

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

In the Matter of:)
)
DARWIN VANDERESCH¹) OAH No. 14-1498-GUI
) Board No. 2013-001910
)
_____)

DECISION ON SUMMARY ADJUDICATION

I. Introduction

The primary issue in this case is whether Darwin Vanderesch's guilty plea, in a 2013 criminal case involving unsworn falsification, based on the same facts as this licensing action, prevents him from contesting, in this proceeding, that he made an intentional misrepresentation when he completed and submitted a registered guide-outfitter renewal application in December 2009. This decision concludes that the elements of the crime of unsworn falsification, to which Mr. Vanderesch previously pled guilty, are equivalent to the elements of fraud, deceit, and misrepresentation which must be proven to establish a licensing violation under AS 08.54.710(d). Because the Division of Corporations, Business and Professional Licensing has filed a certified copy of Mr. Vanderesch's criminal conviction, it has established, without an evidentiary hearing, that Mr. Vanderesch obtained the license renewal at issue through fraud, deceit, or misrepresentation. When a license has been obtained through fraud, deceit, or misrepresentation, AS 08.54.710(d) requires that the license be revoked; no lesser sanctions are available. Accordingly, the Board is required to revoke Mr. Vanderesch's guide license. Mr. Vanderesch may not provide big game hunting services or transportation services during the period of revocation.

II. Facts

The material facts relevant to this proceeding are not in dispute.² Mr. Vanderesch first became licensed by the Alaska Big Game Commercial Services Board (Board), as an assistant guide, in 2002.³ His assistant guide license was subsequently renewed in 2003 and 2005.⁴

¹ This case was originally filed as "In the Matter of Darwin Vander Esch." However, as the case progressed, it became apparent from the respondent's filings that the correct styling of the respondent's last name is "Vanderesch." The case caption is amended to correct that error.

² To the extent that any minor factual disputes exist, all such factual issues are resolved in favor of Mr. Vanderesch for purposes of this summary adjudication decision. See *Wilson v. Pollet*, 416 P.2d 381 (Alaska 1966) (in determining whether there is a genuine issue of fact, the proofs offered must be viewed in the light most favorable to the party opposing the motion); *Gablick v. Wolfe*, 469 P.2d 391, 396 (Alaska 1970) (same).

³ See certified record of the Division of Corporations, Business and Professional Licensing (agency record) at page 438. Future citations to the agency record are abbreviated as "R. at ____."

In November 2005 Mr. Vanderesch shot a mule deer while hunting (but not guiding) in South Dakota.⁵ Mr. Vanderesch had a permit or tag covering deer at the time of the hunt, but the tag covered only white tail deer and did not cover mule deer.⁶

In April 2008, Mr. Vanderesch was licensed by the Board as a full-fledged registered guide-outfitter.⁷ He subsequently guided hunts in Alaska using this license in 2009, 2010, and 2011.⁸

On July 15, 2008, an administrative complaint was filed against Mr. Vanderesch with the State of Idaho Outfitters and Guides Licensing Board for events that occurred during the 2005, 2006, and 2007 hunting seasons.⁹ Following hearing, the Idaho board found that Mr. Vanderesch had committed some (but not all) of the violations alleged.¹⁰ The Idaho board fined Mr. Vanderesch \$1,000, placed him on probation for three years, and ordered him to pay the board's attorney fees and costs.¹¹

In August 2009, almost four years after Mr. Vanderesch's 2005 South Dakota deer hunt, the United States Fish and Wildlife Service (USFWS) began an investigation concerning that hunt.¹² In September 2009, USFWS investigators served a search warrant on Mr. Vanderesch at his residence in Riggins, Idaho.¹³ The USFWS seized Vanderesch's mule deer mount from the 2005 hunt.¹⁴ The USFWS agents also questioned Mr. Vanderesch about the hunt.¹⁵ Mr. Vanderesch stated that he thought his permit had covered both white tail deer and mule deer, but admitted that he must have misread the permit.¹⁶ The USFWS agents did not give Mr. Vanderesch their contact information before leaving his home, did not tell him that they would be back in touch with him, and did not tell him that any further investigation was pending.¹⁷

⁴ R. at 431, 435.

⁵ R. at 166; Affidavit of Darwin Vanderesch dated December 3, 2014 ("Vanderesch affidavit") ¶ 3.

⁶ *Id.* According to Mr. Vanderesch, he thought the permit covered both white tail deer and mule deer. *Id.*

⁷ R. at 249-253. Mr. Vanderesch received License No. 1270 on April 16, 2008 (R. 38).

⁸ R. at 38.

⁹ R. at 86 - 98.

¹⁰ R. at 100 - 117 and 223 - 240. The accusation included allegations that Mr. Vanderesch threatened other hunters with physical harm based on their perceived encroachment on his guiding territory (R. at 103, 112). Because the case was settled, the Idaho Board did not make findings regarding these allegations.

¹¹ R. at 105 - 106, 114 - 115, 228 - 229, and 237 - 238.

¹² R. at 41 - 48.

¹³ R. at 41 - 42 and 49 - 51; Vanderesch affidavit ¶ 3.

¹⁴ R. at 38, 39, 41, 52, and 53.

¹⁵ R. at 38, 42, and 43.

¹⁶ R. at 43 and 125; Vanderesch affidavit ¶ 3.

¹⁷ Vanderesch affidavit ¶ 4.

