

BEFORE THE BOARD OF OUTFITTERS
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2012-OUT-LIC-452 REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 369-2015
TREATMENT OF THE LICENSE OF)
ROBERT BARTHELMESS,)
Outfitter, License No. 385.)
)

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

I. INTRODUCTION

The Business Standards Division of the Department of Labor and Industry (BSD) alleged that Robert Barthelmess violated Mont. Code Ann. § 37-1-316(7) (denial, suspension, revocation, probation, fine or other license restriction or discipline by a state, province, territory, or Indian tribal government or the federal government) and (18) (conduct that does not meet the generally accepted standards of practice); Mont. Code Ann. § 37-47-341(1) (a license or right to apply for and hold a license . . . may be denied, suspended or revoked upon the following grounds (5) one conviction or bond forfeiture for a violation of the fish and game or outfitting laws or regulations of any state, the United States, or other jurisdictions and (9) misconduct as defined by board rule; and Admin. R. Mont. 24.171.2301 (having hunting or fishing privileges suspended, revoked, placed on probation or voluntarily surrendered in the state of Montana or any other jurisdiction).

On September 9, 2014, the Board of Outfitters (Board) transferred this matter to the Office of Administrative Hearings for contested case hearing. After a telephone conference was held, a Scheduling Order was issued on October 1, 2014 setting the pre-hearing deadlines and the date for hearing. On November 25, 2014, the matter was transferred to Hearing Officer Caroline A. Holien.

On January 7, 2015, the hearing officer issued an order vacating the hearing upon receiving notice that the parties had entered into preliminary settlement discussions.

On June 14, 2015, the hearing officer was notified the Adjudication Panel for the Board of Outfitters had rejected the Stipulation presented by the parties with the recommendation for stiffer sanctions. On June 17, 2015, the hearing officer was notified the parties' settlement discussions were unsuccessful and the parties were requesting a contested case hearing.

On June 25, 2015, a Scheduling Order was issued setting the pre-hearing deadlines and hearing date agreed to by the parties during a telephone conference held on June 24, 2015.

On December 7, 2015, Barthelmess, by and through his attorney, Mark D. Parker, filed a Motion to Dismiss claim arguing that dismissal was warranted on several grounds. On January 5, 2016, the hearing officer issued an Order Denying Licensee's Motion to Dismiss.

On January 19, 2016, the hearing officer convened a final pre-hearing conference at which both Parker and Mark Jette, agency legal counsel, appeared. Jette requested leave to file a Motion for Summary Judgment and Parker did not object. The contested case hearing set for January 26, 2016 was vacated and reset for February 25, 2016. Jette filed his motion that same day and Parker filed his response on February 5, 2016.

On February 19, 2016, the hearing officer issued an Order Granting Motion for Summary Judgment on the issue of whether Barthelmess had engaged in unprofessional conduct under the rules and laws of the State of Montana based upon Barthelmess' admission that he had been convicted of two counts of unlawfully guiding a non-resident alien client hunting big game (e.g. elk) and two counts of unlawfully possessing big game (e.g. elk) in Canada. The hearing officer held that she would recommend to the Board of Outfitters that Barthelmess had violated professional standards and a hearing would be held on the issue of what, if any, sanction should be imposed on Barthelmess' license.

The hearing officer convened a contested case hearing in this matter on February 25, 2016. Jette appeared on behalf of BSD and Parker appeared on behalf of Barthelmess, who also appeared personally for the hearing. Neither party offered any exhibits. The only witness called was Barthelmess himself. Each side was given the opportunity to make an oral argument regarding what sanction should be imposed upon Barthelmess' license.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief which was timely received in the Office of Administrative Hearings on March 24, 2016. Based on the evidence and argument adduced at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

