

A Report to the Montana Legislature

Performance Audit

Oversight Improvements in the Outfitting and Guiding Industry

Montana Board of Outfitters

November 2024

Legislative Audit Division

23P-07

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PERFORMANCE AUDITS

Performance audits conducted by the Legislative Audit Division are designed to assess state government operations. From the audit work, a determination is made as to whether agencies and programs are accomplishing their purposes, and whether they can do so with greater efficiency and economy.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. Members of the performance audit staff hold degrees in disciplines appropriate to the audit process.

Performance audits are conducted at the request of the Legislative Audit Committee, which is a bicameral and bipartisan standing committee of the Montana Legislature. The committee consists of six members of the Senate and six members of the House of Representatives.

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November 2024

The Legislative Audit Committee of the Montana State Legislature:

We are pleased to present our performance audit of the Montana Board of Outfitters, which is allocated to the Department of Labor and Industry.

This report provides the legislature with information about the board's oversight of the outfitting and guiding industry. This report includes recommendations for improving the support for board decisions related to disciplinary sanctions and creating more active oversight to further protect the public's safety. A written response from the board and the department are included at the end of the report.

We wish to express our appreciation to board members and Department of Labor and Industry personnel for their cooperation and assistance during the audit.

Respectfully submitted,

/s/ Angus Maciver

Angus Maciver Legislative Auditor

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APPOINTED AND ADMINISTRATIVE OFFICIALS

Montana Board of Outfitters <u>Name</u> **City** <u>Term</u> John Way, Chair Ennis June 2026 Bainville Wagner Harmon, Vice Chair June 2027 Ernie Barker Augusta July 2028 Matt Greemore Twin Bridges June 2025 Ennis Chris Gentry June 2027

Department of Labor and Industry

Sarah Swanson, Commissioner

Graden Marcelle, Deputy Chief Legal

Jay Phillips, Chief Financial Officer

Eric Strauss, Employment Standards Division Administrator

David Cook, Employment Standards Division Deputy Administrator

Kevin Bragg, Management Section Chief

T.J. Hunt, Compliance and Investigations Unit Supervisor

Dan Ritter, Board of Outfitters Executive Officer

23P-07 November 2024 S-1



MONTANA LEGISLATIVE AUDIT DIVISION

Performance Audit

Oversight Improvements in Outfitting and Guiding
Montana Board of Outfitters

A report to the Montana Legislature

BACKGROUND

The purpose of the Board of Outfitters is to provide quality regulatory functions and services to the outfitters and guides in Montana and the public.

There are five board members who each serve three-year terms. It is their responsibility to enforce statute and adopt rules for the oversight of the industry and to safeguard the public health, safety, and welfare.

Allocated to: Department of Labor and Industry

Board Chair: John Way

Department Commissioner: Sarah Swanson

Board Revenue FY 24: \$176,440

Board Expenses FY 24: \$369,096

The hands-off nature of the Board of Outfitters' oversight satisfies license holders but limits the board's ability to provide meaningful oversight to the industry. Regulations that limit the number of clients an outfitter serves are not enforced. Policies like self-attestation of licensee criminal histories create a risk that the board will not fulfill its statutory mandate to protect the health, safety, and welfare of the public by engaging the services of outfitters and guides.

KEY FINDINGS:

The Board of Outfitters (board) makes consistent application decisions, but disciplinary decisions need more structure to ensure sanctions are proportionate to violations. It was not always clear why board sanctions were appropriate for licensees who have violated statutes or rules. Other boards have implemented decision matrices to standardize sanctions for licensee violations.

The board does not effectively communicate or share information with Fish, Wildlife & Parks Enforcement regarding the oversight of outfitters and guides. A previous memorandum of understanding (MOU) between the board and FWP Enforcement was allowed to lapse. This leaves no formal agreement for exchanging information, such as licensees who have lost their licenses or those who have violated fish and game laws. An MOU outlining information sharing would improve the board's ability to oversee the industry.

Self-attestation of criminal history by potential and current licensees leads to unreported citations and crimes the board should consider in licensing decisions. Unlike other boards and outfitting regulatory entities in other states, the board does not require background checks for licensees. This led to violations by licensees, which were identified in Department of Justice data, not being reported.

Conflicting statute and rule make it unclear what criminal history should lead to board review. When criminal history is reported, time frames in rule for when that history is applicable conflict with statute for some offenses. Time frames in rules leave gaps for when the board would review certain offenses.

For the full report or more information, contact the Legislative Audit Division.

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The board does not review the number of Net Client Hunter Use Days (NCHU) outfitters use to ensure they are not exceeding the limit of clients they can serve. Rule only requires outfitters to record the use of NCHU in their client logs and report NCHU transactions between outfitters to the board. We found instances of outfitters exceeding their NCHU but more commonly serving significantly fewer clients than allowed by NCHU. Without a board review of NCHU usage by outfitters, it is an ineffective regulatory tool.

RECOMMENDATIONS:

In this report, we issued the following recommendations: To the board: 5

RECOMMENDATION #1 (page 8):

Internal Control

We recommend the Board of Outfitters work with the Department of Labor and Industry to develop a matrix of sanctions against licensees who have violated statute and/or rule.

Department response: Partially Concur

RECOMMENDATION #2 (page 10):

Internal Control

We recommend the Board of Outfitters enter into and implement a memorandum of understanding with Fish, Wildlife & Parks Enforcement Division outlining a working relationship and information sharing to facilitate more effective oversight of the outfitting and guiding industries.

Department response: Partially Concur

RECOMMENDATION #3 (page 14):

Governance, Risk Assessment, and Planning

We recommend the Board of Outfitters work with the Department of Labor and Industry to pursue administrative rule changes requiring background checks and establishing how background check fees should be paid.

Department response: Do Not Concur

RECOMMENDATION #4 (page 15):

Governance, Risk Assessment, and Planning

We recommend the Board of Outfitters work with the Department of Labor and Industry to pursue administrative rule changes to remove time restrictions for certain criminal history or pursue a statutory change to add time frames currently in rule.

Department response: Partially Concur

RECOMMENDATION #5 (page 19):

Internal Control

We recommend the Board of Outfitters work with the Department of Labor and Industry to change rule to conduct annual checks on outfitter adherence to NCHU limits or review NCHU's effectiveness as a regulatory tool.

