BEFORE THE BOARD OF OUTFITTERS
STATE OF MONTANA

IN THE MATTER OF CASE NOS. 2012-OUT-LIC-18, 2012-OUT-LIC-24, 2012-OUT-LIC-19, 2012-OUT-LIC-32, 2012-OUT-LIC-122, 2012-OUT-LIC-139, AND 2012-OUT-LIC-158 REGARDING:

THE PROPOSED DISCIPLINARY TREATMENT OF THE LICENSE OF GERALD CARR, Licensed Outfitter, License No. 12.	)))))	Case Nos. 2217-2012, 2226-2012, 2227-2012, and 621-2013

PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

I. INTRODUCTION:

In this matter, the Business Standards Division of the Department of Labor and Industry alleged that Gerald Carr violated professional standards of conduct contained in Mont. Code Ann. 37-1-316(18)(failing to meet generally accepted standards of practice), Mont. Code Ann. 37-47-301(5)(willfully and substantially misrepresenting facilities, prices, equipment, services, or hunting or fishing opportunities), Mont. Code Ann. 37-47-301(6)(which requires outfitters, their employees, agents, and representatives to take every reasonable measure to provide their advertised services to their clients), and Mont. Code Ann. 37-47-341 (10).

Hearing Examiner Gregory L. Hanchett conducted a contested case hearing in this matter on August 21, 22 and 28, 2013. Michael Fanning, agency legal counsel, represented the Department. James E. Brown, attorney at law, represented Carr. Dr. Edwin Gerrish, Jeffrey Raugnik, Matthew Shane Robinson, Sandra Brown, Sam Brown, Eli Schrock, Shane Carr, Zach Anderson, Beau Jensen, Tracy Caldwell, Teri Smith, Trudy Phippen and Connie Beckmen testified under oath. Exhibits were admitted as reflected in the transcript of this matter. The parties graciously provided the hearing examiner with posthearing briefs, the last of which was timely received on October 25, 2013.

At the close of the Department's case in chief, the parties stipulated that the complaints of Jeff Bergsbaken, Brian Yoder and John Yoder should be dismissed because the Department presented no evidence on those complaints. Accordingly, those complaints were dismissed.

The hearing examiner also asked the parties to brief in post- hearing briefing the issue of whether the testimony of Connie Beckmen should be admitted. Having reflected on the issue, the hearing examiner has decided that it is moot. While the hearing examiner tends to agree with the licensee's position that the evidence is not proper rebuttal evidence, *see. e.g., Massman v. Helena* (1989), 237 Mont. 234, 773 P.2d 1206, the hearing examiner finds it is unnecessary to consider Beckmen's testimony and therefore has not done so in rendering the conclusions of law and proposed order in this matter.

Based on the evidence submitted at hearing and the arguments of the parties made both at hearing and in post hearing briefing, the hearing examiner finds that Carr has violated professional standards and recommends to the Board of Outfitters that sanctions should be imposed against his license. The factual basis and legal rationale for these recommendation is set forth below .

II. FINDINGS OF FACT:

1. At all times material to these complaints, Gerald Carr (hereinafter Carr)has held Montana outfitter's license Number 12 and has been the owner of Cabinet Mountain Outfitters (CMO). Carr's son Cody is also a licensed outfitter in Montana and owns an outfitting company called "Cody Carr's Hunting Adventure." Carr's other son, Shane Carr, is a licensed guide in Montana and works for Carr during hunting season. Carr and Cody are licensed to engage in outfitting in various hunting areas in around the Cabinet Mountains in Western Montana.

2. When he first started out as an outfitter, Carr advertised primarily by "word of mouth." However, over the years, as competition between outfitters has become more intense and the cost of outfitting has increased, he has turned to becoming an exhibitor at various sportsman's shows in many states, including Pennsylvania, Utah, and South Dakota. The number of exhibitors at the shows has also increased, increasing the competition among exhibitors, including Carr, to attract clients. At the show in Harrisburg, Pennsylvania, for example, there were as many as 300 to 400 outfitters vying with Carr to attract clients. The increased competition has required Carr to aggressively market his outfitting business.

3. Carr exhibits his outfitting business with Cody's outfitting business. His booth displays are indistinguishable from Cody's booth displays. He tells potential clients that his sons work with him. As noted below, he has told clients that he does the background work while his sons take the lead. In this regard, Carr has represented his business to be associated with Cody's business when it is not. This has caused understandable confusion on the part of several of the clients who testified in this matter.

4. Carr essentially has five areas where his clients can stay and also hunt out of. One place is the lodge known as the Horseman's Lodge, which Carr leases. The other areas are the Eddy Creek cabin (located at an elevation of approximately 3700 feet), the Eddy Creek tent camp (located at an elevation of approximately 6500 feet), the Big Hole Camp and also a roving camp which can be set up in many of the areas where he is permitted to conduct outfitting.

5. At all times material to the complaints in this case, clients staying at the Horseman's Lodge would drive from the lodge to Gerald Carr's house in order to meet up with their guides for each day's hunt. The lodge is about a 45 minute drive from Carr's house, but can be as much as an hour away depending on the weather. The mounts used for hunting excursions were stabled at Carr's house. During the 2011 season, Carr maintained about 30 mounts at his residence.

6. All of the complainants in this matter signed a document entitled "Montana Outfitter & Client Agreement." With the exception of the document signed by complainants Sam and Sandy Brown, each document contained a clause entitled "Covenant of Good Faith." That clause states:

> I recognize that outfitter as provider of goods and/or services, will operate under a covenant of good faith and fair dealing, but the outfitter may find it necessary to terminate an activity due to forces of nature, medical necessities or other problems; and/or refuse service or terminate, the participation of any person the outfitter judges to be incapable of meeting the rigors or requirements of participation in the activity. I accept outfitter's right to take such actions for the safety of myself and/or other participants. I acknowledge that no guarantees have been made with respect to achieving objectives.

7. The Brown's outfitter agreement with Carr did not contain any provision like that contained in the above paragraph. The agreement does state, however, that the outfitter "reserves the right to refuse any person he

judges to be incapable of meeting the rigors and requirements of participating int eh activities." Exhibit 4.

8. It is unprofessional conduct for a licensed outfitter to guarantee that a client will bag an animal. Testimony of Gerald Carr.

Raugnik/Robinson Complaint.

