

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

In the Matter of)	
)	
JERRY CATES)	OAH No. 19-0192-GUI
_____)	Agency No. 2017-000993

DECISION

I. Introduction

Jerry Cates holds Assistant Guide License GUIA 7591. The Division of Corporations, Business and Professional Licensing initiated an action for disciplinary sanctions against Mr. Cates’s license after learning that he had failed to disclose an extensive criminal record when applying for that license. After the Big Game Commercial Services Board rejected a consent agreement, the Division filed a formal Accusation and a hearing was held.

This decision concludes that Mr. Cates’s omissions, while significant in scope, were more likely than not the result of a misunderstanding on his part about what needed to be disclosed. While it is appropriate to impose disciplinary sanctions against the license based on Mr. Cates’s negligent omissions, the evidence as a whole does not support either revocation or suspension.

II. Facts

A. Background

Jerry Cates grew up mostly in Texas but spent several years of his childhood in Alaska, and ultimately moved to Alaska in 2010. After a young adulthood marked by petty crime and generally bad choices, he has, over the last decade, settled into a markedly different, stable lifestyle, the centerpiece of which has been his work since 2015 as a licensed assistant guide.

Mr. Cates has no formal education beyond high school. He is not a sophisticated businessperson. Prior to beginning his guiding career, he supported himself through odd jobs and manual labor – basically, providing the services of “a big strong fellow with a pick-up truck” – as well as selling his blood plasma “thousands” of times.¹

In early adulthood, however, Mr. Cates also made a series of “huge mistakes” that led to multiple criminal convictions. There were two misdemeanor convictions in the late 1990s,

¹ Cates testimony.

followed by six convictions, five of them felonies, in 2008. The 2008 convictions led to roughly two years of imprisonment in a Texas penitentiary.²

Not long after his release, Mr. Cates relocated to Alaska.³ Spending time in Alaska as a child had led him to “fall in love with the wilderness and wildlife,” and he recounts having “always known” he would return.

Mr. Cates learned to hunt as a young boy, and has hunted extensively in the Lower 48. He first hunted big game in Alaska in 2006.⁴ When he relocated to Alaska, he continued to hunt recreationally, but for years assumed his earlier felonies would be a disqualifier to any career in the industry.⁵

As he matured and became more interested in a stable lifestyle to support a family, however, Mr. Cates began exploring the possibility of a career in guiding. During the summer of 2014, he and his girlfriend researched the requirements for obtaining certification in Alaska. To his “delight and amazement,” they concluded that his prior felonies would not disqualify him from a license.⁶

“Elated” at the discovery that his felonies were not automatic disqualifiers for a guide license, Cates reached out to Art Hirschel, an experienced registered guide he had met while hunting recreationally several years earlier. With Hirschel’s encouragement about an apprenticeship, he ultimately decided to seek an assistant guide license.⁷

B. Cates’s assistant guide application

Mr. Cates first applied for an assistant guide license in March 2015.⁸ Under the heading “Disciplinary/ Investigation/ Profession Questions” the assistant guide license application contains a series of four yes/no questions inquiring about criminal convictions, investigations, and outstanding judgments.⁹ Two of these, questions 3 and 4, use the expansive modifier “in any state, jurisdiction, or in Canada.”¹⁰ The other two questions do not contain this language. At issue here is Question 1:

² Agency Record (R.) 60, 61, 64-79, 77, 80-81, 86-88; Cates testimony

³ See R. 110.

⁴ Cates testimony; Ex. C, p. 3.

⁵ Cates testimony.

⁶ *Id.*

⁷ In August 2012 Mr. Cates had had a chance meeting with guide outfitter Art Hirschel at a roadhouse on the Denali Highway, and Mr. Hirschel had volunteered to help him after a successful grizzly bear hunt.

⁸ Ex. F.

⁹ Ex. F, pp. 1, 3.

¹⁰ Ex. F, p. 1.

Have you ever been convicted of a crime or are you currently charged with committing a crime? For purposes of this question, ‘crime’ includes a misdemeanor, felony, or military offense, including, but, not limited to, driving under the influence (DUI) or driving while intoxicated (DWI), driving without a license, reckless driving, or driving with a suspended or revoked license. “Convicted” includes having been found guilty by verdict of a judge or jury, having entered a plea of guilty, nolo contendere or no contest, or having been given probation, a suspended imposition of sentence, or a fine.¹¹

For reasons he now admits were faulty, Mr. Cates incorrectly read Question 1 as being limited to Alaska-based offenses.¹² And, having no Alaska offenses, he checked “no.”

