

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

In the Matter of)	
)	OAH No. 14-0057-GUI
VIRGIL L. UMPHENOUR)	Agency Nos. 2011-000326, 2011-001203;
<hr style="width:30%; margin-left:0"/>)	2013-000045

DECISION

I. Introduction

The Division of Corporations, Business and Professional Licensing filed a seven-count accusation against Master Guide Virgil Umphenour.¹ The first five counts alleged that Virgil was the contracting guide on two different hunts, and that on those hunts he failed to comply with legal obligations of the contracting guide. The facts that came to light at the hearing, however, proved that Virgil was not the contracting guide on those two hunts. His son, Eric Umphenour, was actually the contracting guide. Because the Division did not prove that Virgil was the contracting guide on those two hunts, counts I-V of the accusation are not sustained.

Count VII of the accusation alleged that Virgil had provided guiding services without a contract. Because the Division did not prove that Virgil provided guiding services without a contract, count VII is not sustained.

The Division did prove that Virgil failed to provide 36 contracts to the Division that he was legally obligated to provide as part of an investigation. Therefore, count VI of the accusation is sustained, and the Board imposes discipline on Virgil for his failure to provide the contracts.

II. Facts

A. Virgil and his son Eric collaborate under the name “Hunt Alaska”

Virgil Umphenour is a registered master guide-outfitter operating out of the Fairbanks area. He has been guiding for 27 years. He is a successful guide, and in many years his clients have achieved Boone and Crocket recognition.²

Virgil’s son Eric Umphenour is also a registered master guide-outfitter. Virgil and Eric are registered in different game use areas. Virgil used to be registered in Game Unit 20-04, a

¹ Because this case involves two Mr. Umphenours (Virgil and his son Eric), Virgil and Eric will be referred to by their first names in this decision.

² V. Umphenour testimony.

unit particularly suited for sheep hunting. When he could no longer climb mountains to guide sheep hunts, he gave up his registration in Game Unit 20-04, and Eric registered for it.³

Virgil and Eric each own their own limited liability companies. Virgil's LLC is called "Hunt Alaska with Virgil Umphenour, LLC."⁴ Eric's is called "Wild Alaskan Adventures, LLC." Although Eric's company name is on his business card, he rarely uses the company name. He considers his LLC a formality that he undertook for tax and liability purposes at the advice of an accountant. Although both Virgil and Eric acknowledge that the LLC named "Hunt Alaska with Virgil Umphenour" is technically Virgil's LLC, they both consider the term "Hunt Alaska" to loosely stand for a family company that encompasses both Virgil and Eric.⁵

Virgil and Eric advertise together. Their web page features "Hunt Alaska" as offering "[t]he hunting experience of a lifetime with Virgil and Eric Umphenour."⁶ Their advertisements read "Hunt Alaska with Virgil and Eric Umphenour."⁷ When a client wins an award from the Alaska Professional Hunters Association, the association publishes the name of the guide/outfitter as either "Eric Umphenour/Hunt Alaska" or "Virgil Umphenour/Hunt Alaska."⁸

B. The T hunt

In 2008, N T read an article about Hunt Alaska and Virgil and Eric Umphenour in Peterson's Hunting Magazine. He wanted to go to Alaska to hunt Dall Sheep, so he located a phone number for Hunt Alaska, and called. He recalls that he spoke to both Virgil and Eric several times.⁹

After these initial calls with Eric and Virgil, Eric's wife, Rebecca (Becky) Umphenour, who did the paperwork for both Virgil and Eric, took a call from Mr. T.¹⁰ He requested a contract for a guided sheep hunt. Mr. T wanted a signed contract as soon as possible, locking in a hunt in August 2010. At that time, Eric was in the field. On April 25, 2008, Virgil signed a

³ Eric Umphenour testimony.

⁴ Exhibit 1, Division's Motion for Summary Adjudication (Certificate of Organization); *see also* R. 801 (2014 business license issued to "Umphenour Virgil (Hunt AK)").

⁵ V. Umphenour testimony; E. Umphenour testimony.

⁶ Umphenour Exhibit A.

⁷ *E.g.* Umphenour Exhibit C at 4; Exhibit H.

⁸ Umphenour Exhibit B.

⁹ T testimony.

¹⁰ R. Umphenour testimony.

contract and sent it to Mr. T.¹¹ The contract locked in Hunt Alaska to provide a Dall Sheep hunt in the time period between August 19, 2010 and August 30, 2010.¹²

The contract was on a standard form that Virgil had been using for years. The contract identified the contracting business name as “Hunt Alaska.” It stated that “Hunt Alaska is a limited liability company, owned and operated by Master Guide Virgil L. Umphenour.” The contract did not mention Eric Umphenour.¹³

At some point, however, Eric signed the contract. He did not enter the date of his signature. He did not remember when he signed it, but he was sure it was before the hunt.¹⁴ He also wrote his guide license number on the contract. He did not provide a copy of the contract with his signature to Mr. T.

