

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

In the Matter of)
) OAH No. 18-0539-GUI
STEPHEN HICKS) Agency No. 2017 001107/
) Agency No. 2018 000181

DECISION

I. Introduction

In the aftermath of a thoroughly miserable October 2017 hunting trip, the Division of Business, Corporations, and Professional Licensing accused Registered Guide Stephen Hicks of maintaining unsatisfactory field conditions; encouraging clients to hunt in a restricted area; misrepresenting his services; engaging in same-day airborne taking of big game; and failing to report violations by other licensed guides – and of doing all of these things while under probation for an earlier licensing violation. At a hearing on the Division’s allegations, the Division met its burden of proving the majority of allegations in its Accusation. Accordingly, and given the serious nature of the violations, this decision recommends that the Big Game Commercial Services Board REVOKE Mr. Hicks’s license, and impose a fine of \$15,000.

II. Facts and Procedural History

A. Background and 2016 Consent Agreement

Stephen Hicks holds Registered Guide License GUIR 1298, first issued in February 2015. Prior to obtaining his Registered Guide license, Hicks’s Assistant Guide license was in probationary status due to his failure to disclose criminal convictions on his license application. He was released from that license probation in December 2015.¹ That same month, however, the Division began investigating Hicks for various alleged violations of the Big Game Commercial Services statutes and regulations.²

In February 2016, Hicks and the Division entered into a consent agreement under which Hicks admitted to several instances of having failed to provide clients with a hunt contract before providing guide services.³ The parties agreed that Hicks would receive a reprimand and a fine, and his license would again be under probation for two years.⁴ The Board adopted the parties’

¹ Strout testimony; Ex. HH.
² R. 0312-0313.
³ R. 0319-0320.
⁴ R. 0321.

agreement in March 2016.⁵ The Accusation in this case was filed after Hicks’s second license probation ended, but concerns events that occurred while he was still on probation.

B. October 2017 expedition

1. Arranging the hunt

In March 2017, Hicks arranged to conduct an October 2017 moose hunt for Drs. Jeffrey Banich and Jonathan Weaver in Cape Yakataga, about 230 miles southeast of Anchorage. Dr. Weaver is an avid hunter who has lived in Alaska for nine years. He and Dr. Banich, who lives in Washington, are close friends and experienced hunters who take multiple hunting trips together each year.⁶ Dr. Banich has taken six to eight guided hunts, but none in Alaska.⁷

Dr. Weaver had previously gone on a black bear hunt with Hicks in 2012, and they had kept in contact intermittently over the years.⁸ Hicks and Weaver had discussed the possibility of a moose hunt in 2016, but Dr. Weaver injured his ACL and was unable to go. Hicks later contacted Weaver about a 2017 Cape Yakataga moose hunt. Hicks expressed to Weaver that this was “a new area that we hunt moose in” and that the moose hunting was extremely good.⁹

At some point in their moose hunt discussions, Hicks sent Weaver photos of a large trophy moose.¹⁰ The photo, along with Hicks’s representations about this being a great area to hunt trophy moose, “sold” Weaver on the Cape Yakataga hunt.¹¹ He, in turn, convinced his friend Dr. Banich to join him. Hicks charged the two dentists \$29,500 for their hunt.¹² Dr. Weaver obtained bear, moose, and goat tags; Dr. Banich obtained a moose tag.

At some later point, Hicks also agreed to conduct a goat hunt for a third client, Louis Strocher. Strocher, a Canadian resident and experienced hunter, has gone on numerous guided bear, moose, and sheep hunts in Alaska.¹³ Strocher made his hunt arrangements through Hicks’s friend and pilot, Doug Zweifel (GUIR 1028), having gone on a moose hunt piloted by Zweifel the previous year.¹⁴ Strocher paid \$8,500 for the goat hunt.

⁵ R. 0318-0323.

⁶ Weaver testimony.

⁷ Banich testimony.

⁸ Weaver testimony; Ex. 33; Ex. 34.

⁹ Ex. 35.

¹⁰ Ex. 16; Weaver testimony; Ex. 33; Ex. 34.

¹¹ Weaver testimony; Ex. 33, Ex. 34.

¹² Weaver testimony.

¹³ Strocher testimony; Ex. 31; Ex. 32.

¹⁴ Ex. 32.

2. The start of the Cape Yakataga trip

The hunt was scheduled for October 6 through October 16, 2017. Hicks arranged for Zweifel to transport the three clients in the hunt area, and hired Casey Lillis to assist as a packer.

On October 6, 2017, Banich, Weaver, Strocher, and Lillis were flown from Lake Hood in Anchorage to Cape Yakataga on Regal Air. At some point prior to the plane taking off, the clients learned that Hicks would not be accompanying them on the flight. The evidence is disputed, but there is some evidence that he was weathered in on another hunt, and some evidence that at least some of the clients were informed of this.¹⁵

Whatever the precise reason for Hicks's absence at the very start of the trip, and whatever the clients knew about it, it is undisputed that no one met the plane when it landed at the airstrip at Cape Yakataga. It is also undisputed that neither the clients nor the inexperienced packer knew where Hicks's camp was or where they were supposed to go once they landed.

The four men waited on the remote airstrip for "four to five hours."¹⁶ Weaver, Strocher, and Banich were "frustrated" to find themselves "in the middle of nowhere," with "no idea where anything was" or "what was going on."¹⁷

Eventually, Zweifel arrived in his own plane – a green and white Super Cub with a yellow elevator, a belly pod, and tail #N2871P – and led the men to the cabin.¹⁸

3. The cabin and provisions

The base camp accommodations for the hunt was an old miner's cabin. The hunting party was apparently the first to use the cabin since the prior spring, and the previous occupants failed to clean it properly or secure it for a period of inoccupancy. Thus when the hunting party finally arrived at the cabin, it was very wet and very dirty.

¹⁵ Weaver says he was told that Hicks was not there because he was on a brown bear hunt and wanted to get a grown bear for his client; Banich says he was told Hicks was weathered in; Strocher said he wasn't told anything about why Hicks wasn't there. There is documentary evidence that on October 6, the day the clients flew down, Hicks was hunting "on the Peninsula," already knew he would not arrive at Cape Yakataga until October 8 at the earliest, was planning an overnight in Anchorage, and had not yet hired an assistant guide for the trip. Ex. 25, p. 30 (10/6/17 InReach message to Tony Tarnato: "need a guide for Sunday to go down to Southeast with me to guide moose and a goat till the 16th. ... I'll be back from peninsula tomorrow night then heading down Sunday if Wx is good. Clients and doug are there now waiting.")

¹⁶ Weaver testimony; Strocher testimony; Banich testimony.

¹⁷ Weaver testimony; Strocher testimony; Banich testimony.

¹⁸ Weaver testimony; Strocher testimony; Banich testimony.

The wood stove was filled with three to five inches of standing water, rendering it nonoperational.¹⁹ A throw rug in front of the stove was wet and moldy.²⁰ There were dirty dishes in the sink, food that had been left out, and, according to Mr. Strocher, rodent droppings throughout the cabin.²¹

None of the hunters was impressed by or pleased about the conditions of the cabin, although Mr. Strocher was the most upset and offended by the conditions. In an interview shortly after the hunt concluded, Strocher told Alaska State Trooper Mike Cresswell that the cabin was “the worst place I’ve ever been in my life.”²² At the hearing, he opined that the cabin “should be burned to the ground.” In his interview with Trooper Cresswell, and in his hearing testimony, he described a sink full of dirty dishes; rodent droppings covering the sink, table, and floors; rancid food; a flooded wood stove; and a wet, moldy throw rug in front of the stove.²³

In his testimony at hearing, Dr. Weaver downplayed concerns about the cabin, describing it as “damp and wet” but also as a “typical cabin for wilderness Alaska,” and saying he “didn’t expect anything more or less.”²⁴ But when interviewed by Trooper Cresswell just weeks after the hunt, Weaver described subpar camp conditions including mold in the cabin and water in the stove, as well as substandard equipment generally.²⁵ Dr. Banich similarly described the cabin as “dirty” and “run down.”²⁶

4. Waiting for Hicks

Hicks would ultimately not arrive in Cape Yakataga until four days after his clients’ arrival. In the meantime, the clients cleaned the dirty cabin to make it habitable, explored the local area, and waited.

a. Cleaning up the mess

Because the cabin had not been prepared for their arrival, after not being closed properly the previous spring, the men spent time scrubbing pots and pans, scrubbing the floor, cleaning rodent droppings, fixing the broken stove and a broken 4-wheeler, and otherwise doing “all the

¹⁹ Weaver testimony.

²⁰ Weaver testimony, Strocher testimony.

²¹ Weaver testimony, Strocher testimony.

²² Ex. 31, Ex. 32.

²³ Strocher testimony; Ex. 25, pp. 10-11; Ex. 31; Ex. 32.

²⁴ Weaver testimony. Dr. Weaver remembered food left out, but not dirty dishes or mold.

