

BEFORE THE BOARD OF OUTFITTERS
STATE OF MONTANA

IN THE MATTER OF DOCKET NO. CC-10-0356-OUT REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 2081-2010
TREATMENT OF THE LICENSE OF)
KENNETH GRESLIN, Licensed Outfitter,)
License No. 1447.)
)

**PROPOSED FINDINGS OF FACT; CONCLUSIONS OF LAW;
RECOMMENDED ORDER; AND NOTICE OF
RIGHT TO FILE EXCEPTIONS**

I. INTRODUCTION

The Business Standards Division (BSD) seeks to impose a two year suspension upon the outfitter's license of Kenneth Greslin based upon several criminal violations committed in 2005 while engaged in outfitting activities, which resulted in:

(1) His criminal conviction in Lewis and Clark County in 2009 of one count of Failure of Outfitter to Submit Accurate and Complete Records (a misdemeanor);

(2) His criminal conviction in Powder River County Justice Court in 2009 of one count of Outfitter Misrepresenting Services (a misdemeanor);

(3) His forfeiture of collateral in 2005 of \$2,025.00 for a Lacey Act violation.

On January 4, 2011, Hearing Examiner Terry Spear held a hearing in this matter. Michael L. Fanning, Special Assistant Attorney General and Agency Legal Counsel, represented BSD. Licensee Kenneth Greslin attended, with his counsel, Mark D. Parker, Parker, Heitz & Cosgrove, PLLC.

Greslin, Lennie Buhmann, and Brian Lakes testified under oath. Exhibits 1A, 1B, 1D, 2A, 2B, 2C, 3A, 3B,¹ 4B, 4E (page 83 only), 5A, 5B, 5C, 6A, 6B, 6C, 7, 8, and 9 were admitted into evidence.² Exhibit 1C was withdrawn. Licensee objected to the relevance of all parts of Exhibits 1-6, except 1D and 2C, and subsequently withdrew the relevance objections to Exhibits 3A and 3B (Transcript, p. 14, line 21). The portions of Exhibits 5 and 6 admitted over the relevance objections were admitted subject to a final ruling in this decision upon Greslin's objection (as part of his relevance objection to Exhibits 5 and 6) that these prior disciplinary actions against Greslin's license were too remote in time and different in character from the criminal violations cited as the reasons for this present disciplinary proceeding to be relevant.

Counsel for Greslin also noted, for the record, a constitutional challenge that could only properly be brought at the district court level.

Based on the evidence adduced at hearing, the following proposed findings of fact, conclusions of law, and recommended decision now issue, for the consideration of the Board of Outfitters.

II. FINDINGS OF FACT

1. Kenneth Greslin is a licensed Montana outfitter, licensed since 1967, holding license number 1447. He has been an outfitter since he was 25 years old and has been a hunter since he was a child. He does business as Powder River Outfitters.

2. Lennie Buhmann of the Montana Department of Fish Wildlife and Parks is a warden and investigator with 15 years experience, and a sworn peace officer, graduate of the Montana Law Enforcement Academy, and Powder River County Reserve Deputy Sheriff. He has completed many hours of training on investigations and interviewing. Based on a complaint from a Broadus area meat processor in late 2005, Warden Buhmann began an investigation of Greslin's outfitter business. He completed that investigation in 2008 and criminal charges were filed against Greslin in both Lewis and Clark and Powder River counties. In 2005, Warden Buhmann also

¹ The transcript, at p. 7, line 25, indicates that BSD counsel offered Exhibits "3A and D," but this is clearly a mistake. There is no Exhibit 3D, and all further references are to Exhibits 3A and 3B.

² In his final pre-hearing order, at BSD's request, the Hearing Examiner took administrative notice of Exhibits 1-6, all subparts, the authenticity of which were conceded by Greslin. Exhibits 4A, 4C, 4D, and 4F are not mentioned anywhere else in this decision, because although administrative notice was taken of them, they were never offered into evidence.

shared his investigative report with Special Agent Brian Lakes of the United States Fish and Wildlife Service, who issued a federal criminal citation to Greslin.

3. In 2009, Greslin was convicted in Lewis and Clark County Justice Court, upon a no contest plea, of one misdemeanor count of Failure of Outfitter to Submit Accurate and Complete Records. This conviction was part of a plea bargain that resolved multiple counts charged as a result of Warden Buhmann's investigation, that Greslin omitted the harvesting of antelope by 15 of his clients from his annual report to the Board of Outfitters, thereby failing to submit accurate hunting records in violation of Mont. Code Ann. §§ 37-47-301(2) and 344. The Justice of the Peace entered a six-month jail sentence, suspended, together with a \$500.00 fine and applicable surcharges and fees, on the amended complaint. Greslin was represented by an attorney in that action.