In August 2010, Mr. T came to Alaska, and he, Eric, and Assistant Guide Tony Kirby went to Eric’s sheep hunting camp in the Brooks Range. On August 20, 2010, Mr. T, while guided by Mr. Kirby, shot a sheep. On August 25, Mr. Kirby and Mr. T reported to Fish and Game in Fairbanks with the sheep. Eric remained in the field. Mr. T recalled that Virgil was present and helped him through the legal process that followed.¹⁵

Fish and Game determined that the sheep was sub-legal, and referred them to State Wildlife Trooper David Bump.¹⁶ Trooper Bump issued citations to Mr. Kirby and Mr. T.¹⁷ Trooper Bump asked to look at the paperwork that Mr. T had with him. Included in this paperwork was a copy of the contract and a copy of the hunt record. The hunt record designated Eric as the contracting guide, and was signed by Eric. The contract in Mr. T’s possession, however, had only Virgil’s name and Virgil’s signature. Trooper Bump became suspicious because he knew that Virgil did not guide sheep hunts. He noted that the contract appeared to indicate that Virgil was the contracting guide, yet the Hunt Record designated Eric as the contracting guide. He determined that Virgil was not registered in the guide use area in which

¹¹ V. Umphenour testimony; R. Umphenour testimony.

¹² Administrative Record at 71. “Wolf” was also circled on the contract, although the testimony indicated that the primary purpose of the hunt was sheep.

¹³ *Id.*

¹⁴ E. Umphenour testimony; Umphenour Exhibit R.

¹⁵ T testimony.

¹⁶ Testimony indicated that the sheep missed having a full curl by 3/8 of an inch. V. Umphenour testimony.

¹⁷ Bump testimony. For unexplained reasons, the case against Mr. T was dismissed. Mr. Kirby was found guilty and fined. *Id.*

the hunt apparently took place. Because he was suspicious that some false reporting might be occurring, Trooper Bump referred the matter to the Division.¹⁸

In 2011, Eric brought Mr. T back to Alaska for a second hunt at Eric's expense. Mr. T was pleased with the hunt, and pleased with the service he received from Hunt Alaska.¹⁹

Mr. T testified that at all times he considered Eric to be the guide on his hunting trip.²⁰ Both Virgil and Eric testified that Eric received all of the compensation paid by Mr. T.²¹

The T matter later became the basis for Counts I-III in this action.

C. The D hunt

In January 2011, Virgil attended the Dallas Safari Club outdoor show to promote Hunt Alaska and procure guiding clients. At that time, Hunt Alaska had certain slots open, some for Virgil and some for Eric, and Virgil wanted to fill those slots. While at the show, Virgil met X D, who wanted a guided moose hunt and had heard of Hunt Alaska from a friend. On January 6, 2011, Virgil and Mr. D signed two original versions of the same contract form used by Virgil with Mr. T.²² Mr. D paid a deposit. The hunt was for moose, wolf, black bear, and grizzly bear, to begin around September 1, 2011. Mr. D understood that Eric was to be his guide. On January 10, Mr. D sent an email to Eric to introduce himself and tell Eric that he was excited about hunting with Hunt Alaska.²³

Mr. D came to Alaska in September 2011, flew to Eric's camp and shot a moose and a black bear while guided by Eric. On September 7, 2011, Trooper Bump, out on air patrol, flew into Eric's camp in the Dry Creek area. He asked to review Mr. D's paperwork, and again noticed that although the hunt record designated Eric as the contracting guide, the signed contract appeared to be with Virgil. He was concerned that Virgil had contracted the hunt but then Eric acted as the contracting guide. The identity of the contracting guide needed to be clear, so that authorities would know who was responsible for the hunt. He referred the D matter to the Division.

¹⁸

Id.

¹⁹

T testimony.

²⁰

Id.

²¹

V. Umphenour testimony; E. Umphenour testimony.

²²

V. Umphenour testimony; D testimony; R.91-3;

²³

R.95.

Mr. D testified that at all times he considered Eric to be the guide on his hunting trip.²⁴ Both Virgil and Eric testified that Eric received all of the compensation paid by Mr. D.²⁵

The D matter later became the basis for Counts IV-V in this action.

D. The request for contracts

The Division assigned investigator Lee Strout to investigate the two referrals from Trooper Bump. To determine whether Eric and Virgil had other contracts and hunts that fell into the same pattern as the T and D matters, on March 22, 2011, Mr. Strout sent a written request to Virgil, asking Virgil to provide him with a copy of hunt records and contracts for 36 clients.²⁶ He sent a similar request to Eric for 15 clients.²⁷

Before the hearing in this case occurred in April 2014, neither Virgil nor Eric had complied with Mr. Strout's request. Eric, however, provided copies of his contracts to Mr. Strout at the hearing. The contracts were not made part of this record, but Eric testified that the only two instances in which Virgil had signed contracts for hunts on which Eric would be the contracting guide were the T and D contracts.²⁸ Virgil still has not produced his contracts.