²⁵ Ex. 25, p. 12; Ex. 33, Ex. 34.

²⁶ Ex. 25, p. 11; Ex. 35; Ex. 36.

opening up and cleaning up.”²⁷ Strocher, in particular, was incensed by the wait and the mess; his complaint to the licensing investigators about these issues would eventually prompt a larger investigation into the hunt.

b. The damaged plane

The men were limited in any efforts to explore the area because, at some point after their arrival, Zweifel’s plane was damaged in a windstorm after he apparently failed to tie it down properly. The plane could not be flown for several days until a replacement part arrived. Thus, rather than even being able to spend the time before Hicks’s arrival surveying the surrounding area, the men mostly spent it cleaning the cabin and waiting for their guide to arrive.

c. The Mental Health Trust

The second day at camp, Dr. Weaver asked Zweifel about the impressive moose photos Hicks had emailed him from the prior year’s hunt. Zweifel’s response surprised and upset Weaver. Zweifel told Weaver that the moose in the photos had been taken on Mental Health Trust lands, that the guides had gotten in trouble for being there, and that they could not hunt for moose in that area this year.²⁸

The Alaska Mental Health Trust owns lands which it manages in order to generate revenue for state mental health programs.²⁹ Trust lands are closed to commercial use without authorization, which is rarely, if ever, given to commercial hunters.³⁰ Hicks has never received authorization from the Trust to engage in commercial hunting on Trust lands.³¹ Additionally, the Trust’s Icy Cape parcel near Cape Yakataga has been closed to public use since 2008.³² In 2016, Hicks and Zweifel were investigated for hunting on Trust land.³³

Neither Banich nor Weaver had ever heard of the Mental Health Trust or Mental Health Trust lands before learning about them from Zweifel. Zweifel explained what these lands were and that he and Hicks had previously gotten into trouble for hunting on them.³⁴ Zweifel also implored Weaver not to mention this revelation to Hicks, stating that Hicks would “beat [his]

²⁷ Banich testimony; Weaver testimony; Strocher testimony.

²⁸ Weaver testimony.

²⁹ Menefree testimony.

³⁰ Menefree testimony.

³¹ Menefree testimony.

³² Menefree testimony.

³³ Malm testimony.

³⁴ Weaver testimony.

ass” if he learned that Zweifel had shared this information.³⁵ Weaver felt he had been “deceived” with regard to his hunt by being shown a photo of a moose taken in an area where he couldn’t legally hunt.³⁶ Two days in, with no sign of Hicks, and now hearing that the trophy moose was actually on Trust land, Weaver and Banich were “frustrated about how this was going.”³⁷

d. The bear on the beach

Two days after arriving in Cape Yakataga, Weaver legally harvested a brown bear on the beach near the cabin, and he and Banich harvested the bear with help from Strocher, Zweifel, and Casey Lillis. Strocher had to repair a broken 4-wheeler in order to assist in transporting the bear back to the cabin. This would be only animal successfully harvested during the October 2017 hunt.

5. October 9: Hicks and Taranto arrive

The following day, Monday October 9, 2017, Hicks finally arrived with an assistant guide, Anthony Taranto. (Hicks had contacted Taranto on October 6 – after the clients had already been flown to Cape Yakataga – asking if he would assist on the trip).³⁸

The three clients were irritated and frustrated with the trip by the time Hicks arrived, none having expected to be in camp for four days without a guide; with Strocher, if not the others, disgusted by the cabin conditions; and with Weaver and Banich upset by the revelation about the Mental Health Trust land issue.³⁹

Upon his arrival, Hicks tried to energize the group and get everyone ready for their delayed hunts.⁴⁰ A plan was made that the goat hunters would leave that evening, and the moose hunters would set out the following day.

6. Mr. Strocher and the irretrievable goat

Taranto, Lillis, and Strocher set out by foot on the evening of October 9 to begin the goat hunt.⁴¹ This was Lillis’s first hunt working for Hicks. The extent of Taranto’s experience – particularly with regard to guiding goat hunts – is disputed. Strocher testified that Taranto did

³⁵ Weaver testimony.

³⁶ Ex. 25, p. 12; Ex. 33; Weaver testimony.

³⁷ Weaver testimony.

³⁸ Ex. 25, p. 29.

³⁹ Weaver testimony.

⁴⁰ Banich testimony.

⁴¹ Unless otherwise indicated, the factual findings about the goat hunt are taken from Strocher’s testimony and prior statements to Trooper Cresswell (Ex. 31, Ex. 32).

not appear knowledgeable about goats or goat hunting. While Taranto testified that he is knowledgeable and experienced with regard to goat hunting, his belligerence and argumentative tone while testifying significantly impaired his credibility as a witness. In any event it is undisputed that Taranto had never hunted in the area that he took Mr. Strocher for his goat hunt.

The three men set out late in the day on the ninth, expecting a relatively short (45 minute) hike to their camp location. With neither Taranto nor Lillis familiar with the area, they relied on information from Hicks as to where to go and how long it would take to get there. The hike took significantly longer than anticipated because a stairwell structure Hicks had told them they could use to ascend the mountain turned out to be “rotted and deteriorated,” requiring the men to spend three and a half hours bush whacking in the dark.

Strocher was unhappy that Hicks had been unaware that the stairwell was no longer usable, and had sent them off on an unnecessarily difficult hike without warning due to a lack of care or preparation. After three difficult hours, they decided to stop for the night, sleeping inside an abandoned army bunker.

The next morning the men set out to get their goat. All three were all unfamiliar with the terrain. According to Strocher, Hicks had instructed them as to where they could hunt and likely not have problems retrieving the goat. On the first day of the hunt, they saw goats but did not attempt to take any. On the second day, Strocher, with Taranto’s approval, shot a goat in the area recommended by Hicks. The goat fell, injured, behind a boulder. The men then shot in its direction multiple times in an attempt to move the goat from its blocked location. The goat reappeared, and Strocher shot it a second time. The goat then fell into a steep ravine.

Unbeknownst to the hunter or the assistant guide, the area where the goat was located when Strocher shot it backed up to a cliff face. Taranto, who had not been provided climbing equipment by Hicks, was unable to retrieve the goat. Taranto hiked 45 minutes to try to reach the goat, but, after a fall, concluded it was too dangerous to continue. He shot the goat “to put it out of its misery,” but abandoned his efforts to retrieve it.⁴²

Strocher felt that if he had had a guide with knowledge of the terrain, he would not have been encouraged to shoot the goat in an area where retrieval turned out to be so challenging. He also felt that if he had been accompanied by more knowledgeable and experienced guides, they

⁴² Ex. 31, 32; 37; Strocher testimony.

may have been able to retrieve the goat. In any event, the men were unable to retrieve the goat, and they returned to the cabin.

7. The moose hunters and the spike camp

In the meantime, on October 10, Zweifel flew the moose hunters – Weaver, Banich, and Hicks – to set up a spike camp on the beach near the confluence of the Tsiu and Tsivat rivers. Zweifel and Hicks also flew around the area scouting for moose, and may have plotted some on a GPS.⁴³

Either that evening or the following morning, they discussed their hunt plans – essentially, that they would hike back into the swamps and look for moose. Two parts of the plan, however, went beyond walking and looking. First, at some point, Zweifel and Hicks had coordinated a signaling system by which Zweifel would fly over the area and maneuver his plane to signal the location of moose. Specifically, if Zweifel “saw a big bull” while they were in the field hunting, he would circle left.⁴⁴

Both clients understood that Hicks and Zweifel had arranged for Zweifel to be spotting moose from the air during their hunt. Weaver testified that it was his understanding by the time they left on the hike that Zweifel would be spotting moose from the air. He testified that the hunters didn’t want or need the assistance of the airplane, but that he felt uncomfortable and did not speak up against the plan.⁴⁵ Banich also testified that he recalled Hicks telling them about the plan for Zweifel to fly a turn if he spotted a moose while they were out hunting. He testified that he felt this was unnecessary as well as “probably not the most legit way to go about hunting moose,” but neither client directly confronted Hicks with their discomfort over this plan.⁴⁶

Second, at some point Hicks and Zweifel arranged to divide the group’s messaging devices, keeping one with the hunting party and one in the plane. As discussed further below, the group on the ground would exchange messages with Zweifel as they hunted on October 11.

8. October 11 Hunt: The Swamp and the Fly-Overs

⁴³ Weaver testimony; Banich testimony; Ex. 33-36.

⁴⁴ Weaver testimony.

⁴⁵ Weaver testimony.

⁴⁶ Dr. Banich was probably the most credible witness to testify. It was clear that he did not want to be involved in this proceeding or the underlying investigation, and he went out of his way to minimize any complaints, but he clearly (albeit reluctantly) verified the key violations in dispute.

On the morning of October 11, five days after arriving in Cape Yakataga, the dentists finally began their moose hunt. The group set out from camp after breakfast and began their trek into the swamp. The conditions were very challenging. They hiked for four to five miles, much of which was in thigh-high to waist-high water.