9. Raugnik and Robinson met Shane Carr at a sportsman's show in Pennsylvania in February, 2011. Carr and Cody were both exhibitors at the show. Gerald Carr's booth was attached to Cody's. Raugnik has been a big game hunter for more than 25 years. Robinson has been a big game hunter for 20 years.

10. Shane took Raugnik and Robinson to Cody's booth to show them pictures of various animals that had been harvested in the region in which Gerald and Cody are licensed to outfit. Raugnik and Robinson also looked at Cody's brochures. Shane indicated to Raugnik and Andersen that Cody, Carr and he worked together. Shane also told them that everything had been scouted out and discussed a pack in hunt and that he would be their exclusive guide for each day of a hunting trip.

11. Raugnik and Robinson had been planning to take a hunting trip out to Montana. They had wrestled with whether to "go it alone", i.e., without an outfitter, or whether to go through an outfitter. After talking it over, they decided that having a guide for the first trip out to Montana might be a better idea.

12. Raughnik and Robinson indicated to Shane that in order for them to contract for a hunting trip with CMO, they must have CMO agree to two terms: (1) it had to be a "110% pack -in hunt" (testimony of Raugnik) and (2) Shane had to be their guide for the trip. Shane understood and indicated that these would be the terms of the agreement. Shane also indicated that they would be hunting in area exclusively reserved to CMO.

13. Raugnik and Robinson signed a Montana Outfitter & Client Agreement agreeing to use Gerald Carr as their outfitter. The handwritten terms of the agreement that Raugnik and Robinson each signed were filled in by Shane. The handwritten terms indicate, among other things, that each would pay $4000.00 for the trip, that the hunt would be a 7 day hunt from September 20 through September 26th, 2011, that the trip would be a pack in trip, and that it would be a fully guided hunt. Exhibits 2 and 3.

14. Raugnik and Robinson arrived for their hunt on September 19, 2011. Raugnik and Robinson believed that they were supposed to pack out that day to the camp and begin hunting the very next morning. Shane arrived at the Horseman's Lodge and informed then that there was rain forecast for the mountains and that for that reason, they would not be doing a pack in hunt. Instead, they were going to hunt out of the lodge and then "play it by ear." Testimony of Robinson. Raugnik and Robinson reminded Shane that they had brought rain gear with them as suggested by the materials list that CMO had earlier provided to them. They also checked the forecast and saw that no rain was forecast for the rest of the week. Shane, however, refused to"budge" on the issue and told them that they would not be doing a pack- in. Testimony of Raugnik. In fact, there was no rain during the entire week that Raugnik and Robinson were scheduled to be with CMO.

15. Shane also advised Raugnik and Robinson that he would not be able to guide them on the first day of their hunt. Shane told them that he had a court appearance regarding the custody of his child that created an unavoidable conflict. Shane provided Raugnik and Robinson with another guide, Zack Robinson (hereinafter, Zack, no relation to Shane Robinson complainant).

16. Zack guided Raugnik and Robinson into the Deemer Creek/Peak area on September 20, 2011. They rode for 15 to 16 hours searching for game. They stopped on occasion to rest. At one point, they also dismounted and pursued a bull elk.

17. Another CMO client and his guide accompanied Zack, Raugnik and Robinson into the Deemer Creek/Peak area. Raugnik and Robinson had contracted with CMO for an exclusive guided trip. Despite this agreement, another guide and client accompanied Zack, Raugnik and Robinson on their horseback ride into Deemer Creek/Peak.

18. The Deemer Creek/Peak area is not land exclusively reserved for CMO's use. It is an area open to the public for hunting.

19. At the end of the day, Raugnik was saddle sore. Raugnik got off of his horse and laid down complaining of being saddle sore. Raugnik had not developed any blister that might impede his walking. Robinson's knee bothered him a bit. Neither hunter was incapable of engaging in the pack-in hunt each had contracted for. There was no need to scrub the pack in hunt over safety concerns for Raugnik and Robinson.

20. The next morning, Raugnik and Robinson were again transported back to Carr's house. Raugnik indicated that while he would be willing to ride horses to reach a definite destination such as a camp, he was unwilling to ride around all day as they had done on the first day of hunting because doing so was a waste of time. Robinson had a sore knee, but was not impacted in his ability to hunt either on foot or on horseback and he never complained about it to anyone. No one at CMO at anytime indicated that hunting plans would be curtailed due to perceived medical issues with either Raugnik or Robinson. No one at CMO spoke of nor attempted to invoke the "Covenant of Good Faith" contained in the outfitter and client agreement.

21. In response to Raugnik and Robinson, Shane went and got a white Cadillac automobile and decided to take them hunting in flat land in the Cadillac. Again, no one at CMO discussed any concerns about medical issues that they perceived either Raugnik or Robinson might be facing. Shane took them hunting that day in the Cadillac, never suggesting anything about when or if Raugnik and Robinson would be offered the pack in trip that they had contracted for. After the hunt ended that day, Raugnik and Robinson returned to the lodge.

22. After hunting in the Cadillac and never having been given the opportunity to undertake the pack-in trip as Carr had promised, Raugnik and Robinson decided to discuss the matter with Carr. They made an appointment with him and met him at his residence the next day, now into the fourth day of seven day hunting excursion. Raugnik and Robinson were fed up with Carr's failure to deliver on the promises that he had made to them when booking their hunt. Raugnik told Carr that he and Robinson were not satisfied with the way the hunt was going and they had not been given any opportunity for the pack in hunt as promised. Raugnik asked Carr to reimburse each of them $2,000 for the hunt . At that point, they were told that they could be given the pack in trip, but it would take time to get the tent campsite set up. Understandably, Raugnik and Robinson did not want to waste an additional half day (already being on the fourth day of their hunting excursion) to permit Carr's employees to set up a tent at a remote site. Raugnik and Robinson declined the offer.

23. The conversation then became heated. Apparently, Raugnik still owed Carr $400.00. Raugnik gave it to Carr immediately before the conversation began. When Raugnik and Robinson declined the pack in trip, Carr then told them that there was no way he was going to give them their money back. One of Carr's employees who was present told Raugnik that of if he didn't like Carr's suggestion, then he could "get his shit and go." RT p. 86, lines 17-18. Carr became so upset that he wadded up the $400 that Raugnik had just given him and threw it back at

Raugnik . He stated "You boys are starting to piss me off," and threw a red handkerchief at Raugnik, telling Raugnik "here, go dry your tears."