Department response: Partially Concur

Chapter I – Introduction

Introduction

The Board of Outfitters (board) is a licensing board with the statutory power and duty to establish and enforce outfitter and guide standards. U.S. Bureau of Economic Analysis data showed Montana's outdoor economy grew 14 percent from 2021 to 2022, generating \$2.9 billion in economic output. Outfitting and guiding are a substantial part of that economic output. The board's stated purpose is to ensure the industry operates at a high degree of competence and satisfies its public users. The board uses its statutory authority to implement rules for the industry that safeguard the public's health, safety, and welfare. However, in an effort to streamline the licensing process, the board has taken an increasingly hands-off approach to oversight. This audit identified that this approach limits the board's ability to most effectively oversee the industry and identify where improvements are needed.

Background

The board regulates the outfitting and guiding industry by setting rules, licensing outfitters and guides, and sanctioning those who violate the statute or administrative rules (ARM) governing the industry. The board has established different licensing requirements for outfitters and guides based on the services they provide when licensed. An outfitter license applicant must meet the following criteria:

- 100 days of verified experience as a licensed guide (120 days for a watercraft endorsement)
- Pass an examination
- Acquire liability insurance

This allows the licensee to directly book clients for hunting or fishing. Guide licensees must meet lower experience requirements and have their application endorsed by a licensed outfitter. Generally, outfitters book clients and hire a guide as an independent contractor to take the clients into the field. The five-member occupational licensing board is allocated to the Department of Labor and Industry (DLI). The governor appoints each board member to serve a three-year term with no term limits. Statute requires the following makeup of board members:

- Outfitter licensed for both hunting and fishing, operating on public land
- Fishing outfitter
- Private land hunting outfitter
- Hunting and fishing outfitter whose business is predominately fishing
- Member of the public who owns a Montana-based business that engages in nonoutfitter business that is reliant on the local outdoor recreation industry

Figure 1 to the right provides 2023 licensing and FY 2024 budgetary information for the board.

The board predominantly generates revenue from fees levied against licensees. For example, the current fee to apply to become a licensed outfitter is \$1,300. Expenditures currently exceed revenue to spend down the board's fund balance. The board's main expenditures are related to the duties it carries out with the assistance of DLI staff. DLI staffs all professional licensing boards that are allocated to the department.

Figure 1

<u>Licensing Fees Generate Most of the Board's Revenue</u>

822 licensed outfitters in 2023
3,097 licensed guides in 2023
\$176K revenue in FY2024
\$369K expenditures in FY2024
\$804K fund balance in FY2024

Source: Compiled by the Legislative Audit Division.

The board develops and adopts the ARM that regulates outfitter and guide licensing and sanction decisions. ARM outlines when DLI staff can issue licenses on behalf of the board for standard or routine applications or if they should be considered nonroutine and reviewed by the board. Staff also take complaints about outfitters and guides and brings those meriting a potential sanction to the board. The duties of DLI staff and the board related to the oversight of outfitters and guides are illustrated in the following figure.

Figure 2

The Board and DLI Staff Share Oversight Responsibilities

The Board



- -Nonroutine licensing decisions
- -Disciplinary decision making on complaints
- -Licensee sanctions
- -Rule making

DLI Staff

-Application processing



- -Complaint intake, information gathering, and potential administrative closure
- -Board administration
- -Legal Support
- -Liability insurance and first aid certification audits

Source: Compiled by the Legislative Audit Division.

The following figure shows complaints and applications that were handled by DLI staff (routine, administratively closed) or went before the board between FY 2019 and 2023.

Figure 3

Processed Complaints and Applications

	Addressed by staff	Heard by the board
FY19-23 Applications	2,822	64
FY19-23 Compliants	34	155

Source: Compiled by the Legislative Audit Division.

Application and complaint processes are tools for the board to ensure they are safeguarding the public health, safety, and welfare of those hunting and fishing with outfitters and guides.

Audit Scope

Our audit focused on the board's oversight role due to broad interest in the outfitting and guiding industry as well as recent statutory changes related to the board's oversight and the state's licensing of hunters using an outfitter. Our work predominantly focused on the board's activities from fiscal years 2019 through 2023. Assessment work reviewing the board and DLI staff decision-making processes led us to focus audit work on the support for licensing and complaint decision-making, including information available to support those decisions and structures in place to ensure decisions are appropriate. We also found the board was largely reactive in its oversight, so audit work included determining the repercussions of relying on self-reported information from licensees and industry self-regulation in some cases. Additionally, we reviewed legislative changes (SB 275 and HB 637, 2021) affecting board membership, outfitter requirements, and licensing of out-of-state hunters, leading us to evaluate the board's adaptation to these changes.

We developed the following objectives for examining the consistency of the board's decisions and the effectiveness of their oversight:

- Are the Board of Outfitters' disciplinary and licensing decisions consistent?
- Does the Board of Outfitters' oversight result in industry compliance with statute and administrative rule to ensure public safety?

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Audit Objectives and Methodologies

To address these objectives, we completed the following methodologies:

- Reviewed relevant DLI policy, ARM, and statute related to the board's operations.
- Interviewed DLI staff and observed the application review, receiving and processing complaints, and board meeting preparation.
- Interviewed four outfitters and one guide.
- Reviewed a sample of DLI staff and board decisions related to outfitter and guide applications and complaints from FY 2019 to FY 2023.
- Identified licensees with a criminal history based on Department of Justice data. Reviewed a sample of those violations to determine if the criminal history was reported to the board.
- Interviewed Fish, Wildlife & Parks Enforcement Division staff to determine the working relationship between the board and Enforcement.
- Conducted online and site searches to identify unlicensed outfitters and guides advertising independently of an outfitter.
- Reviewed a sample of outfitters' client logs to determine if they exceeded the number of clients they could serve.
- Interviewed board members regarding the results of our work and the potential for more active oversight.
- Interviewed industry stakeholders to determine their view of the board's oversight.
- Interviewed other states (Colorado, Idaho, Utah, Wyoming) to determine how they regulate outfitting and guiding.
- Interviewed other professional licensing board members (Board of Behavioral Health, Board of Barbers and Cosmetologists, and Board of Realty Regulation) and reviewed their rules and policy.

