division’s witness, Mr. Hill’s “no” answers were appropriate. Accordingly, the division has not met its burden of proving Mr. Hill negligently misrepresented or omitted a material fact in violation of AS 08.54.710(a)(3) as alleged in Counts I and III.

2. Counts II, IV, V, VI, VIII, & X - Failure to Disclose Criminal Convictions

It is undisputed that Mr. Hill was convicted of a class C felony on September 1, 1998. Therefore, every time he answered “no” when asked if he had been convicted of a felony, he answered incorrectly. Similarly, Mr. Hill answered incorrectly when he answered “no” when asked on his 2004/2005 renewal application and his 2005 registered guide license, whether, since the date of his last application and within the last five years respectively, he had been *convicted* of state hunting and guiding violations and fined more than \$1000.⁹⁶ When he failed to correctly answer these questions, Mr. Hill supplied false information. Therefore, at issue is whether Mr. Hill’s failure to correctly answer was intentional or the result of negligence.

(a) Mr. Hill’s Failure to Disclose His Felony Conviction was Negligent, Not Intentional

When determining whether a person’s actions were negligent, the test applied is the “reasonable person” test: the person’s whose actions are in question are compared to how a

⁹⁴ The legislature has provided guidance when construing words and phrases at AS 01.10.040. Although directed at statutory and regulatory interpretation, the principal set forth is equally persuasive when construing an application for licensure: unless words and phrases have acquired a peculiar and appropriate meaning, they should be “construed according to . . . their common and approved usage . . .” AS 01.10.040(a).

⁹⁵ Black’s Law Dictionary Abridged 6th Ed. (1997) at page 1072 defines the term “‘use’ of narcotics for purposes of statute defining offense of narcotics use, refers to act of injecting or ingesting controlled substance or narcotic.”

⁹⁶ *Emphasis added.*

reasonable person would have acted given the same facts and circumstances.⁹⁷ If the person did not act as a reasonable person would, they have, at a minimum acted in a negligent manner.

A professional license is important. It indicates to others that its holder has attained a minimum level of skills and abilities. When, as here, a person may not guide without a license, it is the vehicle that permits the person to make a living at what they choose to do. A reasonable person would have exercised more care in the pursuit of a professional license. A reasonable person would know or have reason to know he or she had been convicted of a felony. At the very least, a reasonable person would have made further inquiry to ensure the conviction was not required to be reported.

Mr. Hill attempts to blame the division for the delays and difficulty he encountered throughout his application process. He spent much time establishing through cross examination of division witnesses that the division had misfiled his submissions and that the division had independent knowledge of his criminal violations so they could have told him he was answering incorrectly. The division's errors or knowledge do not excuse Mr. Hill from exercising reasonable care and accepting responsibility for providing correct information on an application.⁹⁸ Therefore, when Mr. Hill's failed to correctly answer questions regarding his felony convictions, he did so negligently.

To establish that Mr. Hill intentionally failed to answer yes, it must be established by a preponderance of the evidence that Mr. Hill desired cause the consequences of his act or he believed the consequences were substantially certain to result.⁹⁹ The evidence relied upon to support a finding of intentional misrepresentation includes the existence of the felony conviction, the revocation of the SIS and accepting a conviction of record, as well as the division's 2002 motion for summary judgment stating the division's intention to amend the accusation to include Mr. Hill's failure to disclose his felony conviction on an application. The division reasons that it

⁹⁷ *Lyons v. Midnight Sun Transp. Services, Inc.*, 928 P.2d 1202, 1203 (Alaska 1996); Alaska Pattern Jury Instruction 03.03A, Negligence Defined – Adult.

⁹⁸ While the division may be able to identify certain information from prior applications the applicant may have submitted, or from other collateral sources, these means are imperfect and material information may be missed if not the responsibility of the applicant. *In re Sykes*, OAH No. 08-0475-MED (January 29, 2009) at 9 (Alaska State Medical Board discussing the importance of an applicant disclosing all states of licensure on an application).

⁹⁹ *In re L.H.*, OAH No. 07-0325-PFD at 4 (October 30, 2007) citing BLACK'S LAW DICTIONARY p. 560 (Abridged 6th ed. 1991) (discussing whether a permanent fund applicant intended to claim or maintain a property tax exemption).

is unbelievable for Mr. Hill to contend he did not know he had a felony conviction and, therefore, his failure to disclose was intentional.

The mention of the felony conviction in the summary judgment motion does not establish that Mr. Hill's former attorney discussed the division's threat to amend its accusation in 2002 or provided Mr. Hill with a copy of the motion. Mr. Hill testified that he did not recall receiving a copy of the motion for summary judgment. When asked about his reasons for dismissing the appeal he explained that his attorney informed him that the hunting and guiding convictions were barrier crimes and by statute he could not receive a license until 2004, so he dropped the appeal.

While it may seem self evident that a person convicted of a felony would be aware of the nature of their conviction it must still be established by a preponderance of the evidence that Mr. Hill's misrepresentation was intentional, that is Mr. Hill made no attempt to hide his felony conviction from the Board. Mr. Hill's testimony successfully rebutted any assumption regarding his knowledge that could be drawn from the fact that he had been convicted of a felony. Mr. Hill testified convincingly that his answering "no" was not done to hide his felony conviction. Rather, his failure to answer correctly was attributable to a lack of attention to detail and a lack of knowledge of criminal procedure.