Mr. Vanderesch did not hear anything further from USFWS before submitting his next Alaska license renewal application.¹⁸ On December 30, 2009, Mr. Vanderesch completed and signed his 2010 - 2011 biennial license renewal application for his Alaska registered guide-outfitter license.¹⁹ At page two, item three of the renewal application, in response to the question "Since your last license was issued . . . [a]re you aware of any investigations against you, in any state, jurisdiction or in Canada?," Mr. Vanderesch answered "no."²⁰ Just above the signature line on the last page of the renewal application, there was a warning stating that "[t]he Board may deny, suspend, or revoke the license of a person who has obtained or attempted to obtain a license to practice as a Master or Registered Guide-Outfitter by fraud or deceit," and that [t]he person may also be subject to criminal charges for unsworn falsification."²¹ Mr. Vanderesch signed the application just beneath this warning.²² The Board subsequently renewed Mr. Vanderesch's license on January 25, 2010.²³

On February 18, 2011, USFWS issued a notice of violation (NOV) to Mr. Vanderesch concerning the taking of the mule deer in South Dakota in 2005.²⁴ The NOV alleged that Mr. Vanderesch had violated the Lacey Act by unlawfully taking, possessing, and transporting the mule deer.²⁵ The NOV was resolved in March 2011 by Mr. Vanderesch's forfeiture of items previously seized by USFWS (presumably the mule deer trophy), which USFWS valued at \$1,025.00.²⁶

On September 28, 2011, an indictment was issued by the Magistrate Court in Meade County, South Dakota charging Mr. Vanderesch with two misdemeanor violations of state law

¹⁸ Vanderesch affidavit ¶4.

¹⁹ R. at 81 - 84 and 193-196.

²⁰ R. at 82 and 194. At ¶ 2 of his affidavit Mr. Vanderesch stated "I checked the 'no' box because I genuinely did not think any investigation was pending against me," and he asserts in his memorandum that his intent in answering "no" to this question creates a genuine issue of material fact, which precludes entry of summary adjudication against him in this case. In the absence of a prior adjudication concerning the issue of his intent in answering this question, Mr. Vanderesch would be correct, and he would be entitled to an evidentiary hearing on this issue. However, as discussed in Section III of this decision, below, Mr. Vanderesch's prior criminal conviction concerning this issue precludes re-examination of the issue, on its merits, in this case.

²¹ R. at 84 and 196.

²² R. at 84 and 196.

²³ R. at 80 and 192. Mr. Vanderesch subsequently applied to renew his Alaska license at the end of 2011 (R. at 161 - 166), and the Board renewed his license effective March 8, 2012 (R. at 155). Most recently, Mr. Vanderesch applied to renew his Alaska license at the end of 2013 (R. at 140 - 143), and the Board renewed his license effective January 14, 2014 (R. at 139).

²⁴ R. at 59 - 60; Vanderesch affidavit ¶5.

²⁵ R. at 59 - 60. The Lacey Act, codified at 16 U.S.C. §§ 3371-3378, was originally enacted in 1900 and, in its current form, prohibits the interstate trade of wildlife, fish, and plants that have been illegally taken, possessed, transported, or sold.

²⁶ R. at 59 - 60; Vanderesch affidavit ¶ 5.

based on Mr. Vanderesch's taking of the mule deer in 2005.²⁷ Mr. Vanderesch entered into a plea agreement to resolve that case, under which he pled either guilty or no contest to the charge of unauthorized possession of big game.²⁸

By January 2012, Mr. Vanderesch had notified the Alaska Division of Corporations, Business and Professional Licensing (Division) concerning his conviction in the state of South Dakota for the taking of the mule deer in 2005.²⁹ Following investigation, the Division concluded that this conviction did not bar renewal of Mr. Vanderesch's license, and his license was renewed effective March 8, 2012.³⁰

By December 2012, the Alaska Department of Public Safety's Wildlife Investigation Unit (WIU) had opened its own investigation concerning Mr. Vanderesch.³¹ WIU became aware of the September 2009 USFWS investigation, and of Mr. Vanderesch's "no" answer on his December 2009 Alaska license renewal application.³² On March 7, 2013, a criminal complaint (Information) was filed against Mr. Vanderesch in Anchorage District Court (Case No. 3AN-13-2672 CR).³³ The Information charged Mr. Vanderesch with two counts of unsworn falsification in the second degree under AS 11.56.210(a)(2).³⁴ Count I of the Information was based on Mr. Vanderesch's failure to disclose the 2009 USFWS investigation on his 2010 - 2011 license renewal application submitted in December 2009.³⁵ Count II of the Information was based on Mr. Vanderesch's failure to disclose his March 2011 Lacey Act conviction on his 2012 - 2013 license renewal application submitted in December 2012.³⁶ If convicted, Mr. Vanderesch faced a possible fine of up to \$10,000, and up to one year in prison, for each count.³⁷

²⁷ R. at 130, 172.

²⁸ R. at 128.

²⁹ R. at 159 - 183. It is unclear from the record as to whether the Division was aware of the related federal investigation and subsequent violation/conviction at this time.

³⁰ R. at 155 - 159.

³¹ R. at 35 - 39.

³² R. at 35 - 39.

³³ R. at 19 - 22, 25 - 28, and 146 - 149.

³⁴ R. at 20, 26, and 147. Under AS 11.56.210(a)(2), [a] person commits the crime of unsworn falsification in the second degree if, with the intent to mislead a public servant in the performance of a duty, the person submits a false written or recorded statement that the person does not believe to be true . . . on a form bearing notice, authorized by law, that false statements made in it are punishable." Pursuant to AS 11.56.210(b), unsworn falsification in the second degree is a class A misdemeanor.

³⁵ R. at 19 - 20, 25 - 26, and 146 - 147.

³⁶ R. at 20 - 22, 26 - 29, and 147 - 149.

³⁷ AS 12.55.035(b)(5), AS 12.55.135(a).

