

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

In the Matter of)	
)	
THOMAS G. SHANKSTER)	OAH No. 18-0734-GUI
<hr style="width: 40%; margin-left: 0;"/>)	Agency No. 2018-000561

DECISION¹

I. Introduction

The Division of Corporations, Business and Professional Licensing (Division) filed a four-count accusation against hunting guide Thomas Shankster, seeking disciplinary sanctions against his master guide-outfitter license based on four June 2018 convictions for hunting or guiding law violations, all based on incidents that occurred in the fall of 2014. Mr. Shankster submitted a notice of defense and requested an administrative hearing.

Prior to the hearing, the Division moved for summary adjudication on its primary allegation – that is, that Mr. Shankster had been convicted of the four violations. The Division’s motion was granted because the Division proved, as a matter of law, that Mr. Shankster had committed four violations of statutes and regulations relating to hunting or to provision of big game hunting services.

After the Division’s motion was granted, a hearing was held on remaining issues. After careful consideration, and taking into account all of the evidence presented over the course of the five days of hearing, including Mr. Shankster’s contention that he was unfairly targeted by the Division and the Alaska Wildlife Troopers, this decision concludes that Mr. Shankster also committed other violations of statutes and regulations relating to hunting or big game hunting services in 2014, and in prior and subsequent years, which the Big Game Commercial Services Board (Board) may take into account for purposes of determining the discipline to be imposed in this matter. Accordingly, and for the reasons further described below, it is recommended that the Board impose the following disciplinary sanctions on Mr. Shankster’s license:

1. A \$20,000 fine with \$10,000 stayed;
2. A one-year suspension;

¹ This revised decision has been issued pursuant to 2 AAC 64.350(a), to correct manifest typographical errors on pages 17 and 20; the proposed decision otherwise remains unchanged.

3. A four-year probationary period, during which time any violation of a hunting or guiding statute or regulation will result in the stayed portion of the fine becoming immediately due and payable; and
4. A public reprimand.

II. Procedural Background

A. *The Division's Accusation*

The Division issued its Accusation in this matter on June 28, 2018 and served it on Mr. Shankster on July 5, 2018. The Accusation specifically alleges four violations of statutes and regulations relating to hunting or to provision of big game hunting services, based on Mr. Shankster's June 2018 criminal convictions on four separate counts, as follows:

- (1) For "violating AS 08.54.720(a)(8)(A) for committing or aiding in the commission of a violation of AS 08.54, a regulation adopted thereunder, or a state or federal wildlife or game statute or regulation. Mr. Shankster knowingly violated 5 AAC 92.220(d) which prohibits waste of wild food by failing to salvage all edible meat from a caribou taken by Client #1."²
- (2) For "violating AS 08.54.720(a)(8)(A) for committing or aiding in the commission of a violation of AS 08.54, a regulation adopted thereunder, or a state or federal wildlife or game statute or regulation. Mr. Shankster knowingly violated 5 AAC 92.220(d) which prohibits waste of wild food by failing to salvage all edible meat from a caribou taken by Client #2."³
- (3) For "violating AS 08.54.720(a)(1) for knowingly failing to promptly report a violation of a state or federal wildlife or game, guiding, or transportation services statute or regulation that he reasonably believed was committed by an employee. Mr. Shankster failed to promptly report that his assistant guide Employee #1 transported antlers from the kill [site] before salvaging all edible meat from the caribou taken by Client #3."⁴
- (4) For "violating AS 08.54.720(a)(1) for knowingly failing to promptly report a violation of a state or federal wildlife or game, guiding, or transportation services statute or regulation that he reasonably believed was committed by an employee. Mr. Shankster failed to promptly report the sub-legal sheep taken by Client #4 hunting with his assistant guide Employee #2."⁵

² June 28, 2018 accusation, para. 3 (Client #1 later identified as Jason Clark).

³ *Id.*, para. 4 (Client #2 later identified as Sydney Cornell).

⁴ *Id.*, para. 5 (Employee #1 later identified as George Jobe, Client #3 as Bela Hedvigi).

⁵ *Id.*, para. 5 (Employee #2 later identified as Daniel Graham, Client #4 as Jeffrey Haigh.).

The Division established Mr. Shankster's criminal convictions for these violations by filing a copy of the criminal court judgment, issued by the Alaska District Court at Aniak, Alaska on June 4, 2018.⁶

The Division's Accusation sets out the four criminal convictions, and requests that the Board impose discipline against Mr. Shankster's master guide license pursuant to AS 08.54.710(a)(1), which authorizes the Board to impose discipline if a licensee is convicted "of a violation of any state or federal statute or regulation relating to hunting or to provision of big game hunting services or transportation services."

B. The Division's motion for summary adjudication

As mentioned above, prior to the hearing the Division moved for summary adjudication of its claims that Mr. Shankster had violated Board statutes AS 08.54.720(a)(8)(A) and AS 08.54.720(a)(1), and Board regulation 5 AAC 92.220(d). Motions for summary adjudication are expressly authorized under the regulations governing hearings before the Office of Administrative Hearings;⁷ they are analyzed according to the same principles applied to motions for summary judgment in Alaska court proceedings. Under these principles, summary adjudication will be granted if there are no material facts in dispute and one party is entitled to prevail as a matter of law.⁸

The Division's motion was filed on September 27, 2018, about a month before the first scheduled hearing date, and was predicated on Mr. Shankster's 2018 criminal convictions described above. Mr. Shankster's opposition was due on October 15, 2018, but he sought and received an extension of time to file it, such that it was filed on October 25, 2018, only four days before the start of the hearing. As a result, disposition of the motion was not addressed until the first day of the hearing on October 29, 2018. After a short discussion on the record at the start of the day, the motion was orally granted. The rationale for granting the motion is memorialized below.