24. Having been treated as they were by Carr and his employees, Raugnik and Robinson did as Carr's employee suggested and got their gear and left.

25. Raugnik and Robinson encountered Carr again at the February 2012 sportsman's show in Pennsylvania. They spoke to both Gerald and Cody Carr. Cody initially offered them a free hunt in order to settle the matter with them. Cody subsequently withdrew that offer, telling them that he had spoken with the Montana Board of Outfitters and that they had done nothing wrong with respect to the hunt Raugnik and Robinson had participated in 2011. They then spoke with Carr and he offered to refund each of them $1,000.00. Raugnik and Robinson continued to insist that they each be reimbursed $2,000.00. Carr and Raugnik and Robinson could not come to an agreement.

26. Raugnik and Robinson then filed the instant complaint which resulted in the hearing before this tribunal.

Brown Complaint

27. Sandra and James Brown live in Utah where they own and run a small farm. Both of the Browns are in good physical condition. They undertake all the chores needed to keep the farm running, including stacking hay bales by hand. They hike, ski and exercise. They are both experienced hunters, having hunted for 40 years. They have hunted large game animals in various locales around the United States and have retained outfitters to lead them on hunts at those locales. In addition, both are accomplished horsemen. They keep their own horses and ride them regularly. They both have ridden horses since they were very young and have used them in rounding up and herding cattle, which includes roundups in the mountains and in all kinds of weather, since they were in their teens. Mr. Brown has belonged to horseback riding clubs and has also rodeoed on horseback, engaging in such events as cattle roping.

28. Sandra and James Brown encountered Carr at a sportsman's trade show in Salt Lake City, Utah in the spring of 2010. Carr was an exhibitor at the show.

29. The Browns talked with Carr and told him that they wanted a "once in a lifetime" hunt. RT page 271, line 21. They discussed the possibility of a hunt in November, 2011. The Browns indicated to Carr that they wanted to hunt for trophy

animals, including trophy mule deer and explained to him that they could hunt locally in Utah to obtain small bucks. In response, Carr told them "I guarantee you and your wife a trophy." RT page 272, lines 1-9. He also told them that the only reason they would not "score a trophy deer is if you cannot hit it." Carr also told them that he could guarantee that both of them would get a trophy elk. *Id.*

30. Carr also told the Browns that one of them would also get a bear. Mrs Brown inquired of Carr as to whether the bear population in the area might not be in hibernation during the time of the planned hunt. Carr told them that they could still hunt bear at that time. RT page 226, lines 20-23. Mr. Brown asked Carr "several times over" whether he was sure that these things would happen and Carr said "I have exclusive rights to this mountain, we'll be up there and I can guarantee you this stuff." RT p. 272, lines 15 through 21.

31. Mr. Brown asked Carr repeatedly about his promises because no other outfitter that the Browns had employed had ever made such promises. RT p. 273, lines 2-4.

32. The Browns also told Carr that they wanted to be able to conduct their hunt from horseback. They were very specific, telling Carr that they "knew that days would be long and we would like to be on horses." RT p. 223, lines 17-19. Carr told them that they would have access to horses for every day of their hunt and "if for some reason they did not, say, for example there was too much snow, then they would have access to snowmobiles." RT page 223, lines 21-25, Rt page 224, lines 1 through 2.

33. Carr and the Browns also discussed the lodging that the Browns would have during the hunt. Carr told the Browns that they would be staying in a lodge and would have their own room with a bathroom. RT p. 273, lines 17-19.

34. At no time during their discussions did Carr ever tell the Browns that if Carr, in his sole discretion, determined that the weather was too bad, he could call off the hunt. RT p. 226, lines 5-8, RT p.

35. The Brown's decided, based on Carr's representations and the fact that Carr was a licensed Montana outfitter, to book a hunt with Carr. They signed Carr's "Montana Outfitter & Client Agreement" (as noted above in Paragraphs 4 and 5) on March 20, 2010. The cost of the hunt was $6,750.00. Because the Brown's could not afford to pay that amount all at once, they booked the hunt for November, 2011

and made installment payments to Carr in order to have that amount paid off by the time of the hunt.

36. The Brown's arrived for their hunt in Montana on November 18, 2011 as scheduled. Upon arrival, Carr informed them that the lodge had been over booked and that a private room was not available for them. He offered them the use of a trailer that had living quarters in it. Not surprisingly, they took it since that was the only way that they could obtain private accommodations as Carr had promised.

37. The accommodations proved problematic. For the first day, there was no propane available and the trailer, therefore, could not be heated. In addition, the water to the trailer froze, leaving the Browns without water in the trailer. This resulted in them having to use bottled water in order to flush the toilets. The trailer did not have a shower, so the Browns had to use showering facilities in the lodge. To get a shower, the Browns had to ask other clients staying in the lodge if they could use the shower.

38. Carr assigned guide Walt Gilroy to lead the Browns on their various hunting excursions. Gilroy is a licensed guide.

39. The Browns requested on a daily basis during their stay with Cabinet Mountain Outfitters that their hunts be conducted on horseback as Carr had promised. The Browns were never allowed to use horses on their hunts. The Brown's were given various excuses, ranging from the weather to horses not being available because they were being used by Cody Carr's clients at the time. The weather was not a legitimate reason for denying the Browns the use of the horses as Carr's other clients were using them.

40. The Browns also asked about using the snowmobiles that Carr had promised them. Their request was declined because the snowmobiles were not functioning. Carr's baseless denial of the Browns' request to use horses and snowmobiles demonstrates that Carr willfully and substantially misrepresented his services to the Browns when they met at the sportsman's show in the spring of 2010.

41. The Browns were only permitted to hunt by being driven to certain locations and then walking in to hunt.

42. At no time did Carr or any of his employees suggest to the Browns that they were not being permitted to ride horse or use snowmobiles because they were not physically up to the rigors of riding or snowmobiling. Had that been the case,

surely Gilroy would have mentioned as much to the Browns. Carr would have done so as well. Because no one at Cabinet Mountain Outfitters mentioned to the Browns at any time that they were not up to the rigors of riding horses or snowmobiles, there is no basis in fact to find that any such concerns present a legitimate basis for denying the Browns the use of either horses or snowmobiles.