On August 13, 2013 Mr. Vanderesch pled guilty³⁸ to, and was convicted of, the charges contained in Count I of the Information (charging unsworn falsification in the second degree, in violation of AS 11.56.210(a)(2)), for his failure to report the USFWS investigation on his December 2009 license renewal application.³⁹ Mr. Vanderesch was sentenced to 30 days in jail (with all 30 days suspended), fined \$2,500.00 (with \$2,000.00 suspended), was ordered not to commit any fish and game violations, and was put on probation for two years.⁴⁰

On December 30, 2013, Mr. Vanderesch submitted an application to renew his registered guide-outfitter license for the 2014 - 2015 renewal period.⁴¹ At page two of the renewal application Mr. Vanderesch answered "yes" to the question "[s]ince your last license was issued , , have you . . . been convicted of a crime?".⁴² Mr. Vanderesch's conviction did not constitute grounds for automatic denial of his renewal application because the conviction was not a felony conviction, there was no jail time served, and the unsuspended fine was less than \$2000.00.⁴³ Accordingly, the Division renewed Mr. Vanderesch's license on January 14, 2014.⁴⁴

III. Relevant Case Procedural History

On August 15, 2014, the Division filed a two-count Accusation seeking the imposition of disciplinary sanctions against Mr. Vanderesch. Count I of the Accusation asserts that Mr. Vanderesch's "no" answer to the question at page two, item three of his 2010 - 2011 biennial license renewal application (concerning awareness of any pending investigations) constituted obtaining a license through fraud, deceit, or misrepresentation, requiring permanent revocation of his guide license under A.S.08.54.710(d). Count II of the Accusation asserts that Mr. Vanderesch's 2013 conviction for unsworn falsification under AS 11.56.210(a)(2) constitutes grounds for discipline under AS 08.54.710(a)(1) and 12 AAC 75.340(a).

³⁸ Mr. Vanderesch would have entered a plea of no contest to the charge, but he could not do so, because it is the policy of the District Attorney's Office to accept only pleas of guilty in their offers to resolve cases (Vanderesch affidavit at page 2, paragraph 7.

³⁹ R. at 16, 17, 30, 153, and 154. The document at R. 17 appears to be a photocopy of a certified copy of the Judgment dated August 13, 2013, the copy having been certified by the Alaska Court System on June 10, 2014. The undersigned construes AS 08.54.710(f) as requiring the filing of an actual certified copy of the judgment, rather than a *copy* of a certified copy. Mr. Vanderesch did not, however, dispute the authenticity of the Judgment, and so any objection as to the certified status of the Judgment is waived for purposes of this proceeding.

⁴⁰ R. at 16, 17, 30, and 153.

⁴¹ R. at 140 - 143.

⁴² R. at 141. Along with his application Mr. Vanderesch submitted a letter from his attorney, copies of the final judgment, the criminal log notes, the Information, the Alaska Department of Public Safety's incident report, and his written explanation of the events at issue (R. at 145-154).

⁴³ AS 08.54.605(a).

⁴⁴ R. at 139.

Mr. Vanderesch's counsel filed a Notice of Defense on September 2, 2014, and the matter was referred to the Office of Administrative Hearings on September 4, 2014. On November 12, 2014 the Division filed a motion for summary adjudication as to Count I of its Accusation, asserting that Mr. Vanderesch's 2013 conviction for unsworn falsification in the second degree under A.S.11.56.210(a)(2)) conclusively established that Mr. Vanderesch had obtained his 2010 - 2011 biennial license renewal through fraud, deceit, or misrepresentation in violation of A.S.08.54.710(d). The Division's motion further asserted that there was no need for a hearing concerning the appropriate sanction or discipline because AS 08.54.710(d) compels license revocation when a license is obtained by fraud, deceit, or misrepresentation. Mr. Vanderesch opposed the motion, arguing that because facts were in dispute, the matter should be set for hearing.

An order granting the Division's motion for summary adjudication was issued on December 9, 2014, advising that a written decision would be issued at a later date. The hearing previously scheduled for December 11, 2014 was vacated.

IV. Discussion⁴⁵

The question in this case is whether Mr. Vanderesch obtained his license through fraud, deceit, or misrepresentation. If so, the Board must revoke his license.⁴⁶

The Division's argument is simplicity itself: in 2013 Mr. Vanderesch was convicted of fraud, deceit, or misrepresentation in connection with his December 2009 license renewal application. Under the guiding statutes, if a licensee is convicted of a crime, the licensee cannot argue in a licensing action that he or she did not commit the offense: "[a] certified copy of a judgment of conviction of a licensee for an offense is conclusive evidence of the commission of that offense in a disciplinary proceeding instituted against the licensee under this section based on that conviction, regardless of whether the conviction resulted from a plea of nolo contendere or the conviction is under appeal, unless the conviction is overturned on appeal."⁴⁷

The Division argues that, for purposes of this proceeding, it has established that Mr. Vanderesch committed fraud, deceit, or misrepresentation, in connection with his December 2009 license renewal application, by submitting a certified copy of the 2013 criminal conviction.

⁴⁵ Summary adjudication was granted to the Division under 2 AAC 64.250. Under that regulation, a party may request summary adjudication on one or more issues in an administrative proceeding if a genuine dispute does not exist on an issue of material fact. Where a motion for summary adjudication is supported by an affidavit or other documents, the defending party may not rely on mere denial, but rather must show, by affidavit or other evidence, that a genuine dispute exists on an issue of material fact for which an evidentiary hearing is required. 2 AAC 64,250(b).

⁴⁶ AS 08.54.710(d),

⁴⁷ AS 08.54.710(f).

