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

In the Matter of	)	
DAVID B. LYON	)	OAH No. 11-0272-GUI
_____	)	Agency No. 1706-08-003

DECISION

I. Introduction

The Division of Corporations, Business and Professional Licensing issued an accusation seeking board-imposed sanctions against transporter David B. Lyon for false answers to two questions on a 2008 application, and for 2003 guiding violations for which Mr. Lyon received court-imposed sanctions in 2006, shortly after his guide license expired. Mr. Lyon admitted that he carelessly marked incorrect answers to the two questions but asserted a timeliness defense.

The division met its burden of proving that Mr. Lyon committed two acts of negligent misrepresentation. Mr. Lyon's timeliness defense was not persuasive as to the counts concerning the misrepresentations dating back only as far as 2008. His timeliness defense, however, was sufficiently persuasive as to the counts seeking sanctions under his transporter license for 2003 violations as a guide that those counts should be dismissed.

Accordingly, Mr. Lyon should be sanctioned for two negligent misrepresentations. A combination of a reprimand and a $4,000 fine, with 75 percent of the fine amount suspended during a one-year probation period would be consistent with sanctions the board has imposed in prior cases.

II. Facts

On March 25, 2008, David B. Lyon, who was doing business as Ashore Water Taxi & Freight, was issued Transporter License No. 934 with an expiration date of December 31, 2009.[1] He subsequently renewed the license and it now has an expiration date of December 31, 2011.[2] On his March 5, 2008 application, Mr. Lyon answered "no" to the following questions:

> HAVE YOU AS A THE [sic] SOLE PROPRIETOR OR ANY PARTNER IN A PARTNERSHIP OR HAS THE CORPORATE ENTITY, LLC, OR LLP[,]
>
> 2. been convicted of a felony or other crime? (convictions include: suspended imposition of sentence, no contest, nolo contender, etc.)?

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1 Div. Exh. 1 at 116-118 & 122.

2 Div. Exh. 2 at 4.

> 7. had your rights to obtain or exercise the privileges granted by a hunting, guiding, outfitting, or transportation services license revoked or suspended in this state or another state or in Canada?[3]

"No" was a false answer.[4]

In 2006, just weeks after his Registered Guide license expired, Mr. Lyon pleaded no contest to two misdemeanor violations from a May 2003 bear hunt in which the bear was not promptly tagged. He received a citation about two years after the hunt.[5] After contacting the division about the possible effect on his ability to renew the license if he accepted a plea agreement of the type offered,[6] Mr. Lyon entered no contest pleas to one count each of (1) Guide—Commit/Aid/Allow Violation (AS 08.54.720(a)(8)(A)) and (2) Guide—Failure to Report Violation (AS 08.54.720(a)(1)).[7] His sentence for the two convictions included five days' suspended jail time for each violation; respectively, fines of $5,000 and $2,500, each with all but $500 of the amount suspended; a period of probation; and a one-year suspension of his guide license.[8]

Mr. Lyon's guide license expired at the end of 2005,[9] less than a month before the court imposed the one-year suspension. He decided not to reapply after the court-imposed suspension period expired because he had a small child at home and wanted to eliminate the long absences often involved in guiding hunts.[10] He began operating a water taxi service and decided to expand that business to include big game commercial services transportation, which now accounts for about five percent of his business.[11] He read the eligibility requirements on line and in the

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3 Div. Exh. 1 at 128.

4 October 4, 2011 Testimony of David B. Lyon (Lyon Test.) (acknowledging that the correct answer to both questions is "yes"). In his December 28, 2009 renewal application, Mr. Lyon answered the criminal convictions question analogous to number 2 truthfully, as well as the question about suspension of licensure, which in the recent application has undergone a tense change so that it asks about current, not past, licensure status. Div. Exh. 2 at 6.

5 Lyon Test. (estimating that he received the citation in mid to late 2005).

6 *See* Div. Exh. 1 at 5. In this January 23, 2008 email between Lyon and Roccodero of the division, Mr. Lyon explained that he had been charged with a misdemeanor, and asked about the effect of a possible sentence on future license renewal, and Ms. Roccodero responded by emailing the then-recently amended AS 08.54.605(a)(1)(A). That provision precludes licensure or license renewal if a person has been convicted of violating a state hunting, guiding or transportation services statute or regulation for which the unsuspended sentence exceeded five days in jail or certain dollar amounts over specified periods—the smallest being $2,000 in the previous 12 months.

7 Div. Exh. 3 at 2-3 (judgments in Case no. 3HO005-280CR).

8 *Id.*

9 Div. Exh. 1 at 14 (license wallet card showing December 31, 2005 expiration date).

10 Lyon Test.

11 *Id.*

application cover sheet, confirming his understanding that the two convictions would not bar him from obtaining a transporter license.[12]

When he filled out the application in March 2008, Mr. Lyon answered the two questions incorrectly because he was going too fast—not reading them carefully enough and instead thinking in terms of the application cover sheet's listing of the eligibility requirements.[13] The cover sheet contained a section entitled "Eligibility for Licensure" that identified a statute bearing upon eligibility, and reproduced or paraphrased statutory language consistent with AS 08.54.605(a)'s prohibition against licensing a person convicted of hunting or guiding violations for which certain sentences are imposed.[14] In his testimony, Mr. Lyon explained that he had the eligibility requirements in mind when he filled out the form and went too hastily through the questions, not realizing that the questions elicit broader information on criminal history and license suspension than he had in mind after reading the cover sheet.