Dr. Banich estimates that the hunting party began seeing Zweifel's plane about two hours after they began their hike.⁴⁷ Weaver believes he saw Zweifel's plane fly over 4-5 times that day.⁴⁸ Both Banich and Weaver saw Zweifel's plane maneuvering in accordance with what they understood to have been his prearranged signal with Hicks. Banich understood that the purpose of the flyovers was to locate a trophy moose.

Banich testified that Zweifel "circled over" a moose which he (Banich) "drew down on" but ultimately did not shoot. Banich had his shooting sticks set up and had sighted a moose through his rifle on the sticks, but he ultimately did not take a shot, deeming it not worth the effort of transporting for the five swampy miles back to the spike camp.

9. The reality tv star

Meanwhile, at the same time that the Hicks party was moose hunting, another party had been hunting nearby. The Hicks party's spike camp was 2-3 miles from a lodge owned by Master Guide Outfitter Samuel Fejes (GUIM73). Mark Heck, a bowhunter and reality tv personality, had contracted with Fejes for a moose hunt in the area. Earlier the same week as the hunt at issue in this case, Heck, accompanied by a videographer and Assistant Guide Jack Preston, had set up a spike camp on the same beach where the Hicks party would later set up theirs.

On the morning of October 11, Mr. Heck successfully took a moose. As the Heck party field dressed the moose, they noticed Zweifel flying overhead. Preston had seen the same plane earlier in the week and photographed it. On the day that the dentists were in the field, Preston estimates that he heard the plane overhead several times during the three hours it took to field dress Heck's moose. After making "several very low fly-overs" around 10 am., Zweifel stayed in the area for several hours, "cutting the meadows" and flying at altitudes where moose would be plainly visible.⁴⁹

⁴⁷ Banich testimony.

⁴⁸ Weaver testimony.

⁴⁹ Ex. 25, p. 27; Ex. 39, Ex. 40; Preston testimony.

Heck, the client, was annoyed by the presence of Zweifel's airplane both because he felt like it detracted from the remote "getting away from it all" wilderness experience, and because he was filming his hunt, so did not want the airplane noise.⁵⁰

Another of Fejes's assistant guides, Jeremiah Hemphill, who was hunting with a different party, also noticed Zweifel's low-flying plane. Hemphill described a plane consistent with Zweifel's (dark green or black wings and a belly pod), and testified that the plane was flying low, "circling" a moose that Hemphill was "going after."⁵¹ Both Hemphill and Preston believed the plane was attempting to spot moose from the air.⁵²

10. The InReach Messages

In the meantime, in addition to Zweifel's airborne maneuvers, Hicks and Zweifel were communicating via InReach messaging. The Hicks hunting party carried Dr. Weaver's InReach device, while Zweifel had Hicks's InReach device with him. Throughout the day, Hicks dictated messages for Weaver to send to Zweifel.

At 9:16 a.m., the hunting party messaged Zweifel: "Hey doug we just heard 3 shots back by the moose can u fly over and check it out[?]"⁵³ Zweifel did not respond, although the Heck hunting party reports that Zweifel began his repeated flyovers of their location about forty minutes after this message was sent.⁵⁴

At 11:20 a.m., the Hicks hunting party messaged Zweifel again: "You out there doug[?]"⁵⁵ Zweifel responded at 11:40 a.m.: "On my way, water in fuel pro[b]lem."⁵⁶ Thereafter, between 12:10 p.m. and 2:25 p.m., the hunting party and Zweifel exchanged a series of messages using a thinly veiled code whereby the words "backpack," "package," "big dog," and "big boy" were used to describe moose. Hicks dictated the messages for Dr. Weaver to type into his InReach. Weaver followed Hicks's direction to use code words to "disguise" that the messages were about moose. As described by Dr. Banich: "every time John texted, Steve was telling him what to text."⁵⁷

⁵⁰ Ex. 25, p. 7; Heck affidavit.

⁵¹ Hemphill testimony.

⁵² Hemphill testimony; Preston testimony; Ex. 39; Ex. 40.

⁵³ Ex. 25, p. 18. The InReach messages contain many shorthand abbreviations and typographical errors; they are transcribed here as written.

⁵⁴ See Ex. 25, p. 27.

⁵⁵ Ex. 25, p. 18.

⁵⁶ Ex. 25, p. 18.

⁵⁷ Banich testimony.

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The following are the messages exchanged between the group on the ground and Zweifel in his plane.

Time	Ground to plane	Plane to ground
12:10 p.m.	Edge of trees south of big dog. ⁵⁸	
12:18 p.m.	In swamp where big boy was originally. ⁵⁹	
12:38 p.m.		Did not find your backpack. ⁶⁰
12:56 p.m.	Did you see any other backpacks any word from the other group ⁶¹	
1:13 p.m.		Normal spot. ⁶²
2:15 p.m.	We where right next to the last package good one but not great we are gonna start making are way back. ⁶³	
2:25 p.m.	Find plan b qpackage ⁶⁴	
3:06 p.m.		Roger that. ⁶⁵

Both Weaver and Banich testified that these messages were sent with the purpose of Zweifel locating large trophy moose, and relaying information about their whereabouts to the hunters on the ground. Both Weaver and Banich understood that Hicks and Zweifel were using coded language to disguise the purpose of the messages. (Weaver confirmed at the hearing that no one had lost a backpack during the hike and the hunters were not, in fact, searching for a lost “backpack” or a missing “package.”)

⁵⁸ Ex. 25, p. 18.
⁵⁹ Ex. 25, p. 18.
⁶⁰ Ex. 25, p. 18.
⁶¹ Ex. 25, pp. 18-19.
⁶² Ex. 25, p. 19.
⁶³ Ex. 25, p. 19.
⁶⁴ Ex. 25, p. 19.
⁶⁵ Ex. 25, p. 19.

Weaver was uncomfortable, and now expresses remorse, but sent the messages per Hicks's instructions.⁶⁶ Banich was aware that the messages were being sent, but did not voice disapproval or attempt to stop the others.

After Banich's decision not to shoot at the moose he had been watching through his scope, the hunters rested a bit and then began the return trip to the spike camp. Dr. Banich estimates it took three hours to hike back, and that they arrived about ninety minutes before dark.⁶⁷

At 4:21 p.m., the ground party messaged the plane: "Meet us at air strip at 6 to pull one out tonight other2in morning."⁶⁸ At 5:06, the ground party messaged; "Be at camp in 25min."⁶⁹

11. The conflict with Fejes

Shortly after Hicks and the dentists arrived back at the spike camp, another plane landed on the beach by their camp. It was Sam Fejes. Hicks borrowed Banich's cell phone to record the encounter.⁷⁰

Fejes asked the group who their guide was, and, when he located Hicks, complained heatedly about the airplane "buzzing" his hunters, and about Hicks having set up a spike camp "right on top of us." Fejes accused Hicks of lacking "ethics," and told him that the plane's buzzing his clients was "all on film."⁷¹

12. Hicks's offer to hunt on Mental Health Trust lands

After Fejes left, Hicks attempted to make amends with Weaver by offering to make up for the day's "crappy hunt."⁷² Hicks suggested to Weaver that they could fly into the Mental Health Trust lands and "get you a moose" there.⁷³ During this conversation, Hicks revealed to Weaver that he was on license probation, and said he did not know whether he would be able to persuade Zweifel to take another trip to Trust lands.⁷⁴ Weaver declined.

13. The clients' decision to leave early

⁶⁶ Weaver testimony.

⁶⁷ Banich testimony.

⁶⁸ Ex. 25, p. 18.

⁶⁹ Ex. 25, p. 18.

⁷⁰ Ex. 41.

⁷¹ Ex. 41.

⁷² Weaver testimony.

⁷³ Weaver testimony.

⁷⁴ Weaver testimony.

Weaver and Banich were frustrated and dissatisfied with their hunt experience by the time the group returned to the spike camp. They were unhappy with the cabin conditions and lengthy wait before the hunt started, distressed by what Zweifel had told Weaver about the prior year's hunt in Mental Health Trust lands, uncomfortable with the same-day airborne hunting situation, and uncomfortable having been involved in the InReach messaging. The confrontation with Fejes solidified their view "that this was just a dirty hunt so we just wanted out."⁷⁵ Hicks's offer for an illegal trip to Trust lands – along with the revelation that he was on probation – furthered their resolve to end the trip.

Weaver and Banich decided that night to leave the following morning. Aware of Strocher's dissatisfaction with the trip, Weaver and Banich informed Strocher of their decision to leave and asked if he wanted to come with them. He decided to join them, and the three clients agreed to split the extra unexpected cost of being flown out early.

