

BEFORE THE BOARD OF OUTFITTERS
STATE OF MONTANA

IN THE MATTER OF CASE NO. 2012-OUT-LIC-821 REGARDING:

THE PROPOSED DISCIPLINARY) Case No. 1347-2013
TREATMENT OF THE LICENSE OF)
RANCE HERTZ,)
Guide, License No. 15141.)
)

**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 Rance Hertz violated Mont. Code Ann. § 37-1-316(8) (failure to comply with a term, condition or limitation of a license by final order of a board) and (18) (conduct that does not meet the generally accepted standards of practice) as well as 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 (1) having ceased to meet all of the qualifications for holding a license, as required under this chapter and rules adopted pursuant to this chapter).

On March 19, 2013, the Board of Outfitters transferred this matter to the Hearings Bureau for contested case hearing. On April 3, 2013, Hearing Officer Gregory L. Hanchett convened a scheduling conference at which time the parties agreed that the contested case hearing in this matter would be held by telephone on May 10, 2013. On May 1, 2013, BSD counsel filed a motion for partial summary judgment.

In conformity with the scheduling order, the hearing officer convened a contested case hearing in this matter on May 10, 2013. Mary Tapper, agency legal counsel, represented BSD. Mr. Hertz represented himself. Prior to hearing, Mr. Hertz candidly admitted that he violated the above enumerated statutes and rules. As he admitted these violations, the focus of the hearing was narrowed to the issue of the appropriate sanctions to be imposed upon his guide license. BSD's

Exhibits 1 through 12 were admitted into the record by stipulation and each side made oral argument regarding what sanction should be imposed upon Mr. Hertz's license. 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. On June 27, 2006, Mr. Hertz was sentenced to 20 years in the Montana State Prison with 15 years suspended on two counts of burglary, one count of theft, and one count of criminal mischief, all felonies committed by Mr. Hertz in 2005 (Cause No. DC-06-31). Also on June 27, 2006, Mr. Hertz was sentenced to 10 years in the Montana State Prison with five years suspended on one count of theft and one count of criminal endangerment, both felonies committed by Mr. Hertz in 2004 (Cause No. DC-04-380).

2. After being released from his incarceration and while still on parole and serving the suspended portions of the sentences, Mr. Hertz applied for the guide's license at issue in this case. On June 1, 2012, the Board of Outfitters ("Board") considered his application. Upon recommendations and proof of course work and counseling programs that Mr. Hertz was sufficiently rehabilitated, the Board granted Mr. Hertz a probationary license subject to the following conditions:

Applicant's [Hertz's] license will be placed on probation for a period of one year upon issuance of a license. During the term of this probation, the Applicant shall review and follow all laws and rules under the Board's jurisdiction and ensure that his conduct meets the generally accepted standards of practice. If any of Applicant's conduct during the one year period of probation results in a finding of reasonable cause to believe Applicant has violated any statute, rule, or standard applicable to Applicant's probationary license, including but not limited to the provisions of Title 37, Chapters 1 and 47, and Title 87, Montana Code Annotated, and Title 24, Chapters 101 and 171 of the Administrative Rules of Montana, and if that matter concludes with any sanction authorized under 37-1-312, MCA, then Applicant shall be deemed to have violated the final order of the Board in this present matter and may be sanctioned on that basis as well.

During and after the one year period of probation, Applicant shall maintain strict compliance with the terms of his sentences in Cause Nos. DC-04-380 and DC-06-31. Should any action be taken adverse to those sentences,

including but not limited to a petition to revoke, Applicant shall notify the Board. If any of the foregoing conditions of probation fails, then the screening panel may find that the public health, safety, or welfare imperatively requires emergency action and summarily suspend Applicant's license.

3. On June 9, 2012, Mr. Hertz signed the Stipulation agreeing to the terms and conditions of the Notice and consented to the entry of a Final Order for the issuance of a probationary license. (Exhibit "2").

4. On June 15, 2012, the Board issued Mr. Hertz a guide license.

5. On June 18, 2012, Mr. Hertz was arrested in Missoula County for pointing a gun at a car full of people, including three children, and offering the deputy who arrested him a \$20,000 bribe.

6. As a result of Mr. Hertz's June 18, 2012 conduct, a petition to revoke Mr. Hertz's probation in Cause No. DC-06-31 was filed on June 25, 2012 in the Fourth Judicial District Court, Missoula County, entered Petition to Revoke in Cause No. DC-06-31, against Mr. Hertz.

