

BEFORE THE BOARD OF OUTFITTERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-08-0616-OUT REGARDING:

THE PROPOSED DISCIPLINARY)	Case No. 64-2009
TREATMENT OF THE LICENSE OF)	
MAC VINNEDGE,)	
Outfitter License No. 3895.)	
)	

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

I. INTRODUCTION

In this matter, the Montana Department of Labor and Industry's Business Standards Division (BSD) contends that Mac Vinnedge's failure to log in a fishing trip that he outfitted for Tom and Patricia Kendall (Kendalls) violated Mont. Code Ann. § 37-1-316(18) (committing an act of unprofessional conduct), Admin. R. Mont. 24.171.408 (which requires outfitters to log in the names, dates, and locations of fishing trips provided to clients), and Admin. R. Mont. 24.171.2301 (which provides that a violation of Admin. R. Mont. 24.171.408 is unprofessional conduct).

Hearing Examiner Gregory L. Hanchett held a contested case hearing in this matter on November 14, 2008. Patricia Bik, agency legal counsel, appeared on behalf of the Department of Labor and Industry. Dale Trigg, attorney at law, appeared on behalf of Vinnedge. Exhibits A, B, C, and D were admitted into evidence. Vinnedge, Margine Rosaur, Tom Kendall, Deb Tomasky, Game Warden Brian Sommers, and Jeremy Maynard all testified under oath.

At the conclusion of the hearing, the parties requested an opportunity to provide post-hearing briefs. The last of the parties' briefs was received on January 14, 2009, at which time the record was deemed closed. Based on the evidence adduced at the hearing, the hearing examiner makes the following findings of fact, conclusions of law, and recommended decision.

II. FINDINGS OF FACT

1. At all times pertinent to this matter, Vinnedge has been a licensed Montana outfitter. Vinnedge is the proprietor of Wild Trout Adventures, an outfitting entity that provides fishing trips for customers.

2. Jeremy Maynard has, at all times pertinent to this matter, been a licensed fishing guide. Maynard obtained his guide's license in 2006. In obtaining Maynard's guide's license, Vinnedge served as Maynard's endorsing outfitter. Exhibit D.

3. At all times pertinent to this matter, Maynard has held an independent contractor's license. Maynard's contract with Vinnedge provided that Maynard was to provide Vinnedge with a copy of the client logs that Maynard kept for each client. The purpose of this provision was undoubtedly to ensure that Vinnedge could meet the state administrative requirements imposed upon outfitters to keep logs on each client for whom services were provided.

4. In August 2006, Great Montana Adventure Company at Grouse Mountain Lodge in Whitefish, Montana, booked a fishing trip for Patricia and Tom Kendall with Vinnedge. The fishing trip which the Kendalls purchased was a ½ day adventure. Great Montana Adventure Company paid Vinnedge \$275.00 for the Kendalls' fishing trip.

5. Vinnedge assigned Maynard to pick up the Kendalls and take them on a fishing trip on the Flathead River. The trip was scheduled for August 8, 2006.

6. At Vinnedge's direction, Maynard picked up the Kendalls from Grouse Mountain Lodge and provided them with a ½ day fishing excursion down the Flathead River. While on the river that day, Game Warden Brian Sommers contacted Maynard and checked to ensure that Maynard and the Kendalls had proper documents (fishing licenses, etc.). Sommers had earlier that day contacted Vinnedge who was also on the river providing a fishing trip.

7. Pursuant to their employment contract, Maynard provided Vinnedge with a copy of the client information for the Kendalls' fishing trip.

8. As part of Game and Fish's annual efforts to ensure that outfitters are comporting with their administratively prescribed logging requirements, Sommers requested a copy of Vinnedge's client logs to determine whether he had properly logged all clients for the year. Sommers discovered that Vinnedge had not logged in the Kendalls' trip into his client logs.

9. At hearing, Vinnedge commendably conceded that maintaining client logs is his responsibility. In addition, there is no evidence that Vinnedge has failed to include clients in his logs at anytime in the past. Nor is there any evidence that Vinnedge's license has previously been sanctioned for unprofessional conduct.