In fact, however, the question is not self-limited to Alaska offenses. And, had he read the question without that limitation, Mr. Cates would have been compelled to disclose the following criminal history:

Date of Conviction	Criminal charge	Classification	Sentence
October 1997	Driving while license suspended/invalid	Misdemeanor	Fine: \$100 ¹³
Aug. 6, 1999	Theft of property, \$50 to \$500	Class B Misdemeanor	Fine: \$400 ¹⁴
Jan. 29, 2008	Theft of property, \$1,500 to \$20,000	Felony	Jail: 14 months ¹⁵
	Unlawful carrying weapon	Class A misdemeanor	Jail: 30 days ¹⁶
Feb. 13, 2008	Burglary of habitation	Felony 2nd degree	Jail: 2 years ¹⁷
	Burglary of building	Felony	Concurrent ¹⁸
May 12, 2008	Theft of Property, \$1,500 - \$20,000	Felony	Jail: 10 months ¹⁹
	Unauthorized use of vehicle	Felony	Concurrent ²⁰

11 Ex. F, p. 1.
12 Cates testimony.
13 R. 76-77.
14 R. 61, 80-81.
15 R. 63-66.
16 R 86-87.
17 R. 66.
18 R. 67.
19 R 67-68, 88-89.
20 R. 68-69, 88-89.

Mr. Cates did not disclose this history, however. He received his assistant guide license in December 2015.

C. Assistant guiding career

Guiding in Alaska – assisting multiple outfitters on bear, sheep and moose hunts – has been Mr. Cates’s sole means of income since 2015.²¹ As an assistant guide, Mr. Cates has been well liked by both clients and employers. The record in this matter includes client questionnaires obtained by the Division in the course of his 2017 Registered Guide application.²² These speak favorably of Mr. Cates, with responses describing him as safe, ethical, hard-working, and knowledgeable. Handwritten comments reference Mr. Cates’s work ethic, honesty, calm demeanor, and positive attitude.²³

A July 2017 evaluation by Registered Guide Art Hirschel attested that Mr. Cates had worked for him in the field on guided hunts for a total of 50 days. Mr. Hirschel ranked Mr. Cates as “excellent” in his knowledge of hunting and guiding regulations, ethics, safety procedures, and firearm use and safety, among other categories.²⁴

Mr. Cates also earned the respect of Division Investigator Lee Strout because of his conduct in reporting an unscrupulous operator.²⁵ In April 2017, Mr. Cates had accepted a position doing work for Darwin Vanderesch, whom he believed to be a registered guide. When he arrived at the remote location, the circumstances raised his suspicions, and he learned that Mr. Vanderesch’s certification had been revoked.²⁶ Concluding the situation “has stink written all over it,” Mr. Cates contacted the Division to make a report. He also asked Investigator Strout’s advice about what to do. When Investigator Strout recommended that “it was probably in his best interests to not work for” Mr. Vanderesch, Mr. Cates took that advice – accepting a loss of income rather than risk becoming entangled in a potentially unlawful situation. Mr. Cates testified that he reported the situation “because it’s the right thing to do,” and also because, having turned his life around, he “didn’t want to get caught up with any illegal activity.”²⁷

Investigator Strout believed that Mr. Cates’s conduct – in taking the time to report his concerns, and in declining to work for an operator about whom he had concerns – spoke well for

²¹ Ex. B, Ex. H, p. 1.

²² Ex. B. (R. 40-55).

²³ Ex. B, pp. 1, 6, 11, & 12.

²⁴ Ex. C, p. 10.

²⁵ Testimony of Lee Strout.

²⁶ See *In re Vanderesch*, OAH No. 14-1498-GUI (Alaska Big Game Commercial Services Board 2015) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2036>).

²⁷ Cates testimony.

him. At the hearing in this matter, Investigator Strout described himself as having “no negative feelings” towards Mr. Cates, and reiterated that his first impression, based on Mr. Cates’s April 2017 report, was “very positive.”²⁸

D. 2017 Registered Outfitter Examination application

On August 7, 2017, Mr. Cates submitted an application for the Registered Guide Outfitter Examination.²⁹ As with the assistant guide application, Question 1 of that application asks:

Have you ever been convicted of a crime or are you currently charged with committing a crime? For purposes of this question, ‘crime’ includes a misdemeanor, felony, or military offense, including, but not limited to, driving under the influence (DUI) or driving while intoxicated (DWI), driving without a license, reckless driving, or driving with a suspended or revoked license. “Convicted” includes having been found guilty by verdict of a judge or jury, having entered a plea of guilty, nolo contendere or no contest, or having been given probation, a suspended imposition of sentence, or a fine.³⁰

On his August 2017 application, Mr. Cates answered this question “yes.”³¹

This is the same question to which Mr. Cates answered “no” on his 2015 assistant guide application. Mr. Cates attributes his realization about the scope of Question 1 (*i.e.*, asking about all convictions, not just those in Alaska) to an increased level of care: “By this time, I was used to being more thorough when it comes to paperwork.”³² Thus Mr. Cates noticed in 2017 what he had failed to notice in 2015: the need to disclose his out-of-state criminal record.