4. Submission of accurate records is a crucial component of outfitters' duties. Mont. Code Ann. § 37-47-201(4)(d) and (6) and § 37-47-301(2).

5. In 2009, Greslin was also convicted in Powder River County Justice Court, upon a guilty plea, of one misdemeanor count of Outfitter Misrepresenting Services. This conviction was part of a plea bargain that resolved multiple counts charged in late 2005, as a result of Warden Buhmann's investigation, that Greslin was paid \$50.00 each by approximately 20 of his clients, as handling fees to process game animals the clients chose not to keep, and that Greslin represented falsely to his clients that the game animals would be processed and the meat obtained would be donated to charities; instead, Greslin kept the money and at least some animals that were not processed were given to a third party and ended up rotting in a landfill, which violated Mont. Code Ann. §§ 37-47-301(5) and 344. The Justice of the Peace entered a sentence of a \$500.00 fine and applicable surcharges and fees on the amended complaint. Greslin was represented by an attorney in this action.

6. Special Agent Brian Lakes pursued a federal prosecution of Greslin for involvement in illegal interstate transportation of illegally taken wildlife, in violation of the Lacey Act. Special Agent Lakes is a sworn peace officer whose duties include enforcing federal criminal law regarding wildlife. Special Agent Lake's duties include enforcement of the Lacey Act. In October 2008, the United States Attorney's Office offered a resolution of the Lacey Act violations to Greslin, through his attorney in the Powder River County case. Greslin accepted. In conformity with that agreement, Special Agent Lakes issued a "violation notice" dated December 10, 2008, alleging that Greslin had committed a wildlife violation by conducting outfitting activities in Montana for two out-of-state hunters who killed pronghorn antelope without

Montana hunting licenses, in violation of 16 U.S.C. §3372(a)(2)(A). Greslin paid a fine and processing fee totaling \$2,025.00 to resolve the charges.

7. One of the qualifications required to obtain or to renew an outfitter's license is a demonstrated respect for and compliance with the laws of any state or of the federal government and all rules promulgated under those laws related to fish and game, conservation of natural resources, and preservation without pollution of the natural ecosystem.

8. The Board had sanctioned Greslin's outfitter license twice in the past.

9. In November 1998, Greslin was convicted of a Montana Fish Wildlife and Parks misdemeanor for allowing outfitting services to be conducted for clients outside the boundaries of Greslin's operations plan. In December 1999, the Board imposed a \$300.00 fine and a one-year probation on Greslin's license. Greslin faced an automatic suspension if he violated his probation. He did not.

10. During the 2004 hunting season, one of Greslin's guides was issued two Montana Fish Wildlife and Parks' criminal citations for driving on a closed Department of Natural Resources and Conservation road and driving off an established road on Bureau of Land Management land. In August 2005, the Board ordered Greslin to pay a \$200.00 administrative fine and to take "remedial" outfitter education.

11. Greslin committed the three criminal offenses for which he either was convicted or forfeited his collateral, and which are the basis for the current disciplinary proceedings, within two to four months after the August 2005 sanctions order.

12. Given his experience as an outfitter and as a serving member of the Board of Outfitters (see Finding 13, below), it is not credible that Greslin did not know and appreciate that these were three criminal offenses.

13. Based on the same three convictions at issue here, federal regulators from the Department of the Interior and the Department of Agriculture revoked Greslin's special use permits, which had allowed him to conduct outfitting services on federal lands.

14. Over the years, Greslin served as a member of the Board of Outfitters, from October 1988 to October 1990 and from October 1997 to October 1999.

15. All the violations involved in this present disciplinary proceeding occurred in 2005. The record of this hearing is devoid of evidence of more recent violations or suspicions of violations involving Greslin. Since 2005, the Board of Outfitters and the Montana Department of Fish Wildlife and Parks have had authority to inspect and have periodically inspected Greslin's hunting camps. The current record also is devoid of evidence of current investigations of any potential Lacey Act violations involving Greslin.

16. Greslin is correct that his convictions and bond forfeiture are, each separately, for single violations of state or federal law. The two misdemeanor convictions came out of a plea bargain reducing 15 to 20 offenses in each case to one charge for the conviction. In the third case, the United States accepted forfeiture of collateral instead of prosecution of multiple charges, including at least one felony charge. In addition, all three incidents occurred in a single hunting season, and within less than four months after conclusion of Greslin's most recent prior discipline by the Board.

17. In the 44 years that Greslin has been an outfitter, all Board disciplinary proceedings against his license have occurred in the most recent 12 years. Two out of the three proceedings have occurred within the last six years. The three disciplinary proceedings involve three misdemeanor convictions and three criminal citations.