After Virgil received the March 22, 2011, request from Mr. Strout, he and his attorney, Bill Satterberg, began a course of correspondence voicing Virgil's objection to the request. The correspondence involved Mr. Strout; Attorney General John Burns; Assistant Attorney General Kevin Saxby; Commissioner of Commerce, Community and Economic Development Susan Bell; and the Big Game Commercial Services Board.²⁹

In the correspondence, Virgil explained that in his view, guiding contracts were personal and confidential. He believed that the Division did not have the right to request production of a contract except in the specific instance in which a client had complained, and the name of the complainant had been provided to the guide to first resolve the complaint. He contended that the Division was allowed to investigate only if the guide and the complainant were not able to resolve the matter. In his February 12, 2013, correspondence to the Board, Virgil petitioned the Board to amend the regulations to clearly reflect Virgil's view of the limited scope of the

²⁴ D testimony.

²⁵ V. Umphenour testimony; E. Umphenour testimony.

²⁶ Umphenour Exhibit AH.

²⁷ Umphenour Exhibit AG.

²⁸ E. Umphenour testimony.

²⁹ Umphenour Exhibits AH-BC.

Division's authority to request contracts.³⁰ In this petition, Virgil argued that his view was the original intent of the Board in permitting the Division to request contracts.

The failure of Virgil to produce the contracts as requested later became the basis for Counts VI and VII in this matter.

E. The accusation, motion for summary adjudication, and hearing

On December 23, 2013, the Division filed a seven-count accusation against Virgil. The first five counts turned on the theory that Virgil was the contracting guide in both the T and the D hunts. Counts I and IV alleged that, as the contracting guide in these two hunts, Virgil illegally contracted for and provided big game hunting services in guide use areas in which he was not registered. Counts III and V alleged that Virgil illegally failed to fill out the hunt record for these two hunts. Finally, Count II alleged that Virgil was responsible for the actions of his alleged assistant guide, Mr. Kirby, relating to Mr. T's taking a sub-legal sheep in 2010.

Counts VI and VII related to Virgil's failure to produce the contracts to the Division. Count VI alleged that his failure to produce the contracts was a violation of regulations and statutes relating to the requirement that licensed guides must provide contracts upon request. Count VII was in the alternative: in case Virgil said he was innocent of the charge in Count VI because the requested contracts did not exist, then the accusation charged him with guiding without a contract. (Virgil never raised this defense, however, so Count VII is moot.)

Virgil filed a notice of defense, and a hearing was scheduled. Before the hearing, the Division filed a motion for summary adjudication, seeking a ruling that the undisputed facts established that Virgil was guilty of Counts I-VI as a matter of law. If so there would be no need for a hearing.

On Counts I-V, however, the question of whether Virgil was the contracting guide on the T and D hunts was a disputed issue of fact. A hearing was needed to take testimony on this issue. Therefore, summary adjudication was denied as to Counts I-V.

On Count VI, no material facts were in dispute. The parties agreed that Virgil had not produced the contracts. The only question in dispute was whether the law required that he produce the contracts. Because the law was clear that the Division could require a guide to produce a contract, without regard to any predicate requirement that the contract be related to a

³⁰ Umphenour Exhibit BC.

complaint, or that the guide be given the name of the complainant, the Division was granted summary adjudication that Virgil had committed the violations alleged in Count VI.³¹

The order granting summary adjudication acknowledged, however, that “[i]f the Division abused its authority—for example, by requesting the documents for a wrongful reason or in bad faith—then Virgil may be able to avoid liability for his failure to comply.”³² Some leeway was granted to Virgil to introduce evidence at the hearing on “alternative defenses,” such as his arguments that the Division’s case was a product of bias/selective enforcement, or that his withholding of the contracts was justified because he had taken his case to the Board. The factual inquiry regarding these affirmative defenses was to be limited, and would be cut off if Virgil could not make out a prima facie case for a genuine defense.

A two-day hearing was held in Fairbanks on April 14-15, 2014. Assistant Attorney General Robert Auth represented the Division, and Mr. Satterberg represented Virgil. The record was held open for the parties to file closing briefs, particularly to address the legal requirements to establish an agency relationship. Telephonic closing arguments were heard on June 10, 2014.

III. Discussion

A. Was Virgil the contracting guide in the T and D hunts?

This case presents a classic “law vs. facts” dilemma. On their face, the two contracts seem to make Virgil ultimately responsible for providing big game services to the two clients. If so, then, as a matter of law, *Virgil* would be the contracting guide.³³ The facts, however, indicate that the parties to these transactions believed at all times that *Eric* was the contracting guide. Even though the original version of the contract did not mention Eric, they knew that Eric was the responsible party. The parties believed that when Virgil signed the contracts, he was acting as Eric’s *agent*, binding *Eric*, not himself, to be the contracting guide. The question here is whether as a matter of *law* Eric was the contracting guide, or whether the law requires that Virgil’s signature made Virgil the contracting guide.