The Division's motion for summary adjudication was based on AS 08.54.710(f),⁹ which provides as follows:

⁶ Agency Record (AR) 11-12, admitted as Division Exh. 1, is a simple photocopy of the judgment; a certified copy was attached as an exhibit to the Division's motion for summary adjudication.

⁷ 2 AAC 64.250.

⁸ See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); *Estate of Miner v. Commercial Fisheries Entry Comm'n*, 635 P.2d 827, 834 (Alaska 1981); 2 Davis & Pierce, *Admin. Law Treatise* § 9.5 at 54 (3d ed. 1994).

⁹ The Division's motion erroneously cites this statute as AS 08.54.730(f).

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.

The Division provided as an exhibit to the motion a certified copy of the June 4, 2018 criminal court judgment, which indicates that Mr. Shankster pleaded guilty to four counts while four other counts were dismissed.¹⁰

Mr. Shankster stated during a pre-hearing conference that he actually was not guilty of the four charges; that he pleaded guilty to the charges because he felt that he wouldn't receive a fair trial in Aniak and he couldn't afford to pay his counsel to take the matter to trial; and that he had no idea when he pleaded guilty that the Board could take action against his license based on the criminal convictions. In addition, in his written opposition to the motion for summary adjudication, Mr. Shankster argued that the actual facts underlying the four criminal counts did not support the allegations; that extenuating circumstances existed that should have excused any violations; and that the actions of the Alaska Wildlife Troopers in allegedly harassing his employees and unfairly targeting his guiding operation contributed to the situations that resulted in the convictions.

The Division's motion and Mr. Shankster's arguments in opposition were discussed on the record at the start of the hearing on October 29, 2018. At that time, the undersigned explained to Mr. Shankster, prior to granting the Division's motion for summary adjudication, that he could have raised these arguments with the Aniak court during the criminal proceedings. For purposes of this administrative appeal, however, the issues raised by Mr. Shankster were conclusively resolved when he pleaded guilty and was convicted on the four counts listed in the criminal court judgment.

The language of AS 08.54.710(f) leaves no room for misunderstanding: a criminal conviction is "conclusive evidence of the commission of that offense in a disciplinary proceeding instituted against the licensee." The purpose of such a provision is to preclude a licensee from relitigating issues that have already been resolved in a criminal proceeding, whether that resolution is the result of a jury verdict, a guilty plea, or a no-contest plea. Mr. Shankster's arguments in opposition to the Division's motion for summary adjudication failed to present any

grounds under which his criminal convictions would fall outside the clear mandate of AS 08.54.710(f).¹¹ The Division's motion for summary adjudication, therefore, was granted, pending approval of the Board.¹²

C. The hearing

After the Division's motion for summary adjudication was granted, the hearing was then held on the remaining issues in dispute. The hearing was held over portions of five days on October 29 and 30 and November 7, 8, and 26, 2018. Mr. Shankster represented himself throughout this proceeding. The Division was represented by Assistant Attorney General Megyn Weigand. Mr. Shankster testified on his own behalf. In addition to Mr. Shankster, the following persons testified:

David Knight, a client of Mr. Shankster;
Savannah Grove, an Alaska Dept. of Fish & Game employee;
Brett Gibbens, a trooper with Alaska Wildlife Troopers;
Lee Strout, Division investigator;
Bob Graham, an assistant guide and pilot employed by Mr. Shankster
Dan Graham, an assistant guide employed by Mr. Shankster;
Jodi Shankster, Mr. Shankster's wife;
Gene Moffitt, a cameraman for "Building Alaska" television show;
Spencer McCuin, an assistant guide employed by Mr. Shankster;
Raymond Haselip, an assistant guide employed by Mr. Shankster;
Levi Totty, a meat packer employed by Mr. Shankster in 2016;
Chris Fleck, a meat packer employed by Mr. Shankster in 2014;
Harold Fahrenbrook, a client and former guide for Mr. Shankster;
Matthew Clyde, a client of Mr. Shankster; and
John Gibson, a client of Mr. Shankster.

The parties submitted post-hearing briefs, and the record closed on December 10, 2018.

D. Introduction of evidence of other violations

The Division's Accusation does not seek discipline for, cite, refer to, or otherwise mention any other possible violations that may have been committed by Mr. Shankster either

¹⁰ Exhibit 1 to Division's motion for summary adjudication.

¹¹ See *In re Skaflestad*, OAH No. 13-0661-GUI (Alaska Big Game Commercial Services Board 2014) (certain counts in accusation established as a matter of law based on criminal convictions).

¹² Late in the fourth day of the hearing, Mr. Shankster indicated that he wanted to move for reconsideration of the undersigned's oral ruling granting summary adjudication. After discussion of the untimeliness of such a motion, Mr. Shankster did not further pursue it.

before or after the 2014 incidents involved in his criminal convictions.¹³ Nonetheless, as further discussed below, the Division offered extensive evidence at the hearing regarding numerous other alleged violations by Mr. Shankster between 2002 and 2016. The Division's counsel argued that such evidence was necessary so that the Board, when determining the appropriate disciplinary sanctions to be imposed on Mr. Shankster's license for the four counts in the Accusation, would have the benefit of a complete picture of an alleged pattern of behavior by Mr. Shankster. The Division's counsel also argued that the Board could potentially consider the other alleged violations as "prior offenses."

An argument could be made that the omission of these other alleged violations from the Accusation itself resulted in defective notice to Mr. Shankster, and that therefore the Division should not have been allowed to present evidence regarding the incidents in this case.¹⁴ Mr. Shankster, however, at no time argued that the Accusation had given him inadequate notice of the allegations against him, nor did he ever object to admission of evidence regarding the other alleged violations. Prior to the hearing the Division produced documents to Mr. Shankster relating to each of the incidents not referenced in the Accusation. In addition, in its pre-hearing brief and in discussions on the record during a pre-hearing conference, the Division explained its position regarding the relevance of the other incidents to the disciplinary sanctions to be imposed by the Board. Mr. Shankster, therefore, was on notice of the Division's intent to introduce evidence regarding these incidents and had more than adequate opportunity to prepare his response to it. He was in fact able to respond to the Division's allegations and to offer his own evidence in efforts to counter them.