Therefore, in the Division's view, the Board must find, as a matter of law, that Mr. Vanderesch violated AS 08.54.710(d), and must revoke his license.⁴⁸

Mr. Vanderesch asserts, however, that the Division's argument is flawed. Specifically, Mr. Vanderesch asserts (1) that the type of misrepresentation involved in the crime of unsworn falsification in the second degree under AS 11.56.210(a)(2) is not the same as "fraud, deceit, or misrepresentation" as referenced in AS 08.54.710(d);⁴⁹ (2) that, under AS 08.54.710(f), a certified copy of his conviction for unsworn falsification is proof that he violated AS 11.56.210(a)(2), but is not proof that he violated AS 08.54.710(d);⁵⁰ (3) that his intent in completing his December 2009 license renewal application is still at issue and cannot be determined through summary adjudication;⁵¹ (4) that the phrase "after a hearing" in AS 08.54.710(d) requires that Mr. Vanderesch be given an evidentiary hearing in this matter, regardless of whether there are any disputed issues of material fact;⁵² and (5) that the Board has the discretion under AS 08.54.710(d) not to revoke his license, since the Division renewed his license on January 14, 2014, after it knew of his 2013 conviction.⁵³ These five arguments are analyzed below.

A. *Are the Elements of AS 11.56.210(a)(2) Equivalent to the Elements of AS 08.54.710(d)?*

Mr. Vanderesch's first argument is that, although he did plead guilty to charges of unsworn falsification, the type of misrepresentation involved in that crime (unsworn falsification in the second degree under AS 11.56.210(a)(2)) is not the same as "fraud, deceit, or misrepresentation" as referenced in AS 08.54.710(d).⁵⁴ To resolve this issue, the elements of unsworn falsification under AS 11.56.210(a)(2) must be compared to the elements of "fraud, deceit, or misrepresentation" as referenced in AS 08.54.710(d). If the elements are equivalent, then Mr. Vanderesch's guilty plea will stand as proof of a violation of the guiding statute.

Although research reveals no reported decision discussing the elements of unsworn falsification under AS 11.56.210(a)(2), the elements are clear from the plain language of the statute. The elements of unsworn falsification in the second degree are (1) submission of a false written or

⁴⁸ As the Division states succinctly at page 1 of its December 9, 2014 reply memorandum, "[t]he only issue to be resolved in this motion is a legal one - whether, by virtue of respondent's conviction of unsworn falsification on his 2009 big game guide renewal, he necessarily committed fraud, deceit or misrepresentation under AS 08.54.710(d) with regard to that renewal."

⁴⁹ See Mr. Vanderesch's opposition memorandum dated December 4, 2014 at page 5.

⁵⁰ See Mr. Vanderesch's opposition memorandum dated December 4, 2014 at page 6.

⁵¹ See Affidavit of Darwin Vanderesch at page 3, paragraph 11.

⁵² See Mr. Vanderesch's opposition memorandum dated December 4, 2014 at page 7.

⁵³ See Affidavit of Darwin Vanderesch at page 3, paragraph 13.

⁵⁴ See Mr. Vanderesch's opposition memorandum dated December 4, 2014 at page 5.

recorded statement, (2) that the person submitting it does not believe to be true, (3) with the intent of misleading a public servant in the performance of a duty, (4) on a form bearing notice, authorized by law, that false statements made on the form are punishable.

The elements of AS 08.54.710(d), the licensing statute at issue here, are (1) obtaining a license, (2) through fraud, deceit, or misrepresentation.

First, there can be little doubt that "obtaining a license" under AS 08.54.710(d) involves the submission of a "written or recorded statement" (*i.e.* license application), with the intent that a public servant rely on it in the performance of official duties (*i.e.* processing the application and issuing a license). Accordingly, those elements of AS 11.56.210(a)(2) and AS 08.54.710(d) are equivalent. The more hotly contested issue in this case, however, is whether Mr. Vanderesch's admission that he intentionally submitted a false statement that he did not believe to be true establishes that he committed "fraud, deceit, or misrepresentation" under AS 08.54.710(d). There is no statutory or regulatory definition of fraud, deceit, or misrepresentation that applies to this case. Those terms have, however, been defined by judicial decision, and, as discussed below, their elements are substantially similar to the criminal statute. Each term is discussed separately below.

1. Fraud

Common law fraud claims require a showing of (1) a false representation of fact; (2) knowledge of the falsity of the representation; (3) intention to induce reliance; (4) justifiable reliance; and (5) damages.⁵⁵ The first four of these elements are clearly the same as the elements of AS 11.56.210(a)(2). "Damages" are not an express element of unsworn falsification in the second degree. Damage, however, is implicit in the crime of misleading a public servant in the performance of his or her official duties. Misleading an official damages the state by, at a minimum, wasting the time of the official who is misled. In a licensing context, the damage implicit in the crime is significant—misleading a licensing official could mean that an unqualified applicant may be licensed or that a wayward applicant may escape discipline. This damages the profession and the public. Accordingly, the elements of unsworn falsification in the second degree under AS 11.56.210(a)(2) are equivalent to the elements of fraud under AS 08.54.710(d).

2. Deceit

The elements of deceit are (1) a false representation, (2) which the defendant knows is false, (3) made with the intent to induce the plaintiff to refrain from action, (4) which causes the plaintiff

⁵⁵ *Shehata v. Salvation Army*, 225 P.3d 1106, 1114 (Alaska 2010), citing *Jarvis v. Ensminger*, 134 P.3d 353, 363 (Alaska 2006) and *City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d 1173, 1176 n. 4 (Alaska 1998); see also *Burseth v. Weyerhaeuser Mortgage Company, Inc.*, 1993 WL 13563649 (Alaska 1993).

to justifiably rely on the false statement by refraining from taking action; and (5) damage to the plaintiff.⁵⁶ As with fraud, the first four elements of deceit are subsumed within the elements of AS 11.56.210(a)(2). Again, as with fraud, damage is an implicit element of the crime and no further proof of damage is required. Accordingly, the elements of unsworn falsification in the second degree under AS 11.56.210(a)(2) are also equivalent to the elements of deceit under AS 08.54.710(d).