³¹ Order Denying Motion for Summary Adjudication on Counts I-V and Granting Summary Adjudication on Count VI (April 2, 2014). The ruling contained in this order is incorporated in Part III of this decision.

³² *Id.*

³³ The term “contracting guide” is used sparingly in statute and regulation. *E.g.*, AS 08.54630(b)(3); 5 AAC 92.044(b)(6); *see also* AS 08.54.610(e). The term is also used on the hunt record. As used in this decision, “contracting guide” means the registered guide-outfitter ultimately responsible for providing big game commercial services to a client, in a guide-use area in which the guide is registered, in exchange for consideration, and who may employ licensed assistants to help provide the services.

As a threshold matter, Virgil argues that the Division is not allowed to object to the ambiguity in the contract. In his view, the contract is for the benefit of the parties to the transaction. The enforcement agency has no interest in the contract, and should not be examining the contract to determine who is responsible for the hunt. He believes that the enforcement agency needs only to look at the hunt record to determine who is responsible. In support of his argument, Virgil notes that the law requires that the hunt record be carried in the field during the hunt, but not the contract. The first line on the hunt record is a space to fill in the name of the “Contracting Registered Guide-Outfitter.”³⁴ In Virgil’s view, this means any ambiguity in the contract is harmless.

Virgil’s argument, however, presumes that the enforcement agency will never have an interest in verifying that the hunt record *correctly* identifies the contracting guide. To the contrary, however, the agency needs to know who is responsible for a hunt. If for any reason the hunt record is not available, is unclear, or is in doubt, the agency needs to be able to turn to other sources to establish responsibility. Contracts are required by law, and the contract would be the first source to which the agency would turn. Therefore, the agency has an interest in being able to determine the identity of the contracting guide from the contract itself.

Turning to the Division’s assertion that Virgil was the contracting guide, the Division argues that the plain language of the contract controls the outcome of this case. In the Division’s view, under the regulations and statutes, only a single guide can enter into a contract, and nothing in the statutes allow one guide to be an agent of another.³⁵ Therefore, the Division concludes, common-law agency principles do not apply to this case. The problem with this argument, however, is that it leads to a result that simply would be untrue. Here, the overwhelming evidence proves that Eric, not Virgil, was the contracting guide on the T and D hunts.

First, the Division’s argument that agency principles do not apply to guides misses the point of how agency principles are being applied here. The Division asserts that, because the guide statutes allow only a contracting guide to enter into contracts, an agent for the contracting guide is impliedly prohibited from making a legal contract on behalf of the guide. Therefore, in the Division’s view, agency principles do not apply and should not be employed in this analysis.

³⁴ E.g., Umphenour Exhibit T.

³⁵ Division’s Post Hearing Brief at 3.

Regardless of whether the big game commercial services laws allow guides to employ agents, however, nothing in guiding laws prevent application of common-law agency principles to determine who, legally and factually, is bound by the contract. If, under agency principles, Eric is the contracting guide, then Eric is the contracting guide. If Eric has violated the guiding laws by employing an agent, that is a different matter.³⁶

Second, under the principles of agency law, Virgil has established that he was acting as Eric's agent. An agent is a person who has the "power to alter the legal relations between the principal and third persons."³⁷ Here, Eric testified that Virgil had permission from him to contract on his behalf for the T and the D hunt.³⁸ Therefore, Virgil (the agent) had the authority to alter the legal relations between Eric (the principal) and third persons. In addition, in order for an agency relationship to exist, the principal must have "the right to control the conduct of the agent with respect to matters entrusted to him."³⁹ Eric testified that Virgil had to have his permission in order to bind him to a contract.⁴⁰ Therefore, Eric did have control over Virgil's conduct with respect to entering into guiding contracts.

Third, the intent of the parties when entering into a contract, and the question of who is bound by the contract, are questions of fact.⁴¹ The writing is evidence of the parties' intent, but the contract is the actual agreement among the parties.⁴² Here, the facts all show that the intent of the parties was to form a binding contract between the hunters and Eric. Virgil does not guide sheep hunts and he is not registered in an area for sheep hunting, so he knew he would not be the contracting guide on the T hunt. Mr. T had made several calls to both Virgil and Eric and

³⁶ The Division is concerned that a finding that Virgil was not the contracting guide will open the door for agents to be procuring guide contracts, which will make enforcement of guiding laws much more difficult. This decision, however, does not address whether Eric *properly* employed an agent. If Eric violated the guiding laws by employing an agent here, nothing in this decision would prevent the Division from holding Eric accountable for that offense. Moreover, this decision does not address whether Virgil violated guiding laws by acting as an agent because the accusation did not raise that issue. Here, as the Division made clear in oral argument, the allegations raised in Counts I-V turn on whether Virgil was the contracting guide. If not, counts I-V must be dismissed.