In addition, it is important to note that the Division did not cite the other alleged violations as primary bases for any of the counts in its Accusation against Mr. Shankster. Rather, evidence of the incidents was only offered to illustrate an alleged pattern of conduct and to provide a basis for the Board to assess the proper level of sanctions under its "Disciplinary Guidelines and Precedence" matrix. Under all of these circumstances, it was appropriate to

¹³ The Division did not file, nor seek to file, an amended accusation in this matter. *See* AS 44.62.400.

¹⁴ Under some circumstances, an agency's failure to include an allegation in an accusation might result in the agency being barred from raising the allegation at the hearing. *See, e.g.* OAH Case No. 18-0527-DEN (Board of Dental Examiners) (Division barred from arguing two of four issues presented at hearing due to their omission from accusation). If an agency plans to rely upon a pattern of conduct to support a proposed disciplinary sanction, the best practice would be to state this plan up front in the accusation.

allow evidence of these incidents to be admitted at the hearing and to be considered as part of the disciplinary analysis in this case.

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III. Facts

Mr. Shankster holds master guide-outfitter license M-148, first issued to him on February 2, 2004. His license is scheduled to expire on December 31, 2019.

A. 2002 hunt record violations

In 2003, Mr. Shankster was charged with seven misdemeanor counts of various alleged violations of statutes and regulations relating to hunting or to provision of big game hunting services in the fall of 2002.¹⁵ He pleaded no contest to two of the charges, which were reduced from misdemeanors to “violation offenses.” These two charges involved a “hunt record” violation under 12 AAC 75.210 (Mr. Shankster’s failure to file a hunt record for one of his clients), and an “unlawful possession” violation under 5 AAC 92.140(a) (Mr. Shankster’s transporting of an illegally-taken sheep); the other five charges were dismissed.¹⁶ The judgments indicate that Mr. Shankster was fined \$300 for each of the two violations.¹⁷

The Division’s investigator, Lee Strout, testified at the hearing that he found these convictions by doing a search on CourtView during his investigation in this matter in 2018, and that he then obtained certified copies of the criminal court judgments from the Alaska District Court in McGrath. The judgments were admitted into evidence at the hearing. However, other than the certified copies of the judgments, and Mr. Strout’s brief comments apparently based on his review of the documents, no other evidence was presented regarding these violations. Mr. Strout did not testify as to whether the Division had been aware of these convictions prior to 2018, whether Mr. Shankster had ever disclosed them to the Division, nor whether back in 2002 Mr. Shankster had been guiding under a previously-issued license (his current license having been issued to him in 2004). During the hearing, Mr. Shankster was never questioned about the incidents underlying these criminal convictions. By the same token, Mr. Shankster did not dispute that he had been convicted of these two offenses for violations that occurred in 2002.

If the Division were prosecuting a disciplinary proceeding against Mr. Shankster based on these convictions for his 2002 violations, pursuant to AS 08.54.710(f) the violations would be

¹⁵ AR 000577-588.

¹⁶ *Id.*

¹⁷ AR 000577-578.

conclusively established via the admission into evidence of the certified copy of the criminal judgments, notwithstanding the absence of testimony regarding facts and circumstances surrounding the violations. It must be noted that the Division has not based its Accusation here on these convictions. Nonetheless, this decision finds that the judgments are persuasive evidence that two criminal convictions for hunting-related violations were entered against Mr. Shankster in 2003. The Division established by a preponderance of the evidence that Mr. Shankster committed the underlying offenses in 2002.

B. 2008 breach of contract

In 2008 a client from Texas by the name of Robert Sanders sued Mr. Shankster, both in his individual capacity and as “Tom Shankster *dba* Alaska Trophy Hunts,” for breach of contract in the County Court in Angelina County, Texas. In 2009 the Texas court entered judgment for Mr. Sanders against Mr. Shankster for breach of contract, for fraud, and for violation of the Texas Deceptive Trade Practice–Consumer Protection Act (DTPA).¹⁸ The court’s final judgment indicates that Mr. Shankster did not appear for the trial in August 2009. It orders Mr. Shankster to pay \$67,720 to Mr. Sanders; this amount includes actual damages in the amount of \$15,680 plus a \$47,040 penalty, apparently imposed due to the DTPA violation or “alternatively ... as a result of [Mr. Shankster’s] fraud.”¹⁹ The judgment does not explain or discuss any of the underlying facts and allegations in the case; in fact, the judgment does not even mention whether the breach of contract concerned a contract for a guided hunt or some other business matter.

At some point in 2008 Mr. Sanders also filed a complaint against Mr. Shankster with the Division.²⁰ Division investigator Lee Strout started working on hunting guide investigations for the Board in 2010, and in 2011 he learned of the previously-filed Sanders complaint. Eventually Mr. Strout received a copy of the civil judgment entered against Mr. Shankster in Texas, and he presented it to a reviewing Board member in 2014. The Board member recommended that the Division send Mr. Shankster a “non-disciplinary letter of advisement,” rather than imposing actual discipline, because the complaint had been resolved through entry of the court judgment.²¹ Mr. Strout sent such a letter to Mr. Shankster on October 30, 2014. The letter states that the reviewing Board member “found that you did breach the contract between yourself and Mr.

¹⁸ AR 000567-569.

¹⁹ AR 000568.

²⁰ Strout testimony.