7. As a result of the June 18, 2012 conduct, the Missoula County Attorney filed an Information against Mr. Hertz as well as a supporting Affidavit and Motion for Leave to File an Information in Cause No. DC-12-299 in the Fourth Judicial District Court charging Mr. Hertz with one count of criminal endangerment, a felony, and one count of bribery, a felony. The possible sentence for the criminal endangerment is 20 years of imprisonment at the Montana State Prison and/or a \$50,000 fine.

8. On July 12, 2012, the Fourth Judicial District Court, Missoula County, entered a Petition to Revoke in Cause No. DC-04-380 against Mr. Hertz. (Exhibit "6").

9. On December 6, 2012, the Screening Panel of the Board considered the information presented and issued Mr. Hertz a Notice of Proposed Board Action, Summary Suspension, and Opportunity for Hearing ("Summary Suspension") (Exhibit "7") immediately and summarily suspending his guide license for an indefinite period of time because public health, safety, or welfare imperatively required emergency action.

10. Pursuant to the terms and conditions of his probationary guide license, the facts presented to the Screening Panel established reasonable cause to charge Mr. Hertz with a violation of the following statutes:

Mont. Code Ann. § 37-1-316. The following is unprofessional conduct for a licensee or license applicant governed by this part: . . . (8) failure to comply with a term, condition, or limitation of a license by final order of a board . . . (18) conduct that does not meet the generally accepted standards of practice.

Mont. Code Ann. § 37-47-341. A license or right to apply for and hold a license issued under this part may be denied, suspended, or revoked or other disciplinary conditions may be applied upon any of the following grounds: (1) having ceased to meet all of the qualifications for holding a license, as required under this chapter and rules adopted pursuant to this chapter.

11. On April 2, 2013, the Fourth Judicial District Court, Missoula County, accepted and entered Mr. Hertz's Plea of No Contest and Waiver of Rights in Cause No. DC-12-299 against Mr. Hertz. (Exhibit "8"). On April 2, 2013, Mr. Hertz pled no contest to one count of criminal endangerment, a felony, and he admitted violating the conditions of probation for his previous felony convictions.

12. Pursuant to Mont. Code Ann. § 37-47-341:

A license or right to apply for and hold a license issued under this part may be denied, suspended, or revoked or other disciplinary conditions may be applied under any of the following grounds: . . . (4) having pleaded guilty to or been adjudged by a court guilty of a felony, including a case in which the sentence is suspended or imposition of the sentence is deferred, unless civil rights have been restored pursuant to law . . . (10) any violation of this chapter or a rule adopted pursuant to this chapter.

13. Mr. Hertz's conduct in July 2012, undertaken just three days after his restricted license had been issued and after he had expressly agreed that he would not engage in such conduct and that if he did his license could be sanctioned, demonstrates preponderantly that nothing short of revocation can protect the public health, safety and welfare. Accordingly, as a matter of fact, revocation of his license is the proper sanction under the facts of this case.

III. DISCUSSION

A. *BSD Is Entitled To Summary Judgment On The Issue Of Liability*

Mr. Hertz has candidly admitted that he violated rules of professional conduct. Nonetheless, the hearing officer, for the sake of clarity and to add background for the recommended sanction, will set out why summary judgment is appropriate in this case. The Montana legislature has mandated that regulatory boards apply the Montana Rules of Civil Procedure in contested case proceedings involving licensure issues. Mont. Code Ann. § 37-1-310. Moreover, the Montana Supreme Court has specifically endorsed summary judgment proceedings in licensure cases. *Matter of Peila*, 249 Mont. 272, 280-81, 815 P.2d 139, 144-45 (1991).

“The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.” Rule 56(c), Mont. R Civ. P. The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. Once the moving party meets this burden, the burden then shifts to the party opposing the motion to establish otherwise by more than mere denial or speculation. *Ravelli County Bank v. Gasvoda* (1992), 253 Mont. 399, 883 P.2d 1042. Reasonable inferences from the proof must be drawn in favor of the party opposing summary judgment. *Sherrard v. Prewett*, 2001 MT 228, ¶8, 306 Mont. 511, 36 P.3d 378.

Mr. Hertz candidly admitted at hearing that he did not dispute the factual allegations regarding the issue of his liability for violating professional standards. Mr. Hertz, while on parole for felony convictions stemming from criminal conduct in 2004 and while holding a restricted guide license, entered a “no-contest” plea to committing felony endangerment by pointing a gun at a car full of people. He was in possession of a firearm while being a prohibited possessor. In addition, as a result of his conduct, his probation on his convictions for his 2004 criminal conduct will be revoked. It is likely that Mr. Hertz will be going back to prison as a result of his new criminal conviction and/or because his probation has been revoked.