43. Despite Carr's representation that they would be hunting on property reserved to Carr, such was not the case. The Browns and their guide encountered other hunters and outfitters in the areas that they were hunting. In this respect, too, Carr substantially misrepresented that he had exclusive hunting rights to land that the Browns would be hunting on when in fact he did not.

44. The Browns did not see Carr at all during their stay except for on the first day when they arrived and on the day they were leaving. During that second meeting, the Browns ran into Carr at a gasoline station. Mr. Brown immediately approached Carr to complain about all the promises that Carr had made in getting the Browns to sign an outfitting excursion agreement which were not fulfilled. During this discussion, Carr never suggested that the weather or that the physical condition of the Browns prohibited them from hunting on horseback or riding snowmobiles.

45. Gilroy attempted to make amends for Carr's failure to live up to the representations he (Carr) had made about their dismal hunting experience by offering them a free bear hunt the following spring. Gilroy did not want the Browns to disclose to Carr that he made them that offer.

Garrish Complaint

46. Dr. Ed Garrish lives in Watertown, South Dakota. He has engaged in hunting for 24 years. He has hunted for both elk and white tail deer.

47. In 2011, Garrish met Carr at a sportsman's show in Sioux Falls, South Dakota in March, 2011. Carr had an exhibition booth there showcasing CMO. Garrish discussed very specifically with Carr what they wanted for a hunt. They told him that they wanted to engage in an archery hunt for elk in an area where there were no grizzly bears.

48. When talking with Carr, Carr represented to Garrish that they had game cameras out in various hunting areas and that if the elk were close to the lodge, they could hunt for them right out of the lodge. If the elk were not near the lodge, they

would use horses to pack in to the areas where the elk were. RT p. 25, lines 8-16. Carr also represented to Garrish that Carr's business could take them into hunting areas to which Carr had exclusive hunting rights. Carr also told them that if it was hot weather, which would not be conducive to bugling for elk, CMO had tree stands set up near watering holes so that they could hunt elk from those tree stands. Page 26, lines 3-9.

49. Carr represented to Garrish that because of his age, he was no longer as directly involved in the hunts as were his sons, Cody and Shane. Carr told them that he did more of the "behind the scenes type of [hunt] booking and such while Cody and Shane did more of the guiding of the hunts. RT p. 24, lines 23 through 25, page 25, lines 1 through 2.

50. Carr also showed Garrish pictures of the lodge where they would be staying. The pictures portrayed Cody Carr's lodge, not the Horseman's Lodge that Carr actually put them in. RT page 28, lines 1 through 9. Carr represented that the lodge had a hot tub. RT page 28, lines 8 through 9 Cody Carr's lodge had such a hot tub, the Horseman's Lodge does not have a hot tub.

51. Based on Carr's representations, Garrish entered into a "Montana Outfitter & Client Agreement" with Carr for their hunt. Each agreed to pay Carr $5,200.00. The agreement stated that the hunt would be for 7 days and the location was noted as "Lodge or Pack in." Exhibit 1.

52. Garrish arrived for his hunt on September 2011. Upon arrival, Garrish discovered that the lodge was not as Carr had represented it. It was the Horseman's Lodge. Unlike the lodge that Carr had represented that Garrish would stay in, the Horseman's Lodge was a temporary leased building that was a closed in facility, having only four bedrooms and a kitchen. It was located right next to a river, and there was no hunting available near the lodge as Carr had promised.

53. Carr never provided a pack in hunt as he had represented to Garrish. There were no horses at the lodge. Garrish was never given an option to do any type of pack in trip as Carr had represented. Instead, each day Garrish's guide (Walt Gilroy) would drive Garrish to a location somewhere near Thompson Falls. Neither Cody nor Shane were involved in providing hunts for Garrish. The land where they hunted during Garrish's stay was not land exclusively reserved to CMO as Carr had indicated. There were no tree stands located next to watering areas as Carr had represented.

54. Except for the first day when Garrish arrived, the weather was sunny and warm. Weather was no obstacle to providing the pack in trips that Carr had represented would be made in the event that hunting near the lodge was not practical.

Schrock Complaint

55. Eli Schrock lives in Delaware. He has experience hunting white tail deer on various farms in that state. Schrock is physically fit and at the time of the hearing was 47 years old.

56. Schrock and met Carr at a sportsman's show in Harrisburg, Pennsylvania in February, 2011. Carr was exhibiting CMO hunts at the show. Cody Carr was also exhibiting Cody Carr's Hunting Adventure at the show.

57. Schrock told Carr that he and his companions were seeking a pack in hunt on horseback. As Schrock testified, and the hearing examiner finds, Schrock and his companions were "very specific about getting packed in," that is, loading up equipment on horseback and "actually go in beyond –because there is [sic] a lot of places to hunt out there that you could drive to a gate and then walk" RT page 314, lines 1 through 9. He wanted a hunt trip from an outfitter "with the equipment and ability to get us to a location that is not accessible with normal equipment like we would have." RT page 313, lines 23 through 25. Schrock was very specific with Carr that he "wanted to be packed in and we wanted to hunt that way." RT page 314, lines 10 through 13.

58. After Schrock described what he was looking for in a hunting excursion, Car responded that Schrock would be hunting at Eddy Creek camp and staying in a walled type outfitter's tent. RT page 315, lines 15-22. tent. There was a picture at the display booth showing the tent accommodation at the hunting camp. *Id.* Carr represented to Schrock that Schrock would be hunting out his front door from an outfitter's tent as shown in the picture. Carr also left Schrock with the impression that he would be hunting exclusive grounds. RT page 324, lines 17through 25.

59. As a result of Carr's representations, Schrock entered into an agreement with CMO for a pack in hunting trip. Exhibit 5. The contract specifically mentions that Schrock's hunting excursion would be at Eddy Creek from November 15th through the 19th, 2011. *Id.* Schrock paid Carr $3,375.00 for his hunting excursion.

60. Schrock arrived in Montana for his hunting excursion as scheduled. He was picked up from the airport by two of Carr's employees and taken to the Horseman's Lodge. Soon after Schrock arrived, Carr informed him and the other hunters in his group that they had already pulled the tent out at Eddy Creek and that someone else was already staying at the Eddy creek cabin, so Schrock would not be hunting at those locations. Schrock told Carr that the pack in hunt was his whole reason for coming to Montana to hunt with CMO. Carr responded that it was his decision to make and that Schrock would not be hunting at either Eddy Creek site.