The application requires that, if a yes answer is given, the applicant must provide (1) a full explanation of the circumstances of the event(s) in their own words, as well as (2) any/all applicable supporting documents, such as court records, charging documents, judgments, et cetera.³³ Mr. Cates submitted with his application a single-spaced typewritten accounting of his criminal history but did not initially provide the supporting documents. In the written narrative that accompanied his application, Mr. Cates explained that this was because he had not expected any questions on the application about criminal history outside of Alaska, and now – upon realizing the scope of the question – did not believe he had sufficient time before the application

²⁸ Strout testimony.

²⁹ Ex. C.

³⁰ Ex. C, p. 2.

³¹ Ex. C, p. 2. Notably, Mr. Cates had, in the interim, twice renewed his Assistant Guide License application. The renewal form, however, only asks whether the licensee has been convicted of a crime “since the date of [his or her] last application.” See Ex. D, p. 2 (Dec. 2017 renewal application) Ex. E, p. 3 (Dec. 2015 online renewal).

³² Cates testimony.

³³ Ex. C, p. 2.

deadline to submit all the required documents associated with his Texas criminal history.³⁴ He did, however, offer “an explanation in my own words.”³⁵

Mr. Cates then described a tumultuous period in his late teens and early twenties when he was “sort of a typical young man with an attitude” and “made very poor decisions and choices,” as a result of which he has “a criminal record/history in the state of Texas.”³⁶ Cates provided a fluid, difficult-to-follow narrative of his criminal convictions, insisting that these were the result of youthful immaturity and no longer reflect who he is as a person. In addition to listing all of his convictions (including several felonies), Mr. Cates listed offenses that had been charged and later dropped, as well as deferred adjudications which do not count as convictions, indicating that he “just wanted to cover all of it.”³⁷

Mr. Cates urged that he was a changed man. After serving a two-year prison sentence in the Texas Department of Corrections and Justice, Cates contended, “I straightened up completely after that and have never looked back since, nor will I ever make any sort of bad decision or choice that would lead to anything remotely like that ever again, period.” He noted that his record had been clean since that time, saying “I was young and I was stupid and I have learned my lesson. I learned it more than a decade ago.” He added, “some people, me being one of them, can change, and change for the better. I wish I had done so many things differently in my past but of course they are impossible to undo now.”

E. Investigation and consent agreement

Mr. Cates’s “yes” answer on the Registered Guide Outfitter exam application triggered a “yes answer referral” to Investigator Strout.³⁸ As noted, Investigator Strout was familiar with Mr. Cates due to Mr. Cates’s reporting the unlicensed outfitter the previous April. Upon receiving the “yes answer referral,” Investigator Strout was concerned because he did not recall previously conducting a yes answer investigation on Mr. Cates, leading him to suspect, correctly, that Mr. Cates had not previously disclosed his criminal history when applying for licensure.³⁹

At all times since the investigation began, Mr. Cates has maintained that the reason he had not previously disclosed his criminal history was that he had – erroneously, he now concedes

³⁴ Ex. C, p. 5.

³⁵ Ex. C, p. 5.

³⁶ Ex. C, p. 5.

³⁷ Ex. C, p. 5.

³⁸ Strout testimony; Ex. M, p. 1.

³⁹ Strout testimony.

– read the application questions as being limited in scope to offenses that occurred in Alaska.⁴⁰ Throughout his “extensive conversations” with Mr. Strout over the course of the investigation, Mr. Cates consistently maintained that, “from the get go,” he had (mistakenly) read Question 1 to refer only to convictions in Alaska.⁴¹ Mr. Cates has noted that both the criminal background check and wildlife violation background check he was required to obtain at the time of his 2015 application were limited to Alaska, and has speculated that this limitation, and his “haste” to complete his application, led him to mistakenly conclude that Question 1 was limited to Alaska as well.⁴² Once he understood that Question 1 referred to *all* convictions, Mr. Cates disclosed his convictions – as well as also disclosing matters he was not required to disclose.⁴³

Consistent with Board and Division practice, Investigator Strout contacted a reviewing board member for a recommendation about the appropriate course of action with regards to what discipline would be appropriate in Mr. Cates’s situation. However, that reviewing Board member asked that the matter instead be presented to the entire Board. Investigator Strout then presented the matter to the entire Board in executive session. The outcome of that meeting was that Investigator Strout was to pursue a consent agreement with Mr. Cates along terms identified by the Board.⁴⁴

On February 26, 2018, Investigator Strout sent Mr. Cates a proposed consent agreement conveying the terms the Board had identified. The proposed agreement provided for a 3-month off-season suspension, a \$5,000 fine with \$2,500 suspended, three years of probation, and a board reprimand.⁴⁵

Mr. Cates accepted these terms, returning a signed consent agreement on March 16, 2018. But when the signed agreement was presented to the Board at its March 20, 2018 meeting, the Board rejected it, and instead directed the Division to pursue revocation of Mr. Cates’s license.⁴⁶

The Board that rejected the consent agreement was differently composed than the Board that had originally identified its terms. Specifically, four board members present at the March

⁴⁰ Strout testimony; Cates testimony; Ex. H.