Chapter II - Board Decision-Making Needs to be Equitable and Informed

Introduction

Outfitters and guides face a unique responsibility to their clients. They often work in remote settings with clients with varying outdoor recreation experience. Licensees conducting themselves professionally helps ensure the public's health, welfare, and safety. The Board of Outfitters' (board) ability to make licensing and disciplinary decisions enables it to promote and enforce that professionalism. Department of Labor and Industry (DLI) staff work with the board to carry out its decision-making processes.

We found the board and DLI staff handled applications for licensure consistently. However, we found inconsistency in the board's sanction decisions. We also identified the need for more information sharing between the board and Fish, Wildlife & Parks Enforcement Division (Enforcement). Enforcement shares the responsibility of maintaining professionalism in the industry. The board and Enforcement rely on having the information necessary to fulfill that shared responsibility.

DLI Staff and the Board Share Responsibility for Application and Complaint Processing

DLI staff are responsible for the receipt and processing of license applications, renewals, and complaints against licensees. The board has established criteria in Administrative Rule (ARM) determining when staff can process an application or administratively close a complaint. If the criteria are unmet, it goes before the board for review. Allowing staff to process qualifying applications and administratively close meritless complaints is essential to effectively managing the board's workload.

Applications are Handled Appropriately

DLI staff process applications to determine if they include all the information required to approve the application. If the following criteria are clearly met, the application is considered routine, and the staff can issue a license on behalf of the board as a routine application:

- Application requirements such as guide experience and testing are met
- No evidence of unprofessional conduct
- Complete documentation
- No materials or issues deemed necessary for board review by DLI staff

In fiscal year 2023, DLI licensing staff processed 614 routine applications (555 guides, 59 outfitters). Due to the low risk associated with these applications, we reviewed a random sample of 35 routine applications and found no issues with the DLI staff's determination to issue licenses.

Applications that do not clearly meet all criteria are considered nonroutine and must be reviewed by the board. Examples of applications that are deemed nonroutine include applications with certain criminal histories and insufficient proof of experience from another state. We reviewed half of the 64 nonroutine applications from fiscal years 2019 through 2023. We did not identify any inconsistency and believe the board's licensure decisions were appropriate.

Complaint Process Includes Little Input from the Board in Sanction Decisions

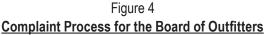
Complaints against licensees can be generated by the public, clients, licensees, DLI staff, law enforcement, and others. DLI staff process incoming complaints and conduct an informal investigation by gathering information related to the case. At this stage, staff can work with legal counsel and administratively close the case if the allegation has no merit. Complaints were commonly based on alleged unprofessional conduct, such as licensees receiving Fish, Wildlife & Parks citations, client complaints, and outfitting without a license. If department staff establish that a complaint has merit, the complaint goes to the board screening panel, a three-member subset of the board. The screening panel determines whether to:

- Dismiss the complaint
- Dismiss and send a letter of instruction
- Table the matter (potentially pending a formal investigation by DLI staff)
- Find reasonable cause to believe the licensee violated a statute, ARM, or standard justifying disciplinary proceedings

If the screening panel finds cause, department counsel assesses the facts and law and negotiates or pursues an appropriate sanction. The board sends a notice of proposed board action and an opportunity for a hearing to the licensee involved. If the licensee does not respond within 20 days, the case defaults and is sent to the adjudication panel, another subset of the board, for a final order of the sanction or to modify the sanction against the licensee. More commonly, the board's legal counsel and the licensee reach an agreement on the proposed sanction, called a stipulation. The adjudication panel can accept, reject, or propose a modification to the stipulation.

Support for the Severity of Sanctions Varied

We reviewed a random sample of 10 administratively closed and 65 nonadministratively closed complaints to determine if the decisions made by DLI staff, legal counsel, and the board were consistent. We found one instance where DLI staff should have forwarded a complaint they administratively closed to the board based on information that confirmed the guide in this complaint was independently advertising as an outfitter. This was a unique situation and did not indicate there was a systemic issue with DLI staff's review of complaints.





Source: Compiled by the Legislative Audit Division.

We analyzed nonadministratively closed complaints by grouping them into categories such as:

- Client Safety Issues
- FWP Citations
- Guide Conduct
- United States Forest Service Violations

We determined if documentation or meeting minutes could explain how the board determines proportionate sanctions for violations within those categories. Out of the 65 nonadministratively closed complaints we reviewed, we identified 17 where the board did not have support for the different sanctions licensees received.

The following are examples where it was unclear how the board determined the sanctions against licensees were proportionate to the violations:

- Two outfitters received tickets for fishing access site violations. One received a \$300 fine and one-year probation, and the other received a \$150 fine and one-year probation. Two other similar access violation cases from the United States Forest Service received only a letter of instruction. The board seemed to issue different sanctions based on the jurisdiction where the violation occurred. Where the violation occurred should not affect the sanction.
- Fish, Wildlife & Parks law and ARM violations resulted in disproportionate sanctions:
 - Failure to have a first aid kit received a \$200 fine and three months probation.
 - Violations such as not renewing a special river permit, no guide sticker, and fishing on a closed stretch of river were dismissed or received only a letter of instruction.
 - One licensee had charges, including illegally possessing game, exceeding the number of clients allowed, transferring an elk license to a client, and taking an elk over the limit. The licensee received a \$500 fine and 12 months probation. FWP took his hunting license, but the board did not take away his outfitting license.

It is unclear what sanctions the board considers appropriate for different fish and wildlife-related violations. Meeting minutes in these cases did not provide additional information on how the board ensures the sanctions are proportionate to the severity of individual violations. In cases where it was the licensee's word against the complainant, some board members indicated they do not always have the information necessary to make an informed decision and are discouraged by DLI from requesting a full investigation due to the cost. These cases were dismissed by the board. Disproportionate board decisions can lead to improper handling of unprofessional conduct and sanctions that are either too harsh or too lenient.