Montana Code Annotated § 37-1-316(8) states that unprofessional conduct exists when a licensee fails “to comply with a term, condition, or limitation of a license by final order of a board.” In the instant case, the Board granted Mr. Hertz a one-year probationary license with certain conditions including that he remain in compliance with the terms of probation for his previous felony convictions and that

he not violate any statute or rule applicable to his probationary license. However, approximately three days after the Board of Outfitters granted Mr. Hertz a guide license, he committed felony criminal endangerment and violated his conditions of probation for his previous felony convictions, i.e., owning, possessing or being in control of any firearms or deadly weapons and not possessing, using/drinking intoxicants/alcohol. (See Exhibits “10,” “11,” and “12”). Consequently, Mr. Hertz violated the Final Order of the Board, and pursuant to Mont. Code Ann. § 2-4-631(3), the Department determined that public health, safety, or welfare imperatively required emergency action and the suspension of Mr. Hertz’s guide license.

Mr. Hertz pled no contest to felony criminal endangerment and, therefore, is in violation of Mont. Code Ann. § 37-47-341(4). As BSD counsel correctly points out, a plea of no contest is the same as a guilty plea. See Mont. Code Ann. §§ 46-18-201 and 46-21-101. By engaging in conduct that violates Mont. Code Ann. § 37-47-341(4), Mr. Hertz has failed to adhere to the requirement of his restricted license that he “follow all laws and rules under the Board’s jurisdiction and ensure that his conduct meets the generally accepted standards of practice.” Moreover, by virtue of Mr. Hertz pleading no contest to a felony, his violation of the Final Order of the Board, and his violation of the conditions of probation for his previous felony convictions, there are no genuine issues of material fact that his conduct does not meet the generally accepted standards of practice. Mont. Code Ann. § 37-1-316(18). Accordingly, BSD is entitled to judgment as a matter of law with regard to the allegation that Mr. Hertz violated applicable statutes and has committed unprofessional conduct as alleged in BSD’s complaint.

B. *Sanctions*

What remains for consideration is the appropriate sanction to be imposed on Mr. Hertz’s license. BSD argues for revocation as a result of his latest round of criminal convictions and probation violation. BSD contends that the proximity of Mr. Hertz’s latest round of criminal conduct shows that he has no regard for the Board’s direction, particularly in light of the fact that his conduct which led to his latest conviction came only three days after he was issued his guide license. Mr. Hertz contends that his license should not be revoked because he was not engaging in outfitting at the time the conduct which led to his latest conviction occurred. He also indicated that he was not drinking alcohol when he pointed his firearm at a car full of people.

The Board of Outfitters may impose any sanction provided for by Montana Code Annotated Title 37, Chapter 1, upon a finding of unprofessional conduct. Mont. Code Ann. § 37-1-307(f). Among other things, Montana Code Annotated § 37-1-312 provides that a regulatory board may revoke a license for violating standards of professional conduct.

To determine which sanctions are appropriate, a 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).

Under the circumstances that exist in this case, the hearing officer agrees with BSD that Mr. Hertz's license must be revoked. In light of Mr. Hertz's conduct and given the nature of his licensure (i.e., a guide who likely would be alone with clients in remote areas), nothing short of revocation can ensure the protection of the public. Moreover, nothing short of revocation will impress upon Mr. Hertz that his conduct cannot be tolerated because it directly and adversely impacts the health, safety and welfare of the citizenry of Montana.

The hearing officer does not perceive that the threat to the citizenry is lessened in any way by the fact that Mr. Hertz was not involved in guiding at the time he engaged in the conduct which led to his new conviction and petition to revoke his probation. The conduct could just as easily have happened when he was guiding an excursion leaving a client at serious risk of bodily harm or death due to Mr. Hertz's fit of rage. When considered in light of the fact that Mr. Hertz engaged in this conduct just three days after his license had been issued and after he had expressly agreed that he would not engage in such conduct and that if he did his license could be sanctioned, the hearing officer can only conclude that at this time no amount of rehabilitation can ensure the protection of the public.

Mr. Hertz has indicated that he has undertaken anger management classes and if he has done so, he is to be commended. Hopefully, he can get his anger under control so that at some point he will be sufficiently rehabilitated such that he can apply for and obtain a guide's license in the future. However, for the reasons stated above, he cannot at this time be allowed to retain his licensure.

IV. CONCLUSIONS OF LAW

1. The Board of Outfitters has jurisdiction over this matter. Mont. Code Ann. § 37-47-201(5).

2. The licensee has violated professional standards of conduct as described above.

3. Revocation of the licensee's license is necessary as nothing short of that can protect the health, welfare and safety of the public at this point in time.

V. RECOMMENDED ORDER

Based on the foregoing, the hearing officer recommends that the Board enter its order revoking Mr. Hertz's guide license number 15141.

DATED this 16th day of May, 2013.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU
By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
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.