Mr. Hill explained that he knew he had been charged with a felony but when he was offered the SIS he thought that if he accepted the SIS then the felony conviction went away, that his record would be wiped clean.¹⁰⁰ Because the conviction of record came out of a hearing to revoke the SIS, he reasoned the conviction of record was for the SIS, not the felony. He recalled the judge focusing on how Mr. Hill almost completed his SIS and offering that he could go back on probation or accept the conviction of record. Mr. Hill took the conviction of record because he wanted to move forward. He did not recall anyone discussing a felony conviction nor did he feel he was treated as if he had a felony. After all, Mr. Hill testified that he had passed a federal background check and purchased a firearm which he understood a felon could not do. Additionally, the court offered that he could buy back his firearm.

In response to Mr. Hill's explanation, the division asserted that under the presumption of government regularity it must be presumed that the court and Mr. Hill's public defender fulfilled their obligation to Mr. Hill to explain he was accepting a felony conviction as prescribed by law. The presumption of regularity requires that, in the absence of evidence to the contrary, the trial

¹⁰⁰ Testimony of Hill.

court carried out its prescribed duties.¹⁰¹ The division did not identify where such actions are prescribed. The order revoking the SIS and entering conviction of record does not identify the matter as a felony conviction.¹⁰² Criminal Rule 11(c) governing plea agreements provides a list of criteria that must be fulfilled before the court may accept a plea of guilty or no contest. Included in the list is that the court must ensure that the defendant understands the nature of the charge to which he is pleading. The phrase “understanding the nature of the charge” encompasses the defendant understanding the elements of the crime to which he is pleading and an awareness of the guilty plea.¹⁰³

Without more, the presumption of regularity does not attach to the conclusion that the court or Mr. Hill’s counsel informed Mr. Hill that he was accepting a felony conviction and not a conviction of the suspended imposition of sentence. It was not until the Board’s action in 2007 and an explanation by a division employee that Mr. Hill understood he had a felony conviction that he was required to and did report on his subsequent applications.

Mr. Hill’s composure added credibility to his testimony. Mr. Hill presented himself as a “what you see is what you get” individual; a person who is more focused on the present than the events of the past. Mr. Hill has a history of cooperation and being forthright with authority figures. When the trooper arrived at his house and inquired about the marijuana, Mr. Hill invited him in and readily admitted he brought the drug back from Fairbanks and had bartered with it. During his testimony, Mr. Hill’s voice did not soften as if he was unsure when he explained his understanding of court proceedings or why he failed to mark “yes” on the application. Nor did Mr. Hill become defensive. Rather, he was sure and forthright when testifying. Mr. Hill readily admits that knowing what he knows now, he should have answered “yes” when asked about his felony convictions, but on the applications in question, when he marked “no” he did so believing it was the correct box to mark as he understood the facts to be.

¹⁰¹ *Jerrel v. State*, 851 P.2d 1365, 1372 (Alaska App. 1993) citing *U.S. v. Manthei’s Bondsmen*, 2 Alaska 459 (1905).

¹⁰² Div. Exh. 32, 33.

¹⁰³ *See e.g., Else v. State*, 555 P.2d 1210 (Alaska 1976) (judge failed to inform *pro se* defendant that unloaded gun not used to bludgeon was not a dangerous weapon); *Ingram v. State*, 450 P.2d 161 (Alaska 1969) (“understanding the nature of the charge” requires the defendant be aware of the consequences of his plea including the mandatory maximum and minimum sentence that may be imposed).

That is when Mr. Hill marked “no” he did so believing it was the correct box to mark. Mr. Hill’s failure to accurately complete his applications was a negligent misrepresentation or omission, not intentional.

(b) Mr. Hill’s Failure to Report his Hunting and Guiding Convictions was Negligent, not Intentional.

Mr. Hill was convicted in July 2001 and fined \$10,000 with \$8,000 suspended for October 1997 hunting violations. He failed to report this conviction on his 2004/2005 renewal application and his 2005 registered guide application. The renewal application asked whether, since July 2000 (the date of his last application) he had been convicted of any guiding or hunting violations for which he was fined more than \$1,000. Mr. Hill should have answered yes when asked about his hunting conviction. When asked why he did not, he responded that he really did not know why but believes because of the way he answered it, he must not have read the question carefully, that he must have read the question to be asking about when the unlawful acts occurred, not when he was convicted. After receiving Mr. Hill’s testimony it is conceivable that he did not read the question carefully and correctly answered the question as he read it. When viewed sequentially, Mr. Hill could have been answering “yes” to the question if the question was inquiring about when the violations took place versus the conviction. Mr. Hill is not sophisticated. He admittedly and demonstrably does not pay attention to detail. As discussed above, Mr. Hill testified consistently and convincingly that he did not intentionally fail to answer “yes.”

Applying the reasonable person test, Mr. Hill failed to act as a reasonable person would under similar facts and circumstances. A reasonable person in Mr. Hill’s position would have read the question carefully and if unsure of how to respond, would have asked the division for guidance. Mr. Hill admittedly did neither. Mr. Hill’s failure to report his hunting and guiding convictions was, at a minimum, negligent.