The eligibility-related language in the cover sheet, like section 605 itself, speaks about convictions of a disqualifying type, including any "felony within the last five years" and felony offenses against the person "within the last 10 years."[15] In contrast, question 2 in the 2008 application form asks more broadly whether the applicant has been convicted of a felony or other crime. Over the many years of filling out various guide applications, Mr. Lyon was presented with questions about convictions and license suspension worded differently than the 2008 transporter application, especially the questions about license suspension, which were stated in the present tense, focusing on whether the license was currently suspend at the time of application.[16] This contrasts with question 7 in the 2008 transporter application, which asks about past, not just current, suspensions.[17] Mr. Lyon's testimony suggested that he believes the

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12 *Id.*

13 *Id.*

14 Lyon Hearing Exh. E. The exhibit is an almost illegible copy of Transporter License Application form 08-4007, revised January 14, 2008. Neither Mr. Lyon nor the division was able to produce a wholly legible copy of the form, but the testimony of Mr. Lyon and Mr. Warren, taken together with the legible parts of the document, confirm that though some words are impossible to read, the eligibility section is consistent with AS 08.54.605's language.

The Lyon "Hearing" exhibit reference distinguishes the exhibits attached to Mr. Lyon's hearing exhibit list from similarly lettered exhibits attached to Mr. Lyon's September 27, 2011 Motion to Dismiss for Delay. The latter are referred to as Lyon "Motion" exhibits.

15 Lyon Hearing Exh. E; AS 08.54.605(a)(1).

16 Div. Exh. 1 at 22 (2004 application), 89 (2002 application), 98 & 102 (2001 applications), 109 (1999 application) & 112 (1998 application), all with questions focusing on type and fine amount for past convictions and asking with the present tense "are" whether the applicant's rights and privileges were at the time "currently revoked or suspended."

17 Div. Exh. 1 at 128 (asking have you "had your rights to obtain or exercise the privileges granted by a hunting, guiding, outfitting, or transportation services license revoked or suspended …).

tense change in questions from the guide applications to the transporter application may have contributed to his mistake on question 7 because he would have been expecting to be asked about his current license status, not about past suspensions.

Mr. Lyon was adamant that he had not intended to mislead the division, or conceal the criminal history information, but rather had simply been careless. He was credible on this point for several reasons:

- He had nothing to lose by disclosing the convictions because they would not have been a bar to licensure.[18]
- He had reason to believe the division was aware of his convictions because of the court-imposed suspension of the license and his correspondence with the division when he was considering the plea agreement. He, therefore, had no reason to think he could hide the convictions by answering "no."
- He cooperated with the investigation commenced by the division in 2008, explaining that the "no" answers were "simply sloppy mistakes" resulting because he "failed to note subtle changes" between the application cover sheet and the questions.[19]
- His explanation remained consistent. He blamed his carelessness even in the face of an opportunity to blame the confusing wording of the questions in the 2008 version of the transporter license application, which have since been clarified.[20]
- Though his demeanor in response to some questions by the division's attorney made him appear angry or defensive, this is consistent with the reaction of a person offended by an accusation that he intentionally lied rather than made what he knows to have been a careless error.[21]

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[18] The unsuspended amounts of the two fines, and of the jail time, were below the threshold for a bar to licensure under AS 08.54.605(a).

[19] Lyon Motion Exh. C at 3 & Div. Exh. 2 at 20 (January 26, 2009 Letter from Lyon to Warren); *also* Lyon Motion Exh. B (November 20, 2008 Letter from Lacy to Fitzgerald regarding investigation).

[20] Mr. Lyon could have tried to blame the transporter application questions, which mixed references to various business types with "you" and "your rights" in a structure that arguably made it difficult to tell whether the applicant was supposed to be responding individually or on behalf of the business. He made no attempt to blame the poorly worded questions. He steadfastly blamed his own carelessness.

For changes from the 2008 form to the form as revised in November 2009, *compare* Div. Exh. 1 at 128-129 *with* Div. Exh. 2 at 6-7.

[21] Four witnesses testified to their opinions that Mr. Lyon is honest/has a reputation for honesty in the Homer community. October 4, 2011 Testimony of Larry Kuhns, Roger MacCampbell, Marvin Peters and Thomas McDonough. Evidence of a character trait, such as honesty, can be used by the accused to try to rebut contrary evidence. *See* Alaska R. Evid. 404(a)(1) & 405. Here, however, the administrative law judge's finding that Mr.

Throughout his years working as a guide or assistant guide, Mr. Lyon completed several applications for licensure or renewal of licensure but none after his 2006 convictions.[22] His 2008 transporter application was the first following the convictions. Though it is reasonable to infer that Mr. Lyon was aware that Big Game Commercial Services license applications ask about criminal convictions, it is not reasonable to draw any inferences about what this experience told him about how to answer questions following convictions.

Nothing in the record indicates that the division commenced an investigation of Mr. Lyon about the 2003 bear hunt violations prior to or contemporaneous with the 2006 convictions. The court documents made part of the record here indicate that Mr. Lyon was required to surrender his license to the court.[23] They do not indicate whether the license was to be held by the court or returned to the division, nor do they indicate that the division was served with copies of the judgments of conviction.[24] At that point in time, the ethical obligation for guides to self-report their convictions was not in effect.[25] The division was made aware that a conviction might be imminent from the January 2006 email correspondence between Mr. Lyon and Ms. Roccodero, but nothing in this record establishes when the division first learned that the two convictions had in fact been entered.