³⁷ *E.g.*, *Manes v. Coats*, 941 P.2d 120, 123-24 (Alaska 1997) (quoting Restatement (Second) of Agency §§ 12, 14 (1958)).

³⁸ E. Umphenour testimony.

³⁹ *Manes*, 941 P.2d at 123-24; *see also Harris v. Keys*, 948 P.2d 460, 464 (Alaska 1997) (agency relationship existed if arrangement required agent to act on principal's account, subject to principal's control).

⁴⁰ E. Umphenour testimony.

⁴¹ *E.g.*, *Alaska Continental, Inc. v. Trickey*, 933 P.2d 528, 534 (Alaska 1997) ("the intent of the parties when entering a contract is a question of fact").

⁴² *See, e.g., Juliano v. Angelini*, 708 P.2d 1289, 1291 (Alaska 1985) ("If [the parties'] expressions convince the court that they intended to be bound without a formal document, their contract is consummated, and the expected formal document will be nothing more than a memorial of that contract." *Quoting* 1 A. Corbin, *Corbin on Contracts* § 30, at 98-99 (1963)).

understood that Eric would be the principal on the hunt.⁴³ Virgil's intent in signing the T contract was to commit that Eric would be the contracting guide on the hunt. Because in his mind "Hunt Alaska" was synonymous with "Virgil and Eric Umphenour," he thought his signature was making that commitment, even though on paper it appeared that he was committing himself to guiding a sheep hunt.

With Mr. D, the understanding of the parties is even clearer. Virgil testified that he went to Dallas with the intent of booking certain hunts for Eric to fill space in Eric's schedule.⁴⁴ Mr. D knew Eric would be the principal on the hunt, and he knew that he would be in Eric's guide use area. After learning from Virgil that Eric would be his guide, Mr. D's subsequent communication was with Eric.⁴⁵

Fourth, with both contracts, Eric's signature on the contract, with his guide license number, signaled his intent to be bound by the contracts as the contracting guide. Eric testified that he accepted responsibility and liability for the contracts. His entry of his name as the contracting guide on the hunt records confirms the factual finding that he is the contracting guide here.

Fifth, the evidence in this case proves that Virgil and Eric were acting simply as father and son in a family business. They were not trying to illegally pool their guide use areas, avoid liability, play a shell game with contracts, or confuse the agency. As father and son, they have a good reason to collaborate. Their course of conduct, including their advertisements, their web sites, and their joint use of the name "Hunt Alaska" all show that they do collaborate. That one of them should book a hunt for the other, and sign a contract that in their minds bound the other, is not evidence of an intent to circumvent the law or avoid responsibility for a hunt.

Finally, the Division's concern that this case will open the door for guides to book hunts for other guides, pool guide use areas, and do an end-run around liability as the contracting guide are unfounded. First, this decision is not holding that Virgil's and Eric's actions were permissible under the guiding laws. This decision holds only that under these facts, Virgil was not the contracting guide in the T and D hunts and therefore cannot be held liable for Counts I-V

⁴³ T testimony. Mr. T was pressed at hearing as to whether his understanding was merely that Eric would be accompanying him, or whether he understood that Eric was the principal guide who was legally responsible for the hunt. This distinction was important, because if he was referring to Eric as the "guide" merely because Eric was accompanying him, Eric could be the assistant and Virgil could be the principal (contracting) guide. Mr. T understood that Eric was legally responsible for the hunt. *Id.*

⁴⁴ V. Umphenour testimony.

⁴⁵ D testimony.

as they have been framed in this accusation. Second, nothing in this decision should be read to condone the confusion created by Virgil and Eric in their actions here. Guides should be held to a high standard of professionalism, and that includes having legal documents that are clear and unambiguous.⁴⁶ Third, this case is limited to its facts—a father and son team, with a history of joint advertising and collaboration, whose clients fully understood who was the contracting guide, and the contracting guide taking full responsibility for the two hunts. Here, Eric and Virgil had no reason to thwart the guide laws.⁴⁷ If the facts had shown an intent to avoid a legal responsibility, the outcome would have been different.

In sum, agency principles must be employed here to determine who was the contracting guide. Any other approach would lead to a counterfactual result, and put the Board in an illogical position of enforcing the law against a person who was not responsible for the hunts. This result does not impinge on the Division’s enforcement authority—it strengthens the Division’s authority because it allows the Division to enforce the law against the actual party who was responsible for the hunt.