Shortly after 8:00 p.m. on October 11, Weaver messaged his wife, asking her to arrange a flight to retrieve them "ASAP." He wrote: "Hey can you call regal air at 7 am sharp and get a flight for 3 outa cape yakataga asap. Don't ask just get us outa hear! I'll tell you when I get home."⁷⁶

The hunters did not initially tell Hicks that they had decided to leave. They also did not tell Hicks about their deep unhappiness with the trip, or otherwise "confront" him about issues with the hunt. All three testified they were worried about "setting him off" and wanted to keep the peace.

Hicks learned of the hunters' plan to leave early when Regal Air messaged him to confirm the request by Weaver's wife. In messages on the morning of October 12 after his wife told Weaver that Regal had "texted Steve to see if it's all right if they come" and asking who was paying for the flight, Weaver responded that the three clients were paying. "Jeff and I and older guy are paying this has nothing to do with steve just get us out!" Four minutes later he added: "I don't care if steve approves or not we r paying."⁷⁷

In messages to his girlfriend and to Regal Air, Hicks expressed annoyance at his clients' decision, calling Dr. Banich "a pussy," complaining that "ugh people are so weak now days,"

⁷⁵ Banich testimony.

⁷⁶ Ex. 25, p. 24.

⁷⁷ Ex. 25, pp. 24-25.

and telling Regal to “yes come get these idiots.”⁷⁸ When Hicks learned his clients had arranged a charter flight, he arranged to load supplies for his cabin onto the plane before it left Anchorage. The hunters, not Hicks, paid for the plane.

C. Post-Hunt Complaints and Trooper Cresswell’s investigation

On October 13, 2017, Fejes called Alaska Wildlife Trooper Michael Cresswell to complain about a plane that had been “circling for hours” above a field camp a few days earlier. Fejes told Trooper Cresswell that Preston and Heck reported seeing a Super Cub (N2871P) circling for hours several days earlier near their field camp by the confluence of the Tsiu and Tsivat Rivers.⁷⁹

Several days later, on October 17, 2017, a Department of Fish and Game employee forwarded to the Wildlife Troopers a complaint the Alaska Department of Fish and Game had received from Laurie Strocher. When he had contacted the Department of Fish and Game to report the unrecoverable goat, Strocher expressed his desire to file a complaint about substandard field conditions.⁸⁰ This email was forwarded to Trooper Cresswell for investigation.

Trooper Cresswell set about investigating the two complaints, initially unaware of the relationship between them. It was only as his investigation unfolded that he realized that the pilot being reported for circling over the Fejes camp was associated with the trip Mr. Strocher had taken.

1. Strocher interviews

Trooper Cresswell spoke with Strocher on October 17, 2017. Strocher reported substandard cabin conditions, the assistant guide (Taranto) falling ill from possible food poisoning, the guide’s lateness, the assistant’s lack of apparent goat hunting experience, and the clients’ collective decision to leave early.⁸¹ Trooper Cresswell followed up with another interview on October 26, 2017. In addition to the information previously reported, Strocher described the accommodations in more detail, calling the cabin the “worst place I’ve ever been in

⁷⁸ Ex. 25, p. 20. The messages were not negative towards Dr. Weaver, and indicated Hicks’ belief that Weaver was only leaving because his wife wanted him to. Weaver testified that he “made excuses” in order to leave without a confrontation.

⁷⁹ Ex. 25, p. 7.

⁸⁰ Ex. 25, pp. 7-8.

⁸¹ Ex. 25, p. 8.

my life,” with rodent droppings, moldy food, a leaking wood stove, a moldy rug, and “generally filthy conditions.”⁸²

2. Fejes interview

After speaking briefly with Fejes on October 19, 2017, Trooper Cresswell interviewed him on October 31, 2017.⁸³ Fejes reported hearing from his guide, Jack Preston, that Zweifel’s plane had (1) landed near their field camp on October 10, and (2) flown “grids” over the area “all day” on October 11. Fejes also described his confrontation with Hicks and Zweifel, reporting having told Hicks that Zweifel had been “buzzing” moose for two days, and that his conduct was unethical.⁸⁴

3. Banich interviews

Trooper Cresswell first spoke with Dr. Banich on October 27, 2017.⁸⁵ It was in this interview that he first heard that Zweifel was flying over the hunters while they were out in the field. Banich told Cresswell that during the hunt, Zweifel and Hicks “had some deal ... where [Zweifel] was flying over us a couple of times ... looking for moose or something.” He also described the conflict with Sam Fejes, and informed Trooper Cresswell of Hicks’s “shady” offer to take the two men hunting on Mental Health Trust lands.⁸⁶

At the time of the first interview, however, Banich did not disclose what he knew about the InReach communications between the ground party and the plane. In a second interview after Trooper Cresswell learned of the InReach messages from Dr. Weaver, Dr. Banich confirmed that the messaging had occurred, that it had been Hicks’s idea, that Hicks dictated what the messages should say, and that Hicks told him to use words like package and backpack instead of moose.⁸⁷ Dr. Banich also gave more details of the hike itself, stating that the hunters had been attempting to locate 3-4 bull moose that Hicks had marked in his GPS the previous night while “pre-scouting,” and that Hicks was specifically looking for one particular large bull moose he had previously seen and was hoping to take.⁸⁸

4. Weaver interviews

⁸² Ex. 25, pp. 10-11.

⁸³ Ex. 25, pp. 9-10, 13.

⁸⁴ Ex. 25, p. 13.

⁸⁵ Ex. 25, pp. 11-12.

⁸⁶ Ex. 25, pp. 11-12.

⁸⁷ Ex. 25, p. 27.

⁸⁸ Ex. 25, p. 26 (“He (Hicks) said there’s one that was really big – close to 70 inches – or something like that, and he wanted to try to kill it but, we never did see it in the field.”)

Trooper Cresswell first spoke with Dr. Weaver on October 27, 2017.⁸⁹ Dr. Weaver told Trooper Cresswell that the hunt was the worst he had ever been on. He described the cabin as wet and moldy with equipment in need of repair. He told Trooper Cresswell that on the day of the hunt, Zweifel was flying around overhead.

Like Dr. Banich, Dr. Weaver initially withheld critical information: namely, that the hunting party had communicated with the plane via InReach, and that the InReach messages were saved on Weaver's device. Trooper Cresswell spoke with Weaver again a week later, on November 4, 2017. In this second interview, Weaver provided more details of Hicks's offer to take the men hunting on Mental Health Trust lands, including Hicks expressing uncertainty as to whether Zweifel would be willing to return to the Trust lands, and telling Weaver that he was already "on probation for getting busted for being in there the year before."⁹⁰ At the end of the November 4 interview, Weaver disclosed to Trooper Cresswell that he needed to "clear [his] chest" about additional information regarding "that plane flyover." Weaver then told Cresswell about the InReach messaging, saying he had sent messages as dictated by Hicks, and expressing remorse for having done so.⁹¹

5. Search Warrants

Trooper Cresswell obtained a search warrant for Weaver's InReach device, which in turn yielded enough information for a search warrant for Hicks's Garmin user account.⁹² The messages include those described above, as well as others from before and after the dentists' hunt, that substantiate the view that Hicks and Zweifel were more likely than not engaging in same-day airborne hunting activities. The day before the hunt, Hicks messaged his girlfriend: "found couple monster bulls so we are packing up to go get them. Gonna be a long shitty walk but I'm gonna wear these guys out lol"⁹³ After returning to the spike camp, he messaged her again: "ugh such a long brutal day. Saw some moose but not the ones we were looking for."⁹⁴ The following day, Hicks messaged an unknown number that his hunting party had "chased a 75 incher yesterday." Two minutes later he added: "Big boy shit for sure haha."⁹⁵ These messages

⁸⁹ Ex. 25, pp. 12-13.

⁹⁰ Ex. 25, pp. 14-15.

⁹¹ Ex. 25, p. 15.

⁹² Ex. 25, p. 15.

⁹³ Ex. 25, p. 17.

⁹⁴ Ex. 25, p. 19.

⁹⁵ Ex. 25, p. 23.

are consistent with statements from Weaver and Banich that Hicks was looking for a specific, large trophy moose, and supports the inference that the “big boy” and “big dog” references in the InReach messages were communications about that moose, which Hicks indicated the following day he and Zweifel had been “chasing.”

Additionally, the InReach data included messages from October 2016, in which Hicks appears to be describing flying with Zweifel around the Mental Health Trust lands, and planning to hunt there. In messages sent on October 8, 2016, Hicks describes flying with Doug to a moose sanctuary with dozens of trophy-sized moose, says he “found over 80” moose, describes the scene as “moose like I’ve never seen,” and concludes that it is “going to be a great hunt.”⁹⁶ In messages sent two weeks later, he implores the unidentified recipient: “don’t say stuff on here. don’t want anything on text.”⁹⁷

(At the hearing, Hicks’s counsel stipulated that “a moose was shot on Mental Health Trust lands.”⁹⁸)

Trooper Cresswell concluded his investigation when the matter was taken up by the Wildlife Investigation Unit. The current status of that investigation was unclear at the time of the hearing. However, Trooper Malm testified that a related investigation – of Zweifel and Hicks allegedly hunting on Mental Health Trust lands in 2016 – had been completed and referred to the Office of Special Prosecutions and Appeals for possible prosecution.

