

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 128

ADMINISTRATIVE LAW AND PROCEDURE - Whether rule specifying necessary experience for outfitter's license conflicts with statutory minimum age requirement;
FISH AND WILDLIFE - Licensing of outfitters;
LICENSES, PROFESSIONAL AND OCCUPATIONAL - Licensing of outfitters;

OPINIONS OF THE ATTORNEY GENERAL

ADMINISTRATIVE RULES OF MONTANA - Sections 8.39.409 (superseded), 8.39.502;
MONTANA CODE ANNOTATED - Sections 2-4-305(6), 2-15-1883, 37-47-101 to 37-47-404, 37-47-201, 37-47-302, 37-47-303, 37-47-305;
MONTANA LAWS OF 1903 - Chapter 11, section 10;
MONTANA LAWS OF 1941 - Chapter 103;
MONTANA LAWS OF 1949 - Chapter 173;
MONTANA LAWS OF 1951 - Chapter 184;
MONTANA LAWS OF 1955 - Chapter 223, section 1;
MONTANA LAWS OF 1971 - Chapter 221;
MONTANA LAWS OF 1975 - Chapter 541, section 3;
MONTANA LAWS OF 1987 - Chapter 528.

HELD: Section 8.39.502(1)(a), ARM, which requires certain experience as a condition to outfitter licensure and which may not be satisfied by an applicant based on experience in Montana prior to his 18th birthday, is not inconsistent with section 37-47-302(1), MCA, which conditions licensure on an applicant's being at least 18 years of age.

29 December 1988

Ron Curtiss, Chairman
Board of Outfitters
Department of Commerce
1424 Ninth Avenue
Helena MT 59620-0407

Dear Mr. Curtiss:

You have requested my opinion concerning the following question:

May the Montana Board of Outfitters require, as a condition of licensure as an outfitter, that an applicant have three seasons of experience in Montana or bordering states as a licensed outfitter or licensed professional guide working for a licensed outfitter if such requirement makes it impossible for the applicant to have satisfied the experience requirement prior to his 18th birthday?

I conclude that the Board of Outfitters does have authority to issue reasonable rules requiring specified experience as a condition to licensure as an outfitter and that section 8.39.502(1)(a), ARM, is not inconsistent with section 37-47-302(1), MCA, merely

OPINIONS OF THE ATTORNEY GENERAL

because its requirements cannot be satisfied by all applicants prior to their 18th birthdays. It is inappropriate to resolve the other question raised in your letter, concerning whether the experience requirement in section 8.39.502(1)(a), ARM, is reasonable.

The Legislature first required licensure of individuals in the "guiding" business under 1903 Montana Laws, chapter 11, section 10. The 1903 statute permitted such licensure upon submission of an affidavit by "[a]ny competent person, who is a bona fide citizen of the State of Montana ... stating that the applicant is of good moral character and responsible, and signed by three tax payers of the county in which the applicant lives" and payment of a \$10 annual fee. Aside from the addition of a reciprocity provision in 1941 Montana Laws, chapter 103, the 1903 statute's substantive requirements remained unchanged until 1949 Montana Laws, chapter 173.

The 1949 law established separate licensure requirements for "outfitters" and "guides." The word "outfitter" was defined as "any person or persons who shall engage in the business of outfitting for hunting or fishing parties, as the term is commonly understood, or any person, persons, or agent of a domestic corporation who is operating in this state from a temporary or permanent camp, private or public lodge, private or incorporated home, who shall for pay provide any saddle or pack animal or animals, vehicles, boats, or other conveyance for any person or persons to hunt, trap, capture, take or kill any of the game animals or to catch any of the game fish of the State of Montana." 1949 Mont. Laws, ch. 173, § 4. Section 1 of this statute not only specified the requisite elements of the application for an outfitter's license but also vested in the state fish and game warden discretion to determine whether the applicant possessed "the necessary ability, experience and equipment" for the protection and convenience of his guests. The Legislature consolidated the outfitter and guide licensure requirements in 1951 Montana Laws, chapter 184, leaving unaltered the state warden's authority to make the ability, experience, and equipment determination. In 1955 the warden's licensure responsibility was assumed by the director of the Montana Fish and Game Department who, in turn, was required to make the outfitter ability, experience, and equipment determination with reference "to such standards that have been adopted by the [Montana Fish and Game] commission." 1955 Mont. Laws, ch. 223, § 1.

OPINIONS OF THE ATTORNEY GENERAL

The Legislature substantially revised the regulation of outfitters in 1971 Montana Laws, chapter 221. Most importantly, the 1971 statute created an advisory council, known as the Montana Outfitter's Council, and transferred the Fish and Game Commission's rulemaking powers to the director of the Fish and Game Department. Section 5(2) of this statute further required the director, after considering the Council's recommendations, to issue "[o]utfitter standards" and "[r]egulations prescribing all requisite qualifications for license, including training, experience, knowledge of rules and regulations of governmental bodies pertaining to outfitting and condition and type of gear and equipment." Section 8(2)(c) also imposed, for the first time, a requirement that license applicants "[b]e at least twenty-one (21) years of age." The age requirement was reduced to 18 years in 1975 Montana Laws, chapter 541, section 3.

The basic structure of outfitter regulation contained in the 1971 act remained in effect until adoption of 1987 Montana Laws, chapter 528 (codified in §§ 37-47-101 to 404, MCA). The 1987 statute made two significant changes in such regulation. First, it created the Board of Outfitters which assumed the Department of Fish, Wildlife, and Parks' responsibility with respect to licensing and promulgation of rules

to administer and enforce this chapter, including but not limited to rules prescribing all requisite qualifications for licensure. These qualifications must include training, experience, knowledge of rules of governmental bodies pertaining to outfitting, and condition and type of gear and equipment[.]