At some point after the March 2008 issuance of the transporter license, the division began an investigation into the truthfulness of Mr. Lyon's answers on the application. The first sign of that in the documentary record is in a November 20, 2008 letter from Linette Lacy to Mr. Lyon's attorney, asking: "Please view the wording that David Lyon certified was true and correct information on his 03/08 application and his 'checked box' response."[26] Mr. Lyon confirmed that in late 2008, he received a telephone call from "somebody in charge" who informed him of the problem with his answers.[27] Chief Investigator Quinten Warren, who took over the

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Lyon's explanation was credible does not depend on the character evidence but rather is based on his demeanor, the consistency of his explanation, and the absence of a reason to lie when he completed the 2008 application.

[22] Div. Exh. 1 at 21-23 (2004 Registered or Master Guide Prorated Biennial License application), 89-90 (2002 Registered Guide License Application), 97-98 (2001 Class-A Assistant Guide Biennial License Renewal), 102-103 (2001 Class-A Assistant Guide Application), 108-109 (1999 Assistant Guide Biennial License Renewal application) & 112-113 (1998 Assistant Guide License application).

[23] Div. Exh. 3 at 2 & 3.

[24] *Id*. The two judgment documents show service on "OSP" (presumably the Office of Special Prosecutions) and on "DPS" (presumably the Department of Public Safety). No evidence was elicited to establish whether either of those state entities did or likely would have forwarded a copy to the division.

[25] The self-reporting requirement is found in the professional ethics standards for guides, at 12 AAC 75.340(a)(2)(D)—part of a regulation first adopted in July 2006.

[26] Lyon Motion Exh. B (November 20, 2008 Letter from Lacy to Fitzgerald).

[27] Lyon Test.

investigation from Ms. Lacy, described unsuccessful efforts to settle the matter through a consent agreement in early 2009 and again at some unidentified point in 2010.[28]

During the early 2009 settlement effort, Mr. Warren consulted with board chair Paul Johnson about "what would be an appropriate sanction" for this type of violation in light of the explanation provided by Mr. Lyon. Mr. Warren testified that he did not identify Mr. Lyon specifically, and that he was discussing this and another disciplinary matter with Mr. Johnson at the same time, so he did not think Mr. Johnson would recognize this case as the matter they discussed back in 2009 when it comes before the board following the hearing.[29] He explained that it is not unusual for investigators to contact a board member for guidance because the board sets the standards for appropriate sanctions. Because he believed he was being general enough with the information to minimize the likelihood that Mr. Johnson would recognize the matter in the future, Mr. Warren did not advise Mr. Johnson that he should recuse himself from participating when the case ultimately comes before the board for formal action, but he said he always reminds a board member he consults that the member should not to speak to anyone else about the matter.[30]

On February 15, 2011, the division issued a six-count accusation alleging that Mr. Lyon had violated AS 08.54.710 by answering the two questions falsely (Counts I-IV) and had violated that same statute and 12 AAC 75.340(b)(1) when he was convicted of the two bear-tagging-related violations (Counts V-VI). Later, the accusation was amended to add alleged violations of AS 08.54.720 to Counts V and VI.[31] The first four counts essentially allege that, when he falsely answered the two questions, Mr. Lyon "negligently misrepresented or omitted a material fact" (Counts I and II) or "engaged in fraud, deceit or misrepresentation" (Counts III and IV).

Ten days after the initial accusation was issued, Mr. Lyon answered it, admitting "that his omissions were negligent, at most," and asserting that the disciplinary action is untimely,

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[28] October 4, 2011 Testimony of Quinten Warren (Warren Test.). *See also* Lyon Motion Exh. C (January 26, 2009 Settlement-related correspondence from Mr. Lyon and his attorney to Mr. Warren).

[29] Mr. Warren added that the only thing possibly unique to Mr. Lyon's situation is that he (Warren) indicated the transporter in question had previously been a registered guide.

[30] Whether board member Paul Johnson should recuse himself from participating in the board's deliberations on this matter is, in the first instance, a question for Mr. Johnson to decide, possibly in consultation with independent legal counsel. It should be noted, however, that in oral argument at the hearing, Mr. Lyon's counsel questioned whether a board member consulted by the division—the prosecutor equivalent—for guidance while the matter was under investigation properly can participate in the judge/jury-like function of deciding Mr. Lyon's case.

[31] September 27, 2011 Amended Accusation.

especially the Counts V and VI allegations relating back to the 2003 hunt itself.[32] The matter was not referred for a hearing until July 8, 2011.

A one-day hearing was held on October 4, 2011. Six witnesses testified: Mr. Lyon, Chief Investigator Warren and four character witnesses called by Mr. Lyon. Division Exhibits 1-3 were admitted but Division Exhibit 4 was not. Lyon Hearing Exhibits A-E and Lyon Motion Exhibits A-F were admitted. On September 27, Mr. Lyon had filed a motion seeking to have the case dismissed due to delay in pursuing the disciplinary action because of the passage of time since the 2003 hunt and the 2008 application.[33] The motion was treated as Mr. Lyon's hearing brief, to keep the hearing date and allow the matter to reach the board at its December 2011 meeting.

III. Discussion

The primary issue raised by this disciplinary action is whether Mr. Lyon's failure to disclose the two misdemeanor convictions in his 2008 transporter license application was merely a negligent misrepresentation or omission, or instead rose to the more serious level of fraud, deceit or knowing misrepresentation. Resolving that issue affects what sanction or combination of sanctions may or must be imposed.