²¹ *Id.*

Sanders,” and that “[y]ou are hereby cautioned that your actions did violate AS 08.54.710(a)(4)[²²] and the Board may have taken additional action against you and your license had it been deemed appropriate.”²³ It concluded by stating that the matter was closed “and no further action will be taken.”²⁴

It must be noted that the Division did not offer Mr. Sanders’ complaint letter as evidence in this case. No evidence was presented regarding what Mr. Sanders alleged in his complaint, other than Mr. Strout’s brief testimony that the complaint related to a guided hunt and that Mr. Shankster had provided him with a copy of Mr. Sanders’ hunt contract. As with the 2002 violations discussed above, Mr. Shankster was not questioned during the hearing regarding the facts and allegations concerning his dispute with Mr. Sanders. On the other hand, Mr. Shankster offered no testimony or argument to suggest that he had not breached a contract with Mr. Sanders regarding a guided hunt. Based on the Texas court judgment and Mr. Strout’s testimony that the complaint and lawsuit involved a dispute regarding a guided hunt, this decision concludes that the Division established by a preponderance of the evidence that Mr. Shankster breached a hunt contract in 2008.

C. 2014 violations

During the summer and fall of 2014, Mr. Shankster’s main hunting camp was the subject of a reality TV show, “Building Alaska.”²⁵ This meant that in addition to guides, packers and hunting clients, camp crew, a film crew and a “build crew” were in camp for the entire fall hunting season. The film crew filmed the process of Mr. Shankster and others constructing a new lodge building at the camp, utilizing locally-mined gravel and lumber milled from trees in the vicinity of the camp.²⁶

Mr. Shankster testified that during the fall hunting season, the fact that the TV show was being filmed and the lodge was being built did not distract him from his primary focus, which was to take care of his hunting clients and ensure to the best of his ability that they had successful hunting trips with his assistant guides.²⁷ Ray Haselip, an assistant guide who had

²² AS 08.54.710(a)(4) provides that the Board may discipline a licensee for “breach[ing] a contract to provide big game hunting services or transportation services.”

²³ AR 000571.

²⁴ *Id.*

²⁵ Shankster testimony; Gibbens testimony; Haselip testimony.

²⁶ Shankster testimony.

²⁷ Mr. Shankster said that at a certain point in the fall he became overwhelmed and asked his wife Jodi to come out and assist him; he explained, however, that this was due more to pressure from Alaska Wildlife Troopers.

guided for Mr. Shankster in the past, testified that he essentially became the building project leader during the fall season, and that for Mr. Shankster the build was secondary in priority to taking care of the hunting clients and managing the guides. Mr. Haselip also pointed out, however, that Mr. Shankster spent a half hour every day being interviewed for the TV show. Gene Moffitt, a TV cameraman for the show, testified that Mr. Shankster was “managing all of it,” meaning the camp, the hunting guides and clients, and the build, and he characterized it all as a “monumental effort.” Trooper Gibbens felt that the build project and TV show “appeared to be the priority in camp and [were] taking up much of the time and attention of Shankster, his guides, and packers.”²⁸

Whether or not the build project and TV show constituted a distraction for Mr. Shankster, the evidence overall demonstrated that they caused the hunting camp to be more crowded than it otherwise would have been, which may have contributed to tensions between clients and Mr. Shankster. Several witnesses testified that the camp was very busy and crowded with people. One client, Matthew Clyde, testified that when he arrived for his hunt there was no place for him to sleep, and camera gear had to be moved out of a tent to accommodate him. The build project, TV show filming, and overall congested camp conditions set the context for the violations committed by Mr. Shankster in 2014.

1. Violations covered by the criminal convictions, i.e. the basis on which the Division’s Accusation seeks to impose discipline.

As previously discussed, the following violations committed in 2014 by Mr. Shankster have been conclusively established for purposes of this licensing action, through the granting of the Division’s motion for summary adjudication:

- He violated AS 08.54.720(a)(8)(A) through his knowing violation of 5 AAC 92.220(d) by failing to salvage all edible meat from a caribou taken by client Jason Clark;
- He violated AS 08.54.720(a)(8)(A) through his knowing violation of 5 AAC 92.220(d) by failing to salvage all edible meat from a caribou taken by client Sydney Cornell;
- He knowingly violated AS 08.54.720(a)(1) by failing to promptly report that his assistant guide George Jobe transported antlers from the kill [site] before salvaging all edible meat from the caribou taken by client Bela Hedvegi.

²⁸ AR 000073.

- He knowingly violated AS 08.54.720(a)(1) by failing to promptly report the sub-legal sheep taken by client Jeffrey Haigh hunting with his assistant guide Daniel Graham.

These are the four violations on which the four counts of the Division's Accusation are predicated.

2. Nyle Swast complaint

In its effort to portray a complete picture of an alleged pattern of behavior by Mr. Shankster, the Division introduced evidence concerning a complaint filed by Nyle Swast, a hunting client who contracted with Mr. Shankster for sheep and moose hunts in the fall of 2014.

After waiting for a guide in camp for 12 days, one of Mr. Shankster's assistant guides finally became available and guided Mr. Swast on a successful sheep hunt. Mr. Swast then waited in the main camp to go out on a guided moose hunt, apparently became impatient, and was informed by Mr. Shankster that he could hunt for moose without a guide. So Mr. Swast proceeded to go out and shot and killed a moose on his own.²⁹ Mr. Swast marked the location of the carcass with a "space blanket," another hunter marked it with a GPS the next day, and Mr. Shankster thereby was made aware of the location of the carcass. Nonetheless, by the time Mr. Shankster's packers got to the carcass many days later, the meat had spoiled and was not salvageable.³⁰

Mr. Swast submitted a complaint to the Division regarding this incident in December 2014.³¹ The incident was also the basis for one of the criminal charges against Mr. Shankster (for failure to salvage all edible meat from the moose) that was eventually dismissed when he pleaded guilty to the four charges discussed above.