⁴¹ Strout testimony.

⁴² Ex. H, p. 2.

⁴³ Cates testimony; Ex. C, pp. 5-6.

⁴⁴ Strout testimony; Ex. M, p. 3.

⁴⁵ Strout testimony; Ex K; Ex. M, p. 3.

⁴⁶ Strout testimony; Ex. M, p. 3.

meeting were either new to the Board since the December 2017 meeting, or had been absent at that meeting.

F. Mr. Cates's refusal to surrender his license

In a phone call on March 27, 2018, Investigator Strout informed Mr. Cates of the Board's decision. Mr. Cates was surprised and disappointed that, as he saw it, "the Board would offer one thing, but then go back on it."⁴⁷ The two had a lengthy discussion about possible options and outcomes, including various advantages and disadvantages of voluntarily surrendering a license versus going through an evidentiary hearing on an accusation.

On May 1, 2018, Investigator Strout wrote to Mr. Cates that the Board had rejected the proposed consent agreement and that "the Division/Board is requesting you immediately surrender your Alaska Assistant Guide License GUIA7591."⁴⁸

Mr. Cates, after considerable deliberation, elected not to do so.⁴⁹ In a July 9, 2018 letter explaining that decision, he again insisted that his failure to disclose his criminal background had been based on a misunderstanding, not any intent to deceive. He also described feeling that he had had "the rug pulled out from under [him], so to speak," with the Board's change in course between the December 2018 and March 2019 meetings.

I really thought that once this matter was looked into by all the powers that be, that it would become clear that I did not mean to hide anything at all because it is clear that I disclosed everything on my 2017 application and I thought that would be the end of the investigation and everything would be ok. I cannot go back in time and change my mistaken interpretation of that question I answered incorrectly in 2015 but I can tell you, or anybody that it was not intentional and it haunts me on a daily basis. I know that I can be a great guide and that I can do positive things for the guiding industry and for our great state of Alaska and for many people in this industry.⁵⁰

Mr. Cates noted his affinity for Alaska and for the guiding profession, and spoke of a desire "to continue guiding and facilitat[ing] many future clients in enjoying our wonderful state and its amazing and unique wilderness and wildlife."⁵¹ While acknowledging that he acted negligently and that some level of sanction was warranted, Mr. Cates urged that revocation was "much too harsh a penalty", and urged that "this stupid careless clerical error" should not end his career.⁵²

⁴⁷ Ex. M, p. 4.

⁴⁸ R. 118.

⁴⁹ Cates testimony; Ex. M, pp. 4-5.

⁵⁰ Ex. H, p. 3.

⁵¹ Ex. H, p. 2.

⁵² Ex. H, p. 1.

He also enclosed a letter from Art Hirschel, who noted he had worked with many assistant and registered guides over his 20 years as a registered guide, and had known Mr. Cates closely for four years. Mr. Hirschel's June 10, 2018 letter described Mr. Cates as "hardworking, trustworthy[,] conscientious [and] honest," and expressed his view that Mr. Cates "did not knowingly or intentionally falsify the assistant guide application." Mr. Hirschel urged that revoking Mr. Cates's assistant guide license was an "overkill punishment for an unintentional clerical mistake."⁵³

Mr. Cates having declined to surrender his license, the Division set about preparing a formal Accusation to initiate disciplinary proceedings.⁵⁴

G. Hirschel/Cates client taking a sublegal ram

In the meantime, but unknown to the Division until several months after Mr. Cates's July 2018 letter, another issue arose concerning Mr. Cates's assistant guide license. On August 15, 2017, Mr. Cates was serving as an assistant guide a sheep hunt for one of Art Hirschel's clients. The client shot a Dall sheep ram.

The hunters had been observing the ram at length, and Mr. Cates had concluded – and advised the client – that it was a legal ram. All other guides and hunters involved in the hunt apparently likewise believed that the ram was legal. However, when Mr. Hirschel brought the head and horns to the Department of Fish and Game office for inspection and sealing, it was confiscated on suspicion of being sublegal.