D. 2018 probation release and subsequent suspension

The Division of Business, Corporations, and Professional Licensing opened an investigation into the complaints related to the October 2017 hunt.⁹⁹ The Division’s records document various unsuccessful attempts in late 2017 to correspond with Hicks about the reported violations. The Division’s records further reflect that, during February 2018, the Division’s investigator drafted a letter to impose an automatic suspension because Hicks was still on probation from the 2016 consent agreement.¹⁰⁰ However, the Division did not move forward with the automatic suspension at that time, or at any time before the two-year probationary period ended.

⁹⁶ Ex. 48, p. 125.

⁹⁷ Ex. 48, p. 84.

⁹⁸ December 20, 2018 hearing.

⁹⁹ R. 0248; Strout testimony.

¹⁰⁰ R. 0026.

Instead, and despite the foregoing events, the Division released Mr. Hicks from probation at the end of his two-year term. On May 7, 2018, two months after releasing Mr. Hicks from probation, the Division notified Mr. Hicks that it was summarily suspending his license based on alleged violations of the 2016 consent agreement. Reasoning that these alleged violations occurred during the two-year probationary period, the Division contended that summary suspension was authorized under the consent agreement.¹⁰¹

Mr. Hicks timely requested an expedited hearing on the summary suspension. Prior to the hearing, the parties briefed the threshold procedural question of whether the summary suspension was authorized given that the Division had released already Mr. Hicks from probation. The undersigned issued an order on June 6, 2018, finding that the Division lacked authority to summarily suspend Mr. Hicks under the terms of his (expired) probation.

E. May 2018 Accusation

In the meantime, on May 21, 2018, the Division issued a twenty-one-count accusation against Hicks based on the same alleged conduct as the summary suspension. The Accusation contended that Hicks had:

- Misrepresented his services by not informing prospective clients that the bull moose photos in his solicitation email came from a restricted area,
- Failed to provide clients with minimally satisfactory field conditions,
- Encouraged clients to hunt in a restricted area,
- Altered the hunting experience of other hunters;
- Participated in the airborne taking or assisting of big game;
- Failed to report another guide's (Zweifel's) hunting violations;
- Failed to timely provide clients with sufficiently detailed contracts;
- Failed to provide client contracts to the division upon request; and
- Violated the terms of his prior probation by committing these acts.

The Division elected to not contest the June 6 order regarding summary suspension, and to instead proceed to hearing on the Accusation.

F. Hearing

The hearing on the Division's Accusation began in late August 2018. It was later postponed for several months while the parties attempted to reach a settlement agreement, and

¹⁰¹ R. 0027-0029.

eventually concluded on December 20, 2018. Mr. Hicks was represented by Barton Tiernan, Esq. The Division was represented by Assistant Attorney General Joan Wilson. Fifteen witnesses testified:

- The clients: Dr. Weaver, Dr. Banich, and Mr. Strocher;
- Investigators: Trooper Cresswell, Trooper Katrina Malm, and Division Investigator Lee Strout;
- Hicks’s assistant guide, Anthony Taranto;
- Sam Fejes and his assistant guides, Jeremiah Hemphill and Jack Preston;
- Mental Health Trust Lands manager Wynn Menefee and Trust Lands Office Southeast Area Lands Manager David Griffin; and
- Three former Hicks clients (Richard Duffy, Patrick Goodpaster, and Robert Meyer).

Doug Zweifel was subpoenaed but, through counsel, asserted his Fifth Amendment right against self-incrimination and declined to testify. Mr. Hicks did not testify, with his counsel citing the risks of a criminal action.¹⁰² The parties submitted post-hearing briefing and the record closed on February 8, 2019.

G. Credibility of testimony and other evidence

1. Hicks’s allegation that the clients are lying

Throughout the hearing, Hicks attempted to establish that the clients were motivated – either by a vendetta, by embarrassment about their unsuccessful hunt, or by a desire to minimize their own culpability – to exaggerate or even lie about Hicks’s actions. In his post-hearing brief, Hicks argues that this case was borne out of Fejes’s desire to “get rid of a competitor,” and motivated by the sour grapes of a bad hunting experience. This narrative is not convincing, and not supported by the evidence.

It is true that Weaver and Banich were less than forthcoming when first contacted by the Troopers about the hunt. In their initial interviews with Trooper Cresswell, both disclosed the signaling by Zweifel’s plane, but neither disclosed that the hunters had also communicated with Zweifel’s plane during the hunt using the InReach device. If anything, though, their initial reluctance to be fully forthcoming about the events of the hike undermines Hicks’s claim that the clients are acting out of a vendetta or dissatisfaction over a bad hunt. Moreover, the delay in

¹⁰² Mr. Hicks did not overtly assert his Fifth Amendment right against self-incrimination; his attorney simply indicated that he was not calling Mr. Hicks to testify, and the Division did not attempt call him either.

disclosure does not undermine the multiple forms of evidence supporting the conclusion that Hicks and Zweifel engaged in improper same-day airborne activities.

Hicks suggests that the clients are lying because the hike was hard and the hunt went badly. This is not a convincing defense to the allegations in this case. All three clients testified credibly to their experience with difficult hunts in difficult conditions and to their awareness that a guided hunt comes with no guaranteed outcomes. Further, the clients who informed the Troopers of the same day airborne activities did not seek to be involved in a complaint or an investigation, and only made statements when contacted by law enforcement. And although Weaver and Banich did not want to be involved in complaints regarding this hunt, their statements to Troopers and their testimony are consistent with multiple forms of documentary and eyewitness evidence.

Hicks also contends that the offer to hunt on Mental Health Trust lands is a fabrication. But none of the three clients knew or had reason to know of the existence of the Trust lands prior to this trip. Weaver and Banich only learned about them from Zweifel, in a discussion about Zweifel and Hicks having previously gotten in trouble for hunting on them. This story is supported by credible evidence from Mental Health Trust lands personnel and Trooper Malm that Hicks and Zweifel have engaged in unauthorized hunting on Trust lands in the past, and by Hicks's admission to have taken a moose on Trust land.

Hicks also attempted to create an evidentiary issue out of the clients' slightly different narratives about the hunting trip between their various Trooper interviews in October and November 2017, and their eventual testimony in August and November 2018. However, these inconsistencies in recollection are typical for events that occurred more than a year prior. Trooper Cresswell testified that the hunters' inconsistencies in their interviews were within the expected range of what is typical for investigative interviews, and not evidence of deceit. Many of the inconsistencies relate to timing of when Zweifel's plane flew over the hunters during the day on October 11. Given the highly demanding physical conditions of the hike as well as the stress created by the overall situation, it is reasonable that participants' estimates of time during the hike would be just that: estimates.¹⁰³ Likewise, fuzzy memories of the timing of

¹⁰³ See, e.g., Banich testimony (when asked to approximate length of hike to moose: "Yeah, I would say it seemed like forever. I don't remember. ... We had waders and stuff on so there was no way to check times on our cell phones or anything. Sorry, but it was a long hike.")

conversations are not uncommon more than a year after those conversations occurred, and both men were credible in explaining the limits of their recollections as well as deferring to their earlier statements to Trooper Cresswell for more precise details.

Hicks also avers that the clients were motivated to deflect blame to Hicks for their own misconduct because they were afraid of getting in trouble for their participation in game violations. Hicks points to Sam Fejes's statement to Hicks that he "got it all on tape" – "it" being Zweifel's low-flying and signaling – and suggests that the clients were afraid they would get in trouble. But there is no evidence that either client ever heard Fejes's comments. Nor would either client likely believe himself – rather than the guide – to be the likely target of any repercussions arising out of the signaling agreement between Hicks and his pilot. Thus, Fejes's statement that he "got it all on tape" is not a convincing motivator for the clients to have concocted a story to get Hicks in trouble. Moreover, the clients would only have reason to believe that they would be in trouble if the violations at issue had, indeed, occurred. The clients testified credibly and were believable in their description of Hicks and Zweifel having orchestrated the same-day airborne hunting plan, but even if the clients had played a more active role (and there is no evidence that they did), this would not negate the evidence most key to the Board's proceeding here: namely, that Hicks participated in same-day airborne activities.

The clients' overall narrative of the October 2017 hunt is consistent between numerous sources, including witness and participant statements; the InReach transcripts; Trooper testimony about prior investigations; and client testimony at the hearing. The cumulative effect of this testimony far outweighs the minor and expected inconsistencies in witness recollection, and leaves the trier of fact with the firm conviction that Hicks and Zweifel were purposefully engaging in multiple forms of signaling between the plane and the ground during the hunt.