3. Misrepresentation

Under Alaska law, misrepresentation can be innocent, negligent, or intentional.⁵⁷ The type of misrepresentation involving the highest level of culpability is known as intentional or fraudulent misrepresentation. Alaska follows the Restatement (Second) of Torts as to what constitutes an intentional or fraudulent misrepresentation.⁵⁸ As described in the Restatement, the elements of fraudulent misrepresentation are (1) a misrepresentation of fact or intention, (2) made fraudulently (that is, with “scienter”), (3) for the purpose or with the expectation of inducing another to act in reliance, (4) with justifiable reliance by the recipient, (5) causing loss.⁵⁹

As with fraud and deceit, discussed above, the first, third, and fourth elements of intentional misrepresentation are subsumed within the elements of AS 11.56.210(a)(2). And again, although damage is not an express element of unsworn falsification in the second degree, it is clear that misleading a public servant in the performance of his or her official duties causes damage to multiple parties and interests. The real issue in this case is whether the second element of fraudulent misrepresentation - the requirement of scienter - is also present in AS 11.56.210(a)(2).

⁵⁶ *Palmer v. Borg-Warner Corp.*, 838 P.2d 1243, 1252 at footnote 16 (Alaska 1992), citing *W. Page Keeton et al., Prosser and Keeton on the Law of Torts*, § 105 at 728 (5th Ed. 1984); see also *Grinnell v. Erkins*, OAH 07-0240-RES at 6 (2008) citing *Jarvis v. Ensminger*, 134 P.3d 353 (Alaska 2006); Restatement (Second) of Torts §526.

⁵⁷ For innocent misrepresentation, see *Cousineau v. Walker*, 613 P.2d 608, 612 at note 2 (Alaska 1980), recognizing the tort of innocent misrepresentation as defined by Section 552C of the Restatement (Second) of Torts (1977); see also *Hayes v. Bering Sea Reindeer Products*, 983 P.2d 1280, 1286 at note 24 (Alaska 1999). For negligent misrepresentation, see *Willard v. Khotol Services Corp.*, 171 P.3d 108, 118 - 119 (Alaska 2007), which states:

The Restatement (Second) of Torts § 552 defines the four elements required to establish negligent misrepresentation as: (1) the party accused of misrepresentation must have made the statement in the course of his business, profession or employment; (2) the representation must supply “false information”; (3) the plaintiff must show justifiable reliance on the false information; and (4) the accused party must have failed to exercise reasonable care or competence in obtaining or communicating the information. [Internal quotation marks omitted].

⁵⁸ *Lightle v. State of Alaska Real Estate Commission*, 146 P.3d 980, 983-984 (Alaska 2006); see also *Anchorage Chrysler Center, Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905 (Alaska 2006); *City of Fairbanks v. Amoco Chemical Co.*, 952 P.2d 1173, 1176 n. 4 (Alaska 1998); *Barber v. National Bank of Alaska*, 815 P.2d 857 (Alaska 1991); *Carter v. Hoblit*, 755 P.2d 1084, 1086-87 (Alaska 1988).

⁵⁹ Restatement (Second) of Torts §§ 525, 526, and 531 (1977).

The Alaska Supreme Court has explained "scienter" as follows:⁶⁰

As used in the Restatement, the word "fraudulent" refers "solely to the maker's knowledge of the untrue character of his representation. This element of the defendant's conduct frequently is called scienter." Under Section 526 of the Restatement, [a misrepresentation is fraudulent if the maker] (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

Simply stated, intentional or fraudulent misrepresentation requires proof that the party making the misrepresentation knew that it was untrue.⁶¹

Boards, commissions, and courts construing statutes prohibiting "misrepresentation" in the context of professional licensing have also usually interpreted their licensing statutes as requiring a showing of intentional misrepresentation.⁶² A particularly instructive case in that regard is *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383 (Alaska 1984). In that case, the Alaska Supreme Court interpreted a real estate licensing statute which, like AS 08.54.710(d), referenced the term "misrepresentation" in conjunction with the terms "fraud" and "deceit." The *Johnson* court stated:

The apposition of the term "misrepresentation" to the terms "fraud," "deceit," and "conversion" persuades us that misrepresentation [as referenced in AS 08.88.460(a)] should be limited to only wrongful misrepresentations. A widely applied tenet of statutory interpretation is that if "the legislative intent or general meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their association with other associated words and phrases."⁶³

The Board has likewise construed AS 08.54.710(d) as requiring knowledge, on the part of the person making the representation, that the representation is untrue.⁶⁴ Finally, the Division acknowledges in this case that the type of misrepresentation involved in AS 08.54.710(d) requires knowledge, on the part of the person making the representation, that the representation is untrue.⁶⁵

⁶⁰ *Lightle v. State of Alaska Real Estate Commission*, 146 P.3d 980, 983-984 (Alaska 2006) (internal quotations and internal footnotes omitted).

⁶¹ *See Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 - 381 (Alaska 1984), *citing* Restatement (Second) of Torts § 530, Comment b.

⁶² For example, *see Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386 - 387 (Alaska 1984); *In re Muir*, OAH No. 04-0268-MED (Alaska State Medical Board 2006).

⁶³ *Alaska Real Estate Commission v. Johnston*, 682 P.2d 383, 386 - 387 (Alaska 1984) (citations omitted).