B. Was Virgil excused from the requirement of producing the contracts as requested by the Division?

This decision turns next to whether Virgil’s failure to produce his contracts to the Division upon demand was a violation of the guiding laws, as alleged in Count VI. Alaska Statute 08.54.680(c) requires guides to sign a written contract before providing services to clients, and establishes requirements for the content of the contracts. Under the statute, “[a] registered guide-outfitter or transporter shall provide a copy of contracts to provide big game hunting services or transportation services, as appropriate, to the department upon request of the department.”⁴⁸ The statute also requires that the department keep the contracts confidential, with

⁴⁶ Becky Umphenour testified that shortly after the D hunt (before the accusation was filed), she had realized on her own that the pre-printed contracts should contain both Eric’s and Virgil’s names, and she made that change. R. Umphenour testimony. Virgil testified that he agreed that the contract form was in error, and that he would change it. V. Umphenour testimony.

⁴⁷ The Division agreed that Virgil and Eric could have accomplished their goal by simply tearing up the contract with Virgil’s signature and entering into a new contract with Eric’s and the client’s signatures. Therefore, Virgil and Eric had no reason to create ambiguity or confusion in their contracting, when what they wanted could have been easily accomplished without ambiguity and confusion. Note that this decision does not determine whether Eric’s subsequent signature on the contract cured any alleged violation by Eric because that question is not at issue here. His signature does, however, add weight to the conclusion that Virgil was not the contracting guide.

⁴⁸ AS 08.54.680(c). Virgil argued that the term “as appropriate” in AS 08.54.680(c) is a limit on the Division’s authority to request contracts. The term “as appropriate,” however, is merely clarification that a transporter would provide a transportation services contract; a guide would provide a big game hunting services contract.

limited exceptions for government agencies.⁴⁹ The regulation that governs requests for contracts allows the Division to request a copy of a contract whenever a complaint is received or an investigation is opened.⁵⁰ It does not require that the contracts requested be limited to a contract identified in a complaint from a client.⁵¹ Accordingly, the prehearing order in this cases held that, as a matter of law, Virgil had violated AS 08.54.680(c), AS 08.54.720(a)(8)(A), 12 AAC 75.340, and 12 AAC 75.930(b).

Although the violation was established as a matter of law, the Administrative Law Judge permitted Virgil some leeway to come forward with facts that might show that he was excused from liability for the violation. Virgil appeared to raise two possible affirmative defenses. First, he appeared to allege that the Division had selectively enforced the law against him only. Second, he also alleged that, by petitioning the Board, he had engaged in an alternative process, sanctioned under the law, to protest the Division's request for the contracts. In his view, his use of that process exempted him from compliance with the request, perhaps because it impliedly stayed the Division's demand for production of the contracts.

To prevail on a claim of selective enforcement, Virgil must show

first, that other persons similarly situated to the defendant and equally subject to prosecution were not proceeded against; second, that the defendant was singled out as a result of a conscious, deliberate, and purposeful decision; and, third, that the discriminatory selection of the defendant was based upon an arbitrary, invidious, or impermissible consideration.⁵²

Here, Mr. Strout testified that he has requested contracts from other guides.⁵³ Moreover, before undertaking this investigation, the Division was in possession of contracts that conflicted with the hunt records. Therefore, the Division had grounds for suspecting a possible shell game or other scheme to escape enforcement, and its request to see other contracts was reasonable. In

⁴⁹ *Id.*

⁵⁰ 12 AAC 75.930.

⁵¹ Virgil's argument that the only purpose of providing contracts to the Division would be for consumer protection, and that therefore the guide should be given the name of the complainant before the Division investigates, is not supported by the plain language of the laws. Moreover, the Division is allowed to investigate for compliance with the law even if, as here, no consumer has complained. The Division is not required to disclose this information during the investigation, and in many cases, including consumer protection cases, premature disclosure could thwart the investigation.

⁵² *Closson v. State*, 784 P.2d 661, 669-70 (Alaska App. 1989) (quoting B. Gershman, *Prosecutorial Misconduct* § 4.3(a)(3), at 4-13 (1985)), *rev'd on other grounds*, 812 P.2d 966 (Alaska 1991).

⁵³ Strout testimony.

sum, because the Division requested contracts from other guides, and had reasonable grounds for requesting contracts from Virgil, Virgil has not proven selective enforcement.

With regard to Virgil's petition to the Board, that petition was under AS 44.62.220, which provides a right to petition a state agency for adoption or repeal of a regulation. It does not provide an alternative avenue for a licensee to object to an investigation, and does not excuse noncompliance with a valid request for documents. In sum, Virgil has not established any affirmative defenses that would excuse him from liability for his failure to comply with the request for contracts. Therefore, the decision issued on summary adjudication finding Virgil liable for count VI, is affirmed.⁵⁴

C. What discipline should the board apply to Virgil's violation?

Although Virgil is guilty of the violations alleged in count VI, he has established that he had a strongly-held, good-faith belief that under what he considered the correct interpretation of the regulation, the Division was not supposed to ask him to produce all his contracts. In his view, the request should have only been for the contract of a complainant, and then only after he had an opportunity to confront the complainant. Given his good-faith belief, he asks that no or minimal discipline be imposed for his violation.