2. Hicks's allegation that the criminal investigation and/or the agency record are too incomplete for this matter to be considered by the Board

Hicks suggests that Trooper Cresswell was biased or less than thorough in his investigation, allowing himself to be led by Sam Fejes and, in turn, manipulating Weaver and Banich.¹⁰⁴ But there is no credible evidence that the investigation into Hicks is the result of an improper effort by Fejes to "undermine a competitor." As to the thoroughness of Cresswell's investigation, Hicks objects that Cresswell did not interview him. Cresswell explained that he

¹⁰⁴ See, e.g., Post-Hearing Brief, p. 37.

was directed to transfer his investigative file to a different division of the Troopers that was pursuing an investigation. The limits of Cresswell’s investigation – which included ten witness interviews and multiple search warrants – do not preclude the Division from moving forward with its Accusation about the October 2017 hunt based on the information gathered.

A related issue raised by Hicks was an assertion that other law enforcement investigations that may be underway regarding Hicks are somehow a bar to the Division pursuing this matter at this time. Hicks presented testimony from three former clients who have gone on multiple hunts with him, had good experiences, think highly of him, and have referred other clients to him. Two of these clients testified that in the last year they were contacted and interviewed by U.S. Fish and Wildlife officers who, along with Alaska Troopers, asked questions about Hicks and same-day airborne hunting practices.¹⁰⁵ Hicks objected that the Division had not provided him with evidence relating to this investigation, and argued that the hearing in this matter was premature because recordings of those investigative interviews had never been disclosed. But the record contains no other evidence of that investigation, or any investigation beyond Trooper Cresswell’s investigation of the October 2017 hunt. The possible existence of some larger investigation into Hicks’s practices does not preclude the Division from pursuing discipline against Hicks’s license on the narrower grounds of the October 2017 hunt.

III. Discussion

A. *What laws does the Division accuse Mr. Hicks of violating with regard to the October 2017 hunt?*

The Accusation accuses Hicks of violating the following statutes and regulations.¹⁰⁶

Statute or Regulation	Summary of Statute or Regulation Described in Accusation
12 AAC 75.340(c)(1)(c)	Failing to provide food and shelter consistent with normally satisfactory field conditions
12 AAC 75.340(c)(3)	Encouraging clients to hunt in a restricted area
12 AAC 75.340(d)(10)	Altering the experience of other hunters
12 AAC 75.340(f)(4)	False or misleading advertising
AS 08.54.720(a)(8)(A)	Prohibition against same-day airborne hunting Knowingly aiding in the commission of state or federal wildlife or game regulations.
AS 08.54.720(a)(15)	
5 AAC 92.085(8)	
AS 08.54.720	Knowingly failing to report violations
AS 08.54.740	
(Consent agreement)	Violating conditions of probation

¹⁰⁵ Duffy testimony; Goodpaster testimony.

¹⁰⁶ The Accusation filed in May also included counts under AS 08.54.680(c) and 12 AAC 75.260 regarding contract requirements, but the Division later dismissed those counts. Division’s Post-Hearing Brief, p. 2.

B. Evidentiary issues

Because the Division is seeking to impose discipline on Hicks's license, the Division has the burden of proof by a preponderance of the evidence.¹⁰⁷ Administrative proceedings conducted under the Administrative Procedure Act (APA) do not follow strict rules of evidence. Rather, relevant evidence is admissible "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of a common law or statutory rule that makes improper the admission of the evidence over objection in a civil action."¹⁰⁸ Under the APA, hearsay is admissible, but may not be used alone to establish a fact unless it would be admissible under the Rules of Evidence.¹⁰⁹ Otherwise inadmissible hearsay may, however, "be used to supplement or explain direct."¹¹⁰

As an additional issue, because Mr. Hicks declined to testify, and Mr. Zweifel, through counsel, asserted his Fifth Amendment privilege against self-incrimination as a reason not to testify, it is necessary to address the evidentiary implications associated with these witnesses not testifying.¹¹¹ The Alaska Supreme Court has held that civil parties who refuse to testify based on assertion of a Fifth Amendment privilege may be subjected to adverse evidentiary inferences.¹¹² Where independent evidence exists regarding a fact about which a party could testify, an adverse factual inference may be drawn against the party for refusing to testify.

As a final evidentiary issue, both during the hearing and in his post-hearing briefing, Hicks relied on and submitted unofficial transcripts of various recordings. During the hearing, Hicks submitted unofficial, uncertified transcripts of various witness's interviews with Trooper Cresswell. With his post-hearing brief, Hicks submitted unofficial, uncertified transcripts of the hearing proceedings. In both instances, the transcripts submitted are riddled with inaccuracies that make them unreliable for any purpose other than guiding the reader to a point in the interview or testimony which the reader must then review from the original audio recording to

¹⁰⁷ AS 44.62.460(e)(1).

¹⁰⁸ AS 44.62.460(d).

¹⁰⁹ AS 44.62.460(d).

¹¹⁰ AS 44.62.460(d).

¹¹¹ As noted above, while Mr. Hicks did not formally get on the stand and then assert his Fifth Amendment privilege, the comments of his counsel made clear that he was not testifying because of the potential criminal liability associated with the allegations in this case. Mr. Tiernan asserted that "it would be malpractice" for him to call Mr. Hicks as a witness, and then stated that Mr. Hicks could "not afford to defend a criminal action." Both parties were asked to address this evidentiary issue in their post-hearing briefing; only the Division did so.

¹¹² *Nelson v. State*, 273 P.3d 608, 611-612 (Alaska 2012) (citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976)).

determine what was actually said and by whom. The transcripts are not admissible and were not relied on as accurate.

C. *Did the Division prove that Hicks violated the Board's statutes and regulations?*

1. Did the Division prove alleged violations of prohibitions against same-day airborne taking of game?

The most serious allegation made by the Division is that Hicks and Zweifel engaged in prohibited same day airborne hunting through the use of both flight maneuvers and InReach messaging.. Because of the severity of this allegation, it is addressed first.

The prohibition against same day airborne hunting is found in AS 08.54.720(a)(15), which prohibits anyone holding a big game commercial services license from “knowingly violat[ing] a state statute or regulation prohibiting waste of a wild food animal or hunting on the same day airborne.”¹¹³ The regulation implementing the same day airborne prohibition further specifies that “a person who has been airborne may not take or assist in taking a big game animal and a person may not be assisted in taking a big game animal by a person who has been airborne until 3:00 a.m. following the day in which the flying occurred.”¹¹⁴ (It is of no import that the hunters did not kill or even shoot at a moose. “Take” is defined in AS 16.05 as “taking, pursuing, hunting, ... or attempting to take, pursue, [or] hunt ... game.”¹¹⁵)

The InReach transcripts alone are sufficient to justify a finding that Hicks and Zweifel were, more likely than not, engaged in same day airborne hunting. If they were not attempting to locate moose for hunting that day, they would not have needed to use a code to disguise the subject of their communications.

Hicks contends that Banich and Weaver have conspired to lie about the pre-hunt agreement that Zweifel would scout for moose and perform signaling maneuvers to alert the ground party.¹¹⁶ Hicks argues that the flying makes no sense when the men already had an InReach to signal with. While the logic behind the illegal same-day airborne hunting agreement may be questionable, Banich and Weaver had no reason to lie to Trooper Cresswell or this tribunal about either aspect of the Hicks-Zweifel conduct, and their testimony about both components of the same day air hunt attempts (the flyovers and the InReach) are corroborated by

¹¹³ AS 08.54.720(a)(15) (“It is unlawful for [a] person licensed under this chapter to knowingly violate a state statute or regulation prohibiting waste of a wild food animal or hunting on the same day airborne.”)

¹¹⁴ 5 AAC 92.085(8). Moose are included in the regulation’s definition of “big game.” 5 AAC 92.990(a)(9).

¹¹⁵ AS 16.05.940(35).

¹¹⁶ Post-Hearing Brief, p. 39.

other evidence (witnesses to the flying, and electronic copies of the coded communications). This evidence is more persuasive than an unfounded conspiracy theory. Finally, the adverse factual inferences that arise from the refusal of either Zweifel or Hicks to testify about the same-day airborne issue further support the conclusion that, more likely than not, Zweifel and Hicks were intentionally engaging in same-day airborne hunting practices.¹¹⁷

2. Did the Division Prove Hicks encouraged clients to hunt in a restricted area in violation of 12 AAC 75.340(c)(3)?

12 AAC 75.340(c)(3) requires that “[a]ll classes of guides shall ... advise clients and employees involved in a hunt of the applicable state and federal statutes and regulations relating to hunting, land use, wildlife, big game hunting services, and conservation.” The Division alleges that Hicks violated this regulation by encouraging clients to hunt in a restricted area.

Dr. Weaver testified that Hicks offered to take him to the Mental Health Trust land after the first day’s hunt was unsuccessful. Weaver’s assertion that Hicks offered to take him to the Mental Health Trust lands is credible and supported by other evidence. Dr. Banich testified that Dr. Weaver told him about this offer the day it was made. Mr. Strocher also testified that the dentists had told him about this exchange.