⁶⁴ *See Matter of Fernandez*, OAH No. 09-0395-GUI at 7 (Big Game Commercial Services Board, December 14, 2009); *Matter of Lyon*, OAH No. 11-0272-GUI at 7-8 (Big Game Commercial Services Board, December 15, 2011); *Matter of Skaflestad*, OAH No. 13-0661-GUI at 17-18 (Big Game Commercial Services Board, March 5, 2014).

⁶⁵ See the Division's Motion for Summary Adjudication at 5 and Reply memorandum at 2.

In summary, the unsworn falsification statute, AS 11.56.210(a)(2), requires that "the person [who] submits a false written or recorded statement . . . does not believe to be true . . ." The licensing statute, AS 08.54.710(d), which uses the terms "fraud," "deceit," and "misrepresentation," is likewise interpreted as requiring knowledge, on the part of the person making the representation, that the representation is untrue. The two statutes thus require the same level of scienter on the part of the person making the misrepresentation. The elements of unsworn falsification under AS 11.56.210(a)(2) are therefore equivalent to the elements of fraud," "deceit," and "misrepresentation" under AS 08.54.710(d).

B. Is Proof that Mr. Vanderesch Violated AS 11.56.210(a)(2) Also Proof that he Violated AS 08.54.710(d)?

The Division has filed a certified copy of Mr. Vanderesch's conviction under AS 11.56.210(a)(2) for his failure to report the USFWS investigation on his December 2009 license renewal application.⁶⁶ The Division argues that under AS 08.54.710(f), the conviction is conclusion proof of the violation of guiding statute.

Mr. Vanderesch argues, however, that under AS 08.54.710(f), a certified copy of his conviction for unsworn falsification is proof that he violated AS 11.56.210(a)(2), but is not proof that he violated AS 08.54.710(d).⁶⁷ Mr. Vanderesch is facially correct in that AS 08.54.710(f) does not automatically convert proof of a criminal conviction into proof of a licensing violation. However, that is not quite what the Division is asserting in this case. Rather, the Division is asserting that (1) the elements of AS 11.56.210(a)(2) are conclusively established by the August 13, 2013 conviction; (2) the elements of AS 11.56.210(a)(2), and the facts necessary to prove its violation in this case, *are the same as* the elements of AS 08.54.710(d) and the facts necessary to prove its violation in this case; and therefore (3) proof of Mr. Vanderesch's conviction under AS 11.56.210(a)(2) conclusively establishes that he also violated AS 08.54.710(d).

The Division's reasoning is sound. First, Mr. Vanderesch was convicted of violating AS 11.56.210(a)(2) based on his failure to disclose the 2009 USFWS investigation on his 2010 - 2011 license renewal application submitted in December 2009.⁶⁸ Mr. Vanderesch does not dispute the fact of his conviction. Even had he done so, the Division has provided a certified copy of the judgment of conviction, and under AS 08.54.710(f), this constitutes "conclusive evidence of the commission of that offense in [this] disciplinary proceeding."

⁶⁶ R. at 16, 17, 30, 153, and 154.

⁶⁷ See Mr. Vanderesch's opposition memorandum dated December 4, 2014 at page 6.

⁶⁸ R. at 19 - 20, 25 - 26, and 146 - 147.

Second, as demonstrated above in Section III(D), the elements required for a conviction under AS 11.56.210(a)(2) encompass the elements needed to show a violation of AS 08.54.710(d). Stated differently, Mr. Vanderesch's conviction under AS 11.56.210(a)(2) established that, in filing his 2010 - 2011 biennial license renewal application, he submitted a false written statement, that he did not believe to be true, on a form bearing notice, authorized by law, that false statements made in it were punishable, with the intent to mislead a public servant in the performance of his or her duties. The same facts supporting Mr. Vanderesch's conviction under AS 11.56.210(a)(2), (which facts cannot be controverted in this licensing proceeding by virtue of AS 08.54.710(f)), also establish that Mr. Vanderesch obtained his "license through fraud, deceit, or misrepresentation" in violation of AS 08.54.710(d). Accordingly, on the facts of this case Mr. Vanderesch's conviction under AS 11.56.210(a)(2) establishes, as a matter of law, that he violated AS 08.54.710(d).

Criminal convictions are now commonly given collateral estoppel effect⁶⁹ in subsequent administrative proceedings.⁷⁰ For example, in *Otherson v. Department of Justice*, a border patrol agent was discharged by the Immigration and Naturalization Service following his criminal conviction for physically abusing aliens.⁷¹ When Otherson appealed his discharge, the Merit Systems Protection Board held that collateral estoppel prevented him from relitigating facts established at the criminal trial. The Board upheld the discharge, and the court upheld the Board.

In Alaska, a criminal conviction for a serious crime has a collateral estoppel effect in a subsequent *civil* action relying on the same set of operative facts.⁷² The conviction precludes relitigation of any element of the criminal charge for which the litigant was convicted.⁷³ "No contest" and guilty pleas are given the same preclusive effect as a conviction following trial.⁷⁴

⁶⁹ Res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, bind the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation. *Wilson v. Municipality of Anchorage*, 977 P.2d 713, 726 (Alaska 1999); *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006). The goal of res judicata and collateral estoppel is finality: both doctrines aim to prevent parties from again and again attempting to reopen a matter that has been previously resolved by a court of competent jurisdiction. *State, Child Support Enforcement Division v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

⁷⁰ See *Chisholm v. Defense Logistics Agency*, 656 F.2d 42 (3rd Cir. 1981) ("[a] prior criminal conviction based on the same misconduct is ordinarily premised on the occurrence of the misconduct," and "[t]here is therefore no logical reason why the prior conviction should not be given collateral estoppel effect to establish this relevant predicate fact); *Howard v. Immigration & Naturalization Service*, 930 F.2d 432 (5th Cir. 1991) (holding that facts adjudicated in a prior criminal conviction could not be recontested in a later administrative proceeding).