II. FINDINGS OF FACT

1. Robert Barthelmess has been a licensed outfitter (License No. 385) in the State of Montana since approximately 1983.
2. Barthelmess was originally licensed by Montana Fish, Wildlife and Parks (FWP) until the establishment of the Board of Outfitters in 2002 or 2003.
3. Barthelmess has never been disciplined or had any criminal charges brought against him based upon his work as an outfitter in Montana.
4. Outfitting is Barthelmess' primary source of income. Barthelmess relies on referrals and return customers in his business.
5. Barthelmess had previously operated an outfitting business in Canada for approximately ten years. In 2010, Barthelmess was working with a gentleman who had worked as a guide for his business for several years. The gentleman was a licensed outfitter/guide in Alberta. The gentleman was interested in purchasing Barthelmess' outfitting business but lacked the capital to do so. Barthelmess was in the process of transferring his allocations to the gentleman and had assumed a camp manager role for the gentleman's business.
6. On or about September 21, 2010, a Canadian Fish and Wildlife officer approached Barthelmess at the camp at approximately 8:00 or 8:30 p.m. The officer advised Barthelmess and his daughter that they were in violation of Canadian law and would be required to appear before a judge the following morning. Barthelmess was unsure of what charges were being filed against him and his daughter.
7. Barthelmess reported to the courthouse the following morning and attempted to contact two or three law firms. Barthelmess happened upon an attorney at the courthouse, who agreed to meet with Fish and Wildlife officials on his behalf. The attorney presented Barthelmess with a list of eight charges, which included unlawfully guiding a non-resident alien and unlawfully possessing elk. Barthelmess was advised that if he pleaded guilty to four charges, the remaining

charges would be dismissed. Barthelness agreed to enter a guilty plea to two counts of unlawfully guiding a non-resident alien and unlawfully possessing elk.

8. On or about September 24, 2010, Barthelness was convicted of two counts of unlawfully guiding a non-resident alien client hunting elk without a license in Grande Prairie, Alberta, Canada. Barthelness was also convicted of two counts of unlawfully possessing elk.

9. Barthelness was sentenced to pay a fine of \$4,000.00 for each count of unlawful guiding and \$2,000.00 for each count of unlawfully possessing elk. Barthelness was ordered to serve 56 days in jail if he failed to pay the fines for unlawfully guiding on or before July 29, 2011 and 28 days if he failed to pay the fines for unlawfully possessing elk by that same date.

10. Canadian authorities forfeited Barthelness' rifle, which was valued at approximately \$500.00; four-wheeler, which was valued between \$10,000.00 and \$12,000.00; and a \$10,000.00 cash bond posted by Barthelness.

11. Barthelness left the province without paying the fines at the suggestion of his Canadian counsel. Barthelness has not made any further court appearances in Canada.

12. Canadian authorities have suspended Barthelness' hunting privileges as a result of his convictions.

13. On April 2, 2012, the Board issued a board generated complaint against Barthelness after receiving information from Canadian authorities regarding Barthelness' convictions.

14. On May 31, 2012, the Screening Panel for the Board tabled the complaint against Barthelness for one year to allow Barthelness the opportunity to resolve his legal issues in Canada.

15. On November 7, 2013, the Board requested information from Barthelness pertaining to his legal issues in Canada. Barthelness did not respond to this request for information within the 15 days given by the Board.

16. On May 15, 2014, Barthelness notified the Board that there were no changes regarding his legal issues in Canada. Barthelness was notified that the

Screening Panel would be reconsidering the complaint against him at its meeting on June 5, 2014.

17. The Screening Panel ultimately found reasonable cause for believing Barthelmess had violated the statutes, rules, and standards applicable to his license and moved to initiate disciplinary action.

III. CONCLUSIONS OF LAW¹

A. The Licensee Has Violated Both Statute And Rule.

1. The Board has subject matter jurisdiction and legal authority to bring the disciplinary action under Mont Code Ann. §§ 37-1-131, 37-1-136, 37-1-307, 37-1-309, and Title 37, Chapter 47.

2. The Department bears the burden of proof to show by a preponderance of the evidence that the licensee committed an act of unprofessional conduct. Mont. Code Ann. § 37-3-311; 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. § 37-1-316 provides in pertinent part that the following is unprofessional conduct:

* * *

(7) denial, suspension, revocation, probation, fine, or other license restriction or discipline against a licensee by a state, province, territory, or Indian tribal government or the federal government if the action is not on appeal, under judicial review, or has been satisfied; . . .

(18) conduct that does not meet the generally accepted standards of practice.

4. Mont. Code Ann. § 37-1-341 provides in pertinent part that a license may be suspended, revoked or have other disciplinary conditions imposed upon the following grounds:

* * *

(5) one conviction or bond forfeiture for a violation of the fish and game or outfitting laws or regulations of any state, the United States, or other jurisdictions; . . .

¹Statements of fact contained in this discussion are hereby incorporated by reference to supplement the findings of fact. Coffman v. Niece (1940), 110 Mont. 541, 105 P.2d 661.