Before deciding on a sanction, however, the board needs to consider Mr. Lyon's argument that this disciplinary action should be dismissed because the division has not proceeded "in a timely manner." In that context, the division's assertion that the board should sanction Mr. Lyon as a transporter for the 2003 guide violations will be addressed.

A. Failure to Disclose Convictions

If the board finds Mr. Lyon to have "negligently misrepresented or omitted a material fact" on his 2008 transporter license application, it may impose one of several sanction.[34] If it finds that he obtained his transporter license "through fraud, deceit, or misrepresentation[,]" the board must permanently revoke the license.[35] In the latter instance, the "misrepresentation" must

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[32] February 25, 2011 Answer to Accusation; Notice of Defense at 1 & 5-7.

[33] September 27, 2011 Motion to Dismiss for Delay.

[34] AS 08.54.710(a)(3) & (c) (respectively, making negligent misrepresentations and omissions on an application grounds for discipline and listing seven categories of sanctions that may be imposed). The general disciplinary powers made applicable to this board by AS 08.01.010(7) add one sanction option—requiring the licensee to submit to peer review—not included in the specific powers of the Big Game Commercial Services Board. *Compare* AS 08.01.075(a)(5) *with* AS 08.54.710(c).

[35] AS 08.54.710(d).

be more than negligent; it must be fraudulent—done knowingly, for instance, with knowledge or belief that the representation is false.[36]

Mr. Lyon admits that his "no" answers about prior convictions and license suspension were false. Certainly, if he had read the questions carefully and understood them correctly, and marked "no" anyway, he would have been making a fraudulent misrepresentation. He would have knowingly offered up answers he knew to be false. That is not what the evidence showed, however.

Mr. Lyon was careless. Influenced by his anticipation that the questions would track the eligibility requirements, compounded by the haste with which he completed the application, he answered the two questions falsely, thereby failing to disclose the past convictions and court-imposed license suspension. He knows the answers to be false now that he has read the questions carefully. More likely than not, however, Mr. Lyon failed to recognize his answers to be false at the time he filled out the application due to carelessness, not an effort to deceive or mislead. Mr. Lyon, therefore, made two negligent misrepresentations on his 2008 application.

The two misrepresentations were material, even though the questions sought information broader than needed to assess eligibility. Mr. Lyon argued that the facts he misrepresented were not material because, under AS 08.54.605, the two convictions with the sentences he received and the past (not ongoing) suspension of his guide license would not have been disqualifying. This argument overlooks the facts that question 2 was the only one on the application asking specifically about felony convictions and question 7 was the only one asking about license suspension. As such, these questions elicited information likely necessary for the division to decide how to proceed with the eligibility determination—i.e., whether to seek additional information from the applicant or conduct a background check to verify whether the convictions or suspensions disclosed are disqualifying.

A fact can be material to the division's issuance of a license even if not directly related to section 605 eligibility. To be entitled to a transporter license, a person must apply on the form provided.[37] The 2008 transporter application form required many items of information that cannot be traced to a specific eligibility requirement. For instance, the form required the dates of

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[36] *Matter of Fernandez*, OAH No. 09-0395-GUI at 7 (Big Game Commercial Services Board Dec. 14, 2009), applying a test from the real estate and torts contexts, illustrating that the board considers the more serious type of misrepresentation—the one linked in AS 08.54.710(d) with fraud and deceit—to require some degree of knowledge or belief on the part of the person making the false representation.

[37] AS 08.54.650(a)(1); 12 AAC 75.145(a)(1).

birth and social security numbers of the transportation business owners, the type of organization, the mode of transportation, whether accommodations would be provided, and answers to a series of "personal history" questions about the applicant's treatment for medical and mental conditions and use of certain substances.[38] It also required supplementation of the form with supporting documents for "yes" answers.[39]

In short, the application form serves as more than a place for the applicant to demonstrate that he or she meets minimum qualifications. It facilitates the division's application review and issuance of a license uniquely identified with the specific applicant. False answers that misrepresent or omit facts bearing upon whether and how the division follows up to confirm the applicant's qualifications are material, whether or not those facts go to the core of a specific eligibility requirement.

When he answered "no" to questions 2 and 7, Mr. Lyon negligently misrepresented material facts. The division met its burden of proof as to Counts I and II but not as to Counts III and IV. Accordingly, the board is not required to permanently revoke Mr. Lyon's transporter license, but it may impose one or a combination of disciplinary sanctions, unless his timeliness defense precludes sanctioning him altogether.

B. Timeliness of the Disciplinary Action

The board's discretion to sanction a licensee for negligent misrepresentations is not without limits. Unlike the mandatory permanent revocation required for fraudulent, deceitful-type misrepresentations, imposition of a discretionary sanction for negligent misrepresentations must be done "in a timely manner[.]"[40] The implication is that, though the board must always revoke the license for the more serious type of misrepresentation, no matter how long after the fact it is discovered, the board's discretion to impose a sanction for the less serious negligent misrepresentation has a time limit of some sort. The statute requiring imposition of the sanction to be done "in a timely manner," however, provides no specific time limit or other clear direction on how soon the board needs to act before its sanctioning authority in effect expires.

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38 Div. Exh. 1 at 127-129.

39 *Id.* at 129.

40 AS 08.54.710(a), which states 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" has, among other things, (3) "negligently misrepresented or omitted a material fact on an application …." The mandatory revocation required when misrepresentations are of the more serious, fraudulent/deceitful type is found in subsec. (d), not (a), of AS 08.54.710, and thus are not subject to the timely-manner requirement.