The Board has not Established Appropriate Sanctions

According to DLI policy, the legal counsel assigned to the board should pursue an appropriate sanction and engage the screening panel to assess the relative severity of the violation as it pertains to the potential sanction. We listened to the screening and adjudicatory panel meetings for all cases where we identified the potential for an inconsistent sanction.

In most cases, there was little to no discussion with the screening panel members regarding the appropriate discipline. In cases we reviewed where a stipulation was reached between the licensee and the board—meaning the board's legal counsel and the licensee agreed on a proposed sanction—the adjudicatory panel accepted the stipulation without discussing whether the sanction was appropriate. DLI assigns rotating legal counsel to the board to work with the licensee to generate sanctions for these cases. However, with limited input from the board and no established criteria for determining appropriate sanctions for violations, some board members have expressed concerns. They worry that the lack of a designated legal counsel working consistently with the board may lead to inexperience and the risk of inappropriate sanctions. Still, the adjudicatory panel can reject or modify a sanction they consider inappropriate.

Other Boards have Established Disciplinary Matrices

Other professional licensing boards have created matrices to help ensure consistent and appropriate discipline for licensees committing unprofessional conduct. For example, the Board of Realty and the Board of Barbers and Cosmetologists have preset disciplinary measures in a matrix for common violations. This allows DLI staff to issue sanctions without board review and approval. The Board of Behavioral Health offers another example of a disciplinary matrix for decisions on cases that go to the board. They group all statutory and ARM violations into four categories and structure sanctions around these four categories. The matrix also allows the Board of Behavioral Health to apply more severe sanctions for multiple (as opposed to isolated) violations. This type of matrix helps ensure consistency in sanction decisions while still giving the board an appropriate level of discretion.

A Disciplinary Matrix Would Help Ensure Outfitters and Guides Are More Consistently Disciplined

Statute requires the board to implement their oversight by setting and enforcing standards and adopting and enforcing ARM in a manner that does not discriminate against any person licensed by the board. Board decisions affect the operations of outfitting and guiding businesses. A matrix ensures that DLI legal staff and the board have established sanctions that are consistent and proportional to the violation. This increases the involvement of the board members in determining appropriate discipline, provides guidance to rotating legal staff, and gives clarity to licensees about the sanctions they face if they act unprofessionally.

RECOMMENDATION #1

We recommend the Board of Outfitters work with the Department of Labor and Industry to develop a matrix for sanctions against licensees who have violated statute and/or administrative rule.

Lack of Communication Between Fish, Wildlife & Parks Enforcement and the Board Limits Oversight Effectiveness

While the board has the primary responsibility for enforcing the laws and rules in the outfitting and guiding industry, Enforcement also has a role. For example, statute gives Enforcement the authority to prosecute outfitting without a license, failure of licensees to keep records, and failure to report a client's fish and game violations. However, Enforcement staff and some board members indicated there is no current working relationship between Enforcement and the board making identifying unlicensed practices more difficult. Both entities desired an opportunity to share more information. The lack of communication limits the amount of information shared between the board and Enforcement, even though they share the responsibility for the public's safety when working with an outfitter or guide.

Increased Communication Could More Effectively Address Unlicensed Activity

The board and Enforcement's oversight of the industry could benefit from information sharing. For example, when the board receives complaints about unlicensed outfitting, the board sends a cease and desist letter and can levy fines against that individual. However, it does not forward that complaint information to Enforcement. Outfitting without a license for payment over \$5,000 or for more than five days is a felony. We conducted internet searches and site visits to identify unlicensed outfitters and guides. We found unlicensed operations very difficult to identify, highlighting the importance of communicating suspected unlicensed activity between the board and Enforcement. The board also does not share information with Enforcement about licensees who have had their licenses suspended or revoked by the board. Enforcement does not know these individuals should not be acting as an outfitter or guide and should receive a citation for doing so.

The board is also missing information from Enforcement that would improve its oversight. For example, the board does not get information on citations issued by Enforcement to licensees. Statute considers one conviction of a violation of the fish and game or outfitting laws or regulations to be grounds for potential denial, suspension, or revocation of a license. Violations of fish and game law are also considered unprofessional conduct, which means it should be considered for disciplinary action and licensure renewal decisions. The board does not receive information from Enforcement on violations by licensees that could lead to discipline unless they are reported in a complaint by a game warden or self-reported by the licensee to the board. Based on our review, game wardens report this infrequently. Our review of criminal activity by licensees detailed in the next chapter showed that between 2018 and 2022, licensees did not report a majority of their violations of Fish, Wildlife & Parks or Aquatic Invasive Species law to the board.

Memorandums of Understanding are Common in Other States

According to board members, there used to be a memorandum of understanding (MOU) in place about a decade ago that instructed Fish, Wildlife & Parks to enforce board ARM in exchange for a payment from the board. Board members were unsure of how long the MOU was in place. According to board members, the MOU was not renewed due to disagreement regarding the cost. An MOU outlining communication between different government entities responsible for oversight of outfitters and guides is common in the other states we reviewed and occurred without a cost to the board or regulatory agency.

All four other states we reviewed (Colorado, Idaho, Utah, and Wyoming) had some information-sharing agreements with law enforcement agencies. Three of the four have formalized memorandums of understanding (MOU). Colorado's MOU is between the U.S. Department of Agriculture, U.S. Forest Service, U.S. Department of the Interior, Bureau of Land Management, the Colorado Division of Parks and Wildlife, and the Colorado Office of Outfitters Registration. It outlines that all agencies will maintain close cooperation by exchanging information related to the enforcement of laws, reporting complaints, violations, and unsatisfactory performance, and communicating convictions of outfitters and guides for violations of laws or regulations. It also specifically outlines cooperation and information sharing related to enforcement activities for unlawful outfitting activities. Utah receives a list of anyone who has lost hunting and fishing privileges from the Utah Division of Wildlife Resources Enforcement to crosscheck with licensees. An information-sharing MOU between the Montana Board of Outfitters and Enforcement would increase the effectiveness of the oversight of outfitters and guides in Montana. As in other states, this MOU could potentially include the U.S. Forest Service.

RECOMMENDATION #2

We recommend the Board of Outfitters enter into and implement a memorandum of understanding with Fish, Wildlife & Parks Enforcement Division outlining a working relationship and information sharing to facilitate more effective oversight of the outfitting and guiding industry.