10. In light of Vinnedge's otherwise unblemished record, nothing more than imposition of a fine is appropriate in this case.

III. CONCLUSIONS OF LAW

1. Jurisdiction of this matter is vested in the Montana Board of Outfitters under Mont. Code Ann. § 37-47-201(6).

2. The Board may impose sanctions only if a preponderance of the evidence supports the allegations in the complaint. Mont. Code Ann. § 37-3-311; *Ulrich v. ex rel. Board of Funeral Service*, 1998 MT 196, 289 Mont. 407, 961 P.2d 126.

3. Mont. Code Ann. § 37-1-318(18) prohibits a licensee from engaging in unprofessional conduct.

4. The Board can find a licensee violated Mont. Code Ann. § 37-1-316 "without proof that the licensee acted purposefully, knowingly, or negligently." Mont. Code Ann. § 37-1-320.

5. Admin. R. Mont. 24.171.408 requires an outfitter to maintain logs containing the name and addresses of clients, the dates of service to those clients, and the lakes or rivers fished by the clients. Admin. R. Mont. 24.171.2301 provides that a violation of any of the provisions of Admin. R. Mont. 24.171.408 constitutes unprofessional conduct.

6. The evidence in this matter demonstrates by a preponderance that Vinnedge violated Admin. R. Mont. 24.171.408 by failing to log the Kendalls' fishing trip. The Kendalls were Vinnedge's clients as he contracted to provide them with a fishing excursion. By virtue of Admin. R. Mont. 24.171.2301, Vinnedge's violation of Admin. R. Mont. 24.171.408 also demonstrates a violation of Mont. Code Ann. § 37-1-316(18).

7. Vinnedge argues that he has no control over the independent contractor and, therefore, no liability to observe the regulatory duty imposed by the rules to maintain and produce a log of all clients served. This argument is misplaced for several reasons. First, it would vitiate the rule and the policy purposes behind the rule to exempt an outfitter from the requirement of logging all clients simply because he enlisted an independent contractor to provide an outfitting excursion.

Second, it is clear that the licensee received money with the specific knowledge that he was providing the Kendalls with a fishing excursion and with the specific purpose of providing the Kendalls with a fishing excursion. The Kendalls, therefore, were his clients. The fact that the licensee chose to perform his contract with the Kendalls by implementing the services of an independently contracted guide does not change the fact that the Kendalls were his clients, imposing upon Vinnedge the administrative requirement to log in the Kendalls' fishing trip.

Third, Vinnedge himself knows that regardless of the circumstances, when he contracts with an independent contractor to provide services to one of Vinnedge's clients, he is nonetheless required to log those clients and their trip. Hence, the requirement he had in his agreement with Maynard that Maynard must provide Vinnedge with information to complete a client log. Vinnedge has no factual or legal basis to refute his clear violation of the administrative requirement to log all clients.

8. Mont. Code Ann. § 37-1-312(1)(f) provides that upon a determination that the licensee has committed a violation, the Board may issue an order imposing any number of sanctions, including a fine not to exceed \$1,000.00 per offense. In determining the appropriate sanctions, the Board must first consider the sanctions that are necessary to protect the public, and only after making that consideration can the Board consider the rehabilitative needs of the licensee. Mont. Code Ann. § 37-1-312(2).

9. BSD has asked that a fine be imposed against Vinnedge's license. The propriety of a fine is apparent in this matter. In light of Vinnedge's otherwise unblemished record, imposition of a fine in the amount of \$100.00 is appropriate to impress upon Vinnedge the need to conform to outfitting regulations at all times.

IV. RECOMMENDED ORDER

Based on the foregoing, the hearing examiner recommends that the Montana Board of Outfitters direct Vinnedge to pay a fine in the amount of \$100.00 no later than 30 days after the entry of the final order in this matter.

DATED this 18th day of February, 2009.

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.