Statutes must be interpreted "according to reason, practicality, and common sense, 'taking into account the plain meaning and purpose of the law as well as the intent of the drafters.'"[41] A timeliness element has long been present in the disciplinary system for guides and transporters. For instance, in the 1995 statutes, which predate those prescribing the present board's disciplinary authority, the then-existing board was required to "hold a hearing to determine whether a licensee … should be disciplined within a reasonable time after" a conviction or a complaint against the licensee.[42] Those statutes were repealed in 1996 and replaced with the pre-amendment versions of the disciplinary statutes now in effect, though the power to sanction rested with the then-Department of Commerce and Economic Development because the previous board had been eliminated.[43]

The 1996 version of AS 08.54.710(a) provided that "[t]he department may impose a disciplinary sanction in a timely manner under (c) of this section if the department finds after a hearing that a licensee (1) is convicted" of certain types of violations or (2) "has failed to file" required records and reports.[44] In subsequent amendments, the "after a hearing" language was deleted, and the list and wording of grounds for discipline were changed.

The legislative history for the inclusion of section 710(a) in the 1996 enactment is sparse. In a committee meeting on the legislation that ultimately would enact section 710, public testimony included a recommendation to require that "the department shall act on disciplinary matters in a timely manner" and be subject to other limits on its exercise of disciplinary powers, but no specific discussion of this by the committee members was noted.[45] In a subsequent meeting, the committee discussed an amendment to the pending bill version that included one change relating to the "need for timely action on the part of the department when violations occur."[46] The meeting minutes, however, do not indicate what specific problem the "in a timely manner" language was meant to address, let alone provide insight into how much delay is to be tolerated and under what circumstances.

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41 *Alaska Department of Commerce, Community and Economic Development v. Progressive Casualty Ins., Co.*, 165 P.3d 624, 628 (Alaska 2007) (citations omitted); *see also* AS 01.10.040(a) (requiring that words and phrases be construed "according to their common and approved usage" and that technical words be construed according to their "peculiar and appropriate meaning" if they have acquired such a meaning).

42 AS 08-54-500(a) (1995); AS 08.54.505(a) (1995).

43 1996 Alaska Sess. Laws ch. 33, § 3.

44 *Id*.

45 *Minutes, Hearing on SCS HB 335 (RES) Before Senate Finance Comm*., 19th Legis., 2nd Sess. (April 2, 1996).

46 *Minutes, Hearing on SCS HB 335 (RES) Before Senate Finance Comm*., 19th Legis., 2nd Sess. (April 9, 1996).

The regulations in 12 AAC chapter 75 do not address timeliness of the action to impose sanctions. In the absence of a regulation, the board is faced with interpreting the ambiguous statutory language in the context of specific cases that raise a timeliness challenge. One such case was *Matter of Hill*, in which the decision adopted by the board rejected a guide's timeliness challenge as "not persuasive."[47] In the course of rejecting the argument, the decision observes that the combination of the phrases "in a timely manner" and "if the board finds" in AS 08.54.710(a) "implies that the timeliness requirement applies to the imposition of discipline, not the filing of an accusation."[48] The decision noted that linking the timely-manner requirement to the board's action imposing discipline but not to the division's issuance of an accusation is consistent with the fact that before the 1996 repeal and reenactment of the disciplinary statutes, the timely-hearing requirement was triggered by the filing of a complaint while "under the current statute the discipline must be imposed in a timely fashion after the Board has made a finding."[49]

The *Hill* decision, however, did not analyze the section 710(a) statutory language in context with other relevant statutes and legal doctrines on timely action, presumably because such an analysis was not called for in light of the weakness of Mr. Hill's assertion, which rested on division delays in processing various applications he filed over a ten-year period.[50] In contrast, Mr. Lyon's assertion that this disciplinary action is untimely does not rest on delay in processing the 2008 transporter application; instead, the touchstones for Mr. Lyon's assertion of unreasonable delay are (1) the passage of time since the 2003 bear hunt violations (most pertinent to Counts V and VI) and (2) the roughly three years since the division discovered the false answers on Mr. Lyon's 2008 application (pertinent to all counts). Moreover, Mr. Lyon's argument is not limited to a weak assertion; it includes a formal motion and invokes legal doctrines on timeliness not expressly considered in *Hill*.[51] A closer look at the timely-manner requirement, therefore, is warranted in this case.

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47 OAH No. 10-0250/0387-GUI at 22 (Big Game Commercial Services Board Dec. 14, 2009).

48 *Id.* at 21-21.

49 *Id.* at 22, n. 111.

50 *Id.* at 21-22 (explaining that Mr. Hill had "only offered his assertion that, under [his] circumstances, an imposition of discipline would not be timely" and ruling that Mr. Hill's argument "is not persuasive").

51 Mr. Lyon's motion relied on the AS 08.54.710(a) timely-manner requirement, coupled with an unsupported conclusion that proceeding against him at this time "violated Mr. Lyon's due process rights." September 27, 2011 Motion to Dismiss for Delay at 3-4. His answer to the accusation and the oral arguments on his behalf during the hearing took exception to the *Hill* decision's characterization of the timely-manner requirement, referred to statute of limitations and laches defenses, cited case law on pre-accusation delay from the criminal law context, and

1. The Need for Timeliness Begins Before the Board Makes a Finding.

The key language in AS 08.54.710(a) gives the board power to "impose a disciplinary sanction in a timely manner under (c) of this section if the board finds," for instance here, negligent misrepresentations of material facts on the application. "If" is not "when." "If" also does not mean "after a hearing"; that phrase was deleted from 710(a) in a 2008 amendment.[52] Inclusion of the phrase "if the board finds" creates a condition precedent to the board being able to effectively impose a sanction. This does not mean that the timely-manner clock begins to run only when the board has made the finding—i.e., has adopted a proposed consent agreement or a proposed decision following a hearing.