Chapter III - Self-Attestation Leaves Criminal History Unreported

Introduction

All professional licensing boards consider past criminal history to determine if an individual is an appropriate candidate for new or continued licensure. The Board of Outfitters (board) must be knowledgeable about applicants' and licensees' citations and criminal convictions so it can make informed decisions that protect the safety of the public. We used Department of Justice (DOJ) data to identify licensees with existing violations, such as citations and convictions of certain crimes. Our review of a sample of those violations showed a majority of citations and criminal history were not reported by licensees. We also identified an inconsistency in administrative rules and statute related to the time frames of criminal history that should be considered by the board.

The Board of Outfitters Relies on Self-Attestation of Citations and Criminal Background

The board asks potential and current licensees to self-attest to any criminal background on their application and renewal form. The application requires the licensee to report any conviction outside of misdemeanor driving violations. Licensees are not required to report convictions of driving under the influence if they were sentenced more than five years before the application date or were convicted as minors. The renewal document requires reporting any legal or disciplinary actions against the licensee or their professional license. It is up to the applicant to send in documentation for any criminal convictions they report. If a licensee reports a conviction, Department of Labor and Industry (DLI) staff and legal counsel determine if it rises to the definition of unprofessional conduct that should be considered by the board.

Self Attestation Resulted in Unreported Criminal History

We worked with the Department of Justice (DOJ) to identify any outfitter and guide licensees with past citations, misdemeanors, or felonies. These violations should be reported by the licensee to the board. The DOJ data was checked for active and recently terminated licensees. We selected the following citations and criminal history for the search based on the statute and ARM outlining what could affect licensure:

- Citations issued and misdemeanors for violations of Title 23 (recreation), Title 45 (crimes against person or property), Title 80 (aquatic invasive species), Title 61 (shooting from the road) and Title 87 (fishing and hunting regulations)
- All felony violations

In the DOJ data we found licensees had the following citations and criminal history:

- 30 felonies (21 percent outfitters, 79 percent guides)
- 114 misdemeanors (16 percent outfitters, 84 percent guides)
- 234 citations from 2018-2022 (13 percent outfitters, 87 percent guides)

The percentage of violations committed by outfitters and guides was similar to the total percentage of outfitters and guides (20 percent outfitters, 80 percent guides) in the licensee list used to identify violations. We conducted this search for criminal justice information based on social security number, name, and date of birth for the felony and misdemeanor check and name and date of birth for the citation check. Since this was not a finger print background check, there is the possibility for underreporting or false matches.

To determine if licensees reported these violations to the board, we reviewed all of the felonies and randomly sampled half the misdemeanors and half the citations. We reviewed the felony and misdemeanor matches in our sample with DOJ staff to ensure they were accurate. We also reviewed this sample to ensure licensees were active at the time of the violation. We found nine violations where the license was no longer active at the time of the crime and nine cases of a false match by the DOJ's query system. Citations were only based on name and date of birth, increasing the risk of false matches. However, the following figure show the board faces risks from violations not being reported by licensees.

Figure 5 **DOJ Data Review Shows Unreported Criminal History and Citations**

Of the licensed outfitters and guides who had FWP citations, misdemeanors, or felonies between 2018 and 2022, many went **unreported** to the board.

Of the **unreported** criminal history and citations, a higher percentage occurred at license renewal than at initial application.



Source: Compiled by the Legislative Audit Division.

The figure shows that many licensed outfitters and guides failed to report citations, misdemeanors, or felonies to the board. Overall, only 32 percent of citations and criminal background in our sample were self-reported. Outfitters reported a slightly higher rate of 37 percent. While felonies were reported more often than citations and misdemeanors, serious felonies like criminal endangerment, assault with a weapon, and aggravated animal cruelty went unreported. The board needs to determine what level of risk they can accept from licensees not reporting criminal history without jeopardizing the safety of the public.

Other Montana Boards and Other States Require Finger Print Background Checks

The board does not have ARM requiring new applicants to submit to any type of background check. Some board members and DLI staff expressed concern that background checks could potentially slow down the application and renewal processes. The board may need to consider steps such as conditionally licensing outfitters and guides until the background check is complete. Industry group stakeholders that work closely with the board on rule-making indicated they believe outfitters and guides are likely honest in their self-attestation of past criminal activity. However, our review showed the limitations of this system.

Boards Have Varying Authority to Conduct Background Checks

Some occupational licensing boards are required by statute to conduct federal fingerprint-based background checks on applicants, and applicants are required to pay the fee. Statute (§37-1-201, MCA) further highlights the importance of background checks by stating, "the legislature finds that the process of licensure will be strengthened by instituting an effective mechanism for obtaining accurate public information regarding a license applicant's criminal background." Statute also highlights how boards should assess criminal history, prohibiting them from barring someone from being licensed based solely on their criminal history. There must be information to suggest the individual has not been rehabilitated and poses a risk to public health, welfare, and safety to be denied licensure.

Some Montana occupational licensing boards and other states require background checks upon initial application. The Board of Behavioral Health is an example of a Montana board that uses its statutory authority for federal fingerprint-based background checks, and its licensees pay the associated fees. Utah and Idaho also conduct background checks as part of their regulation of the outfitting and guiding industry, even though in Utah, there are fewer eligibility requirements to become an authorized outfitter or guide than in Montana.

None of the boards we reviewed conduct background checks after licensure. However, the board directs DLI's Licensing Bureau Audit Unit to check a sample of licensees for first aid certification and liability insurance requirements. A similar process could be implemented for criminal background checks on a sample of existing licensees to determine if they properly report criminal history.

The Board Should Conduct Background Checks

Statute (\$37-1-307 (2), MCA) designates all professional licensing boards, such as the Board of Outfitters, as a criminal justice agency. This allows the board to conduct name-based background checks or Montana fingerprint-based background checks. The name-based background check will return criminal justice information for Montana only, while the Montana fingerprint-based check will return criminal justice information from Montana, Alaska, Idaho, Nevada, Oregon, Utah, Washington, and Wyoming. According to the DOJ's fee schedule, the name-based check costs \$15, and the Montana fingerprint-based check costs \$10. These options provide the board with more criminal history information than self-reporting. This reduces the risks associated with the unreported criminal history identified in our review. The board should determine the method for gathering the criminal history of applicants that best ensures the public's safety when working with an outfitter or guide. They should also consider ways to mitigate delays to licensing processes when determining the number of background checks they conduct on an annual basis.