At the hearing, Mr. Shankster did not dispute the facts recited above. He argued, however, that when Mr. Swast opted to hunt on his own, salvage of the meat became Mr. Swast's responsibility. He also argued that he made every effort to assist in salvaging the meat, and that his packers were prevented from getting to the carcass early enough to salvage it due to a mechanical breakdown of an all-terrain vehicle and the difficult terrain in the area.

The Division did not call Mr. Swast as a witness at the hearing, and the entirety of its evidence concerning Mr. Swast's unsalvaged moose consisted of hearsay evidence: Mr. Swast's complaint letter, Trooper Gibbens's report and his testimony regarding conversations with Mr.

²⁹ AR 000234-237.

³⁰ *Id.*; Gibbens testimony; Shankster testimony.

Swast. This hearing is governed by the Administrative Procedure Act; 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.”³² However, the APA also expressly limits the use of hearsay evidence, providing in AS 44.62.460(d) that “[h]earsay evidence may be used to supplement or explain direct evidence but is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action.” The Division did not suggest any basis under which its hearsay evidence on this issue would be admissible over objection in a civil action. Therefore, this decision makes no finding regarding Mr. Swast’s moose hunt.

3. Harold Fahrenbrook and Matthew Clyde complaints

Harold Fahrenbrook is a hunting guide who had guided bear hunts for Mr. Shankster in 2011, and in that process he had earned a credit towards a future hunt with Mr. Shankster. After many years of trying to arrange for a guided hunt, Mr. Fahrenbrook decided in 2014 to instead use his credit for an outfitted hunt for moose, where Mr. Shankster would fly him to a spike camp but Fahrenbrook would hunt without a guide. His friend Matthew Clyde decided to join him, and he separately reached an agreement with Mr. Shankster whereby he would pay for an outfitted moose hunt.³³

Ultimately, Mr. Clyde arrived at Mr. Shankster’s main camp around September 9, 2014, several days before Fahrenbrook flew in. Mr. Clyde found the camp overcrowded and had to move the film crew’s camera gear out of a tent in order to have a place to sleep.³⁴ Mr. Clyde expected his friend Fahrenbrook to be there already; when he wasn’t there, Clyde decided to hunt on his own from the base camp. He went out with Nyle Swast hunting for moose; after Swast shot his moose, it was Mr. Clyde who marked it with a GPS the next day to help Mr. Shankster’s packers find the carcass.³⁵

³¹ AR 000234-237.

³² AS 44.62.460(d).

³³ Fahrenbrook testimony; Clyde testimony; Shankster testimony. The terms of Clyde’s agreement were disputed by the parties at the hearing.

³⁴ Clyde testimony.

³⁵ *Id.*

Mr. Fahrenbrook finally arrived at the base camp around September 14, 2014. Mr. Shankster flew them both to his Moose Lake spike camp the next day. Both Mr. Fahrenbrook and Mr. Clyde testified that when Mr. Shankster dropped them off, he told them that if questioned by Wildlife Troopers, they should say that they were on a “friend hunt.” They both acquiesced in this proposition, apparently in order to just get along with Mr. Shankster so that they could continue with their hunt.³⁶

Mr. Clyde and Mr. Fahrenbrook both killed moose at Moose Lake on September 17 and September 18, respectively. They texted Mr. Shankster to inform him of this; they understood that under their outfitted hunt agreement, Mr. Shankster would pick up their moose meat and antlers and fly it back to base camp. They butchered the animals and placed the meat near the air strip there.³⁷

While waiting for Mr. Shankster, Trooper Gibbens flew over the spike camp and they spoke with him by radio. He told them that Mr. Shankster had said there was no one else in the field. Trooper Gibbens, however, could not land at the strip at that time to further discuss the situation. Mr. Fahrenbrook then texted Mr. Shankster again and informed him of the contact with Trooper Gibbens. Mr. Shankster then flew to the spike camp almost immediately, and when he arrived he reiterated that they were to tell the Troopers that they were only on a “friend hunt.”³⁸ These events took place on September 19, 2014. Both Mr. Fahrenbrook and Mr. Clyde testified that they did not agree with the concept that they were hunting as friends and not as clients of Mr. Shankster.³⁹ Mr. Fahrenbrook knew that he had already paid for his hunt by his labor for Mr. Shankster in 2011; Mr. Clyde knew he had an agreement for an outfitted hunt under which he was to pay Mr. Shankster \$5,500. In any event, they both believed that however Mr. Shankster characterized their status, they should have had signed contracts with him. Mr. Shankster, however, never provided the contracts.⁴⁰

Ultimately, Mr. Shankster flew Mr. Fahrenbrook and Mr. Clyde back to base camp on September 21, 2014. Mr. Shankster had flown out a portion of their moose meat on September 19, and promised to go back and fly out the rest of it as soon as he could.⁴¹ Unfortunately he

³⁶ Fahrenbrook testimony; Clyde testimony.

³⁷ *Id.*

³⁸ Fahrenbrook testimony.

³⁹ Fahrenbrook testimony; Clyde testimony.

⁴⁰ *Id.*

⁴¹ *Id.*

never did so, and the bulk of the meat (as well as the moose capes) was wasted. Trooper Gibbens visited the Moose Lake site on around September 25 and took photographs and collected samples of the wasted meat.⁴² Mr. Fahrenbrook and Mr. Clyde were both later interviewed by Trooper Gibbens. They related to him the full story of their outfitted hunts with Mr. Shankster, as described above.

These incidents regarding Mr. Fahrenbrook and Mr. Clyde's moose formed the basis of two of the criminal counts that were dismissed when Mr. Shankster pleaded guilty to the four charges discussed above. Mr. Fahrenbrook and Mr. Clyde both filed complaints with the Division as well.