61. Carr also indicated that he was concerned with the weather. This explanation was false given the fact that Carr did not allow Schrock the use of the Eddy Creek cabin as there were already hunters there. Weather could not have been a factor in not providing Schrock with the Eddy Creek hunt that Carr had promised.

62. Schrock stayed at the Horseman's Lodge and was driven (or drove) to locations for hunting, except on one day where Schrock hunted from horseback (through it was not a pack in hunt). Most of the hunting was done from the road. The vehicles that Schrock was transported in were in poor condition, smelling of gasoline. On three occasions, the vehicles broke down. RT page 320, lines 11 through 21.

63. Schrock's daily hunts were substantially hampered by the fact that each day the hunters would be ferried from the Horseman's Lodge to Carr's ranch, some 45 minutes away. They would then wait until the guides showed up and then Carr would in an ad hoc manner devise a hunt plan for that day. This caused Schrock to be getting to the hunting areas "way too late . . " RT page 322, lines 24 through 25. As Schrock testified at hearing, and the hearing examiner finds: "Just the disconnect between leaving the lodge , have to go to [Carr's], waiting for him to decide who is going where and what equipment, it ruined the whole morning." RT page 323, lines 3 through 6.

64. None of the areas to which Schrock was taken to hunt were exclusively reserved for Carr's clients as Carr had represented to Schrock. The areas were public hunting grounds. Indeed, because Schrock was being taken to the areas so late in the morning, he would be "passing all the locals coming out every day" because the locals got to the hunting area long before Schrock's guide got him there. RT page 325, lines 1 and 2.

65. The lack of organization and the inordinate delay in getting to the hunt engendered by Carr's ad hoc methodology of planning caused Schrock and his

hunting companions to confront Carr about the problem on a daily basis. When they did so, Carr would just "walk away." RT page 325, lines 15 and 16. Carr made no efforts to resolve Schrock's complaints.

66. Carr has previously been sanctioned by the Board of Outfitters for engaging in unprofessional conduct, willfully and substantially misrepresenting services and failing to take every reasonable measure to provide advertised services to clients. In Docket Number CC-06-0280-OUT, Carr had advertised a guided hunt for his clients and then failed to provide his clients with the guided hunt he promised. Exhibit 23. Carr entered into a consent decree in that case in which he paid a fine of $1,000.00 and his license was placed on probation for a period of six months. *Id.*[1]

67. In Docket Numbers CC-08-0002-OUT and CC-08-0021-OUT, Carr entered into a consent decree whereby he admitted, among other things, to taking a client hunting in an area for which Carr was not licensed to undertake outfitting. Exhibit 24. Another outfitter who had hunting rights in that area logged the client into that outfitter's client log. In the consent decree in that case, Carr agreed that he had once again willfully and substantially misrepresented his outfitting business in violation of Mont. Code Ann. 37-47-301(5). *Id.* As a result of these latter two complaints, Carr's license was once again placed on probation, this time from November 5, 2007 until March 1, 2008.

68. The fact that Carr's license has twice previously been sanctioned for misrepresenting services, combined with the facts as found in all four of the complaints pending before this tribunal, merits aggravated sanctions in this matter in order to protect the public and to ensure the proper rehabilitation of the licensee.

---

[1] In their post hearing briefing, the parties argued vociferously over how these prior complaints could or could not be used as evidence in these cases. The hearing examiner has used these complaints only for the purpose of determining the proper sanction to be imposed in this matter and only after first determining, without using these complaints as other acts evidence, the question of whether Carr violated the rules of professional conduct prescribed for outfitters. The other acts evidence presented by BSD has no relevance to the question of whether Carr violated professional standards. *See generally*, Montana Rules of Evidence Rule 404(b), which prohibits use of other act evidence to prove the character of a person to show that he acted in conformity therewith.

III. CONCLUSIONS OF LAW [2],[3]

1. The Board of Outfitters has jurisdiction of this matter. The Board of Outfitters is empowered to bring disciplinary action against a licensed outfitter for unprofessional conduct. Mont. Code Ann 37-1-307, 37-1-312.

2. The Department bears the burden of proving by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. 3 7-331 1; *Ulrich v. State ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126. The Department must also show that any sanction which it seeks is appropriate under the circumstances of the case.

3. Mont. Code Ann. 37-47-301provides in pertinent part that:

* * *

(5) Outfitters may not willfully and substantially misrepresent their facilities, prices, equipment, services, or hunting or fishing opportunities.
(6) Outfitters and their employees, agents, and representatives shall take every reasonable measure to provide their advertised services to their clients.

* * *

4. Unprofessional conduct also includes conduct that does not meet generally accepted standards of practice. Mont. Code Ann. 37-1-316 (18).

5. A license issued to an outfitter can be revoked, suspended or denied or other discipline can be imposed upon a finding that the licensee has violated any provision of Title 37, chapter 47 or any rule adopted pursuant to the Board of Outfitter's authority under title 37, chapter 47. Mont. Code Ann. 37-47-341(10).

---

[2] Statements of fact in these conclusions of law are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

[3]The licensee, in an understandable overabundance of caution, has both at hearing and in post-hearing briefing lodged constitutional attacks of vagueness and over breadth on the statutory violations alleged in this matter. As the licensee understands, those arguments have not been addressed by this hearing examiner because they cannot be addressed by him. The power to declare a statute invalid does not lie in an administrative tribunal; it lies exclusively with the judiciary. *See, e.g., Jarussi v. Board of Trustees*, (1983), 204 Mont. 131, 135-36, 664 P.2d 316, 318.

6. The term "willful," while not defined within the chapter relating to the Board of Outfitters, is defined in Mont. Code Ann. 1-1-204(5). That statute provides that unless the context of a statute requires otherwise, use of the term "willfully" anywhere in the Montana Code Annotated means "a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, to injure another, or to acquire an advantage." *See also, Erickson v. Fisher* (1976), 170 Mont. 491, 494, 554 P.2d 1336, 1337-38 (citing the above statutory definition in rejecting an appellant's argument that the term "willful" as used in a statute that permitted a sheriff to fire a deputy sheriff for engaging in "willful disobedience" required a showing of malicious intent).