RECOMMENDATION #3

We recommend the Board of Outfitters work with the Department of Labor and Industry to pursue administrative rule change:

- A. Requiring name-based or Montana fingerprint-based background checks for a determined number of new applicants and licensees renewing their applications, and
- B. Determining if fees related to background checks are paid by the board or the applicant.

<u>Timelines for Consideration of Criminal History in</u> <u>Administrative Rule Create Multiple Issues</u>

When an applicant reports a criminal history, a complex set of rules determines if it causes an application to be deemed nonroutine. Nonroutine applications are reviewed by the board. ARM for all licensing boards and ARM specific to the Board of Outfitters include time frames establishing when criminal history will cause an application to be considered nonroutine based on when the violation occurred (ex., Nonviolent misdemeanors with a conviction date within two years of the application). If an applicant's criminal history occurred outside of those time frames, ARM declares the applicant rehabilitated, and the application is routine. However, statute defines specific criminal offenses as unprofessional conduct regardless of when the violation occurred. For these criminal offenses, ARM requires applicants to go before the board as nonroutine. This creates conflict between ARM and statute, and applications that should be considered nonroutine are not going before the board for review.

Further conflict exists between the criminal history timelines established in ARM. Timelines establishing when criminal history should be reviewed by the board do not line up between ARM for all licensing boards and ARM specific to the Board of Outfitters. There is a gap where applicants with two violations of Fish, Wildlife & Parks law occurring between two and five years before the application are considered routine, and those same violations outside that time frame would be considered nonroutine.

Statutory or Rule Changes Are Needed to Clarify the Time Restrictions on Criminal History Needing to Be Reviewed by the Board

We found a conflict between the statute and rules regarding when the board should review criminal history and inconsistencies between the rules for all boards and those specific to the Board of Outfitters. While the ARM intends to consider individuals with distant criminal histories as rehabilitated, the current statute does not allow this for certain crimes. Clear guidance is needed to help DLI staff and the board determine when an application should be classified as nonroutine and require board review.

RECOMMENDATION #4

We recommend the Board of Outfitters work with the Department of Labor and Industry to pursue:

- A. Administrative rule change to remove the time restrictions for criminal history outlined as unprofessional conduct in statute or,
- B. Pursue statutory change to the definition of unprofessional conduct to include time frames for when the criminal history in the definition should be considered and update administrative rule to clarify when violations of Fish, Wildlife & Parks laws should be considered nonroutine.

Chapter IV - Limited Effectiveness of Historic Outfitter Regulations

Introduction

Regulating the outfitting industry is a complex topic that receives interest in almost every legislative session. Because out-of-state hunters are heavy users of outfitters and guides in Montana, laws related to out-of-state hunting licenses directly affect the industry. This leaves the board responsible for updating administrative rules (ARM) to keep up with the changing statutory landscape. Our audit found the changing landscape in statute and rule has limited the effectiveness of an existing regulatory tool in the industry, Net Client Hunter Use Days (NCHU).

NCHU Was Intended as a Regulatory Tool for the Outfitting Industry

NCHU is defined by statute as the maximum number of clients an outfitter can serve each year on private and state land and federal land where no federal permit is required. For example, if an outfitter has 20 NCHU, they are limited to serving 20 clients per hunting season. At the time of the audit, there were two different categories of NCHU outlined in the administrative rule—one primarily for big game and one for birds. However, there is no NCHU or equivalent for fishing outfitters outside of river use days on some rivers. ARM requires outfitters to maintain current and accurate client records and make the records available to the board upon request. The records include the name and category of NCHU for each client.

Changing Big Game Hunting Licensing and Board ARM Limits NCHU's Effectiveness as a Regulatory Tool

Statute for a set number of guaranteed licenses for out-of-state hunters hunting with an outfitter was changed by a 2010 ballot initiative. Now, out-of-state hunters using an outfitter do not get a guaranteed license, but they get the benefit of purchasing an additional preference point that makes them more likely to draw a big game license. Changes to big game licensing coincided with changes to ARM, determining how NCHU is distributed among outfitters. After the ARM changes, the number of NCHU was fixed at 18,671, and was divided into categories for big game and bird hunting. The only way an outfitter can increase their NCHU is to purchase it from another outfitter and record the change in NCHU with the board. This has created a market for NCHU and established it as a valuable asset for outfitters.

The Board Does Not Establish Prices For or Enforce NCHU

The board has no involvement in NCHU transactions outside of recording the transfer. Prices paid for NCHU vary depending on the individual transaction and are determined by the buyer and seller. The board also limited its enforcement of NCHU restrictions on the number of clients an outfitter can serve. Outfitters used to be required to submit NCHU records annually. They are no longer required to submit this information annually, and the board only reviews NCHU compliance if they receive a complaint about an outfitter exceeding their NCHU.

Our Review of NCHU Usage Highlight its Limited Effectiveness

We reviewed NCHU compliance for a sample of 32 randomly selected outfitters who had a total of 2,224 NCHU. We asked each of the selected outfitters to send in their client logs for the 2023 hunting season. The client logs show each client they served and the category of NCHU applicable to that client. Our review found the following:

- Two outfitters exceeded their NCHU:
 - One served 18 clients with only 10 NCHU
 - One exceeded NCHU by one client

Both examples are considered unprofessional conduct and are subject to potential discipline by the board. Since the board does not verify compliance with NCHU, outfitters like these are serving more clients than ARM allows without facing consequences from the board. This gives their outfitting businesses an advantage over those complying with NCHU requirements.

We also found outfitters in our sample were not fully using their NCHU in many cases. Outfitters averaged using less than 50 percent of their available NCHU, or about 38 unused NCHUs. Since the amount is fixed, this limits the ability of other outfitting businesses to grow if the number of clients they can serve is limited by the amount of NCHU they have.