On his first application in 1997, Mr. Hill answered yes to this question, provided a written explanation, and received his class-A assistant guide license. In 2000, Mr. Hill again answered the question correctly and he was denied a license for four years. Arguably, Mr. Hill’s personal experience with truthfully answering this question would provide a reason not to mark “yes.” However, this is insufficient to establish that there is a greater than 50% probability that Mr. Hill would have intentionally misrepresented his prior guiding convictions.

3. Count IX, XI, XII, & XIII – Attempting to Secure a License Though Deceit, Fraud, or Intentional Misrepresentation¹⁰⁴

The division contends that Mr. Hill “secured or attempted to secure a license though deceit, fraud, or intentional misrepresentation” when he misrepresented his criminal history and illegal use of drugs on his applications. Deceit, fraud, and intentional misrepresentation are all terms with specific legal implication. Most notably, they require proof of a specific mental state¹⁰⁵, which, as explained above, the division has not established. Therefore, the division has not met its burden of proving Mr. Hill is subject to discipline under AS 08.54.710(a)(3) as alleged in Counts IX, XI, XII, & XIII.

4. Count XIV – Misrepresentation of Factual Basis of Felony Conviction on 2009 Application for Registered Guide Outfitter

In support of his March 2009 application for licensure as a registered guide-outfitter, Mr. Hill explained his “yes” answer to the felony conviction inquiry and wrote that he had two ounces of marijuana in his house that belonged to a friend.¹⁰⁶ The troopers removed 68.9 grams of marijuana which is 2.4 ounces.¹⁰⁷ The division characterizes the amount as “closer to three ounces” and contends that the disparity between Mr. Hill’s description and the criminal record should be viewed as “another incident of attempting to obtain a license through misrepresentation.”¹⁰⁸

Mr. Hill admits that the amount of marijuana removed was greater than the amount he reported. However, he disputes that this was an intentional mischaracterization of for purposes of obtaining his license. Mr. Hill convincingly testified that he had no reason to understate the amount of contraband in his home.

The division has failed to establish that it is more likely true than not that Mr. Hill intentionally misrepresented the amount of marijuana believing it would aid him in obtaining a license. Rather, it is more likely true than not that this event, as demonstrated by Mr. Hill’s failure to grasp the significance of conviction of record on the felony charge, did not have a great deal of significance. Attention to detail is not Mr. Hill’s strong suit. The division has

¹⁰⁴ Counts IX, XII, and XIII target Mr. Hill’s December 2006, July 2007, and February 2009 applications for registered guide-outfitter by examination. Count XI target Mr. Hill’s August 2006 class-A assistant guide license.

¹⁰⁵ *Barber v. National Bank of Alaska*, 815 P.2d 857, 862 (Alaska 1991).

¹⁰⁶ Div. Exh. 49 at 4.

¹⁰⁷ One ounce = 28.35 grams.

¹⁰⁸ Division’s prehearing Brief at 5.

established by a preponderance of the evidence that Mr. Hill negligently misrepresented the factual basis of the felony conviction. It has not, however, established that by using “two ounces” instead of “2.4 ounces” in the description of his felony conviction, he was attempting to obtain a license through intentional misrepresentation.

5. Count XV and XVI – Violation of State Statutes and Regulations

AS 08.54.710(a)(1) provides that the Board “may impose a disciplinary sanction in a timely manner . . . if the board finds that the licensee (1) is convicted of a violation of any state . . . statute or regulation relating to big game hunting or to the provision of big game hunting services. . . .” It is undisputed that Mr. Hill has been convicted of statutory and regulatory violations relating to big game hunting. Failure to comply with applicable state statutes is a violation of the Board’s regulation prescribing professional ethics standards for guides found at 12 AAC 75.340.¹⁰⁹

Mr. Hill does not deny these violations. Rather, he challenges whether an imposition of discipline more than ten years after the division was aware of the violations meets the “timely manner” requirement as a condition of imposing discipline. Granted, there were delays in processing Mr. Hill’s applications. However, Mr. Hill’s challenge is analogous to an affirmative defense and as such, he carries the burden. In support of his position Mr. Hill has only offered his assertion that, under these circumstances, an imposition of discipline would not be timely and the statute requires that the Board act in a timely manner.¹¹⁰ Mr. Hill is correct that the statute requires the timely imposition of discipline *if the Board finds* the licensee culpable under AS

¹⁰⁹ Specifically, 12 AAC 75.340(a)(2)(A) provides that it is unethical to violate .340(b). This subsection, .340(b) requires all classes of guides to comply with applicable state and federal statutes and regulations. Mr. Hill’s convictions are a violation of 12 AAC 75.340.

¹¹⁰ Mr. Hill does not claim he was prejudiced by the delay in disciplinary action, therefore, he cannot claim these counts are barred the equitable doctrine of laches. To claim laches, Mr. Hill would need to establish: (1) that the division has unreasonably delayed in filing its accusation and (2) that the delay caused Mr. Hill undue harm or prejudice. *Cizek v. Concerned Citizens of Eagle River Valley, Inc.*, 49 P.3d 228, 233 (Alaska 2002).

