

**BEFORE THE BOARD OF OUTFITTERS  
OF MONTANA**

_____ )	Docket No. CC-02-0094-OUT
IN THE MATTER OF THE DISCIPLINARY )	Hearings Bureau Case No. 2040-2002
TREATMENT OF THE LICENSE OF )	
VERNON SMITH, III, )	<b>FINDINGS OF FACT;</b>
License No. 370. )	<b>CONCLUSIONS OF LAW;</b>
_____ )	<b>AND PROPOSED ORDER</b>

**INTRODUCTION**

The Board of Outfitters, acting through its Screening Panel, summarily suspended the State of Montana professional outfitter's license of Vernon Smith, III, License #370. Smith requested a hearing before the Board finally imposed sanctions. John Atkins, Agency Legal Counsel, appeared for the Department of Labor and Industry, prosecuting. Kenneth S. Frazier and Michael K. Rapkoch (Felt, Martin, Frazier, Jacobs & Rapkoch, P.C.) appeared for Smith. The parties expected to settle the contested case. They agreed to submit it on briefs and supporting documents if they were unable to settle it. They were unable to settle it and now have submitted the matter upon their briefs and supporting documents. Based upon those briefs and supporting documents, the hearing examiner makes the following findings of fact, conclusions of law, and proposed order recommending sanctions against Smith's professional outfitter's license.

**FINDINGS OF FACT**

1. Vernon Smith, III, has been a licensed professional outfitter under Montana Board of Outfitters' License No. 370 since January 1, 1985.
  
2. Two federal grand jury indictments issued against Smith for separate felony counts alleging violations of state and federal wildlife laws and federal conspiracy laws. On or about August 3, 2000, an indictment with six such felony counts issued and on October 17, 2000, a second indictment with two more such felony counts issued.
  
3. The federal court dismissed the October counts on September 18, 2001, at the close of the government's case at trial. *See*, Exhibit A, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."
  
4. On September 19, 2001, Smith entered into a plea agreement with the government in *U.S.A. v. Smith*, No. CR 01-64-BLG-RFC (D.C. Mt.), regarding the August indictment. That same day, pursuant to that agreement, Smith entered and the Court accepted a guilty plea on one count of engaging in or aiding and abetting in transporting an illegally taken female mountain lion from Montana to Texas and the government dismissed the other five counts of the August

indictment. *See*, Appendices A and B, "Department's Statement of Facts and Brief," and Exhibit B, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

5. On November 28, 2001, the Montana Board of Outfitters' Screening Panel summarily suspended Smith's license based upon his guilty plea and the impending commencement of mountain lion hunting season.<sup>(1)</sup> *See*, Appendix D, "Department's Statement of Facts and Brief," and Exhibit C, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief." On December 5, 2001, the Board issued the notice of the suspension, citing as its bases Smith's guilty plea, the other charges<sup>(2)</sup> and a report that Smith was currently engaged in mountain lion hunting in Montana. *See*, Exhibit D, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

6. On December 21, 2001, Smith served by mail his request for a hearing on the summary suspension and proposed sanctions. "Request for Hearing."

7. In January 2002, Smith filed an annual application for renewal of his license, requesting that it be renewed in "inactive status."

8. On February 5, 2002, the federal court entered the actual criminal judgment against Smith and imposed a sentence upon him for the one count to which he had entered a guilty plea. *See*, Exhibit E, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

9. On February 10, 2002, Smith entered into an agreement with another licensed outfitter, selling to the other outfitter Smith's Net Client Hunting Use days ("NCHU days"). *See*, Exhibit F, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

10. On February 12, 2002, the Board gave Smith written notice that it rejected his renewal application, citing §37-47-341(4), MCA. *See*, Exhibit G, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

11. On March 28, 2002, the Board returned the other outfitter's application for transfer of Smith's NCHU days, noting four ways in which that application was incomplete. The incompleteness item pertinent to this proceeding was that NCHU days were only transferable from one licensed outfitter to another, and Smith was not currently a licensed outfitter due to his suspension. *See*, Exhibit H, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

12. On May 16, 2002, the Board returned the other outfitter's second application for transfer of Smith's NCHU days, this time for the sole reason that NCHU days were only transferable from one licensed outfitter to another and Smith was not currently a licensed outfitter due to his suspension. *See*, Exhibit I, "Vernon Smith, III's Statement of Facts, Statement of Proposed Relief and Supporting Brief."