Hicks avers, with no evidentiary support, that Trooper Cresswell may have “orchestrated this evidence.” But the record does not support Hicks’s assertion. Weaver and Banich had never heard of the Mental Health Trust or its protected lands before learning of them from Zweifel. Both men recounted Zweifel informing them that he and Hicks had gotten in trouble for hunting on trust lands the previous year. Trooper Malm corroborated this information, testifying that a criminal investigation on this issue had been referred for possible prosecution. Weaver also testified that Hicks told him he was on probation at the time he made the offer – another fact that Weaver would not have known had he not learned it from Hicks.

There is no way that Weaver or Banich would be aware of Hicks’s issues with the Mental Health Trust lands had they not learned of them during the hunt. And there is no evidence

¹¹⁷ Counts 14-15 of the Accusation accuse Hicks of failing to report same day airborne violations by Zweifel. Alaska Statute 08.54.720(a)(8)(A) prohibits a licensee from “knowingly ... commit[ing] or aid[ing] in the commission of a violation of this chapter, a regulation adopted under this chapter, or a state or federal wildlife game statute or regulation.” And AS 08.54.740 provides that, where a registered guide employs a transporter, the registered guide “is equally responsible under AS 08.54.710 for a violation of a state or federal wildlife or game or guiding statute or regulation committed” by the transporter during the course of their employment for the registered guide. Thus, in addition to violating the law with regard to his own participation in the same-day airborne activities, Hicks separately violated the law by assisting with and failing to report Zweifel’s commission of such activities.

refuting Weaver's credible testimony that Hicks offered to take him to Trust lands to get a moose during the October 2017 trip. Because there is no credible evidence to contradict Dr. Weaver's version of these events, it is more likely true than not true that Hicks offered to take Dr. Weaver for a "make up" hunt on Trust land.

However, it is less clear that this offer constitutes a violation of 12 AAC 75.340(c)(3). As noted, that provision requires a guide to "advise clients and employees involved in a hunt of the applicable state and federal statutes and regulations relating to hunting, land use, wildlife, big game hunting services, and conservation." It is not clear from the evidence that Hicks's offer for a hunt on Trust lands falls within the bounds of what the regulation covers. Among other issues, Weaver testified that when Hicks made the offer, Hicks admitted Zweifel might be reluctant to fly them there since they had previously gotten in trouble for hunting there.

Although the Division proved that Hicks offered to take the clients hunting in a restricted area, it did not prove that this constituted a violation of 12 AAC 75.340(c)(3). However, the fact of the improper offer may and should be considered in determining the appropriate level of discipline warranted by the totality of circumstances in this case.

3. Did the Division prove that Hicks failed to provide his clients with satisfactory shelter (12 AAC 75.340(c)(1)(C))?

12 AAC 75.340(c)(1) provides that "all classes of guides shall take every reasonable measure to assure the safety and comfort of the client, including ensuring that during the hunt ... food and shelter are present that are normally considered satisfactory under field conditions." The Division alleges that Hicks violated 12 AAC 75.340(c)(1)(C) by failing to provide the hunters with adequate shelter for field conditions. Hicks responds that the clients were complainers with unreasonably high expectations, and by showing photos of the cabin in nice condition. He also presented testimony of several former clients who had good hunting experiences with Hicks.

The Division met its burden of showing that, as to the hunt beginning on October 6, 2017, Hicks failed to provide his clients with satisfactory shelter for field conditions. As a threshold matter, all three clients were seasoned hunters with a range of experiences in varied conditions. And plainly, the standards for accommodations in remote areas of Alaska are different from the standards for accommodations elsewhere. But the conditions that met these clients at the start of their hunt did not meet the basic minimum requirements for appropriate shelter.

The Division presented undisputed testimony that, at the time of the October hunt, the cabin was not in the condition represented by Hicks's photographs.¹¹⁸ There was undisputed testimony that the cabin had a flooded stove, mold, and dirty dishes. There was credible testimony that food had been left out and rodent droppings were present. There was undisputed testimony that Hicks's clients had to prepare the wet and dirty cabin for the fall hunting season (and that during the time they were doing so, Hicks himself spent a night in Anchorage).

It is not necessary to attempt a definitive identification of the minimum standards for a remote hunting cabin. It is certainly the case that the standard of care for provision of adequate shelter does not include conditions under which clients spend days in camp preparing to open a cabin for the season, cleaning mold and rodent droppings, and repairing water-damaged appliances. The Division met its burden of showing, by a preponderance of the evidence, that Hicks violated 12 AAC 75.340(c)(1)(C).

4. Did the Division prove Hicks engaged in conduct that altered the hunting experience of other hunters (12 AAC 75.340(d)(10))?

12 AAC 75.340(d)(10) provides that "all classes of guides shall... to avoid altering the hunting experience of other hunters, refrain from making multiple, consecutive approaches in any mechanical powered equipment, near any big game animal or group of big game animals during any open hunting season for that species[.]"¹¹⁹ The Division alleges that Hicks violated 12 AAC 75.340(d)(10) by altering the experience of other hunters – namely, Mark Heck, and the other nearby Fejes clients who experienced the repeated "buzzing" by Zweifel's aircraft.

Preston, Hemphill, and Fejes all testified to the intrusive flying. Heck provided an affidavit describing the plane as "circling in the area for hours," and "annoying."¹²⁰ Hicks presented no testimony to refute these witnesses. Zweifel's refusal to testify supports a factual inference in favor of the multiple witnesses who testified that his plane made multiple intrusive passes during their hunt. Hicks's refusal to testify supports a factual inference that Zweifel did so as part of a coordinated effort between Hicks and Zweifel to locate moose from the air.

The Division met its burden of proving a violation of 12 AAC 75.340(d)(10).

¹¹⁸ Strocher testimony.

¹¹⁹ 12 AAC 75.340(d)(10). *See also*, AS 08.54.720(a)(2). ("(a) It is unlawful for a . . . (2) person who is licensed under this chapter to intentionally obstruct or hinder or attempt to obstruct or hinder lawful hunting engaged in by a person who is not a client of the person").

¹²⁰ Ex. 42.

5. Did the Division prove that Hicks misrepresented his services in violation of 12 AAC 75.340(f)(4)?

12 AAC 75.340(f)(4) prohibits registered guides from misrepresenting their services by false or misleading advertising. The Division alleges that Hicks misrepresented his services in violation of 12 AAC 75.340(f)(4) by not informing prospective customers that the bull moose in his hunt solicitation email was taken in a region where Hicks is not permitted to guide and where the hunters could not legally enter.

Hicks emailed or texted Dr. Weaver a photo of a large bull moose as part of an email exchange soliciting Weaver to engage Hicks's commercial services for a moose hunt. Dr. Weaver testified that the photograph of the moose is what "sold" him on the hunt.

The Division contends that the bull moose in question was illegally killed on Mental Health Trust lands. Hicks admits to having killed a moose on Trust lands. The only direct evidence that the moose in the photographs was killed on Trust lands is an out of court statement by Doug Zweifel. Specifically, Dr. Weaver testified that Doug Zweifel told him the moose was taken on mental health trust land. Hicks's counsel objected on hearsay grounds to the introduction of Zweifel's statement. Hearsay is defined as an out of court statement offered to prove the truth of the matter asserted.¹²¹ However, "admissions by a party opponent" – namely, "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" – are *not* hearsay.¹²² Because Zweifel was acting as Hicks's agent both during the alleged illegal 2016 hunt and the October 2017 hunt, and was speaking about a matter within the scope of that agency (namely, where and under what circumstances hunting and piloting occurred or could occur), the statement at issue is a non-hearsay statement of a party opponent.

Even if it were not a statement of a party opponent, the statement would be admissible hearsay, so also not excluded under the APA. Certain out of court statements offered to prove the truth of the matter asserted are excluded from the hearsay rule under certain circumstances. Under Alaska Evidence Rule 804(b)(3), a "statement against interest" is not excluded by the

¹²¹ Alaska R. Evid. 801(c).

¹²² Alaska R. Evid. 801(d)(2) ("Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy").

hearsay rule if the declarant is unavailable as a witness.¹²³ In this case, Zweifel was unavailable as a witness because he asserted his Fifth Amendment privilege against self-incrimination.¹²⁴ The statements in question – that he and Hicks had gotten in trouble in 2016 for hunting on Mental Health Trust lands – are statements against interest and therefore admissible due to Zweifel’s unavailability.¹²⁵

Lastly, as with the other violations, Hicks’s and Zweifel’s refusal to testify supports an adverse factual inference about the moose in the photograph.

For all of these reasons, the Division met its burden of proving that Hicks engaged in false or misleading advertising by soliciting clients for a moose hunt using photographs of a moose taken in an area where hunting is prohibited.