08.54.710. This implies that the timeliness requirement applies to the imposition of discipline, not the filing of an accusation.¹¹¹

The argument that discipline should not be imposed because the imposition of discipline is untimely is not persuasive. The Board, when assessing what type of disciplinary sanction, if any, may consider the amount of time Mr. Hill has been guiding without further violation as a mitigating factor, but it need not ignore his convictions. Therefore, Mr. Hill may be subject to discipline under AS 08.54.710(a)(1) as alleged in Counts XV and XVI.

B. Denial of Registered Guide-Outfitter License Application

Mr. Hill requests that the Board permit him to sit for the qualification examination, and if he passes, license him as a registered-guide outfitter. The qualification examination requires the examinee demonstrate the person is “qualified to provide guided and outfitted hunts and, in particular, possesses knowledge of fishing, hunting, and guiding laws and regulations. . . .”¹¹² As discussed above, Mr. Hill bears the burden of proving by a preponderance of the evidence that he meets the statutory requirements for licensure.

AS 08.54.610(a), which is specific to the Big Game Commercial Services Board, provides that an applicant “*is entitled* to a registered guide-outfitter license” if the person meets certain minimum qualifications.¹¹³ This entitlement is not without limit. The legislature saw fit to prohibit an otherwise eligible applicant from obtaining a registered guide license if the applicant had been convicted of certain barrier crimes or if the applicant has had his guiding license “suspended or revoked in this state”¹¹⁴ This raises as a question of law, whether the language of AS 08.54.610(a) and .605 permits the Board to exercise its discretion when deciding

¹¹¹ Such an interpretation is supported by the legislative history to AS 08.54.710. Prior to 1996 the relevant statutory section, AS 08.54.500(a), read “[t]he board shall hold a hearing to determine whether a licensee should be disciplined within a reasonable time after” written complaints are filed or the licensee had been convicted of a hunting violation. In 1996, AS 08.05.500 was repealed (§ 16 ch 33, SLA 1996) and a new section AS 08.54.710 enacted (§ 3 ch 33 SLA 1996). The new language provided that “[t]he board may impose a disciplinary sanction in a timely manner under (c) of this section if the board finds that a licensee (1) is convicted of [a hunting or guiding violation] . . . (3) has negligently misrepresented or omitted a material fact on an application. . . .” Subsection (c) identifies the range of disciplinary actions available to the Board. Therefore, legislative history corroborates the plain language of the statute that before 1996 the hearing had to take place in a timely fashion after a complaint had been filed and under the current statute the discipline must be imposed in a timely fashion after the Board has made a finding.

¹¹² AS 08.54.600(a)(1)(A).

¹¹³ AS 08.54.600(a) (emphasis added).

¹¹⁴ AS 08.54.605(a)(2).

whether to grant or deny an application for licensure. A post hearing oral argument provided the parties an opportunity to address the following issue:

Does the Board have the statutory authority to deny an application for a registered guide-outfitter license for an action that is disciplinable under AS 08.54.710(a) when the applicant otherwise meets the requirements of AS 08.54.600(a) and is not prohibited under AS 08.54.605?¹¹⁵

Because of the language in the statutes, Mr. Hill took the position that the Board lacks the discretion to deny him a license if he meets the statutory requirements.¹¹⁶

The interpretation advanced by Mr. Hill would deprive the Board of those incidental and implied powers needed to achieve the purpose for which it was created – to license and regulate the providers of big game commercial services in the interest of the state’s wildlife resources – because it would be required to license registered guide-outfitters as a ministerial duty. This Board has authority to impose disciplinary sanctions on a licensee and to authorize the issuance of a registered guide-outfitter license after the licensee satisfies the requirements for licensure.¹¹⁷ It also has incidental and implied powers as needed to achieve its stated purpose.¹¹⁸ Included in these incidental and implied powers is the ability to withhold issuance of a license for good cause.¹¹⁹ If read literally, the statute would require the Board to license individuals who would then be subject to immediate suspension or revocation. This would be an absurd result.

Where a literal interpretation would lead to an absurd result, the Alaska Supreme Court has instructed that the plain meaning of a statute should be ignored.¹²⁰ A literal reading also ignores the general proposition that with the power to grant a license is the power to deny a license for good cause.¹²¹ Good cause includes actions that would expose a licensee to

¹¹⁵ Order Scheduling Limited Oral Argument December 2, 2010.

¹¹⁶ AS 08.54.600 (the Board shall authorize); AS08.54.610 (a person is entitled to a license).

¹¹⁷ AS 8.54.600(a)(2), (3).

¹¹⁸ *In re Professional Nurses Service, Inc.*, 671 A.2d 1289, 1293 (Vermont 1996).

¹¹⁹ *Smith v. University of New York*, 366 N.Y.S.2d 766, 768 (New York 1975).

¹²⁰ *Martinez v. Cape Fox Corp.*, 113 P.3d 1226, 1230 (Alaska 2005); *Brooks Range Exploration Co., Inc., v. Gordon*, 46 P.3d 942, 945 – 946 (Alaska 2002).