## **CONCLUSIONS OF LAW**

1. The Montana Board of Outfitters authorized by §2-15-1773, MCA, has jurisdiction over Smith's license pursuant to §37-47-201(6), MCA; §§37-1-307, 308, 309, 310, 311, 312 and 316, MCA; §§37-47-302, 307 and 341, MCA and §37-47-402 and 404, MCA.

2. The Board had the power to suspend Smith's license once Smith had entered a guilty plea to a felony charge. §37-47-341(4), MCA.<sup>(3)</sup>

3. The Montana Board of Outfitters' Screening Panel had the authority, pursuant to §37-1-307(1)(e), MCA, to determine that reasonable cause existed to believe, after Smith's guilty plea, that Smith was in the process of violating §37-1-316(1), MCA, and had violated §37-47-341(4), MCA. The Screening Panel also had the authority, on behalf of the Board, to summarily suspend Smith's license upon a finding (which the screening panel entered) that public health, safety, or welfare imperatively required the suspension. §2-4-631(3), MCA. The members of the screening panel thereafter could not participate in the Board's final decision, thus necessitating that this and all such screening panels consist of less than the full Board, leaving a sufficient number of Board members to serve as the adjudicatory panel.<sup>(4)</sup> §37-1-307(1)(e), MCA.

4. During the pendency of the summary suspension of Smith's license, Smith's guilty plea and subsequent sentence authorized the Board to reject his renewal application pursuant to §37-47-307(2), MCA; §37-47-302(2), MCA and §37-47-341(4) and (5), MCA. Because the Board had the authority to reject his renewal application, and Smith therefore did not have a current license, the Board also had the authority subsequently to reject the application for transfer of Smith's NCHU days to another outfitter. Without a current license, Smith had no NCHU days. *Cf.*, §37-47-101(9), MCA (NCHU "means the most actual clients served by an outfitter in any NCHU license category in any license year," *emphasis added*).

5. To support final imposition by the Board of sanctions against Smith's license, the Department must prove the truth of the allegations contained in the complaint by a preponderance of the evidence. §37-3-311, MCA; *also, see gen., Ulrich v. State ex rel. Board of Funeral Serv.*, 289 Mt. 407, 961 P.2d 126 (1998). The Department has met that burden by establishing that Smith failed to meet the requirements of a licensed outfitter pursuant to §37-47-341(4) and (5), MCA, and violated §37-1-316 (1), MCA. The Board had the authority to impose the sanctions provided in §37-1-312, MCA, including a continuing suspension of his license until such time as he is no longer under the supervision of the federal criminal system and his civil rights are restored pursuant to §37-47-341(4), MCA. Thereafter, the Board could consider licensing Smith pursuant to Title 37, Chapter 1, Part 2.

6. A continuing suspension of Smith's license until such time as he is no longer under the supervision of the federal criminal system and his civil rights are restored is appropriate pursuant to §37-47-341(4), MCA. The purpose of professional and occupational licensing in Montana "is to assure the public of the adequacy of competence and conduct in the regulated professions and occupations." Ch. 429, L. 1995. In furtherance of this policy, the Montana legislature has clearly

stated its intention to protect the public from outfitters who have engaged, in the course of practicing their licensed profession, in the commission of a felony, during such time as the convicted felon remains under the supervision of the convicting authority and until the individual recovers his civil rights. It has done so by enacting a specific provision in the Montana code that authorizes such action. The licensee in this case has not offered any mitigating evidence of any kind, instead seeking to find technical and procedural violations by the Board during its imposition of the initial summary suspension. The licensee's presentation, while capable and vigorous, did not successfully rebut the evidence in support of both summary suspension and continuing suspension while Smith remains under the convicting authority's power.

### **PROPOSED ORDER**

Based on the foregoing, it is recommended that the Montana Board of Outfitters maintain the suspension, converting it from a summary suspension to a suspension pursuant to a final order, of Outfitter's License No. 370, during the entire periods of incarceration and supervision of Vernon Smith, III, on the criminal charge to which he entered a guilty plea on September 19, 2001 and received his sentence on February 5, 2002, in the matter of *U.S.A. v. Smith*, No. CR 01-64-BLG-RFC (Montana Federal District Court). After the end of the suspension, the former licensee may apply for a license, for Board action in accord with the law.

### **NOTICE**

Pursuant to §2-4-621, MCA, the proposed order in this matter, being adverse to a party other than the agency itself, 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.

DATED this 18th day of November, 2002.

DEPARTMENT OF LABOR & INDUSTRY

HEARINGS BUREAU

By: /s/ TERRY SPEAR

TERRY SPEAR  
Hearing Examiner

1. Smith argued that because the Screening Panel's minutes recited that the basis of the suspension was "numerous felony convictions" (as well as the imminent onset of mountain lion season), the suspension was based on a reversible error of fact. Whatever the language of the

minutes, the Screening Panel relied upon the September 19 guilty plea and the onset of hunting season as the triggering events for suspension and other sanctions.