18. The protection of the public requires suspension of Greslin's license for two calendar years, together with an appropriate fine for each instance of unprofessional conduct, in conformity with Conclusion of Law No. 9, last sentence.

III. RULING ON GRESLIN'S REMOTENESS OBJECTIONS

Greslin's objection that evidence of his prior unprofessional conduct sanctions is too remote is overruled.

The Board first sanctioned Greslin's license in 1999, for a November 1998 conviction of a Montana Fish Wildlife and Parks misdemeanor for allowing outfitting services to be conducted for clients outside the boundaries of Greslin's operations plan. Greslin's probationary year ended in December 2000. The acts at issue in this case all occurred more than 4½ and less than five years after the end of Greslin's probationary year.

The Board next sanctioned Greslin's license in August 2005, for two FWP criminal citations during the 2004 hunting season. The 2005 sanctions (a \$200.00

administrative fine and a requirement to complete “remedial” outfitter education), as noted in the findings, were imposed just months before the 2005 criminal acts that led to Greslin’s convictions and bond forfeiture.

Greslin has presented evidence of the absence of any new citations, investigations, or convictions for acts committed since late 2005, a period now of over five years. This negative evidence (lack of evidence of any such things) was presumably offered as evidence that he is neither a risk to public safety nor in need of such a severe sanction as BSD proposes for any rehabilitative purposes, and covers approximately the same amount of time after he committed the acts at issue in this case as the first of the Board’s prior disciplinary actions was before those acts.

Relevant evidence is evidence that tends to make the existence of any fact of consequence to deciding the current case more or less probable than it would be without the evidence. Mont. R. E., Rule 401. There are no fixed rules to determine whether evidence is too remote to be relevant. The nature of the evidence and the circumstances of the case control. The determination is left to the discretion of the adjudicator and reversed only for manifest abuse. *Preston v. McDonnell* (1983), 203 Mont. 64, 659 P.2d 276; **followed**, *In re the Marriage of Starks* (1993), 259 Mont. 138, 855 P.2d 527; *In re the Marriage of Cole* (1986), 224 Mont. 207, 729 P.2d 1276; *Safeco Ins. Co. v. Ellinghouse* (1986), 223 Mont. 239, 725 P.2d 217; **see also** *Story v. Bozeman* (1993), 259 M 207, 856 P.2d 202; **and** *Zugg v. Ramage* (1989) 239 Mont. 292, 779 P.2d 913.

In a rescission action by purchasers of a bakery, who after the purchase were notified by the Department of Health about deficiencies needing correction, the trial court did not err in refusing admission of conditional health licenses granted to the seller over a decade before the sale, as so remote in time as to have little if any probative value about whether the seller knew at the time of sale that the bakery would not meet health standards. *Preston*.

In a wrongful termination action, the trial court erred in excluding as too remote evidence of alleged dishonesty and theft by the plaintiff within three years before termination. Given the relatively short time between the occurrences, the termination and the trial, the eyewitness nature of the evidence, and the importance of the evidence to the employer’s defense of termination for dishonesty, the evidence should have been admitted. *Barrett v. ASARCO Inc.* (1988), 234 Mont. 229, 763 P.2d 27.

Neither the evidence of the prior disciplinary sanctions nor the evidence of the lack of subsequent criminal violations or investigations are too remote, in time or in circumstances and nature of conduct, and all are admissible as relevant, although of varying weight and substance, to the issues in this case.

IV. CONCLUSIONS OF LAW³

A. *Greslin Violated Professional Standards.*

1. BSD bears the burden of proving, by a preponderance of the admissible and credible evidence, that licensee Kenneth Greslin engaged in 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. BSD must also show that any sanction which it seeks is appropriate under the circumstances of the case.

2. Mont. Code Ann. § 37-1-316 provides in pertinent part:

The following is unprofessional conduct for a licensee . . . governed by this chapter:

(1) conviction, including conviction following a plea of nolo contendere, of a crime related to or committed during the course of the person's practice

3. There is substantial and credible evidence of record in this matter that Greslin was convicted of two crimes in 2009, both committed during the course of Greslin's practice as a licensed outfitter, constituting two violations of the above statute, both committed within months of the most recent disciplinary action taken against him for prior unprofessional conduct.

4. Mont. Code Ann. § 37-47-341 provides in pertinent part:

A license . . . may be . . . suspended . . . or other disciplinary conditions may be applied upon any of the following grounds:

. . . .

³ Statements of fact in the conclusions of law are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

(5) one conviction or bond forfeiture as to a violation of the fish and game or outfitting laws of any state or the United States . . .