The board's finding of a violation is the end of a process that begins with discovery of a potential violation, followed by an investigation conducted by the division,[53] leading to issuance of an accusation, followed by a hearing (possibly preceded by settlement discussions that might result in a consent agreement containing findings for board approval). A disciplinary action, therefore, runs on a continuum that sweeps in not just the board's action at the end but also the division's investigation. Without the investigation, the matter would not proceed to the stage at which the board can enter a final finding and impose a sanction. To read section 710(a)'s timely-manner requirement as excluding delay occurring when the matter is still under investigation, or still in pre-accusation settlement negotiations, could deter parties from trying to resolve issues without need for a costly, contentious hearing. In extreme cases, it could force the board to make decisions based on stale or incomplete evidence after a timely hearing and board process preceded by an investigation that languished for many years.

2. The Timely-Manner Triggering Event Varies with the Circumstances.

The current statute contemplates that the sanction approved by the board in the document making a finding (consent agreement; decision following a hearing) will be imposed in a timely manner relative to some unspecified triggering event. In its earlier, pre-2008-amendment form, AS 08.54.710(a) might have given the impression that a hearing was the triggering event, such

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questioned whether reaching back to old violations contravenes the statutory prohibition against doubling up on suspensions. He did a good deal more to support a timeliness defense than make a "weak assertion" as in *Hill*.

[52] 2008 Alaska Sess. Laws ch. 49, § 1. The purpose of the deletion was to enable the board to summarily suspend licenses in appropriate circumstances, rather than being restricted by the section 710(a) language to suspending licenses only after a hearing had taken place. *Minutes, Hearing on SCS HB 165 (RES) Before Senate Rules Comm*., 25th Legis., 2nd Sess. (April 7, 2008).

[53] AS 08.01.050(19) (authorizing the department—which acts through the division—to provide investigative services to certain professional and occupational licensing boards).

that the things to be done "in a timely manner" were complete the hearing; prepare the proposed decision; and convene the board to take final action. With the 2008 deletion of the phrase "after a hearing," that impression disappeared. The history behind the 2008 amendment of section 710(a) says nothing about trying to set or change the triggering event for the timely-manner requirement. The amendment instead was meant to give the board more flexible enforcement tools by freeing the board to summarily suspend licenses when appropriate.[54]

Since the triggering event for proceeding "in a timely manner" is not entry of a final finding and not the hearing, it necessarily must be something that happens before the hearing. Possible candidates are issuance of the accusation; commencement of the investigation; discovery of the possible violation; occurrence of the alleged violation. In determining which triggering event to apply in Mr. Lyon's case, as well as assessing delay measured from that event, the board can take into account the nature and circumstances of his violations.

For the failure to disclose past convictions that resulted when Mr. Lyon falsely answered the two questions, it would be reasonable for the board to consider delay only during the approximately three-year period after the division learned of the false answers. Choosing an earlier triggering event would set a bad precedent by rewarding concealment of requested information with a more generous timeliness defense, encouraging licensees to engage in continued concealment in the hope of running out the timely-manner clock.

For the 2003 hunt violations themselves (Counts V and VI), however, it may be more appropriate to gauge the reasonableness of the delay over a longer period—for instance, from the point at which the division knew or should have known of the potential violations—because delay alone is not the cause for concern; prejudice is.

3. An Action is Untimely if the Delay is Prejudicial.

Delay becomes a problem when it results in prejudice to the person accused of wrongdoing. Whether applying the doctrine of laches or protecting due process rights, as in the criminal case cited in Mr. Lyon's closing argument, delay is unreasonable only insofar as it results in actual prejudice, for example, by impairing the ability to mount a defense because the evidence becomes stale or is lost altogether.[55] No such prejudice will have resulted to Mr. Lyon

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[54] *Minutes, Hearing on SCS HB 165 (RES) Before Senate Rules Comm*., 25th Legis., 2nd Sess. (April 7, 2008).

[55] *Bibo v. Jeffrey's Restaurant*, 770 P.2d 290, 294, n. 3 (Alaska 1989); *Dep't of Commerce and Economic Dev. v. Schnell*, 8 P.3d 351, 358-359 (Alaska 2000) (stating that laches may bar an action when unreasonable delay results in prejudice); *State v. Mouser*, 806 P.2d 330, 336 (Alaska 1991) (stating in the context of a criminal case that

from the approximately three-year period between the division's discovery of the false answers in late 2008 and the final board action. No evidence relating to Mr. Lyon's false answers was lost. The original investigator, Ms. Lacy, is no longer with the division, but the testimony of Mr. Warren indicated that she is still a state employee. She could have been subpoenaed if Mr. Lyon thought her testimony was necessary. He did not seek to subpoena her or any other witnesses. Mr. Lyon's memory of filling out the application form in 2008 appeared to be quite good.

The same is not so, however, for earlier events related to the 2006 convictions for the 2003 bear hunt violations. Mr. Lyon's recollection of his interview with a reporter at the time of the convictions was spotty. Also, he could not clearly recall details from the period surrounding the convictions, such as how much time elapsed between his email communications with the division about the possible future effects on his license and entry of the judgments following his no contest pleas, or when his guide license expired relative to when the judgments were entered. Thus, if his defense depended on his memory of events occurring around the time of the January 2006 convictions or earlier, the passage of more than five years from the convictions to issuance of the accusation would be problematic.