⁷¹ 711 F.2d 267 (D.C.Cir.1983). See also *Spawr Optical Research, Inc. v. Baldrige*, 649 F. Supp. 1366 (D.D.C. 1986), (upholding finding that certain facts were established for purposes of administrative action by exporter's prior related criminal conviction)..

⁷² *Scott v. Robertson*, 583 P.2d 188, 193 (Alaska 1978).

⁷³ *Pedersen v. Blythe*, 292 P.3d 182, 185 (Alaska 2012).

⁷⁴ *Lamb v. Anderson*, 147 P.3d 736, 744 (Alaska 2006).

The Alaska Supreme Court has confirmed that the principles of res judicata and collateral estoppel apply in administrative proceedings,⁷⁵ and research discloses several Alaska cases involving the collateral estoppel effect of a prior criminal ruling in a subsequent administrative proceeding.⁷⁶

In summary, *even in the absence of a specific regulation like AS 08.54.710(f)*, courts have routinely allowed findings from prior criminal convictions to be given preclusive effect in subsequent administrative proceedings involving the same occurrence. Here, AS 08.54.710(f) in fact *requires* this result.

C. *Is Mr. Vanderesch's Intent in Completing his December 2009 License Renewal Application Still at Issue?*

Mr. Vanderesch's next argument is that his intent in completing his December 2009 license renewal application is at issue and cannot be determined through summary adjudication.⁷⁷

There is no question that, *in the absence of his prior conviction for unsworn falsification*, Mr. Vanderesch would be correct. Intent is a purely factual issue which ordinarily cannot be determined through summary adjudication.⁷⁸ In this case, however, Mr. Vanderesch previously pled guilty to unsworn falsification, thereby establishing that his intent in completing his December 2009 license renewal application was to mislead a public servant in the performance of a duty. Because (as discussed above) this level of intent is equivalent to the level of intent involved in fraud, deceit, or misrepresentation, this in turn establishes that Mr. Vanderesch obtained his license "through fraud, deceit, or misrepresentation" in violation of AS 08.54.710(d).

⁷⁵ *Alaska Public Interest Research Group v. State*, 167 P.3d 27 (Alaska 2007), citing *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 779–80 (Alaska 2002) and *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989).

⁷⁶ *Briggs v. State, Department of Public Safety, Division of Motor Vehicles*, 732 P.2d 1078 (Alaska 1987) (state was collaterally estopped from relitigating, in a license revocation proceeding, certain issues previously resolved in the motorist's favor at a suppression hearing in a prior criminal proceeding); *Godfrey v. State, Department of Community and Economic Development*, 175 P.3d 1198 (Alaska 2007) (upholding administrative decision suspending tobacco licensee's license to sell tobacco, and imposed fines, based on the prior convictions of two of licensee's employees for negligently selling cigarettes to minors).

⁷⁷ See Affidavit of Darwin Vanderesch at page 3, paragraph 11.

⁷⁸ See *In re Disciplinary Matter of Friedman*, 23 P.3d 620 (Alaska 2001) ("[t]he law recognizes that intent is an issue of fact and so, like other facts, must be determined by the totality of the circumstances in each case"); *Calderin v. Fondy*, 1992 WL 12549805 (Alaska 1992) ("the intent of the parties is a genuine issue of material fact not properly resolved on summary judgment"); *Aszmus v. Nelson*, 743 P.2d 377 (Alaska 1987) ("[b]ecause the grantor's intent presents an unresolved issue of material fact, the trial court erred in entering summary judgment"),

D. Does AS 08.54.710(d) Require an Evidentiary Hearing Even Where (as here) the Relevant Facts are Conclusively Established by a Prior Conviction?

Mr. Vanderesch's next argument is that the phrase "after a hearing" in AS 08.54.710(d) requires that he be given an evidentiary hearing in this matter, regardless of whether there are any disputed factual issues.⁷⁹ However, the fact that the regulation requires a "hearing" does not necessarily mean that an *evidentiary hearing* must be held in every case. The term "hearing" has many meanings, ranging from a full trial-type inquiry to oral presentation of legal arguments without the right to produce evidence.⁸⁰ A leading treatise on administrative law defines a hearing as "any oral proceeding before a tribunal."⁸¹ As one court has stated, the words "hearing" and "trial" "are generally understood as meaning an examination of the facts and generally of law as well before some person or tribunal authorized to act."⁸² Thus, it is now generally agreed that not every "hearing" is necessarily one that entitles the parties to present evidence.⁸³

Based on the foregoing, the "hearing" provided for by AS 08.54.710(d) does not require an *evidentiary hearing* in every case. Such an interpretation would make it impossible for either party to obtain summary adjudication in any case involving 08.54.710(d). Several of the Board's reported cases, however, have been partially or completely resolved through summary adjudication.⁸⁴ The process in summary adjudication allows Mr. Vanderesch to have his arguments heard by an impartial decision-maker. This suffices to meet the hearing requirement of AS 08.54.710(d)

In summary, based on the evidence presented, there were simply no disputed factual issues in this case to necessitate an *evidentiary hearing*. However, the parties in this case had the opportunity to present evidence via exhibits and affidavits, and had the opportunity to present legal arguments through written briefing. Accordingly, given the lack of contested factual issues in this case, Mr. Vanderesch received all the hearing he is entitled to under AS 08.54.710(d).