¹²¹ *Smith v. University of New York*, 366 N.Y.S.2d 766, 768 (New York 1975)(Denial of application for licensure by credential appropriate where applicant met all criteria but Board had reason to believe testing for licensure in other state was compromised); *Barton Trucking Corp., v. O’Connell*, 197 N.Y.S. 2d 138, 143(New York 1959) (denial of application for license to engage in trucking services was not arbitrary or capricious where corporate officer met statutory criteria but had been convicted of extortion in a related industry 20 years earlier.)

discipline.¹²² Consideration of an applicant’s qualifications should not be carried out in a vacuum. A board should consider factors that reflect on an applicant current competency.¹²³ These factors may include an applicant’s level of remorse, acknowledgment of past wrongdoing, and the amount of time that has passed since his disciplinable conduct.¹²⁴

In each application for licensure, the Board has implicit discretion to pass upon the fitness of an applicant. When Mr. Hill applies for a registered guide-outfitter license he is claiming that he is ready, able, and willing to accept the additional responsibilities of that license. In the statutes governing licensure of registered guide-outfitters, this is referred to as “essential duties associated with guiding and outfitting.” These essential duties include contracting with a client, outfitting the clients for the hunt, and arranging for transportation.¹²⁵ Only a registered guide-outfitter is statutorily required to have the capability to perform these essential duties. An assistant guide, class-A or otherwise, does not have the statutory authority (in the case of contracting) or obligation to perform these essential duties.¹²⁶ A registered guide-outfitter is statutorily responsible for the violations of those who work under him. Mr. Hill’s demonstrated inability to understand or follow the law calls into question his ability to provide adequate supervision and guidance. His actions do not demonstrate he is ready to accept these responsibilities. In his professional life Mr. Hill has not demonstrated that he understands that it is not enough to accept responsibility for his wrong doings but he must be able to abide by rules and not do wrong.

As an alternative to denial, the Board may consider whether it would grant a license subject to sanctions, such as probation and require education. However, since the Board only has the authority to impose sanctions on licensees¹²⁷ if the Board offers a license to the applicant subject to sanction and the applicant declines to accept the license with the discipline, the Board’s action becomes a license denial. Other boards, such as the Medical Board, have long

¹²² If a behavior is grounds for revocation of a license after it has been issued, it follows that the same behavior is grounds for denial of an application for a license. *In re Wilson*, OAH No. 07-0199-NUR (September 14, 2007) (Board of Dental Examiners denied application for licensure after finding applicant attempted to obtain a license to practice dental hygiene by fraud, deceit or intentional misrepresentation).

¹²³ *Beirne v. State of Alaska, Medical Board*, 3AN 07-11710CI at 21, 22 (November 20, 2008).

¹²⁴ *In re Wiederholt*, 24 P.3d 1219, 1226 – 1228 (finding Bar Association Disciplinary Board appropriately considered past conduct as it reflected upon disbarred attorney’s current fitness).

¹²⁵ AS 08.54.790(8) – (10); 12 AAC 75.990(a)(4).

¹²⁶ By statute a class-A assistant guide or an assistant guide may not contract to guide or outfit a hunt. AS 08.54.620(b)(1); AS 08.54.630(b)(1). Throughout AS 08.54 and 12 AAC 75, the relevant phrase “essential duties associated with guiding and outfitting” is found only in those provisions addressing registered guide-outfitters.

¹²⁷ AS 08.54.600(a)(3).

interpreted their licensing and discipline authority to encompass the intermediate act of offering a license conditioned upon submission to a disciplinary sanction that the Board is authorized to impose on licensees.¹²⁸ It does not appear that this Board has done so, but it also does not appear that this option would be unavailable to the Board if it believed that there were certain conditions that could protect the public, it could offer a licensee subject to conditions such as continuing education, probation, fines, etc.¹²⁹

However, the reason for denial is the conclusion that Mr. Hill will not be able to carry out the additional responsibilities and duties that distinguish a registered guide outfitter from a class-A assistant guide: contracting and supervision of subordinates. Mr. Hill does not therefore meet the minimum requirements. It is difficult to conceive conditions that could be placed on Mr. Hill's license that would enable him to carry out the essential duties of a registered guide-outfitter.

The Second Amended Statement of Issues identified the same 16 counts as reasons for denial. The division established by a preponderance of the evidence that Mr. Hill violated Counts II, IV, V, VI, VIII, X, XIV, XV, and XVI. These violations are sufficient reason to deny Mr. Hill's application for a license and demonstrate that he does not meet the minimum requirements of a registered guide outfitter.

C. *The Appropriate Disciplinary Sanction*

1. The Range of the Board's Discretion

This Board has authority to administer a range of disciplinary sanctions, singularly or in combination, including reprimand, censure, probation, license limitations or conditions, and civil fines.¹³⁰ Its authority derives from two statutes, AS 08.01.075 addressing the disciplinary powers of boards under centralized licensing,¹³¹ and AS 08.54.710 addressing the discipline of guides and transporters. Under AS 08.01.075(f):

¹²⁸ See e.g., *In re Denney*, No. 2852-97-001 (Alaska State Medical Board, adopted August 26, 1998) (license granted if applicant accepts reprimand and fine); *In re Steinhilber*, No. 2850-97-019 (Alaska State Medical Board, adopted August 27, 1998).