7. The term "substantially" is likewise not defined in the Title 37, Chapter 47. It has, however, a well understood meaning in the law. It signifies "without material qualification, in the main, in substance, materially." Black's Law Dictionary (6th Ed., 1990). As used in the statute in question here, the term simply means that Carr misrepresented to the complainants in the main a material matter of the hunt.

8. For the purposes of the case before this tribunal, evidence sufficient to prove a violation of the "willful" requirement of Mont. Code Ann. 37-1-301(5) requires nothing more than preponderant evidence that for whatever reason, Carr had a purpose or willingness to misrepresent his facilities, prices, equipment, services, or hunting or fishing opportunities. It does not mean, as Carr asserts, "to act with intent, knowing that the intentional action will result in serious injury, or to act in reckless disregard of its probable consequences." Carr's Responsive Closing Brief, page 5. Willfulness can be inferred from the actor's conduct and other circumstances. *Maun v. Dep't of Professional Regulation*, 701 N.E. 2d 791, 801 (Ill. App. 1998).

9. The Department's evidence in this matter establishes preponderantly that Carr or his agents violated Mont. Code Ann. 37-1-301 (5). With respect to the Mont. Code Ann. 37-1-301(5) allegation, Carr willfully and substantially misrepresented to all six complainants the services that would be provided on their hunts with CMO. As the Department notes in its responsive brief at page 10, the circumstances surrounding these cases as well as Carr's or Carr's agents' conduct prove this violation. Carr was aggressively promoting his business and at least one of the shows, he had to compete with 300 to 400 other vendors. Starting with Raugnik and Robinson, Shane Carr represented to them that they would have the pack in trip that they wanted to a remote location. He also told them that they would be hunting on land exclusively available to CMO. This promise was obviously material and induced both Raugnik and Robinson to go with CMO. Once they were in

Montana, however, the pack in trip was never offered to them despite repeated requests for that hunt. Indeed, it was not until after Raugnik and Robinson confronted Carr, four days into the seven day hunting trip, that one of the Carr's employees said they would get things set up for such a trip. They never hunted on land that was exclusively reserved to CMO. The failure to provide the material requirement of a pack in, the failure to even be set up to offer the trip until after being confronted about it and the inability to take Raugnik and Robinson hunting on land exclusively held by CMO demonstrates that Carr's representations at the sportsman's show were willful and substantial.

Carr used the same tactic on the Browns. Carr told the Browns "I guarantee you and your wife a trophy." RT page 272, lines 1-9. He repeated that guarantee over and over. Indeed, Sam Brown kept quizzing Carr on it because Brown had never heard such a promise made before. No other outfitter had ever done that and no other outfitter would do that. Carr also told the Browns that they would be able to hunt from horseback as they indicated specifically and repeatedly that they wanted to do. Carr also promised that if for some reason they could not hunt from horseback, they would be able to use snowmobiles. He also promised that the hunts would be on land exclusively used by CMO. Once in Montana, Carr, for no reason at all, repeatedly refused to provide the horseback hunt he had promised the Browns. The Carrs couldn't use the snowmobiles because they were not working. Carr never called the Browns to tell them that the snowmobiles weren't working. The private room in the lodge was not available because the lodge had been over booked. And once again, there was no hunting on land reserved for CMO's exclusive use. Carr's misrepresentations at the sportsman's show were willful and substantial.

Carr continued in his misrepresentations when he made them to Gerrish and to Schrock at the sportsman's shows were they each met Carr. He represented to each of them that they could have horseback hunts to remote locations. Carr also represented to Schrock that he would be able to have his pack in hunt to an Eddy Creek location. When Gerrish arrived, he was never offered a pack in horseback hunt as had been promised. Likewise, Schrock was never allowed to go to either Eddy Creek location. The reason given was that the tent location had been pulled while the cabin location was already occupied by other hunters. Had Carr's representations to Schrock at the sportsman's show been neither willful nor purposeful, he most assuredly would have contacted Schrock before he traveled to Montana only to discover that neither Eddy Creek location would be available to him.

Carr also willfully and substantially misrepresented to each of the complainants that he would have them hunt on lands exclusively reserved for CMO's use. That was a bald faced lie as demonstrated through the complainants' testimony.

And as if the willful and substantial misrepresentations to each of the complainants were not each in their own right sufficient to prove the violation of Mont. Code Ann. 37-1-301(5), all of them combined evinces the willfulness contemplated under the statute. The fact that Carr repeated the representations over and over again to six different complainants at three different sportsman's shows and then failed to fulfill those representations when the complainants arrived in Montana demonstrates Carr's modus operandi of willful and substantial misrepresentations in order to garner business. As the Department correctly argues in its responsive brief, Carr's repeated conduct with respect to the misrepresentations made to each of the complainants over a period of just one year cements the finding of the willfulness of his conduct.

Carr's contention that he has not violated any of the statutes because he provided what was in the written agreement misses the point. Carr or Carr's agents made willful and substantial misrepresentations at the sportsman's shows in order to hook the complainants into entering into a hunting excursion with CMO. Carr and or his agents lead each of the complainants to believe that they would get the material terms of their hunts–a pack in trip to a remote location, hunting from horseback, hunting on land reserved to Carr, a pack in trip to one of the Eddy Creek locations, among other things- that without valid reason were never provided or offered.

Moreover, the assertion that he complied with the written terms is false. For example, Carr promised Schrock in the agreement a pack in trip to an Eddy Creek location. It never happened. He promised Gerrish a lodge or pack in trip. It never happened . He promised the Brown's hunting from horseback or snowmobile. It never happened. Carr committed willful and substantial misrepresentations both as to his promises at the sportsman's shows and the written portions of his agreements.

10. Other than to argue that the complainants are all lying and that he and his witnesses are telling the truth, Carr's explanation for not providing the services promised to the complainants boils down to the physical condition of the claimants or the weather The hearing examiner finds that the complainants' testimony is, contrary to Carr's assertions, highly credible. Carr's excuses, on the other hand, stretch credulity to the breaking point.