The basis for the confusion about the ram's age lies the different methods used to determine age. As is apparently common practice in Game Management Unit 13, Mr. Cates had determined the age of the ram based on the number of growth or annuli rings, rather than based on the degree of curl.⁵⁵ Mr. Hirschel had trained Cates on this method, having found, over decades of hunting sheep in GMU 13, that many rams in that area never achieve a full circle, even at nine or ten years old. Because of this apparent "genetic propensity for smaller horns," it has long been Mr. Hirschel's practice to age sheep by counting annuli instead of by measuring the degree of curl, and he had had provided detailed training Mr. Cates on this method.⁵⁶

⁵³ Ex. G.

⁵⁴ Ex. M, p. 5.

⁵⁵ Hirschel testimony; Cates testimony.

⁵⁶ Counsel for the Division suggested this method was not permissible under the regulation, noting that 5 AAC 85.055(a)(4) only allows taking a "ram with full-curl horn order larger." But 5 AAC 92.990(a)(30) defines "full-curl horn" to mean either that (A) one of the horns has grown through 360 degrees of a circle, (B) both horn tips are broken, "or (C) the sheep is at least eight years of age as determined by horn grown annuli."

In the case of the August 2017 hunt, neither Hirschel nor Cates had any concern about the ram in question. However, when the Troopers evaluated the ram, they determined that one of the rings counted by Cates and his client was a “false annuli,” and that the ram was therefore only seven years old, rather than eight. Mr. Cates and Mr. Hirschel were both very surprised by this finding. Both believed that the ram was legal, and maintained this belief even after the skull was confiscated. Mr. Cates anticipated that “a biologist” would review the skull and agree with him that the ram was legal.

On January 19, 2018, however, he was charged with violating 5 AAC 85.055(a)(4), the regulation governing Dall sheep seasons and big limits. Mr. Cates appeared in court by phone in February 2018, without counsel. He pleaded guilty to the misdemeanor violation of 5 AAC 85.055(a)(4) and was fined \$250.⁵⁷

It was only after he began inquiring of potential legal counsel in the licensing action in late 2018 that Mr. Cates understood the need to report the sublegal ram violation to the Board.⁵⁸ He sent a certified letter to Investigator Strout the following day, as follows:⁵⁹

To Mr. Lee Strout and/or the Alaska Commercial Services Board and whom it may concern:

My name is Jerry Cates and I am a licensed assistant hunting guide here in Alaska and I am disclosing that in August of 2017 during a contracted hunt I was acting as an assistant hunting guide on a hunt in GMU 13 and the client I was guiding harvested a Dall Sheep Ram that turned out to be illegal according to the state of Alaska. It was subsequently confiscated at the Delta Junction Fish & Game office by Alaska State Trooper Duell in early September 2017.⁶⁰

⁵⁷ R. 230.

⁵⁸ Cates testimony. Mr. Cates described having been confused about the distinction between Mr. Strout’s investigative role and the Troopers’ investigative role in wildlife matters, testifying that “they all ran together in my mind.”

⁵⁹ Cates testimony; R. 231.

⁶⁰ R. 231.

H. Accusation and hearing

On February 19, 2019, the Division filed an accusation against Mr. Cates alleging that his failure to disclose his criminal history on his Assistant Guide License application was either negligent or intentional misrepresentation. The week before the scheduled hearing on this accusation, the Division filed an amended accusation adding two additional counts based on the issue of the sublegal ram.

The hearing was held on December 10, 2019. The Division was represented by Assistant Attorney General Harriet Milks. Investigator Strout attended the hearing on the Division's behalf, and testified. Mr. Cates was represented by Kevin Fitzgerald. Mr. Cates attended the hearing and testified on his own behalf. Testimony was also taken from Mr. Cates's "former employer and mentor," Arthur Hirschel. The record closed on December 10, 2019.

III. Discussion

Of the four counts in the accusation, Mr. Cates admits to three. He admits to having negligently omitted material facts from his 2015 assistant guide license application. And, more recently, he admits to having been convicted of guiding on a hunt where a client took a sublegal ram, and to not having reported that conviction to the board within 30 days. But the central issue in this case is whether Mr. Cates intended to deceive the Board when he failed to disclose his criminal history in his 2015 application. For the reasons discussed below, the evidence as a whole does not support the conclusion that Mr. Cates acted with the intent to deceive. That conclusion, in turn, informs the appropriate level of discipline in this case.

A. Counts relating to the 2015 application

Mr. Cates admits Count I of the Accusation – that he negligently omitted a material fact on his assistant guide license application. The central issue in dispute in this case is Count II – whether Mr. Cates's omissions were intentional as opposed to merely negligent.⁶¹ The Division did not meet its burden of proving that Mr. Cates more likely than not intended to deceive when he answered no on Question 1 of his 2015 application.