Interviews with outfitters found the current system and recent ARM changes have created confusion about NCHU requirements. There was confusion about the different categories, and outfitters were unsure how to know if people were complying with the ARM. Some board members expressed the need to simplify NCHU regulations. They also indicated that outfitters could go over their NCHU by 10 percent. However, this practice is not in statute or ARM.

The Board Needs to Determine the Purpose of NCHU

For NCHU to effectively regulate the scope of outfitter operations, the board must proactively ensure outfitters comply with NCHU limits. ARM defines an outfitter exceeding their NCHU as unprofessional conduct subject to potential disciplinary measures, including denial, suspension, or revocation of a license; probation; fine; or remedial education, among others. If the board wants to verify NCHU compliance, it could implement an annual check based on client logs for a sample of outfitters, as we did for this audit. It could also use information from FWP on out-of-state licensees who bought an extra preference point. A potential out-of-state hunting licensee must identify the outfitter they plan to hunt with to purchase a preference point. Knowing how many out-of-state hunters plan to hunt with each outfitter would largely indicate how many potential clients an outfitter plans to work with.

If the board chooses not to enforce NCHU, it could consider sunsetting a no longer relevant regulation. Statute defines NCHU but not the board's authority to regulate its use. This makes a sunset process difficult due to the historic financial value NCHU has to outfitters. Department of Labor and Industry management does not believe the board has the authority to make changes to regulations that affect the value of NCHU. However, the board made recent changes to NCHU regulations in ARM that affect its value. For NCHU to retain value to outfitters, the board must proactively manage its use to ensure it remains a relevant regulation.

RECOMMENDATION #5

We recommend the Board of Outfitters work with the Department of Labor to:

- A. Develop and implement administrative rule changes to conduct annual checks on outfitter adherence to NCHU limits, or
- B. Review NCHU's effectiveness as a regulatory tool and a potential sunset process.

Montana Board of Outfitters

Department of Labor and Industry

Agency Responses



October 30, 2024

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LEGISLATIVE AUDIT DIV

Mr. Angus Maciver Legislative Auditor Legislative Audit Division P.O. Box 201705 Helena MT 59620-1705

Dear Mr. Maciver:

The Board of Outfitters met on October 24, 2024, to review and consider the Legislative Audit Division's Recommendations resulting from its Oversight Improvements in the Outfitting and Guiding Industry (23P-07). After discussion, the Board moved to provide the following formal responses:

Recommendation #1: The Board partially concurs with the recommendation that a disciplinary matrix be developed. This is a partial concurrence only because the Board previously had developed a disciplinary matrix. The matrix resulted in what was seen by some as unfair treatment because the particular facts of a case became overshadowed by a formulaic application of the matrix. However, as explained by the legislative auditor, the Board agrees that it should undertake the process of developing a matrix to improve the consistency of disciplinary sanctions without divesting the Board of discretion. Also, it is important to note that while the auditor appeared to suggest there should be more discussion between a prosecuting attorney and the screening panel, it is beyond the screening panel's scope to sanction a licensee, so DLI may be intentionally limiting that discussion for good reason. On the other hand, as pointed out by the auditor, there should be some discussion addressing each disciplinary action adopted by the Board in its adjudication panel hearings to reflect the Board's role in the process. The Board (excluding its screening panel members) must make the final decision on all such matters, regardless of whether it comes to the Board in the form of a stipulation or as proposed findings of fact, conclusions of law, and order submitted by a hearing examiner following a contested hearing. If DLI concurs with this recommendation, the Board will gladly undertake the process of developing an appropriate matrix.

Recommendation #2: The Board partially concurs with the recommendation that it enter an appropriate memorandum of understanding (MOU) with FWP to facilitate the exchange of relevant information in aid of proper oversight of the outfitting and guiding industry. This concurrence is offered on the condition that the terms of such an MOU do not cause the Board or FWP to incur substantial cost beyond the use of staff and resources already available to provide the necessary and appropriate level of cooperation. The confidentiality of outfitter records must also be addressed consistent with Board rule. Whether the cost and confidentiality issues can be resolved in an MOU that enhances proper oversight is a matter to be considered by FWP and the Board, with the assistance DLI staff.



Recommendation #3: The Board does not concur with the position that the Board should develop rules to require background checks for license and/or renewal applicants. It is the Board's understanding that DLI has taken the position that a board must be given specific statutory authority to require a background check as a condition of licensure or licensure renewal. We are aware of no board allocated to DLI for administrative purposes that performs background checks upon licensure or renewal without specific statutory authority to do so. The Board does not oppose or advocate for being given the legislative authority to do so, but it simply believes it does not presently have the requisite statutory authority to require background checks of its license or renewal applicants.

Recommendation #4: The Board partially concurs as to the recommendation that it work with DLI to address potential discrepancies in what does or ought to constitute a "nonroutine" application. While there was a finding of appropriate consistency in the handling of applications, the auditor believes there is inconsistency or possibly inappropriate leniency in the categorization of some applications as routine. Part of this concern may be addressed by way of recommendation #3, but the Board does not see an inconsistency between rule and statute applicable to the Board, and it is not constrained to follow the policy of any other board. However, the Board is open to considering this recommendation in consultation with DLI staff, and the auditor is requested to identify those statutes and rules, specifically, that should be considered by the Board and DLI.

Recommendation #5: The Board concurs with the recommendation that the Board annually check NCHU compliance. The Board does not concur with the recommendation that the Board review the effectiveness of NCHU as a regulatory tool. NCHU is defined in § 37-47-101, MCA, as follows:

"Net client hunter use" or "NCHU" means the number of clients authorized to be served by an outfitter on private and state land and on any federal land where an outfitter's use of the federal land is not limited by some means other than NCHU.

By the foregoing definition, NCHU limits only those outfitters providing services on private and state lands. On Federal lands, the permitting system typical of each Federal agency provides the limitation. NCHU continues to have an important place as a regulatory characteristic because it limits the number of people professionally guided on private and state lands. Granted, past use of NCHU "categories" was directly related to the guaranteed outfitter tags that have long since been eliminated and there is apparently some confusion out in the ranks of the licensees. Only recently, the Board made changes eliminating NCHU categories and providing for the uniform treatment of NCHU consistent with its statutory definition. It is also well-taken that a requirement such as NCHU loses its effectiveness as a regulatory tool if it is not enforced, and this will require regular audits. The Board had thought such an audit was occurring in a manner that would ensure proper accountability for the use of NCHU when records were audited, but there may have been a misunderstanding on that point. The Board will work with DLI to arrive at an appropriate number or percentage of licensees to ensure oversight without incurring unnecessary cost. The Board believes this, along with the concurrence and partial concurrence as to nearly all of the auditor's recommendations, will restore and correct any lack of oversight found in the audit.