None of the claimants was physically incapable of engaging in the rigors of the hunt and providing them with the hunts that Carr had represented that they would receive would not have imperiled either the complainants' safety or their welfare. Raugnik and Robinson were quite physically capable of being packed in for a back country hunt. Raugnik was ready, willing and able to ride on horseback for miles to reach a remote location as had been promised. His complaint was that he did not want to wander around all day aimlessly on a horse as occurred the first day of his hunt. Neither Raugnik or Robinson had any physical ailments that would have prevented them from going on the hunt that Carr at the sportsman's show had represented they would receive. The Browns, longtime ranchers, horseback riders and physically fit, were also obviously up to the task of riding horses even in the snowy weather. Likewise, Schrock and Garrish were, as they testified, physically capable of undertaking the hunts that Carr had represented they would receive.

Weather was not a factor in Carr's decisions not to provide the hunts that he represented he would provide. As for the hunts of Raugnik, Robinson and Garrish, the weather was warm and dry and the forecast did not call for rain during the time in September when they were in Montana. Moreover, if weather or physical limitations were an issue, Carr would not have offered on the fourth day of the seven day hunting excursion to finally provide Raugnik and Robinson the back country hunt that Shane Carr, as CMO's agent, represented it would provide to at the sportsman's show.

As for the Browns and Schrock, the argument that using horses was too dangerous is also false. Other hunters were using the horses as the Browns credibly testified. Weather could not have been a factor if other hunters were using horses. Also, the weather provided no basis for arguing that the Eddy Creek cabin was not available for Schrock's use. The true reason was that Carr had other hunters at that location. There was no good reason to deny the Browns the opportunity to hunt on horseback. Likewise, there was no basis for denying the Browns in any event the opportunity to hunt using snowmobiles. If, as Carr contended at hearing, noise would be an issue, why, then did Carr state at the sportsman's show that the Browns could use such vehicle to get to hunting locations? Moreover, the snowmobiles were in fact not operational. If they were not operational, why did Carr not take the simple expedient of calling the Browns to inform them of this long before the Browns traveled to Montana? The answer must be either that Carr never intended to provide this service or was not capable of providing this service at the time he made the representation to the Browns that he could and would do so. Carr's representations were both willful and substantial and the Department has proven by a preponderance

of the evidence in each of the complainants' cases that Carr violated the prohibition against such misrepresentations.

11. The evidence also preponderantly demonstrates a violation of Mont. Code Ann. 37-47-301(6). As demonstrated through the testimony of the six complainants, Carr and CMO did not take every reasonable measure to provide their advertised services to their clients. A perfect example is what Schrock described as the utter disorganization in determining a daily hunting plan which unreasonably caused the daily hunts to be delayed so that the hunters got to the hunting areas "way too late." And without reason, Carr simply refused to provide Raugnik, Robinson, Gerrish and the Brown's with their requested pack -in/horseback hunting excursions.

12. The Department has also proven a violation of Mont. Code Ann. 37-1-316(18) by demonstrating a violation of Mont. Code Ann. 37-47-301(5) and (6). Carr's willful and substantial misrepresentations and failure to take reasonable measures to provide his advertised services to his clients show that Carr did not meet generally accepted standards of practice.

13. Carr argues that the Department has failed to prove a violation of Mont. Code Ann. 37-1-316(18) because it has put on no expert testimony regarding the generally accepted standards of practice for licensed outfitters. Setting aside the fact that Carr may himself have provided such evidence (he ostensibly testified that promising a client that they would get a trophy animal would amount to a violation of that standard in arguing that he would never have made such statements to the Browns), the fact remains that the statutorily mandated standards of conduct in both law and logic obviate the need for such testimony in order to prove a violation of Mont. Code Ann. 37-1-316(18). The Montana Supreme Court has recognized that even where a jury is the fact finder, when statutes regulating professional conduct provide grounds for finding a violation of professional standards and those grounds do not require specialized expertise to appreciate, expert testimony is not necessary to prove a violation. *Durbin v. Ross*, (1996), 276 Mont. 463, 476-77, 916 P.2d 758, 766.

With respect to administrative tribunals, agencies are allowed to rely on their experience, technical competence and specialized knowledge in evaluating evidence. Mont. Code Ann. 2-4-612 (7). Certainly, violation of a statute which prohibits specific conduct which is within the knowledge of lay persons to understand gives the evaluator of the evidence in an administrative the experience as contemplated by

Mont. Code Ann. 2-4-612 (7) to understand what is considered to be generally accepted standards of practice within a given profession.

Here, the preponderant evidence establishes that Carr violated Mont. Code Ann. 37-47-301(5) and (6). These two grounds require no expertise in order to ascertain whether the factual predicate for finding them exists. Assessing willfulness and reasonableness is well within the common knowledge of a lay person. What's more, a violation of either Mont. Code Ann. 37-47-301(5) and (6) provides a basis for finding that a licensee's license should be revoked, suspended or otherwise sanctioned. Mont. Code Ann. 37-47-341(10). It cannot logically be that a licensee can be sanctioned for these violations - even to the extent of a license revocation - and yet still meet generally accepted standards prescribed for the outfitting profession. Carr's violation of Mont. Code Ann. 37-47-301(5) and (6) proves a violation of Mont. Code Ann. 37-1-316(18) whether or not expert testimony on the issue was provided.

14. Under the circumstances of this case, discipline is appropriate under Montana statutes and administrative rules including, Mont. Code Ann. 37-1-307, 37-1-309, 37-1-312, 37-1-316, 37-47-341.

15. Because of his conduct, Carr does not meet the qualifications for holding an outfitter's license. Mont. Code Ann. 37-47-302(3).

16. The Department argues that no particular mental intent is required to prove any of the alleged violations in this matter. In doing so, it cites to Mont. Code Ann. 37-1-320 which provides:

> Mental intent -- unprofessional conduct. A licensee may be found to have violated a provision of 37-1-316 or a rule of professional conduct enacted by a governing board without proof that the licensee acted purposefully, knowingly, or negligently.

That statute is found in Chapter 1 of Title 37 and relates to all licensed professionals in Montana.

The Department is correct with respect to the 37-1-316(18) and 37-47-301(6) allegations. No mental state is required for either of those allegations under the auspices of Mont. Code Ann. 37-1-320. The hearing examiner does not agree, however, that the "willfully' requirement of 37-47-301(5) is "meaningless surplusage" as the Department suggests. See Department's response brief, page 10. It is

axiomatic that a tribunal construing the meaning of a statute must endeavor to avoid an interpretation that renders meaningless any of the words used in the statute. *Mattson v. Montana Power Co.*, 2002 MT 113, ¶10, 309 Mont. 506, 48 P.3d 34.