¹²⁹ The Administrative Law Judge assigned to hear this matter reviewed this Board's prior decisions and recent memorandum of agreements (MOAs). Her review revealed that the Board has not addressed this issue and that prior Board actions involved the imposition of disciplinary sanctions against licensees, not the issuance of a license conditioned upon accepting sanctions.

¹³⁰ AS 08.54.710; AS 08.01.075.

¹³¹ AS 08.01.010(7).

A board shall seek consistency in the application of disciplinary sanctions. A board shall explain a significant departure from prior decisions involving similar facts in the order imposing the sanction.

The requirement to “be consistent” with prior application of disciplinary sanctions does not mean that a board cannot change its policy over time, but if this Board decides upon a significant departure from a prior decision involving similar facts, it must explain the departure.¹³² Therefore, it is instructive to look at other instances in which the Board has imposed discipline for similar actions.

This Board and prior guide boards have formally addressed the issues of sanctioning guides in two ways. First, boards have approved a number of memoranda of agreement (“MOAs”) or stipulations between the division and guides for a wide range of violations. Second, they have issued written decisions after a hearing. Of the two, the written decisions after hearing are the more significant, in that they represent a fully considered board action with all relevant facts described in detail. The MOAs are negotiated settlements, with less complete exposition of the facts and potentially with unstated elements that were negotiated but left out of the record. They are, however, instructive as examples of what the Board has found acceptable discipline for certain violations.

Mr. Hill’s eight violations fall into two categories: negligent misrepresentation and violation of statutes and regulations. A review of prior board actions reveals that there are no other cases concerning the same combination of violations presented here. The Board has addressed statutory violations in prior decisions and MOAs; it has addressed negligent misrepresentation only in MOAs. When as here a licensee’s inexcusable violation of guiding laws demonstrate a lack of good judgment, competency, and integrity the Board should question whether the conduct reveals the licensee to be unfit to continue the licensed activity. If so, then revocation or suspension would be appropriate to protect the public and attempt to reform the licensee’s behavior. If not, then lesser sanctions are appropriate.

As set out in a prior decision, when considering the appropriate sanction the Board should consider whether the disciplinable conduct reveals the licensee is unfit to continue the licensed activity.

The imposition of a sanction in professional disciplinary proceedings may fulfill a variety of functions, such as: deterring the Respondent and other licensees from

¹³² AS 08.01.075(f).

similar conduct, affirming professional standards and norms of reasonable conduct, and rehabilitation of the licensee.... Of course, the overriding purpose of any sanction is to protect the public.

A license revocation, or refusal to renew a license, protects the public by removing dangerously incompetent or unethical licensees from the profession and would be inappropriate in the instant case.

Fines and suspensions may also serve as deterrents to less serious breaches of law or ethical standard, or to reinforce standards of conduct. Here, we must affirm professional and ethical standards of conduct for the Respondent and others, as well as deter similar conduct in the future.¹³³

(a) Recent Board Decisions and MOAs Regarding Discipline Imposed for Statutory Violations

In a March 2009 decision, *In re Smith*,¹³⁴ the matter came before the Board several years after the criminal violations and convictions had occurred. During those years, Mr. Smith, like Mr. Hill, continued to guide without further incident. Unlike Mr. Hill, Mr. Smith's criminal violations did not result in a court imposed suspension. Mr. Smith's violations involved improper land use (all guiding violations) which the Board characterized as "a violation of public trust."¹³⁵ The Board imposed disciplinary sanctions focused on deterring others from similar conduct and intended to reaffirm professional standards of behavior. The sanctions selected by the Board to fulfill this purpose were:

1. a nine month suspension during which Mr. Smith was not to be involved in the guiding/transporting industry in any form,
2. a \$5,000 fine,
3. after the suspension is complete a five year probationary period during which time any violation would result in a five year revocation,
4. written remand, and
5. education on the ethics of guiding.

¹³³ *IMO Andreis Case No. 1700-91-031* at 15 (1993). The board found the guide failed to properly supervise assistant guides and that the guide was responsible for the assistant guides' subsequent conviction of violating guiding statutes. The board sanctioned the guide with a written reprimand and \$4,500 fine. The Board determined that if the guide failed to pay the fine within one year it would result in suspension of the guide's license.)

¹³⁴ *In re Smith*, OAH 08-0424-GUI (March 2009).

¹³⁵ *Id.* at 20.

In December 2010, the Board approved two MOAs' imposing discipline for statutory violations after the licensees had been convicted in criminal court for violations of AS 08.54.720.¹³⁶

- *In re Ullrich*, 1700-08-020, the licensee was convicted of one count of an unlawful act by a guide for which the court fined him \$3,000 with \$1,500 of the fine suspended. The court also revoked Mr. Ullrich's license for one year. Because Mr. Ullrich was convicted of the statutory offense, he was subject to Board discipline. The agreement accepted by the Board placed Mr. Ullrich on probation for two years, required a public reprimand, and fined him \$3,500 with \$2,000 suspended.
- In *In re Whitehead*, 1700-10-003 (December 2010), the licensee was convicted of two counts of guiding outside of his designated guide use area. As a penalty, the court required Mr. Whitehead pay a \$500 fine. The agreement accepted by the Board placed Mr. Whitehead on probation for two years, required a public reprimand and explanatory letter from Mr. Whitehead, as well as fining him \$7,000 fine with \$3,500 suspended.