Mr. Shankster disputed the testimony of Mr. Fahrenbrook and Mr. Clyde, arguing that no money ever changed hands, there were no written contracts for their hunts, and that Mr. Fahrenbrook and Mr. Clyde behaved badly when they were at the main camp, allegedly agitating the other clients and soliciting business for another guiding outfit. He also argued that the weather prevented him from retrieving their moose meat. Mr. Shankster's contentions, however, failed to address the fundamental premise at issue here: Mr. Fahrenbrook and Mr. Clyde were clients who were hunting under the auspices of Mr. Shankster's guiding service. The wastage of their moose, therefore, was his responsibility. More likely than not, his failure to fly back to the Moose Lake site to retrieve their moose meat was due to him being overtaxed by the demands of his other clients, the TV film crew, and the build project.

This decision finds that the Division established, by a preponderance of the evidence, that Mr. Shankster failed to salvage and committed waste of the moose harvested by his clients Mr. Fahrenbrook and Mr. Clyde. Because these allegations are not included in the counts of the Accusation, they do not form the basis for any separate disciplinary recommendations. However, they are considered below in the analysis of what discipline is appropriate for those counts that were raised in the Accusation and proven by the Division in this proceeding.

4. Mr. Shankster's claim that he was unfairly targeted by Troopers

Mr. Shankster responded to the Division's evidence of his 2014 violations by arguing that the Alaska Wildlife Troopers unfairly targeted his guiding operation that season, essentially pursuing a vendetta against him. He presented evidence that the Troopers, particularly Trooper Gibbens, dropped in on his guides and spike camps far more frequently in 2014 than they had in

⁴² Gibbens testimony; AR 000073.

prior years. He also presented evidence that, in his characterization, showed that trooper Gibbens intimidated packers and guides and “ran off” his employees.

Mr. Shankster’s arguments along these lines miss the mark. Trooper Gibbens testified that his investigation of Mr. Shankster’s guiding operation in 2014 was the largest investigation he had conducted, involving more wasted game meat and other violations than he had ever seen before. It is inevitable that when a guiding operation is under active investigation, tensions may run high and the guides under investigation may feel “targeted.” An active criminal investigation by definition requires actions that will feel intrusive and unreasonable to the person being investigated. In short, no credible or persuasive evidence was presented of a vendetta against Mr. Shankster, or of any unethical or overzealous behavior on the part of Trooper Gibbens.

D. 2016 violation (David Knight complaint)

In 2016 Colorado resident David Knight complained to the Division that Mr. Shankster had breached his contract for a guided caribou hunt. Mr. Knight testified at the hearing in this matter. He explained that he contracted for a caribou hunt from September 11 through September 20, 2016. He also obtained a tag for black bear. He flew into Mr. Shankster’s basecamp on September 12, it being too windy to land on September 11. He waited for three days at base camp; Mr. Knight believed that this was due to a lack of a guide to take him out, rather than due to the weather. Then Mr. Shankster flew him to the Dalzell spike camp on September 15, but he left him there to hunt by himself. While at the spike camp, Mr. Knight spotted a black bear, stalked it and took a shot at it, but missed. Mr. Knight stated that Mr. Shankster told him he could hunt on his own at the spike camp for a couple of days, then he would come back and take Mr. Knight to another area where there would be caribou. Mr. Shankster came back and picked up Mr. Knight after four days, on September 19, and took him back to base camp. Later that day Mr. Shankster told him it was too windy to fly him anywhere else. That concluded his hunting experience with Mr. Shankster, as the season was ending on September 20.⁴³

Mr. Knight sued Mr. Shankster in small claims court in Colorado, alleging breach of contract for a guided caribou hunt. The court ruled in Mr. Knight’s favor, awarding him the maximum amount allowed under Colorado small claims rules, \$7,500, plus costs, for a total

⁴³ Knight testimony; *see* AR 000492-558.

amount of \$7,650.⁴⁴ A transcript of the small claims trial was admitted into evidence in this matter.⁴⁵ Mr. Shankster appealed the small claims decision, but the appellate court affirmed it.⁴⁶

It is noted for the record that a few days prior to the first day of the hearing in this matter, Mr. Shankster submitted a motion to strike Mr. Knight from the Division's witness list, based on alleged false statements Mr. Knight made to the Alaska Department of Fish and Game in connection with applying for a refund of the fee he had paid for a caribou locking tag. Mr. Shankster argued that the refund Mr. Knight received from Fish and Game played a major role in the Colorado small claims court's judgment against Mr. Shankster. Mr. Shankster's motion was denied on the record on October 29, 2018, because the issues raised in the motion were more appropriately raised in cross-examination of Mr. Knight and were not a basis for preventing Mr. Knight from testifying. In addition, a review of the small claims trial transcript reveals that the fact of Mr. Knight obtaining the refund for his caribou tag appeared to play a very small role, if any, in the trial court's decision. The key to the decision was that Mr. Knight never was "guided" while hunting for caribou. He never carried a rifle while accompanied by a guide, looking for caribou. At the hearing in this matter, Mr. Shankster did not seem to grasp the distinction between the issue raised by Mr. Knight's request for a refund, i.e., "did Mr. Knight hunt for caribou at all," and the issue raised in the breach of contract trial, i.e., "did Mr. Shankster provide a guided hunt for caribou to Mr. Knight."

The Division answered the second question above, establishing by a preponderance of the evidence that Mr. Shankster did not provide a guided hunt for caribou to Mr. Knight, and therefore he breached their contract. This was a violation of AS 08.54.710(a)(4).