The significance of the distinction cannot be overstated. If an applicant has been negligent regarding a material fact on an application, the Board has the discretion to impose

⁶¹ Compare AS 08.54.710(a)(3) (negligence) with AS 08.54.710(c) (fraud or deceit).

disciplinary sanctions.⁶² But if a licensee obtained the license through fraud or deceit, the Board must permanently revoke the license.⁶³

Appropriately to the consequences of such a finding, the Board has historically undertaken “a cautious and careful approach to making a finding of fraud or deceit.”⁶⁴ Here, particularly when viewed through the “caution and care” with which the Board rightly treats such questions, the evidence supports Mr. Cates’s claim that he did not intend to deceive the Board, but instead misunderstood the question due to carelessness.

Mr. Cates is not the first guide board applicant to have, in haste, confused the eligibility requirements for licensure (*i.e.*, disqualifying convictions) with the broader criminal history questions posed on the licensing application.⁶⁵ In prior cases, the Board has declined to assume that such omissions were intentional, or to infer deceit without some evidence of fraudulent intent.

At hearing, the Division argued that it was illogical for Mr. Cates to fail to realize his felonies were relevant to licensure, and so he must have been intentionally trying to hide them. But Mr. Cates never claimed the felonies were irrelevant. He testified that (1) at some point he realized that despite the felonies he could apply for licensure, (2) all of the background check authorizations he had to sign were limited to Alaska, and (3) he erroneously read Question 1 as likewise only asking about Alaska. The Division’s point – that the felonies would have been relevant to licensure – is simply not relevant to whether Mr. Cates intentionally tried to hide them from the Division.

While there is of course no way to know, definitively, what Mr. Cates was thinking when he filled out his original application in 2015, the evidence, taken as a whole, suggests it is far

⁶² AS 08.54.710(a).

⁶³ AS 08.54.710(d).

⁶⁴ *In re Skafelstad*, OAH No. 13-0661-GUI (Alaska Big Game Comm. Serv. Bd. 2014), at 18 (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2034>); *see also In re Lyon*, OAH No. 11 0272-GUI (Alaska Big Game Comm. Serv. Bd. 2011) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2033>); *In re Fernandez*, OAH No. 09-0395-GUI (Alaska Big Game Comm. Serv. Bd. 2009) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2028>). In its prehearing brief the Division characterizes these decisions reflecting “OAH [being] very generous toward licensees” on issues of intent. Division’s Prehearing Brief, pp. 5-6. But as the Division’s counsel is well aware, the decisions in question are final agency decisions by the Big Game Commercial Services Board itself. While the matters were, like this one, heard by an OAH administrative law judge, the decision process belongs to the Board (indeed, in *In re Lyon*, the Board revised the discipline from what had been proposed by the administrative law judge, while expressly adopting the remainder of the decision). Thus, it is this Board itself which has historically been cautious in ascribing deceptive intent.

⁶⁵ *See, e.g., In re Lyon* at 3-4.

more likely than not that he was acting negligently, rather than intending to deceive the Board. That evidence includes:

- Mr. Cates has been consistent in his explanation throughout this process.
- Mr. Cates's reading of Question 1, while wrong, was not entirely illogical. Two of the four questions in that section include a modifier to ask whether the issue identified exists in Alaska "or in any other state or jurisdiction." It is not entirely unreasonable to assume that the questions without the "or any other state" modifier might have been only referring to Alaska.
- Mr. Cates believed, correctly, that his prior felonies in Texas were not bars to licensure. Having determined that, it was not entirely unreasonable (although it was wrong) to not realize he needed to list them given his incorrect reading of the question.
- Mr. Cates's approach to the Registered Guide Exam application supports his version of events. When he submitted that application, he checked yes to Question 1. His narrative explains that he has not included documents about his Texas criminal history because he was not expecting the application to include questions about convictions outside of Alaska. By the time he realized the scope of Question 1 as including all convictions anywhere, it was too close to the application deadline to obtain records from Texas.

This explanation is consistent with his long-time and unwavering explanation that, when he submitted his Assistant Guide application, he interpreted Question 1 as only pertaining to Alaska convictions. That interpretation would have led to an expectation on the registered guide application that any criminal history at issue would be limited to Alaska.

And once Mr. Cates realized he was wrong about the registered guide application, he readily took whatever steps were necessary to gather documents for the Division to review.

- Lastly, at hearing, Mr. Cates did not appear angry, defensive, or deceptive. He took responsibility for his negligence, and presented as a frank and forthright witness who wanted to put this matter behind him and move on with his career.

It is difficult to prove intent to deceive. The Division did not meet its burden of doing so in this case.

B. Counts relating to the sublegal ram

It is undisputed that Mr. Cates was an assistant guide on a hunt during which a client shot what turned out to be a sublegal ram, that he was ultimately convicted of a regulatory violation based on those facts (Count III), and that he did not report the conviction to the Board within thirty days (Count IV). The violation was a strict liability one. The failure to report was due to Mr. Cates not realizing he was required to do so, although, as soon as he became aware of the need to report the Trooper's investigation, he did so. When he did finally make a report to the

Board, Mr. Cates reported only the investigation, not the actual conviction, although this discrepancy appears to have stemmed from his broader confusion about the reporting requirements associated with the violation. In the grand scheme of matters governed by this Board, Counts III and IV are fairly minor technical violations.