6. Did the Division prove that Hicks violated the conditions of his probation?

The last count of the accusation alleges that Hicks’s statutory and regulatory violations, as described above, occurred while he was on probation under the 2016 Consent Agreement, and therefore also constitute violations of that probation. The October 2017 hunt indisputably occurred while Hicks was on probation. The terms of Hicks’s probation required that he refrain from violating game and hunting laws. Having proven the violations detailed above, which occurred while Hicks was on probation under the 2016 consent agreement, the Division met its burden of proving that Hicks violated his probation.

D. What level of discipline is appropriate?

The Division having satisfied its burden of proving violations as described above, the Board must determine what level of discipline is appropriate under the circumstances of this case. Hicks insists that no violations occurred and that the case should be dismissed, or, at most, stayed until “any criminal action against Mr. Hicks [is] completed.”¹²⁶ The Division urges that the violations detailed above warrant license revocation, a reprimand, and a significant fine.¹²⁷

¹²³ Alaska R. Evid. 804(b)(3) (“A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.”)

¹²⁴ Alaska R. Evid. 804(a).

¹²⁵ See AS 08.54.740(b) (“A transporter who provides transportation services is equally responsible under AS 08.54.710 for a violation of a state or federal wildlife or game, guiding, or transportation services statute or regulation committed by a person while in the course of the person's employment for the transporter”).

¹²⁶ Hicks’s Post-Hearing Brief, p. 45. The record contains no evidence of any current criminal actions pending against Mr. Hicks.

¹²⁷ Division’s Post-Hearing Brief, p. 2. If Hicks’s license is not revoked, the Division argues that it should be suspended for at least three years. *Id.*

Under AS 08.01.075(f), a board is required to “seek consistency in the application of disciplinary sanctions.” The Board uses a matrix of criminal sanctions and previous disciplinary actions to guide its decision-making in determining the appropriate level of discipline for any particular statute or regulation.¹²⁸ Whether the offense is a first, second, or third, and the nature of the offense, all influence whether the recommended sanction is as minimal as a letter of advisement and small fine, to as grave as permanent revocation. Additionally, the totality of circumstances in a particular case necessarily influences the appropriateness of any particular disciplinary outcome.

While the matrix is not controlling, it is a useful starting point. The following provisions of the matrix are relevant to the determination of the appropriate sanction in this case:

- For same-day airborne hunting (AS 08.54.720(a)(15), the matrix advises a fine of \$3,000-\$5,000, 1-3 years suspension; 5 years of probation, and a reprimand for a first offense; and permanent license revocation for a second offense.¹²⁹
- For the knowing commission of violations of the Board’s statutes and regulations or state or federal wildlife or game laws (AS 08.54.720(a)(8)(A)), the matrix advises a fine, probation, and reprimand and, for a third violation, a suspension of up to 1 year.¹³⁰
- For knowingly permitting violations of the Board’s statutes and regulations or state or federal wildlife or game laws (AS 08.54.720(a)(8)(B)), the matrix advises a fine (\$1000-\$4000 for first offense; doubling for each subsequent offense), probation (for between 1 and 5 years), reprimand and, for a third violation, a suspension of up to 1 year.¹³¹
- For a first-time offense of failing to report criminal violations by clients or employees, the matrix recommends a \$500-\$5,000 fine, a reprimand, and up to 2 years of probation. For a second offense, the matrix adds a recommended suspension of up to 1 year. For a third offense, it recommends a \$5,000 fine, 2-5 years suspension, up to 5 years of probation, and a reprimand.¹³²

The matrix also contains a disclaimer that the guidelines were developed by the Division at the Board’s request “to capture recent historical discipline taken within the preceding ten years.” The disclaimer notes that that the guidelines presented in the matrix “are a reference for Board consideration during a circumstance that may merit censure or discipline. However, each

¹²⁸ Ex. 46.

¹²⁹ Ex. 46, p. 6. For a first offense, the matrix advises a fine of \$3,000-\$5,000, a 1-3-year suspension, a reprimand, and five years of probation.

¹³⁰ Ex. 46, p. 4.

¹³¹ Ex. 46, p. 5.

¹³² Ex. 46, p. 2.

matter is considered on its individual merits. The guidelines are comprised of a range of penalties which allow for discretion by the Board based upon the individual case specifics.”¹³³

In this case, the totality of circumstances justifies an upward departure from the matrix’s standard recommendations for any individual first-time violation. In particular:

- The offenses occurred while Hicks was on probation for an earlier violation.
- Hicks has been on probation twice since getting his registered guide license; his license has been on probation for all but five months between its issuance and the filing of the Accusation in this case.¹³⁴
- The hunt-day InReach messages reflect intentional deception through use of a code. Further, prior InReach messages in which Hicks instructs others to avoid talking about moose over the InReach suggests experience in using subterfuge to evade consequences for prohibited conduct;
- The improper conduct established by the Division spans across multiple types of violations, with some level of sanction being appropriate for each;
- The substandard accommodations, lack of properly prepared assistants, and promotion of and participation in illegal hunting activities reflect, collectively, an astonishing lack of judgment and character inconsistent with the expectations of the profession.

When registered guides fail to exercise the standard of care (as with the provision of substandard shelter), it reflects poorly on and can negatively impact the profession as a whole. Additionally, because the work of guides is necessarily carried out in remote areas where oversight is minimal, licensee honesty and integrity are paramount to the efficient regulation of the industry. When licensed guides act in a manner that calls their honesty into question – violating hunting laws and engaging in subterfuge to disguise their illegal activities – they impair the trust that is necessary to regulation of the industry.

The record in this case establishes that Hicks failed to act in accordance with applicable laws, failed to provide clients with a minimally adequate experience, and intentionally engaged in multiple illegal acts. The fact that Hicks has some clients (Duffy, Goodpaster, and Meyer) who have enjoyed past trips with him and think highly of him is not enough to outweigh the considerable evidence of wrongdoing on the October 2017 hunt, and the considerable concerns

¹³³ Ex. 46, p. 8.

¹³⁴ Strout testimony.

that evidence raises about his fitness as a guide. The Division met its burden of showing that revocation of Hicks’s license would protect the public and the industry.¹³⁵

The breadth and severity of the misconduct in this matter also warrants a civil fine. The historical first-time fines for the various offenses identified here range from \$500-\$5,000 (for failure to report violations); \$1,000-\$4,000 for knowingly committing a violation of the hunting statutes; \$1,000-\$4,000 for knowingly permitting a violation of the hunting statutes and regulations; and \$3,000-\$5,000 for same day airborne violations. Here, given that Hicks’s violations were committed while on license probation, the higher end of the spectrum is warranted. In light of the totality of circumstances surrounding the violations found above, a fine of \$15,000 is warranted, as is a public reprimand.

IV. Conclusion

The Division met its burden of proving that Hicks engaged in misrepresentations with regard to soliciting hunting clients for the October 2017 hunt, and that, during that hunt, he failed to provide clients with minimally adequate shelter, encouraged clients to engage in multiple violations of state hunting laws, and improperly engaged in same-day airborne hunting. Further, he did all of this while on probation under a consent agreement with the Division. The totality of the circumstances supports a civil fine in the amount of \$15,000, a public reprimand, and revocation of Hicks’s registered guide license.

Dated: March 7, 2019

By: Signed
Signature
Cheryl Mandala
Name
Administrative Law Judge
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

¹³⁵ See, e.g., *Wendte v. State, Bd. of Real Estate Appraisers*, 70 P.3d 1089, 1094 (Alaska 2003) (recognizing case law that “professional license revocation does not punish the licensee, but rather serves the regulatory goal of protecting the public from unfit practitioners”).

Adoption

The Big Game Commercial Services Board 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 _____ day of _____, 2019.

By: _____
Name:
Title:

Non-Adoption Options

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

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2019.

By: _____

Name:

Title:

B. The Big Game Commercial Services Board, in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopts the proposed decision as revised:

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 _____ day of _____, 2019.

By: _____

Name:

Title:

C. The Big Game Commercial Services Board, in accordance with AS 44.64.060(e)(4), rejects, modifies or amends one or more factual findings as follows, based on the specific evidence in the record described below:

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 _____ day of _____, 2019.

By: _____
Name:
Title:

D. The Big Game Commercial Services Board, in accordance with AS 44.64.060(e)(5), rejects, modifies or amends the interpretation or application of a statute or regulation in the decision as follows and for these reasons:

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 _____ day of _____, 2019.

By: _____
Name:
Title:

Clarification and Adoption

The Big Game Commercial Services Board, in accordance with AS 44.64.060(e)(3), revises the enforcement action/sanction as set forth below, and adopts the proposed decision as thusly revised as its Final Administrative Decision in this matter:

Pursuant to AS 44.64.060(e)(3), the Board adopts the Administrative Law Judge's proposed decision with the clarification that the license revocation referenced therein is a permanent revocation under AS 08.54.710(c)(1).

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 2nd day of April 2019.

By: Signed
Signature
Henry D. Tiffany III
Name
Chairman
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]