(b) Recent MOAs where the Licensee Negligently Misrepresented or Omitted Information

In recent MOAs where the licensee negligently misrepresented or omitted information in the application process, the Board has imposed fines, written reprimands, probation, and in one case, a suspension.

In a 2005 MOA accepted by the former Commissioner of Commerce, Community and Economic Development shortly before this Board came into existence, *In re Jairell*, 1700-05-004, the licensee had negligently misrepresented experience and in-state residency on his class – A assistant guide application. He subsequently applied for and received a registered guide license. The Commissioner accepted a settlement imposing a one year suspension, \$999 fine, and proof of qualifications upon reapplication.

¹³⁶ “A certified copy of a judgment of conviction of a licensee for an offense is conclusive evidence of the commission of that offense in a disciplinary proceeding instituted [under AS 08.54.710] against the licensee.” AS 08.54.710(f).

In a more recent matter, *In re McElveen*, 2010-000453 (December 2010), the licensee applied for a non-resident license from 1993 – 1997, then as a resident up through 2008. He disclosed he was a non-resident on his 2009 application. He claimed he probably thought he was a resident because he grew up in Alaska and spent time guiding and fishing, even though he had been receiving a California resident homeowner’s property tax exemption since 1988. The MOA does not provide an explanation as to why Mr. McElveen switched from non-resident to resident in 1998. A court found Mr. McElveen guilty of license and tag violations, and fined him \$10,000 with \$7,500 suspended, required payment of \$7,992 in restitution, and imposed three years probation. The Board imposed its own three year probation period and a \$10,000 fine, with \$8,000 suspended, and issued a public reprimand.

2. Sanctions for Mr. Hill’s Eight Violations

Mr. Hill has not had a guiding services related violation for the past seven years.¹³⁷ Regardless, his guide-related criminal convictions¹³⁸ demonstrate his lack of judgment and disregard for the professional standards expected of licensed guides. For these violations the court imposed over \$6,500 in unsuspended fines and suspended Mr. Hill’s license for 3 years. Mr. Hill’s inattention to the application process, his lack of understanding of the important role he plays in the licensing function and his hunting and guiding violations support the imposition of disciplinary sanctions to deter him and others from similar conduct, to reaffirm professional standards of behavior, and to protect the public.¹³⁹

Mr. Hill’s lack of guiding services violations over the past seven years suggest that he has reformed his ways and his clients have been happy with the service he provides. For this reason, a lengthy revocation or suspension may not be necessary to reform Mr. Hill. Suspending Mr. Hill’s license for Counts XV (violation of state statutes and regulations) and XVI (unethical behavior), therefore, it is not necessary to protect the public or further reform Mr. Hill’s

¹³⁷ AS 08.54.710(g).

¹³⁸ Mr. Hill’s conviction for misconduct involving a controlled substance is not guide related. Mr. Hill’s convictions under AS 08.54 are guide related.

¹³⁹ See *State, Board of Dental Examiners v. Ness*, Supreme Court No. S-13129 Order at 1 (January 28, 2010 Alaska) (discussing purpose of professional disciplinary sanctions); *In Re Hanlon*, 110 P.3d 937, 946-47 (Alaska 2005) (sanctions protect the public and maintain the integrity of the profession); *State, Dept. of Commerce and Economic Development, Div. of Ins. v. Schnell*, 8 P.3d 351, 358 (Alaska 2000) (primary purpose of disciplinary action against attorney is protection of the public); *In re Inquiry Concerning a Judge*, 788 P.2d 716, 722 (Alaska 1990) (primary purpose of judicial discipline is protection of the public; not punishment; *Disciplinary Matter Involving Buckalew*, 731 P.2d 48, 51 (Alaska 1986) (Purpose of lawyer discipline includes protection of the public, deterrence of unethical conduct, and education of other professionals).

behavior. As to the remaining violations for negligent misrepresentation or omissions on his applications, Mr. Hill misrepresented hunting violations and crimes not related to hunting. Mr. Hill's misrepresentations did not go to his experience as was the case *In re Jairell*. Therefore it would be a deviation from *In re Jairell* to suspend or revoke Mr. Hill's license.¹⁴⁰ However, other disciplinary sanctions (probation, civil fines, reprimand and education) are warranted and would be consistent with prior Board actions.

A period of probation is appropriate to provide Mr. Hill with an opportunity to demonstrate to the Board that its trust in his reform is not misplaced. Three years should be sufficient and will take Mr. Hill up through the next license renewal period. Any further omission, misrepresentation, violation of hunting, guiding, or transporter rules and regulations in any jurisdiction found to have taken place within the three year probationary period may result in a revocation of Mr. Hill's license.

Mr. Hill has already incurred court-imposed fines associated with his guide-related violations. These fines exceed \$16,700 with \$10,200 suspended for the seven convictions. This is a substantial amount of money similar to the court imposed fines in *Smith*. There the court imposed fines totaling \$10,700 with \$3,200 suspended. The Board recognized that Mr. Smith had already paid a substantial amount in fines to the court but still imposed a \$5,000 fine for the six violations.