Mr. Strout explained during his testimony in this case that the Division's case regarding Mr. Knight's complaint is still open. He stated that because Mr. Knight has been "made whole" by Mr. Shankster's payment of the Colorado judgment, he expects that the Division will issue a non-disciplinary letter of advisement to Mr. Shankster to close out Mr. Knight's case, as it did with Mr. Sanders' complaint for breach of contract.⁴⁷ The Division's counsel stated on the record that evidence concerning Mr. Knight's complaint was presented in this hearing in order to provide the Board with a full picture of Mr. Shankster's history of violations in determining the

⁴⁴ AR 000492.

⁴⁵ AR 000492-558.

⁴⁶ Shankster testimony; AR 000572.

⁴⁷ Strout testimony.

appropriate discipline to impose in this case. She gave assurances that there will be no “double-dipping” in the form of separate discipline imposed on Mr. Shankster pursuant to Mr. Knight’s complaint.

IV. Discussion

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. As noted at the outset, the Division’s Accusation is based solely on the four criminal convictions arising out of the 2014 incidents and entered in June 2018. The remaining incidents described above were outside the Accusation, and introduced for the more limited purpose of identifying the appropriate scope of discipline for the incidents in the Accusation, as opposed to forming the basis for further separate discipline.

Mr. Shankster argues that no discipline should be imposed, because the penalties imposed on him as a result of his criminal convictions were quite onerous and more than adequate punishment. Mr. Shankster was sentenced by the criminal court to 600 days in jail (570 days suspended, 30 days to serve); one year of probation; and a \$35,000 fine. The Division urges that the violations detailed above warrant license suspension, a significant fine, and a reprimand.⁴⁸

A. Disciplinary principles

When registered guides fail to meet the standard of care (as with waste of their clients’ game meat and trophies), 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 compliance and diligence are critical to the efficient regulation of the industry. When licensed guides violate guiding statutes and regulations and waste Alaska’s game resources, they impair the trust that is necessary to regulation of the industry. The record in this case establishes that Mr. Shankster failed to act in accordance with applicable laws, breached contracts with clients, and engaged in the waste of multiple game animals taken by his clients. The fact that Mr. Shankster has some clients who have enjoyed past trips with him and guides who think highly of him is not enough to outweigh the considerable evidence of violations during the 2014 fall season.

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⁴⁸ Division’s Post-Hearing Brief, p. 19.

B. The Board's sanctions matrix

Under AS 08.01.075(f), the 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.⁴⁹ Investigator Strout explained in his testimony that the matrix is used by the Division to attempt to ensure consistency in discipline imposed on licensees.

Whether the offense is a first, second, or third offense, 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 severe as permanent revocation. Additionally, the totality of circumstances in a particular case will necessarily have an impact on 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 a first-time offense of failure to report a violation of hunting or game laws (AS 08.54.720(a)(1)), the matrix recommends a fine of \$500-\$5,000, a reprimand, and up to two years of probation; for a second offense, the matrix adds a suspension of up to one year; for a third offense, it recommends a \$5,000 fine, 2-5 years suspension, up to five years of probation, and a reprimand.⁵⁰
- 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 recommends a \$1,000-\$4,000 fine, up to one year probation, and a reprimand; for a second violation, it doubles the “previous fine” and increases probation to up to two years; for a third offense, it adds a one year suspension and probation of up to five years.⁵¹

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 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.”⁵²

⁴⁹ Division's Guidelines and Precedence matrix, attachment 1 to Division's pre-hearing brief.

⁵⁰ *Id.*, p. 2.

⁵¹ *Id.*, p. 4.

⁵² *Id.*, p. 8.

In considering the application of the matrix to the facts of this case, it must be noted that the Division presented no testimony or legal authority to establish what exactly constitutes a “prior offense” for purposes of using the applying the guidelines offered by the matrix. Mr. Strout testified that “prior offenses” must be of the same type as the current offense when applying the matrix. But the question remains, what constitutes a prior offense? A prior OAH decision in a Board of Nursing case provides some guidance. In a case entitled *In re Small*, involving a nurse who had violated terms of a prior consent agreement, the decision held that a consent agreement could be deemed a “prior offense” under Board of Nursing regulations, if the agreement showed “that the respondent admitted to an offense or the board’s order component of the agreement includes a finding of violation.”⁵³ That decision can be read to require that there must be a regulatory board or court finding of a violation in order for an incident to constitute a “prior offense.”

Under such an interpretation, Mr. Shankster’s 2003 criminal convictions for his two 2002 violations would qualify as “prior offenses” for current offenses of similar types.⁵⁴ Similarly, the Board’s letter of advisement to Mr. Shankster regarding the Texas judgment for his 2008 breach of contract in the Sanders case would qualify as a “prior offense” for a current offense of a similar type.⁵⁵ However, the previously discussed 2014 offenses that were dismissed from Mr. Shankster’s criminal case would not qualify for consideration in applying the matrix, simply because they were not “prior” in time to the offenses on which the accusation is based, and because they have not been the subject of a “finding of violation” by the Board or a court of law. Similarly, Mr. Knight’s breach of contract from 2016 would not qualify, as it took place *after* the 2014 offenses cited in the accusation and it has not yet been found to be a violation.

C. Discipline sought by the Division

The Division urges that the Board find Mr. Shankster’s two violations of AS 08.54.720(a)(8)(A) cited in the accusation to be third and fourth offenses.⁵⁶ It argues that the

⁵³ OAH Case No. 09-0396-NUR (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=4911>).

⁵⁴ Again, these were a “hunt record” violation under 12 AAC 75.210 and an “unlawful possession” violation under 5 AAC 92.140(a), both of which can be construed as violations of AS 08.54.720(a)(8)(A) (unlawful “to commit or aid in the commission of a violation of this chapter, a regulation adopted under this chapter, or a state or federal wildlife or game statute or regulation”).