Also, upon review of the draft Audit Report, the Board offers the following corrections and clarification:

Correction to page 1 of the Introduction: outfitters do not typically engage the services of guides as independent contractors. However, that is a common characteristic of the relationship between fishing outfitters and their guides.



Clarification to page 1 of the Introduction: By advice of DLI staff, the Board is ostensibly moving away from the requirement that a guide application be endorsed by a licensed outfitter. This move has been opposed by industry organizations such as the Montana Outfitters and Guides Association who believe such a decision is a move away from proper vetting of qualified guides and may compromise public protection.

Sincerely,

___Signed by:

John Way John Way, Chairman Board of Outfitters



November 1, 2024

Angus Maciver, Legislative Auditor Legislative Audit Division Room, 160, State Capital PO Box 201075 Helena, MT 59620-1705 NOV 0 1 2024
LEGISLATIVE AUDIT DIV.

Re: Department of Labor & Industry Response to Legislative Audit Division's *Oversight Improvements in the Outfitter and Guiding Industry* (23-P-07)

Dear Mr. Mciver;

The Department of Labor & Industry welcomes collaborative opportunities to improve its administration of The Board of Outfitter policy directives. DLI is committed to continued collaboration with the Board to implement Legislative Audit Division's Recommendations to the extent the Board concurs. The Board's Responses to the Recommendations are simultaneously submitted with DLI's Response.

DLI's Response addresses LAD's Key Findings, which underpin its Recommendations to the Board. LAD's Key Findings are based on review of DLI's administration of the Board's application and complaint processes, licensing decisions, and disciplinary cases.

Recommendation #1 (sanctions matrix)

Board Response: Partially concurs.

Key Finding: "The Board of Outfitters makes consistent application decisions, but disciplinary decisions need more structure to ensure sanctions are proportionate to violations. It was not always clear why board sanctions were appropriate for licensees who have violated statutes or rules. Other boards have implemented decision matrices to standardize sanctions for licensee violations."

DLI Response: LAD provided insufficient information for DLI to evaluate how LAD reached

this Key Finding to advise the Board whether corrective action is needed despite written requests for clarification LAD agreed it would provide.

Recommendation #2 (MOU)

Board Response: Partially concurs.

Key Finding: "The board does not effectively communicate or share information with Fish, Wildlife, & Parks Enforcement regarding the oversight of outfitters and guides. A previous memorandum of

Greg Gianforte, Governor

COMMISSIONER'S OFFICE

Sarah Swanson, Commissioner



understanding (MOU) between the board and FWP Enforcement was allowed to lapse. This leaves no formal agreement for exchanging information, such as licensees who have lost their licenses or those who have violated fish and game laws. An MOU outlining information sharing would improve the board's ability to oversee the industry."

DLI Response:

DLI routinely exchanges investigation information with FWP wardens and opens Board complaints in response to information provided by FWP and other law enforcement agencies.

Recommendation #3 (pursue administrative rules changes for background checks)

Board Response: Does not concur.

Key Finding: "Self-attestation of criminal history by potential and current licensees leads to unreported citations and crimes the board should consider in licensing decisions. Unlike other boards and outfitting regulatory entities in other states, the board does not require background checks for licensees. This led to violations by licensees, which were identified in Department of Justice data, not being reported."

DLI Response:

Licensing boards which require background checks have specific statutory authority to conduct them. The Board does not have statutory authority to require fingerprint or name-based background checks and may not implement this recommendation by rule. For boards authorized to require background checks, DLI provides advance written notice of their privacy interests and obtains express written consent from the applicants for DLI to review their criminal history for licensing purposes.

The Board lacks legal authority to conduct unannounced unlimited criminal background checks of its total licensee population. Neither the Board's initial licensing applications, nor renewal applications inform applicants they may be subjected to a full criminal history background check at the time they apply or during the time they are licensed. In the context of investigating an applicant's fitness for licensure, and prosecuting the Board's disciplinary cases, DLI is statutorily authorized to receive confidential criminal justice information (CCJI) from other State agencies, including law enforcement. This statutory authority does not authorize initiation of unannounced criminal background checks of licensees' history. Neither DLI nor the Board have authority to undertake a dragnet review of all Board licensees' criminal histories over the course of their lifetimes

LAD relied on its equivalent statutory authority to receive CCJI.



Recommendation #4 (non-routine application definition rule change)

Board Response: Partially concurs.

Key Finding: "Conflicting statute and rule makes it unclear what criminal history should lead to board review. When criminal history is reported, timeframes in rule for when that history is applicable conflict with statue for some offenses. Timeframes in rules leave gaps for when the board would review certain offenses."

<u>DLI Response</u>: LAD's conclusion directly contradicts recent audit recommendations to the

Realty Regulation Board regarding non-routine applications, and stems from an incomplete analysis of the Board's authority to determine, based on evidence of rehabilitation, which applications must be delayed for Board

review.

Recommendation #5 (NCHU)

Board Response: Partially concurs.

Key Finding: "The board does not review the number of Net Client Hunter Use Days (NCHU) outfitters use to ensure they are not exceeding the limit of clients they can serve. Rule only requires outfitters to record the use of NCHU in their client logs and report NCHU transactions between outfitters to the board. We found instances of outfitters exceeding their NCHU, but more commonly serving significantly fewer clients than allowed by NCHU. Without board review of NCHU usage by outfitters, it is an ineffective regulatory tool."

<u>DLI Response</u>: The Board's regulatory authority related to NCHU is limited to regulating

outfitter use of NCHU by auditing licensee records to confirm NCHU is within

limits, which DLI will do as directed by the Board.

Sincerely

Sarah Swanson, Commissioner

Montana Department of Labor and Industry