The matter which most closely resembles Mr. Hill's regarding the number of omissions or misrepresentation is *In re McElveen*, where, in addition to the court imposed fines and probation, the Board imposed a \$10,000 fine for five misrepresentations or two thousand per omission and with 75% suspended during the probationary period.

Here, there were six omissions. Therefore, for the negligent misrepresentations or omissions (Counts II, IV, V, VI, VIII, and X) it is consistent with past decisions to impose a fine of \$12,000 with \$9,000 suspended provided Mr. Hill has no hunting or guiding violation in any jurisdiction during his period of probation. For the guide-related statutory violations (Counts XV and XVI), a \$5,000 fine with \$1,500 suspended is appropriate considering that Mr. Hill has already incurred over \$6,000 in criminal fines. The Board imposed fines total \$17,000 with \$10,500 suspended in addition to the court imposed fines will remind Mr. Hill and members of

¹⁴⁰ Moreover, period of time that has lapsed since the division became aware of Mr. Hill's violations and misrepresentations and the division filed its accusation conveys that the division did not consider that Mr. Hill's continuing to act as a class-A assistant guide would pose a threat to the public.

the profession that they have a responsibility to the public and the profession to comply with the law and to take care to provide accurate information on their application and other license-related paperwork.

Consistent with prior decisions, Mr. Hill should also receive a public written reprimand from the Board and, if available, he should be required to take a class on a guide's legal and ethical obligations. A reprimand is appropriate because it has the benefit of making a clear record of what the licensee is being disciplined for and of making it plain to the licensee and others what he or she must do differently in the future.

IV. Conclusion

The division has met its burden on eight of the 16 counts set forth in its Amended Accusation. The preponderance of the evidence establishes that Mr. Hill has violated state statutes and regulations, and has negligently misrepresented or omitted material facts on several applications. Mr. Hill's violations affirm the Board's decision to deny Mr. Hill's application for licensure as a registered guide-outfitter. Nothing precludes Mr. Hill from reapplying in the future.

Mr. Hill actions or inactions are grounds for discipline against his class-A assistant guide license. Failure to fulfill any of the following may result in revocation of Mr. Hill's license. Accordingly, with respect to Mr. Hill's class-A assistant guide license the following discipline should be imposed:

1. Mr. Hill shall be on probation for three years from the date the Board adopts this decision. Any misrepresentation or omission to a licensing authority or violation of hunting, guiding, or transporter rules and regulations in any jurisdiction that is discovered to have occurred within the three year probationary period may result in an immediate revocation of Mr. Hill's license.
2. A civil fine in the amount of \$17,000 fine is hereby imposed on Craig E. Hill. Mr. Hill shall pay \$6,500 as follows: \$2,500 no later than one year after the Board adopts this decision; \$2,000 no later than two years after the Board adopts this decision; and Mr. Hill shall pay the remaining \$2,000 no later than three years after the Board adopts this decision. Payment of the remaining \$10,500 shall be suspended for a period of three years from the date the board adopts this decision. If Mr. Hill commits no other violations of misrepresentation or omission to a licensing authority or violation of hunting, guiding,

or transporter rules and regulations in any jurisdiction before the end of that three-year period, his obligation to pay the remaining \$10,500 is extinguished. If Mr. Hill does commit a violation of misrepresentation or omission to a licensing authority or violation of hunting, guiding, or transporter rules and regulations in any jurisdiction before the end of the three-year period, the remaining \$10,500 fine amount becomes due and payable immediately upon a final determination by the board that Mr. Hill has committed the violation.

3. The following public reprimand shall be issued and placed Mr. Hill's licensing files:

The Board hereby reprimands you, Craig E. Hill, for failure to follow the rules and regulations relating to hunting, the provision of big game hunting services. You are specifically reprimanded for: the failure to exercise reasonable care or competence when completing applications for licensure by this Board resulting in the omission of information on your applications and for disregarding the statutes and regulations governing the provision of big game hunting services.

Class-A assistant guides are required to maintain Professional Ethics and Standards, which includes meeting a level of conduct that satisfactorily and safely implements under field conditions, the knowledge, skills, qualifications, and judgment required for the license issued to you. The Board hopes you learn from this experience and enhance your knowledge and skills as a class-A registered guide.

4. The Big Game Commercial Services Board concludes that Mr. Hill will benefit from additional education on guides' legal and ethical obligations. Therefore:
 - a. Within six months from the date the Board adopts this decision, Mr. Hill shall identify and submit for the Board to approve a class on guides' legal and ethical obligations.
 - b. Once approved, Mr. Hill will have nine months from the date of approval of the class to successfully complete the class.
 - c. Within two months of completion, Mr. Hill shall file with the Board, through the division, proof of successful completion.
 - d. If Mr. Hill is unable to locate a class on guides' legal and ethical obligations within six months from the date the Board adopts this decision, he shall file with the division a request to vacate and release him from the requirements of ordering ¶ 4. The request shall be accompanied by a sworn statement setting forth the efforts taken to

locate a class on guides' legal and ethical obligations including that he was unable to locate a class.

DATED this 3rd day of March, 2011.

By: Signed

Rebecca L. Pauli
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 08.54.600. The undersigned, 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 17th day of March, 2011.

By: Signed

Signature
Paul Johnson

Name
Chair

Title

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