§ 37-47-201(5)(b), MCA (temporary). Second, the Board is scheduled to terminate as of July 1, 1991, and be replaced by an advisory entity known as the Outfitters' Council, with the former's current licensing responsibilities transferred to the Department of Commerce. §§ 2-15-1883, 37-47-201, MCA (effective July 1, 1991). In discharging its responsibilities, the Department of Commerce is directed, inter alia, to "consult with the outfitters' council to develop policy concerning the administration of outfitting" (§ 37-47-201(4), MCA (effective July 1, 1991)), but, unlike the Board, is given no rulemaking power.

The description of statutory changes with respect to outfitter licensure is important because it shows not only increasingly more complex regulation but also, since 1955, a shift from specifying statutorily all

OPINIONS OF THE ATTORNEY GENERAL

licensure requirements to a process which relies heavily on administratively imposed standards. Promulgation of those standards has been the responsibility of the Fish and Game Commission, the Department of Fish, Wildlife, and Parks and, under the 1987 act, the Board of Outfitters. The 1971 act, moreover, mandated adoption of rules specifying experience requirements. The rules in effect immediately prior to implementation of the Board's regulations at issue here were contained in section 8.39.409, ARM, and stated:

(1) A general outfitter is required to meet the following experience standards:

(a) a minimum of 5 years' hunting, fishing, packing and camping, handling livestock and equipment experience or previous experience as a professional guide with a general outfitter or previous experience as a licensed special class I and II outfitter; and the director, when deemed necessary, may require a practical field examination to determine the applicant's ability to use all equipment required to provide service.

(2) A special outfitter is required to meet the following experience standards:

(a) a minimum of 5 years' hunting[,] fishing, floating and boating or previous experience as a professional guide with a general outfitter or as a professional guide for a special outfitter in category of license requested.

The Board's rules differ somewhat from the Department's in various respects and, as to experience, require an applicant to "have three seasons of experience in Montana or bordering states as a licensed outfitter or a licensed professional guide working for a licensed outfitter" and permits "one season of experience [to] be waived by the board for an applicant who has completed training at an outfitter or guide school licensed by a state and approved by the board." § 8.39.502(1)(a) and (3)(b), ARM.

The longstanding nature of administratively imposed conditions of outfitter licensure and the express legislative direction in section 37-47-201(5)(b), MCA (temporary), mandating the Board to adopt rules governing experience qualifications negative any contention that section 37-47-302, MCA, which sets forth certain qualifications required to apply for or possess an outfitter's license, is intended to identify the only

OPINIONS OF THE ATTORNEY GENERAL

qualifications, aside from satisfactory completion of the examination provided under section 37-47-305, MCA, upon which licensure may be conditioned; i.e., the statutorily established qualifications are not to be exclusive. Cf. McPhail v. Montana Board of Psychologists, 196 Mont. 514, 640 P.2d 906 (1982) (finding statutory requirements to be exclusive and invalidating rule which conditioned licensure upon satisfying additional requirement); Bell v. Department of Licensing, 182 Mont. 21, 594 P.2d 331 (1979) (same). It has nonetheless been suggested that section 8.39.502(1)(a), ARM, is inconsistent with section 37-47-302(1), MCA, which states in part that an applicant for outfitter licensure must be at least 18 years of age, because it is impossible for an applicant to have satisfied by age 18 the experience requirements through work in this state. See also § 37-47-303(1)(a), MCA (requiring applicants for professional guide licensure to be at least 18 years of age). The issue is therefore whether section 37-47-302(1), MCA, requires the Board to adopt experience standards which, at least theoretically, can be satisfied by an 18-year-old.

Nothing in section 37-47-302(1), MCA, evinces an attempt to so limit the Board's standard-setting authority. Literally read, it merely specifies one of several minimum conditions to licensure and does not prevent the Board from fashioning experience requirements which themselves require one or more years of licensure obtainable only by a person who has reached the age of 18 years. The Legislature clearly contemplated through its express grant of rulemaking authority in section 37-47-201(5)(b), MCA, that the Board would adopt licensure standards pertaining to experience and that those standards, unless otherwise independently unreasonable or in direct conflict with a specific statutory provision, should be given effect. § 2-4-305(6), MCA. Since the age requirement in section 37-47-302(1), MCA, represents a minimum licensure condition, the Board cannot be faulted for adopting a rule which may have the practical effect of limiting outfitter licensure to persons who are no less than 19 or 20 years of age. See Bick v. State, 43 St. Rptr. 2331, 2334, 730 P.2d 418, 421 (1986) ("A valid rule must meet both prongs of a two-prong test to determine whether or not it harmonizes with its enabling legislation. It must not engraft additional and contradictory requirements on the statute, and it must not engraft additional noncontradictory requirements on the statute which were not contemplated by the Legislature"). Simply put, section 37-47-302(1), MCA, may not be metamorphosed into a legislative directive

OPINIONS OF THE ATTORNEY GENERAL

that the Board adopt experience requirements which, at least in theory, can be satisfied by age 18.

You also inquire concerning whether the experience standard in section 8.39.502(1)(a), ARM, is reasonable. The reasonableness of this standard likely presents significant factual questions inappropriate for resolution in an Attorney General's Opinion. Thus, that issue cannot be addressed in this opinion.

THEREFORE, IT IS MY OPINION:

Section 8.39.502(1)(a), ARM, which requires certain experience as a condition to outfitter licensure and which may not be satisfied by an applicant based on experience in Montana prior to his 18th birthday, is not inconsistent with section 37-47-302(1), MCA, which conditions licensure on an applicant's being at least 18 years of age.

Very truly yours,

MIKE GREELY
Attorney General