Mont. Code Ann. 37-47-301(5) is found in Chapter 47 and relates specifically to outfitters. It appears that the "willfully" requirement is not wholly consistent with the language of Mont. Code Ann. 37-1-320. To the extent the statutes are inconsistent, the method of determining which statute applies is well established in Montana case law. When a general statute and a specific statute are inconsistent with one another, the specific statute governs over the general so that a specific legislative directive will control over an inconsistent general provision. *Oberson v. USDA*, 2007 MT 293, ¶25, 339 Mont. 519, 171 P.3d 715.

Here, the language of the legislature's specific directive as to the requisites of proving a violation of Mont. Code Ann. 37-47-301(5) controls. As noted above, there must be evidence that Carr had a purpose or willingness to misrepresent his facilities, prices, equipment, services, or hunting or fishing opportunities. In this case, also as noted above, such evidence plainly exists.

17. The Department, conceding that none of the complaints alleges that Carr violated Mont. Code Ann. 37-47-341 (3)(which prohibits false or misleading advertising), nonetheless argues that Carr should be sanctioned for engaging in such conduct. The hearing examiner, while agreeing that the evidence tends to indicate that Carr did engage in such conduct, has no jurisdiction to sanction Carr for such conduct in this proceeding. As Carr correctly points out, none of the complaints charges Carr with such conduct. Given the nature of the other allegations, the fact that evidence came in regarding his advertising does not establish that Carr impliedly litigated whether he violated Mont. Code Ann. 37-47-341 (3) such that the complaints should be deemed to be amended under Rule 15 M. R. Civ Pro. To allow Carr to be sanctioned for such conduct even though he was not charged with such conduct would violate his due process rights. The hearing examiner, therefore, declines to find that the charges should be amended to include an allegation that Carr violated Mont. Code Ann. 37-47-341 (3)

18. The Board has a range of disciplinary option available upon proof of a violation. A sanction may be imposed only after first considering sanctions that are necessary to protect the public. Only after such a determination, may the Board consider and include in the order any requirements designed to rehabilitate the licensee. Mont. Code Ann. 37-1-312.

19. Imposition of substantial sanctions in this matter is necessary in order to both protect the public and to impress upon Carr the need to not make misrepresentations and to provide the service for which he agrees to provide. Carr's conduct as proven through the hearing monetarily damaged the six hunters who were subjected to Carr's misrepresentation and unconscionable refusal to provide the services which he promised to provide. They traveled great distances to Montana in order to enjoy the promised hunts and were instead deprived of their bargain. Once they arrived, Carr failed to take any measures to provide them with the hunts he had promised them. In essence, Carr deprived them of their dream hunts through his misconduct. The sanctions must include placing his license on probation, remedial education, and a period of suspension for two hunting seasons as suggested by the Department. The sanctions must also include restitution to the six hunters of the fees they paid. Only in this way can the public be protected once Carr is permitted to outfit again and only in this way can Carr be made to conform his conduct to professional standards in the future.

20. As the Department correctly notes, several of the complainants testified that they felt Carr's license should be revoked. Given Carr's repeated conduct as exhibited in these cases, the complainants' suggestions are not out of the bounds of reason. However, this tribunal may only impose sanctions that look in the first instance to serve the protection of the public and then to rehabilitate the licensee. If the hearing examiner were truly persuaded that no sanction short of revocation could assure the protection of the public, he would unhesitatingly recommend such a sanction. It appears to the hearing examiner that the public can be protected and the rehabilitation of the licensee be accomplished by suspending Carr's license as suggested by the Department for two full hunting seasons. This, combined with the proposed four year probation and additional terms of probation which include restitution to the complainants will adequately serve to protect the public. Again, while reasonable minds could differ on the proper sanction to be imposed here, the hearing examiner is only persuaded that suspension for a period of two fall hunting seasons is required. Accordingly, that is what the hearing examiner has recommended to the Board.

IV. PROPOSED ORDER

Based on the foregoing findings of fact and in consideration of the above conclusions of law, the hearing examiner recommends that the Board of Outfitters place the license of Gerald Carr on probation for a period of four years with the following terms:

1. Carr's Montana Outfitter license is suspended immediately and shall remain suspended through two full fall hunting seasons following the entry of the Board's final order in this matter. Mont. Code Ann. 37-1-312(1)(b).

2. Carr shall surrender his suspended license within 24 hours of receiving notification of the suspension. Mont. Code Ann. 37-1-312(4).

3. Carr must complete all requirements to maintain licensure. See Mont. Code Ann 37-1-141 and companion regulations. In addition, he shall obey all statutes and rules applicable to outfitters as prescribed in Title 37, Chapters 1 and 47 and Admin. R. Mont title 24, Chapter 171.

4. After completion of his suspension, Carr must petition the Board for reinstatement of his license under Mont. Code Ann. 37-1-314. The Board at that time may impose such restrictions, limitations, or probation on Carr's license as permitted by law. Carr must present evidence to the Board that he has, within six months of petitioning for reinstatement, successfully completed the advanced outfitter training course offered by the Board of Outfitters. Mont. Code Ann. 37-1-312(1)(C), (g).

5. Carr is ordered to repay in full the monies collected from each of the consumer/complainants for their hunts. Mont. Code Ann. 37-l312(1)0). These refunds are due within 30 days of entry of the Board's Final Order in this case and are payable via cashier's check or money order, payable to the following individuals in the following amounts:

Sandra and Sam Brown	$6,750.00
Edwin Gerrish, M.D.	$5,250.00
Jeffery Raugnik	$4,000.00
Matthew Robinson	$4,000.00
Eli Schrock	$3,375.00

///

Carr is ordered to mail each of these refund checks to the Board at the following address:

Montana Board of Outfitters c/o Jennifer Schofield
PO Box 200513
Helena, MT 59620-0513

If Carr fails to pay these fines as prescribed herein, then, as a term of his probation in this matter, his license should be revoked. Carr may not petition for reinstatement unless these refunds are first paid in full.

DATED this 13th day of December, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Examiner

NOTICE

Mont. Code Ann. 2-4-621 provides that the proposed order in this matter, being adverse to the licensee, may not be made final by the regulatory board until this proposed order is served upon each of the parties and the party adversely affected by the proposed order is given an opportunity to file exceptions and present briefs and oral argument to the regulatory board.