Virgil's good-faith belief, however, does not excuse his failure to comply with the Division's request. Although he certainly has the right to protest what he considers unwarranted government intrusion into his business, as a licensed professional, he must accept that one of the burdens of being licensed is that he must comply with all of the statutes and regulations governing his profession. He had options other than noncompliance to lodge his protest. He could have asked a court for an injunction. He could have complied with the request under protest, and then vigorously pursued his arguments that the request was wrongful.⁵⁵

Under AS 08.54.710(a)(2), the Board may impose a disciplinary sanction when a licensee "has failed to file records or reports required under this chapter." Here, Virgil was required to

⁵⁴ In his opposition to the Division's Motion for Summary Adjudication, and again in oral argument, Virgil raised what he termed "jurisdictional issues," arguing that the Division had not followed the procedure required under AS 08.01.087(b). Virgil never filed a motion based on the alleged procedural flaw. Moreover, the issue is not well taken. The Board has jurisdiction over guiding license issues, so Virgil's procedural argument does not actually implicate jurisdiction. In addition, the subsection to which Virgil cites addresses the process for the commissioner to take when filing a cease-and-desist order or a superior court action. Here, the Division filed an accusation under the Administrative Procedures Act, so AS 08.01.087(b) does not apply.

⁵⁵ Virgil argued he was concerned that a heavy-handed investigation would reflect poorly on his business. Better communication among the parties, however, might have alleviated this concern. In any event, this concern is not grounds for failure to comply.

file his records upon request, and failed to do so. Therefore, he is liable for a disciplinary sanction.

Under AS 08.01.075(f), a board is required to “seek consistency in the application of disciplinary sanctions.” The Division did not identify any cases similar to this one. It did, however, suggest that the Board consider the “investigation sanction matrix” that was approved by the Board as non-regulatory guidance.⁵⁶ The matrix would recommend discipline of “Letter of Advisement or \$500-\$5,000 Fine [and] Reprimand” for a first offense under AS 08.54.710(a)(2). The Division also requested that Virgil be ordered to produce the contracts, and suggests that his discipline should be enhanced because he had been previously disciplined for allowing an assistant guide whose license had lapsed to guide a client, and allowing that client to hunt when the hunting season was not open.⁵⁷ The Division did not, however, suggest how large a fine should be imposed under the matrix.

Here, Virgil’s offense is serious. Withholding information that is needed in an investigation causes delay and expense, and can thwart the administration of the guide laws. In this case, had Virgil and Eric cooperated with the investigation, the issue might have been cleared up much earlier, avoiding the need for additional investigation and the hearing. Therefore, the Board will impose a fine on Virgil.

The Board’s cases note that guiding offenses that are among the most serious are those that involve deliberate flouting of hunting and guiding laws, such as wanton waste, hunting on the same day as airborne, and illegal baiting.⁵⁸ It would follow that the most severe discipline for withholding information in violation of AS 08.54.710(a)(2) would be imposed when the withholding impeded an investigation into a guiding violation that was among the most serious guiding offenses. That is not the case here.

Here, although Virgil’s withholding did impede an investigation, several factors indicate the fine imposed on Virgil should be toward the lower end of the range of fines that would apply to a violation of AS 08.54.710(a)(2). His withholding of information was more in the nature of a protest than an attempt to avoid liability for wrongdoing. He did not know that the purpose of

⁵⁶ Attachment, Division’s Hearing Brief. Because this matrix has not been adopted into regulation, it is not binding or even necessarily authoritative.

⁵⁷ R.423-29 (Consent Agreement, Dec. 8, 2010).

⁵⁸ See, e.g., *In re Smith*, OAH No. 08-0424-GUI at 15 (Big Game Commercial Services Board 2009).

the investigation was to determine whether he and Eric were involved in a scheme to pool guide use areas. As shown in this hearing, he was not engaged in any such scheme.

In one case involving contracts, *In re Katzeek*, the Board imposed a \$500 fine with \$100 suspended for a failure to include all written information in a written contract.⁵⁹ That violation might be considered somewhat less serious than Virgil's because it involved an offence of omission (leaving information out of a document) rather than an offense of commission. In a 2007 case, the Board accepted a settlement in a Memorandum of Agreement that imposed a fine of \$750 on an assistant guide who was convicted of failing to report a violation involving a client who knowingly failed to validate his tag after shooting a caribou.⁶⁰ That case, involving an actual field violation, might be considered somewhat more serious than this case. On the other hand, it is an older case, and because it was resolved through an MOA rather than a hearing, the reasons for setting the fine may not be known.⁶¹

A common non-field violation found in many guide cases is negligent failure to disclose required information on an application. A recent review of Board action concluded that this offense generally results in a fine of \$2,000 per failure to disclose, with 75 percent suspended.⁶² Although failure to disclose required information on an application is different than a failure to produce documents upon request, the violations are similar in that both are committed out of the field, and the seriousness of both violations relates largely to the substantial potential to thwart the administration of the guiding laws.