(9) misconduct as defined by board rule; . . .

5. Admin. R. Mont. 24.171.2301(3)(l) provides that all licensees shall not have hunting or fishing privileges suspended, revoked, placed on probation, or voluntarily surrendered in the state of Montana or any other jurisdiction.

6. The preponderance of evidence demonstrates that Barthelmess violated Mont Code Ann §§ 37-1-316(7), (19), Mont. Code Ann. § 37-47-341(5), (9), and Admin. R. Mont. 24.171.2301(1).

B. The Appropriate Sanction Is The Suspension Of Barthelmess' License.

7. A regulatory board may impose any sanction provided for by Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Mont. Code Ann. § 37-1-312 provides that a regulatory board may impose probation, remedial education requirements, a suspension, and restitution.

8. To determine which sanctions are appropriate, the regulatory board must first consider the sanctions necessary to protect the public. Only after this determination has been made can the board then consider and include in the order requirements designed to rehabilitate the licensee. Mont. Code Ann. § 37-1-312(2).

9. Barthelmess argues foreign convictions cannot and should not provide grounds for discipline in Montana. However, unlike the argument offered by Barthelmess, the foreign jurisdiction in this case was not a totalitarian dictatorship such as North Korea but, rather, a trusted and long-term partner of the United States. A conviction in Canada under Mont. Code Ann. § 37-1-341(5) and Admin. R. Mont. 24.171.2301(3)(l) is sufficient grounds for a finding of unprofessional conduct.

10. BSD has requested that Barthelmess' license be suspended until such time as Barthelmess has resolved his legal issues in Canada, or, in the alternative, impose a fine of \$15,000.00 stayed for a three year probationary period with the conditions that Barthelmess engage in no further unprofessional conduct; obtain and maintain licensure in both Montana and Canada; submit monthly reports to both Montana and Canadian licensing authorities; ensure the Board has true and correct contact information for him and his business; and complete an advanced outfitting and guiding class.

11. BSD described its recommendation as a “stick and a carrot.” While the carrot approach is certainly generous, it is not appropriate in this case. Barthelmess not only fled the jurisdiction after learning of the charges being filed in Canada but has done nothing to resolve his legal issues despite knowing those issues were jeopardizing his ability to continue working lawfully as an outfitter in Montana. Barthelmess received a reprieve of sorts in May 2012 when the Board tabled the complaint for one year to allow him the opportunity to resolve the issues. Barthelmess ignored that act of grace and continued to evade justice in both Canada and Montana. In fact, when the Board specifically requested an update on his legal issues in November 2013, Barthelmess ignored the Board’s request and did not respond for six months despite being given only 15 days to respond. Barthelmess’ failure to resolve the issues in Canada coupled with his failure to respond to the Board’s directives establish discipline is warranted in this case.

12. An appropriate sanction in this case is a suspension of Barthelmess’ license until such time as he has fully resolved his legal issues in Canada. Barthelmess should also be required to complete the Advanced Training and Guide class as part of the sanction upon his license, as well as to maintain true and correct contact information for himself and his business with the Board. If Barthelmess is to obtain licensure in Canada, he should be required to submit proof of such licensure to the Board within 30 days of obtaining such licensure.

13. The public can only be protected and Barthelmess rehabilitated if his license is suspended and he resolves his legal issues in Canada. Further, the protection of the public and rehabilitation of Barthelmess can further be obtained if he is required to complete additional training; maintain accurate contact information with the Board; and submit proof of licensure in Canada, if and when it is obtained. If Barthelmess truly plans to resolve the legal issues as he indicated at hearing, then this allows him the opportunity to do so.

IV. RECOMMENDED ORDER

Based on the foregoing, it is recommended that the Montana Board of Outfitters enter its final order finding that the Licensee violated Mont. Code Ann. §§ 37-1-316(7), (19), Mont. Code Ann. § 37-47-341(5), (9), and Admin. R. Mont. 24.171.2301(1). It is further recommended that the Board sanction the Licensee’s license by suspending his license until such time as he has provided the Board with proof that he has resolved all legal issues in Canada that gave rise to the complaint issued by the Board on April 2, 2012. It is also recommended that Barthelmess be required to complete the Advanced Training and Guide class; maintain true and

correct contact information for himself and his business with the Board; and provide proof of licensure in Canada, if obtained, within 30 days of having obtained such licensure.

DATED this 6th day of April, 2016.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
Hearing Officer

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.