⁵⁵ A breach of a hunt contract is a violation of AS 08.54.710(a)(4) and thus can also be construed as a violation of AS 08.54.720(a)(8)(A).

⁵⁶ Division’s Post-Hearing brief, p. 15.

Board should impose a two-year suspension, five years of probation, a public reprimand, and an \$8,000 fine for these two violations.⁵⁷

As to Mr. Shankster's two violations of AS 08.54.710(a)(1) cited in the accusation, the Division argues that the Board should consider these to be seventh and eighth offenses.⁵⁸ The Division argues that "the Board must strike a balance between myopically viewing these convictions as a first offense and piling on."⁵⁹ It urges the imposition of a two-year suspension (to run concurrently with the above suspension), five years of probation, a public reprimand, and a \$10,000 fine.

Taken all together, the Division's proposes the following discipline:

1. An \$18,000 fine with \$9,000 stayed;
2. A two-year suspension with one year stayed;
3. Probation for a minimum of five years; and
4. A public reprimand.

D. What discipline is appropriate under the facts of this case?

The testimony of Investigator Strout indicated that, to the best of his knowledge, there have been no prior cases of discipline imposed by the Board on a licensee with a similar history and/or pattern of violations as those committed by Mr. Shankster. However, one of the Board's prior decisions involving a guide with criminal convictions for guiding violations does provide some guidance. In a 2009 decision, *In re Smith*,⁶⁰ the matter came before the Board several years after Mr. Smith's criminal violations and convictions had occurred. During those years, Smith, unlike Mr. Shankster, had continued to guide without further incident. Like Mr. Shankster, Mr. Smith's criminal violations did not result in a court-imposed suspension. Mr. Smith's violations involved improper land use (all guiding violations) which the Board characterized as "a violation of public trust."⁶¹ The Board imposed disciplinary sanctions focused on deterring others from similar conduct and intended to reaffirm professional standards of behavior. The sanctions selected by the Board to fulfill this purpose were:

1. A nine-month suspension during which Mr. Smith was not to be involved in the guiding/transporting industry in any form;

⁵⁷ *Id.*, pp. 15-16.

⁵⁸ *Id.*, p.16-17.

⁵⁹ *Id.*, p. 17.

⁶⁰ *In re Smith*, OAH 08-0424-GUI (March 2009).

⁶¹ *Id.* at 20.

2. A \$5,000 fine;
3. After the suspension was complete a five-year probationary period during which time any violation would result in a five-year revocation;
4. A written reprimand; and
5. Education on the ethics of guiding.

Mr. Shankster's overall pattern of violations is more egregious than the guide in *In re Smith*, particularly when considered in the broader context of his prior violations, his contemporaneous 2014 incidents, and his 2016 breach of contract with Mr. Knight. However, the Division's proposed discipline is overly harsh. It attempts to apply the guidance of the matrix, but does so based on an analysis that appears to consider any incident in Mr. Shankster's record as a prior offense, whether or not it has been branded a violation by the Board or a court of law.

Taking all of these considerations into account, this decision recommends that the Board view Mr. Shankster's two AS 08.54.720(a)(1) ("failure to report") offenses cited in the accusation as first offenses, as none of his prior offenses are of a similar type. It is recommended that the Board view his two AS 08.54.720(a)(8)(A) offenses ("knowing commission of violations of the Board's statutes and regulations") cited in the accusation as third offenses.

Applying the guidance of the matrix, therefore, the discipline for each of the AS 08.54.710(a)(1) offenses should be the maximum fine allowed, \$5,000 (with half stayed), one year of probation, and a reprimand. The discipline for each of the AS 08.54.720(a)(8)(A) violations should be the maximum fine allowed, \$5,000 (with half stayed), a one-year suspension, four years of probation, and a reprimand. In total, the recommended discipline for the four violations identified in the Division's Accusations is:

1. A \$20,000 fine with \$10,000 stayed;
2. A one-year suspension;
3. A four-year probationary period, during which time any violation of a hunting or guiding statute or regulation will result in the stayed portion of the fine becoming immediately due and payable; and
4. A public reprimand.

IV. Conclusion

The Division met its burden of proving that Mr. Shankster committed four violations of guiding statutes in 2014, as well as other violations in 2002, 2008, 2014, and 2016. The totality

of the circumstances supports imposition of the following discipline for the four violations identified in the Accusation: (1) a civil fine in the amount of \$20,000 with \$10,000 stayed, (2) a one-year suspension, (3) four years of probation, and (4) a public reprimand.

DATED this 29th day of March 2019.

By: Signed
Signature
Andrew M. Lebo
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.]

Adoption

The Big Game Commercial Services Board adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this _____ day of _____, 2019.

By: _____

Signature

Name

Title

Non-Adoption Options

A. The undersigned, on behalf of the Big Game Commercial Services Board and in accordance with AS 44.64.060, declines to adopt this Decision and Order, 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: _____

Signature

Name

Title

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

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: _____

Signature

Name

Title

C. The undersigned, on behalf of the Big Game Commercial Services Board and 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: _____
Signature

Name

Title

D. The undersigned, on behalf of the Big Game Commercial Services Board and 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: _____
Signature

Name

Title

Modification 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 including said revision as its Final Administrative Decision in this matter:

Pursuant to AS 44.64.060(e)(3), the Board adopts Administrative Law Judge's proposed decision dated March 29, 2019, with the following modifications to the discipline listed on page 21 of the decision, imposed pursuant to the Board's authority under AS 08.54.710:

1. A \$20,000 fine with \$10,000 stayed; the stayed portion of the fine will become due and payable if the unstayed portion is not paid by January 2025;
2. Immediate revocation of respondent's license; respondent may apply again for a guide license after January 1, 2025; and
3. A public reprimand.

The discipline listed in this modification and adoption represents the totality of discipline imposed by the Board 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 2 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.]