A substantial fine is necessary to send the message that guides must cooperate with all law-enforcement officials, including the Division's investigators. The fine can, however, be mitigated because Virgil's failure to produce the contracts was done openly (he even appeared

⁵⁹ *In re Katzeek*, OAH No. 08-0533-GUI (Big Game Commercial Services Board 2009). For another case that involved faulty paperwork that was also resolved with a \$500 fine, see *In re Richardson*, Case No. 1700-00-001 (Alaska Dep't of Community and Economic Dev., Div. of Occ. Lic. 2000) (MOA on file at OAH). In that case, the Commissioner of Community and Economic Development accepted a memorandum of agreement that imposed a \$500 fine on a guide who conducted four guided hunts in an area where, at the start of the hunts, he did not have the appropriate land-use registration to conduct the hunts. (*Richardson* was resolved at a time when no guide Board existed.)

⁶⁰ *In re Martin*, Case No. 1704-07-005 (Big Game Commercial Services Board 2007) (MOA on file at OAH).

⁶¹ The respondent in *Martin* was required to pay the entire \$750. *Id.* A review of several MOAs reveals that MOAs often result in straight fines with no suspended fine pending completion of a probationary period. Here, the proposed actual payment for Mr. Umphenour is less the fine imposed in *Martin*, even though the total fine would be larger if Mr. Umphenour failed to successfully complete probation.

⁶² *In re Lyon*, OAH No. 11-0272-GUI at 18 (Alaska Big Game Commercial Services Board 2011); *See also In re Skaflestad*, OAH No. 13-0661-GUI at 25 (Alaska Big Game Commercial Services Board 2013) (following *Lyons* in setting the fine but increasing the length of the probationary period).

before the Board to defend his position). Discipline for future cases of failure to produce required documents will be imposed on a case-by-case basis and may well be considerably more severe for cases that occur in different circumstances.

Based on this review, the board will fine Virgil \$1000 with \$500 suspended, assuming no additional violations for two years. In addition, the Board will reprimand him and require him to produce the requested contracts within 30 days of the Board's adoption of this decision.

IV. Conclusion

1. The Division did not prove that Virgil Umphenour was the contracting guide on the T hunt of September 2010 or the D hunt of 2011. Therefore, Counts I-V of the December 2013 accusation are dismissed.
2. The Division did not prove that Mr. Umphenour provided guiding services without a contract. Therefore, Count VII of the December 2013 accusation is dismissed.
3. The Division did prove that it had requested that Mr. Umphenour produce 36 contracts, and that Mr. Umphenour failed to produce the contracts to the Division as required by law. Therefore, the Division proved that Mr. Umphenour has violated AS 08.54.680(c), AS 08.54.720(a)(8)(A), 12 AAC 75.340, and 12 AAC 75.930(b), as alleged in Count VI of the December 2013 accusation.

V. Order

The Big Game Commercial Services Board imposes the following discipline on Mr. Umphenour:

1. Mr. Umphenour is fined \$1,000. \$500 of the fine is suspended, conditioned upon Mr. Umphenour complying with this order and not violating any hunting, guiding, or transporter laws in any jurisdiction for two years, beginning thirty days after the date of adoption of this decision by the Board. The \$500 payment is due thirty days after the date of the adoption of this decision by the Board.
2. No later than 30 days after the date of adoption of this decision by the Board, Mr. Umphenour shall deliver to the Division copies of the 36 contracts requested in the March 22, 2011 letter to Mr. Umphenour.
3. The following reprimand shall be served on Mr. Umphenour and placed in his file:

The Big Game Commercial Services Board reprimands you, Virgil Umphenour, for failing to produce to the Division of Corporations, Business and Professional Licensing

upon demand records needed for an investigation as required by law. Your withholding of information that was needed in an investigation has caused delay and expense to the officials charged with the administration of the guide laws. This action harms the guiding profession and causes additional expense to all professionals providing big game commercial services. A professional licensed to provide big game commercial services must respect the law and cooperate with officials enforcing the law. The Board hopes you learn from this experience and avoid further violations.

DATED: July11, 2014.

By: Signed
Stephen C. Slotnick
Administrative Law Judge

Non-Adoption Options

B. The undersigned, 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:

to include item #1, a fine of \$1000 with \$500 suspended conditioned upon complying with this order and not violating any hunting, guiding, or transporter laws in any jurisdiction for two years; delete item #2, to deliver 36 contracts to the Division; and include item #3, a reprimand shall be served and placed in his file.

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 October, 2014.

By: Signed
Kelly Vrem
Chair, Alaska Big Game Commercial Services Board

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