2. The suspension order and notice reference the other charges in several different ways, including an assertion that the proof was clear and convincing that Smith committed three of the dismissed charges and a conclusion that Smith (apparently based upon the dismissed charges) failed timely to report violations of fish and games laws of which he had knowledge.

3. Like the statutes governing the licensing of doctors, the statutes governing the licensing of outfitters specifically identify felony convictions as grounds for denying, suspending or revoking a license. Therefore, *Erickson v. Board of Medical Examiners*, 282 Mont. 367, 938 P.2d 625 (1997) governs the Board's authority in this instance, rather than the cases overruled therein. In addition, the felony involved in this case involved conduct by Smith while acting as an outfitter, rather than conduct in some transaction unrelated to his license, thus distinguishing Smith's case from the holding in *Ulrich v. Board of Funeral Service*, 289 Mont. 407, 961 P.2d 126 (1998) (under prior statutes relating to the licensing of funeral directors).

4. Smith argued that only the entire Board could impose a summary suspension.

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<b>VERNON SMITH, III,</b> )	<b>NUNC PRO TUNC ORDER</b>
<b>License No. 370.</b> )	<b>CHANGING CONCLUSIONS</b>
)	<b>OF LAW AND PROPOSED</b>
_____ )	<b>BOARD ORDER</b>

On November 18, 2002, the Hearing Examiner issued findings, conclusions and a proposed order in the above matter. The conclusions and proposed order contained statements that did not accurately reflect the status of the action proposed for the Board. IT IS HEREBY ORDERED that to correct those clerical errors, the following paragraphs are substituted for conclusions 5 and 6 and the proposed order, *ab initio*.

Conclusion of Law No. 5. To support final imposition by the Board of sanctions against Smith's license, the Department must prove the truth of the allegations contained in the complaint by a preponderance of the evidence. §37-3-311, MCA; *also, see gen., Ulrich v. State ex rel. Board of Funeral Serv.*, 289 Mt. 407, 961 P.2d 126 (1998). The Department has met that burden by proving that Smith failed to meet the requirements of a licensed outfitter pursuant to §37-47-341(4) and (5), MCA, and violated §37-1-316(1), MCA. The Board had and has the authority to impose the sanctions provided in §37-1-312, MCA, including a continuing refusal to renew or issue a new license to Smith until such time as he is no longer under the supervision of the federal criminal system and his civil rights are restored pursuant to §37-47-341(4), MCA. Thereafter, the Board would have the power to consider licensing Smith. Title 37, Chapter 1,

Part 2.

Conclusion of Law No. 6. Continuing refusal to renew or issue a new license to Smith until such time as he is no longer under the supervision of the federal criminal system and his civil rights are restored is appropriate pursuant to §37-47-341(4), MCA. The purpose of professional and occupational licensing in Montana "is to assure the public of the adequacy of competence and conduct in the regulated professions and occupations." Ch. 429, L. 1995. In furtherance of this policy, the Montana legislature has clearly stated its intention to protect the public from outfitters who have engaged, in the course of practicing their licensed profession, in the commission of a felony, during such time as the convicted felon remains under the supervision of the convicting authority and until the individual recovers his civil rights. It has done so by enacting a specific provision in the Montana code that authorizes such action. The licensee in this case has not offered any mitigating evidence of any kind, instead seeking to find technical and procedural violations by the Board during its imposition of the initial summary suspension. The licensee's presentation, while capable and vigorous, did not successfully rebut the evidence in support of both summary suspension and continuing refusal to renew or issue a new license to Smith while he remains under the convicting authority's power.

### **PROPOSED ORDER**

Based on the foregoing, it is recommended that the Montana Board Outfitters sustain the summary suspension and expressly decide not to renew Outfitter's License No. 370 or issue a new license to Vernon Smith, III, during the entire periods of incarceration and supervision of Smith on the criminal charge to which he entered a guilty plea on September 19, 2001 and received his sentence on February 5, 2002, in the matter of *U.S.A. v. Smith*, No. CR 01-64-BLG-RFC (Montana Federal District Court). After the end of the incarceration and subsequent supervision of Smith by the convicting authority, he may apply for a license, for Board action in accord with the law.

DATED this 19th day of November, 2002.

DEPARTMENT OF LABOR & INDUSTRY

HEARINGS BUREAU

By: /s/ TERRY SPEAR

Terry Spear, Hearing Examiner