5. Again, there is substantial and credible evidence of record in this matter that Greslin was convicted of two crimes in 2009, both committed during the course of Greslin's practice as a licensed outfitter, constituting two violations of the above statute, both committed within months of the most recent disciplinary action taken against him for prior unprofessional conduct. In addition, there is substantial and credible evidence of record in this matter that Greslin forfeited bond in 2009 for a federal Lacey Act violation committed during the course of Greslin's practice as a licensed outfitter, constituting a third violation of the above statute, also committed within months of the most recent disciplinary action taken against him for prior unprofessional conduct.

B. *The Appropriate Sanction.*

6. A regulatory board may impose any of the sanctions enumerated within Mont. Code Ann. Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Mont. Code Ann. § 37-1-312(1)(a), (b) and (c) provide that a regulatory board may revoke, suspend (indefinitely or for a set time), or restrict or limit practice under the license when the licensee has engaged in unprofessional conduct. This same extremely broad power is entrusted to the discretion of each of the various boards, without regard to whether the particular board's regulatory activity is, to use Greslin's counsel's terms, "curtailing sin" or "controlling good."

7. To determine appropriate sanctions, the Board of Outfitters, like all Montana's professional and occupational licensing boards, must first consider the sanctions that are necessary to protect or compensate the public. Only after making this determination may the board consider and include in the sanctions any requirements designed to rehabilitate a licensee. Mont. Code Ann. § 37-1-312(2).

8. The Board of Outfitters has summarily suspended and subsequently revoked an outfitter's license for one felony conviction, for what appears to have been a violation very similar to Greslin's Lacey Act violation, except that the illegally taken animal was a mountain lion and the plea bargaining conviction was for one of multiple felony charges. *In re Smith*, Docket No. CC-02-0094-OUT, 11-18-02.

9. The protection of the public includes protection of the public's right to hunt, which certainly can be imperiled if outfitters disregard the law and the rules of

their profession. Ignoring or abetting illegal hunting by clients is endangering the public by impinging upon legal hunting. Taking money from clients for services not performed (processing of and donation of meat from game animals), as well as giving away some game animals that were supposedly going to be processed, to at least one person from whose possession the game animals came to rest in a landfill, wastes meat and thus also endangers the public.

10. There is no simple math by which the Board can determine that three misdemeanors related to outfitting are equivalent to one felony related to outfitting for purposes of sanctions against the license. It is within the Board's discretion to suspend Greslin's license for two years, because within a period of about six years, he engaged in conduct that resulted in convictions for three misdemeanors related to his outfitting and three citations for further criminal violations related to his outfitting. Even when the most recent criminal activity involved with the six violations is slightly more than six years old, the Board has the discretion to find that Greslin is unqualified to hold an outfitter's license, because his conduct no longer demonstrates respect for and compliance with the laws of any state or of the United States and all rules promulgated under those laws relating to game and conservation of natural resources. Mont. Code Ann. § 37-47-302(3).

11. It is appropriate to impose total fines of \$1,500.00 upon Greslin, in light of the time elapsed since the most recent unprofessional conduct, the loss of his federal special use permits, and the fines already imposed by the two counties and the United States for the criminal violations. Such a total fine as part of this disciplinary action, together with the terms and conditions of his suspension, will protect the public and facilitate possible rehabilitation of the licensee.

V. RECOMMENDED ORDER

Based on the foregoing, the Hearing Examiner recommends the following order:

1. That the Board of Outfitters suspend the Montana outfitter license of Kenneth Greslin, No. 1447, for two calendar years from the date of entry of the Board's order herein. Mont. Code Ann. § 37-1-312(1)(b).

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

3. That during the period of the suspension of his license, Greslin must complete all requirements to maintain licensure, or risk expiration and termination of his license. *See* Mont. Code Ann. § 37-1-141 and companion regulation.

4. That to become eligible for reinstatement of his outfitter license after completion of the suspension period, Greslin must successfully petition for reinstatement under Mont. Code Ann. § 37-1-314. At that time the Board may grant reinstatement subject to such restrictions, limitations, or probation upon the license as it deems appropriate. Greslin must successfully complete the advanced outfitter training course offered by the Board of Outfitters within six months before filing his petition for reinstatement. Mont. Code Ann. § 37-1-312(1)(c) and (g).

5. That Greslin be fined \$500.00 for each of the three criminal violations proven in this case for a total fine of \$1,500.00, Mont. Code Ann. §37-1-312(1)(h), and that the total fine be due within 30 days of entry of the Board's Final Order in this case, via cashier's check or money order, payable to the Board at the following address:

Montana Board of Outfitters
c/o Linda Grady
P.O. Box 200513
Helena, MT 59620-0513

Failure to timely pay this fine in full is sanctionable unprofessional conduct under Mont. Code Ann. § 37-1-316(8).

DATED this 29th day of March, 2011.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
TERRY SPEAR
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.