Counts I through IV of the accusation relate solely to how Mr. Lyon answered the questions in 2008. Counts V and VI relate to the 2006 convictions but do not depend on Mr. Lyon's memory of the convictions. The judgments themselves provide the essential proof needed to establish unlawful acts under AS 08.54.720 for which the board may impose sanctions under AS 08.54.710. That the board "may" impose one or more sanctions calls into question whether an effective disciplinary action can be pursued as to Counts V and VI without looking through the plea-agreement-based convictions, to the specific circumstances of the 2003 hunt, to assess how the board should exercise its discretion. Choosing an appropriate sanction is not a simple matter of saying a conviction for X violation begets a sanction of Y. The board has not adopted regulations prescribing specific sanctions for certain types of misconduct. Prior decisions guide future ones when the circumstances are similar.[56] Facts about a hunt now more than eight years in the past might be necessary for the board to assess whether the violations are analogous to or distinguishable from those in prior decisions. Mr. Lyon, therefore, could have been prejudiced by the passage of time since the 2003 hunt due to loss evidence.

"the chief concern of the rule prohibiting unreasonable preaccusation delay is the impact of the delay on the accused's ability to present a defense, and not on the length of the delay as such").

[56] The board is required to "seek consistency in the application of disciplinary sanctions." AS 08.01.075(f).

Mr. Lyon, however, did not specifically identify such prejudice as the reason for his timeliness defense. He testified to some advertising expenditures (printing "rack cards") that would be wasted if the sanction imposed prevented him from transporting hunters and he had to change the advertising for his water taxi to delete that service. He argued that sanctioning him now for 2006 convictions based on 2003 behavior, for which he has already been punished criminally, would be unreasonable. But he did not show specifically how it would be prejudicial or why it would be unreasonable, except to say that the effect would be to punish him a second time for past guiding violations in his current capacity as a transporter.

4. Prejudice from Sanctioning Transporter for Long-past Guiding Violations.

Mr. Lyon's timeliness defense to Counts V and VI comes down to whether the board, in its discretion, should sanction him as a transporter for long-past guiding violations. The guiding violations occurred during a hunt that took place almost five years before he applied for the transporter license. When he did apply in 2008, he had already, in effect, relinquished his guide license by allowing it to expire shortly before the misdemeanor judgments were entered against him, and not renewing it after the one-year court-imposed suspension period was over. Mr. Lyon's guide license expired at the end of 2005. Because more than four years have since passed, he could not renew the license now as a matter of routine; he would have to establish that he "meets the qualifications for initial issuance of the license."[57]

The division acknowledged it lacks jurisdiction to pursue allegations similar to those in Counts V and VI against Mr. Lyon under the long-expired license. But for Mr. Lyon having become a transporter, the 2003 violations would be behind him. The real prejudice to Mr. Lyon, therefore, lies in the potential to bootstrap old guiding violations to a current transporter license in an effort to add board-imposed sanctions to the court-imposed ones, when adding sanctions would not otherwise be possible this long after the violations occurred. Mr. Lyon is particularly concerned that this could result in a side-stepping of the AS 08.54.710(e) prohibition against double suspensions.

All of the sanctions, including license suspension, authorized by AS 08.54.710(c) and AS 08.01.075 remain available to the board in this disciplinary action brought against Mr. Lyon as a transporter. Mr. Lyon's sentence for the 2003 violations included a court-imposed one-year suspension of his guide license. Under section 710(e), an administrative sanction of suspension

[57] AS 08.54.670.

could not be added to the court-imposed one for the 2003 violations on the same license. The division argued that since the present action concerns the transporter license, section 710(e) does not apply here. Permitting the division to pursue administrative sanctions for guiding violations that occurred more than eight years ago, under a long-since expired guide license, and have been sanctioned by the court already, would call into question whether the timely-manner requirement is being given any effect at all.

There is room to dispute when the division knew or should have known of the 2003 violations such that it could have begun an investigation and proceeded to get the matter before the board in a timely manner. Possibly that was in January 2006, when Mr. Lyon contacted the division in relation to the then-proposed plea agreement. Possibly it was not until sometime in late 2008, when in the course of discovering the false answers on the transporter application, the division had to know of the convictions and court-imposed suspension to realize the answers were false. At that point, Mr. Lyon's guide license remained expired but still susceptible to being renewed as a matter of routine for about another year, and he had been licensed as a transporter for eight months. The division waited more than two years—until February 2011—to file the accusation. Meanwhile, Mr. Lyon had renewed his transporter license.[58]

By the time it issued the accusation, the division admittedly had no jurisdiction to seek sanctions under the long-expired guide license but included Count V and VI in the accusation nevertheless. The division provided very little explanation for the delay generally, and none directed at the reasons for delaying the accusation past to point at which Mr. Lyon's guide license could no longer be renewed. Some time was devoted to settlement discussions early in 2009. Another settlement effort was made at an unidentified point in 2010. No explanation was offered for the four-and-one-half-month delay in referring the matter for hearing.[59] Though three years may not constitute excessive delay in some circumstances—e.g., for the misrepresentation charges—it can be excessive under others. Now, Mr. Lyon faces the prospect of being sanctioned not just for the 2008 negligent misrepresentations, but also a second time for the eight-plus-year-old guiding violations, having already in effect relinquished the guide license under which those old violations occurred.