C. What sanction, if any, is warranted in this matter?

Having concluded that Mr. Cates committed acts for which discipline can be imposed, the Board must decide what level of discipline, if any, is appropriate. As a threshold matter, it is obvious that the discipline in this case is driven by the 2015 omission, not the sublegal ram. As both the sublegal sheep offense and the failure to report it are minor, technical violations, it would not be appropriate to bootstrap a harsher sanction onto the 2015 omission based on the sublegal sheep incident.

1. Discipline for Negligent Misrepresentation

The negligent misrepresentation or omission of a material fact on an application for licensure is a violation of AS 08.54.710(a)(3). Mr. Cates made a serious error in failing to disclose his criminal history. Had he done so, his initial application would have been subjected to vigorous vetting by Division investigators before any licensure was granted. He should have realized that the question asked for all criminal history, and his failure to realize this and provide the information later provided with his registered guide application was negligent.

Prior to and since self-reporting, Mr. Cates has shown himself to be a hardworking, careful, and ethical member of the profession. When he had suspicions about unscrupulous operators, he called the Division to report them. Clients find him careful, safe, hardworking, and knowledgeable. It is also noteworthy that Mr. Cates's 2015 omission did not come to the Board's attention by its own investigation. Rather, Mr. Cates self-reported, essentially turning himself in, when he submitted his 2017 application. Under these circumstances, revocation is not appropriate.

The Board is obligated to seek consistency in its application of disciplinary sanctions.⁶⁶ In determining disciplinary sanctions in similar cases, the Board has taken care to "balance the importance of having licensed professionals be accurate and diligent about self-reporting with the fact that the licensee was merely negligent about duty to fully answer the questions on the application."⁶⁷ The Board has developed, but not adopted as a regulation, a matrix of

⁶⁶ AS 08.01.075(f).

⁶⁷ *In re Skalflestad*, at 25.

disciplinary sanctions used in prior cases.⁶⁸ That matrix developed provides a useful starting point for analysis.

The matrix notes that previous action taken by the Board for a first-time negligent misrepresentation or omission of a material fact on an application for licensure have consisted of a fine of \$500 to \$5,000, probation of up to one year, and a reprimand. The matrix describes precedents for a second misrepresentation offense as a fine of \$2,500 to \$5,000, suspension of 2-5 years, probation for up to 5 years, and a reprimand. Board precedent only supports revocation as a sanction, according to the matrix, for a third offense in violation of AS 08.54.710(a)(3).⁶⁹

Recent memoranda of agreement on first-time violations of AS 08.54.710(a)(3) have tended to impose a fine of \$1,000 or less, one year of probation, and a reprimand.⁷⁰

Here, the scope of Mr. Cates's omission arguably supports a heavier sanction than might have previously been imposed for first offense of a negligent incorrect answer. Because the omitted facts were multiple and significant, this was a relatively serious first-time violation. This would put the discipline toward the top of the range in the matrix.

In *In re: Hill*, a fine of \$17,000 was imposed (with three-fourths of that amount suspended) after false answers were given on more than a dozen applications over a ten-year period, coupled with other violations.⁷¹ Mr. Hill, however, had continued to accrue and then fail to report or disclose new criminal charges throughout the time period. This is much more serious than a self-reported, one-time failure to correctly interpret a single question – even if the result of that failure was the withholding of a large amount of information. In *In re Lyon*, a fine of \$4,000 was imposed, with the amount representing a single application containing two separate negligent misrepresentations (*i.e.*, “\$2,000 for each of the false answers”); of this amount, three-fourths was suspended.⁷² Here, the inaccurate answer was only one question on one application, although, as noted, the extent to which the answer was inaccurate weighs in favor of a larger fine. A fine of \$3,000 for the single, but significant, false answer is imposed.

The evidence at hearing suggested that Mr. Cates has an underdeveloped understanding of the full range of guides' legal obligations. *In re of Hill*, the Board imposed an education requirement, concluding that the licensee would “benefit from additional education on guides’

⁶⁸ Strout testimony; Ex. A.

⁶⁹ Ex. A.

⁷⁰ See, e.g., *In re Markham*, 2018-000377; *In re Runkle*, 2018-00631; *In re Bernard*, 2018-00685.

⁷¹ *In re Hill*, OAH Nos. 10-0250/0387-GUI (Big Game Comm. Serv. Bd. 2011) (published at <https://aws.state.ak.us/OAH/Decision/Display?rec=2029>).