⁷⁹ See Mr. Vanderesch's opposition memorandum dated December 4, 2014 at page 7. AS 08.54.710(d) states that "[t]he board shall permanently revoke a . . . license if the board finds *after a hearing* that the license was obtained through fraud, deceit, or misrepresentation."

⁸⁰ *Ida County Courier and the Reminder v. Attorney General*, 316 N.W.2d 846, 848 (Iowa 1982).

⁸¹ K. Davis, *Administrative Law Text*, § 701 (1972).

⁸² *Thede v. Thornburg*, 223 N.W. 386, 389 (Iowa 1929); see also *Doran v. Doran*, 287 N.E.2d 731, 733 (Ill. 1972) ("[t]he word 'hearing' is . . . generally understood as meaning a judicial examination of the issues of law and fact between the parties").

⁸³ *Ida County Courier and the Reminder v. Attorney General*, 316 N.W.2d 846, 849 (Iowa 1982).

⁸⁴ See *In the Matter of James A. Smith d/b/a Alaska Extreme Adventures & Safaris*, OAH No. 08-0424-GUI (Big Game Commercial Services Board, March 24, 2009); *In the Matter of Clarence Keith Skaflestad*, OAH No. 13-0661-GUI (Big Game Commercial Services Board, March 5, 2014).

E. Does AS 08.54.710(d) Give the Board the Discretion to Impose a Sanction Less Severe Than License Revocation?

Mr. Vanderesch's final argument is that, because the Division was able to renew his license on January 14, 2014, after it was aware of his 2013 conviction, the Board must necessarily have the discretion, under AS 08.54.710(d), not to revoke his license.⁸⁵ However, the standard applicable to license *renewal* is different than the standard applicable to license *revocation* under AS 08.54.710(d). Under AS 08.54.605(a), the Division may deny license *renewal* only (1) if the person has been convicted of a violation of a state or federal hunting, guiding, or transportation services statute or regulation for which (a) the person was imprisoned for more than five days within the previous five years; or (b) received an unsuspended fine of more than \$2,000 in the previous 12 months; or (c) received an unsuspended fine of more than \$3,000 in the previous 36 months; or (d) received an unsuspended fine of more than \$5,000 in the previous 60 months; or (2) if the person was convicted of a felony within the last five years; or (3) if the person was convicted of a felony offense against the person under AS 11.41 within the last 10 years; or (4) if the person's right to obtain, or exercise the privileges granted by, a hunting, guiding, outfitting, or transportation services license has been suspended or revoked in the United States or Canada. In Mr. Vanderesch's 2013 criminal case, he was sentenced to 30 days in jail (with all 30 days suspended), fined \$2,500.00 (with \$2,000.00 suspended), was ordered not to commit any fish and game violations, and was put on probation for two years.⁸⁶ Accordingly, none of the bases for denial of license *renewal* contained in AS 08.54.605(a) applied to Mr. Vanderesch at the time he submitted his last biennial license renewal application, so the Division was correct to renew his license.

In summary, the fact that nothing in AS 08.54.605(a) prohibited the renewal of Mr. Vanderesch's license has nothing to do with the mandate, under AS 08.54.710(d), that the Board revoke his license if the Board finds that the license was obtained through fraud, deceit, or misrepresentation. Renewal and revocation are simply two completely different licensing procedures, with different criteria applicable to each.⁸⁷

⁸⁵ See Affidavit of Darwin Vanderesch at page 3, paragraph 13.

⁸⁶ R. at 16, 17, 30, and 153.

⁸⁷ It is apparent from Mr. Vanderesch's affidavit and legal memoranda that he may not have been aware of the preclusive effect his criminal conviction would have in later licensing proceedings at the time he entered his guilty plea on August 13, 2013. Although Mr. Vanderesch may not collaterally attack his 2013 conviction in this licensing proceeding, a procedure exists in the courts through which Mr. Vanderesch could potentially withdraw his guilty plea. See A.S. AS 12.72.010 - A.S. AS 12.72.040 and Rule 35.1 of the Alaska Rules of Criminal Procedure. See generally *Swensen v. Municipality of Anchorage*, 616 P.2d 874 (Alaska 1980); *Hansen v. State*, AS 12.72.020(3)(A). 824 P.2d 1384 (Alaska App. 1992); and *Ferguson v. State*, 242 P.3d 1042 (Alaska App. 2010).

V. Conclusion and Order

There is no need for an evidentiary hearing in this case because Mr. Vanderesch's licensing violation under AS 08.54.710(d) is conclusively established by his 2013 conviction for unsworn falsification in the second degree. Based on the facts established by his 2013 conviction, the Division proved that Mr. Vanderesch obtained his 2010 - 2012 biennial license renewal through fraud, deceit, or misrepresentation.

The Division also alleged, in Count II of its Accusation, that Mr. Vanderesch's 2013 conviction is grounds for discipline under AS 08.54.710(a)(1) (imposing discipline for conviction of a violation of a state or federal statute or regulation related to hunting or the provision of big game hunting services). However, that allegation is now moot; since Mr. Vanderesch's license must be revoked under AS 08.54.710(d), no additional sanction can be imposed under AS 08.54.710(a)(1).

ORDER

Mr. Vanderesch obtained his 2010 - 2012 biennial license renewal through fraud, deceit, or misrepresentation. Accordingly, effective on the thirtieth day after the Board adopts this decision, his license is permanently revoked pursuant to AS 08.54.710(d), and under AS 08.54.710(g) he may not engage in the provision of big game hunting services or transportation services during the period of license revocation.

DATED this 24th day of March, 2015.

Signed

Jay Durych

Administrative Law Judge

Adoption

The undersigned adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

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

DATED this 21st day of April, 2015.

By:

Signed

Kelly Vrem

Chair, Alaska Big Game Commercial Services Board

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