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[58] Contrary to Mr. Lyon's position, the division did not waive the right to pursue a disciplinary action because it issued the renewed transporter license. Neither pendency of an investigation nor the 2006 convictions constituted grounds for denial under AS 08.54.605.

[59] Under AS 44.64.060, such matters are supposed to be referred for hearing within ten days after the notice of defense/hearing request is filed.

To eliminate the prejudice to Mr. Lyon of the division's delay concerning the old guiding violations, Counts V and VI should be dismissed as untimely. As to the misrepresentation counts, however, his timeliness defense was not persuasive. Mr. Lyon, therefore, should be sanctioned for the two acts of negligent misrepresentation.

C. Appropriate Sanctions

The board is authorized to impose sanctions ranging from reprimands and fines, to conditions on licensure, remedial education, and license suspension or revocation, among others, and it may impose the sanctions singly or in combination.[60] The board must "seek consistency in the application of disciplinary sanctions[,]" explaining significant departures from prior decisions if they involve similar facts.[61] The key facts on which to base a comparison are these:

- Mr. Lyon failed to disclose on his 2008 transporter application two misdemeanor convictions from 2006 arising out of events during a 2003 bear hunt;
- Mr. Lyon also failed to disclose the one-year court-imposed suspension of his guide license;
- Mr. Lyon's failures were due to carelessness, particularly his haste in completing the application and mistaken belief that the questions would track the eligibility requirements—a mistake he could have avoided through carefully reading;
- Mr. Lyon worked in various guide-related capacities for about seven years with no apparent violations other than the two from the 2003 hunt, and as a transporter for more than three years with no apparent violations other than the false answers on the 2008 application.

At a minimum, a reprimand is in order here, to reinforce the importance of accurate, truthful applications and paperwork, free from careless errors that could injure the reputation of the profession for truthfulness. In addition to a reprimand, other sanctions have been imposed in prior cases involving false answers on applications and other misrepresentations. A fine is commonly one component, with other sanctions, such as remedial education, long probation periods, and suspension or revocation, added when serious violations additional to the misrepresentations are involved.

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60 AS 08.01.075(a); AS 08.54.710(c).

61 AS 08.01.075(f).

For instance, in *Matter of Hill*, the guide case discussed above, Mr. Hill's sanctions included a $17,000 fine (with a portion suspended), a three-year probation period, additional education requirements, and a reprimand.[62] Mr. Hill had given false answers on applications several times over a ten-year period, and had committed other violations that factored into the combination of sanctions.

In the *Hill* fine calculation, the board's decision relied on an earlier case involving multiple omissions or misrepresentations. The earlier case and *Hill* both set the fine at $2,000 per misrepresentation, with 75 percent of the amount suspended during a probation period.[63]

Using the same approach here would make the board's sanction consistent with prior decisions. Mr. Lyon is being sanctioned for two negligent misrepresentations occurring on one application. The maximum total fine, therefore, should be $4,000 ($2,000 for each of the false answers). Suspending 75 percent of the fine amount ($3,000) for a one-year probation period would be consistent with the prior decisions, while also recognizing that Mr. Lyon's comparatively good record, and lack of need for remedial education or other tasks to be completed during the period, warrants a shorter probation period than, for instance, the three-year period Mr. Hill received.

IV. Conclusion

Mr. Lyon negligently misrepresented material facts on his 2008 transporter application by falsely answering two questions. Thus, Counts I and II were proven. Counts III and IV were not. Counts V and VI are dismissed as untimely.

Upon adoption of this decision by the board, unless otherwise ordered, the following sanctions are imposed:

(1) A reprimand substantially similar to the following will be placed in the transporter license file of David B. Lyon.

> The Big Game Commercial Services Board hereby reprimands you, David B. Lyon, for failure to disclosed required information on your 2008 transporter license application. You are specifically reprimanded for the failure to exercise reasonable care when completing the application, which led you to answer two questions falsely. Carelessness in reading and completing applications and other forms required by the laws governing the transporter profession injures the reputation of the profession. The Board hopes you learn from this experience and will more carefully read and accurately answer all application questions in the future.

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62 OAH Nos. 10-0250/0387-GUI at 31-33.

63 *Id.* at 30.

(2) David B. Lyon is ordered to pay a total fine of $4,000, with $3,000 of the fine amount suspended, on the condition that he commits no violations of AS 08.54 or 12 AAC chapter 75, the terms of his transporter licensing, or the requirements of the board's final order in this matter, during the one-year period beginning 30 days after issuance of the board's final order. At the end of the one-year period, if Mr. Lyon has committed no violations as described above, his obligation to pay the $3,000 suspended amount will cease. The $1,000 unsuspended amount of the fine is due 60 days after issuance of the board's final order.

DATED this 21st day of November, 2011.

By: *Signed*
Terry L. Thurbon
Chief Administrative Law Judge

Non-Adoption Options

A. The Alaska Big Game Commercial Services Board, in accordance with AS 44.64.060, declines to adopt this decision and order, and instead orders under AS 44.64.060(e)(2) and that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2011.

By: _____
Signature
_____
Name
_____
Title

B. The Alaska Big Game Commercial Services Board, in accordance with AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

The board adopts the November 21, 2011 proposed decision as the final decision of the board, except that on page 19, in lines four and five the "one –year period" is increased to a "three-year period."

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

DATED this 15th day of December, 2011.

By: *Signed*
Signature
Paul Johnson
Name
BCCSB Chair
Title

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