⁷² *In re Lyon*.

legal and ethical obligations.”⁷³ The evidence here supports the same conclusion. Accordingly, Mr. Cates shall complete a Board-approved course on guides’ legal and ethical obligations.

A three-year period of probation should allay the Division’s concerns about Mr. Cates’s trustworthiness and, coupled with the educational requirement, provide him an opportunity to solidify his knowledge and understanding of and compliance with the licensing requirements. Mr. Cates is cautioned that, moving forward, he must exercise caution and diligence in adhering to the statutes and regulations that govern the profession.

Finally, the Board’s practice is to issue a reprimand identifying the violation and admonishing the licensee to refrain from the prohibited conduct in the future. The text of the reprimand is set out in Part IV.

2. Discipline for Sublegal Ram Conviction

The two violations relating to the sublegal ram were the conviction itself—a technical, strict liability conviction regarding a ram that had the right number of annuli but one of which was apparently a “false annuli”—and the delay in reporting the conviction.

In the past, the board has imposed small fines – typically twice the criminal fine – for violations of this type.⁷⁴ The Division concedes that a small fine of no more than \$500 in total is appropriate here.⁷⁵ Under the totality of the circumstances as described in the hearing and above, this decision concludes that a fine equal to the amount of the criminal fine (\$250), coupled with a reprimand for failure to timely report the conviction, is an appropriate sanction for the sublegal ram offenses.

IV. Conclusion

The Division did not meet its burden of proving that Mr. Cates acted with the intent to deceive the Board when he failed to disclose his criminal history. The evidence supports the conclusion that Mr. Cates acted negligently, but the evidence also supports the conclusion that he has performed successfully and ethically as an assistant guide, and should not lose his license over his failure to understand paperwork five years ago. Upon adoption of this decision by the Board, unless otherwise ordered, the following sanctions are imposed.

- (1) For the violation of AS 08.54.710(a)(3):

⁷³ *In re Hill*, at 32.

⁷⁴ Strout testimony. *See, also*, Memorandum of Agreement in *In re DeBlauw*, 2018-00076 (Big Game Commercial Services Board, July 26, 2018).

⁷⁵ Division’s Prehearing Brief, p. 5.

- Probation. Respondent's license, GUIA7591, shall be on probation for three (3) years from the effective date of this order. Any violation of hunting or guiding rules or regulations during this period may, upon order of the Board, result in immediate suspension of Mr. Cates's license for the remainder of the probationary period.
- Fine. Respondent shall pay a civil fine of \$3,000, payable within 120 days of the adoption of this order.
- Educational requirement. Mr. Cates shall complete a course, approved by the Board or its designee, on the topic of guides' legal and ethical obligations. Within one year from the effective date of this decision, Mr. Cates shall submit to the Board or its designee evidence of satisfactory completion.
- Reprimand: A reprimand substantially similar to the following will be placed in the assistant guide license file of Mr. Cates.

The Alaska Big Game Commercial Services Board publicly reprimands you, Jerry L. Cates, for failure to disclose required information on your 2015 Assistant Guide License application. You are specifically reprimanded for the failure to exercise reasonable care when completing the application, which led you to answer one question falsely and, thereby, withhold relevant information from the Board as it assessed your application. Carelessness in reading and completing applications and other forms required by the laws governing the guiding profession injures the reputation of the profession. It is your responsibility as an individual licensed under AS 08.54 to ensure that such an offense does not happen again. The Board hopes you learn from this experience and will more carefully read and accurately answer all application questions in the future.

- (2) For the violation of 5 AAC 85.055(a)(4), a fine of \$250 is imposed.
- (3) For the failure to report the conviction under 5 AAC 85.055(a)(4), a reprimand substantially similar to the following shall be placed in Mr. Cates's Assistant Guide license file:

The Big Game Commercial Services Board reprimands you, Jerry L. Cates, for your failure to timely to report to the Board your conviction of a guiding violation. It is your responsibility as an individual licensed under AS 08.54, specifically, as an Assistant Guide, to timely report any future convictions, and to ensure that such a violation of the reporting requirements does not happen again.

Dated: January 14, 2020

Signed
 Cheryl Mandala
 Administrative Law Judge

Notice of Revision and Adoption

The Big Game Commercial Services Board, in accordance with AS 44.64.060(e)(3), hereby:

(1) Revises the sanction in this matter as follows:

- a. Of the \$3,000 fine, \$1500 is suspended.
- b. In lieu of the educational requirement set out in paragraph one of the Conclusion, the Board orders that during each year of his probation, Mr. Cates shall attend in person and in its entirety at least one meeting of the Big Game Commercial Services Board.

and

(2) Adopts the proposed decision as so revised.

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. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 19th day of March 2020.

By: Signed
Signature
Henry D. Tiffany IV
Name
Chairman, BGCSB
Title