

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for Renewal of New York
State Guide License No. 434 Pursuant to
Section 11-0533 of the New York State
Environmental Conservation Law and Part 197
of Title 6 of the Official Compilation of
Codes, Rules and Regulations of the State of
New York

- by -

PATRICK CUNNINGHAM,

Applicant.

DEC Case No. OHMS-201368377

DECISION AND ORDER OF THE COMMISSIONER

August 24, 2015

DECISION AND ORDER OF THE COMMISSIONER

This administrative proceeding arises from Patrick Cunningham's operation of a guided whitewater river rafting company known as the Hudson River Rafting Company, Inc., located in the hamlet of North Creek, Warren County. Staff of the Department of Environmental Conservation (Department or DEC) denied Patrick Cunningham's application to renew his New York State Guide License based upon a prior determination of New York State Supreme Court that Mr. Cunningham violated Environmental Conservation Law (ECL) § 11-0533. In that prior determination, Supreme Court, in a special proceeding brought by the New York State Attorney General pursuant to Executive Law § 63(12) and General Business Law article 22-A, held that Mr. Cunningham violated ECL 11-0533 when he repeatedly provided rafting guides for hire who were not licensed by the Department.

For the reasons that follow, Department staff's determination to deny Patrick Cunningham's renewal application is affirmed.

I. BACKGROUND AND PROCEEDINGS

--Issuance/Suspension of License No. 434

The Department issued a "License to Guide" (No. 434) to Patrick Cunningham on April 24, 2008 which, by its terms, was to expire on April 24, 2013.¹ The following categories of guiding activities were designated in the license - fishing, camping, hiking, whitewater rafting, and whitewater canoe.

On October 29, 2012, the Department issued a notice, of which I am taking official notice pursuant to 6 NYCRR 622.11(a)(5), suspending Mr. Cunningham's license pending the outcome of criminal charges brought against him by the State of New York in Hamilton County for various incidents raising public health, safety and welfare concerns. The letter noted that Mr.

¹ Department staff did not offer Mr. Cunningham's license as an exhibit in this proceeding. I am, however, taking official notice of the license pursuant to 6 NYCRR 622.11(a)(5). In future proceedings dealing with the status of a license, staff will be expected to submit the license as an exhibit for the hearing record.

Cunningham could request a hearing within thirty days of receipt of the notice to contest the license suspension.

As noted, Mr. Cunningham's license No. 434 was due to expire on April 24, 2013. On April 14, 2013, Mr. Cunningham applied to the Department to renew his license. In a letter dated May 24, 2013, Department staff denied the application pursuant to ECL 11-0533(7)² based upon Supreme Court's March 29, 2013 decision holding Mr. Cunningham liable for repeated violations of ECL 11-0533 (letter from DEC Senior Attorney Mary Wojcik to Jason T. Britt, Esq. dated May 24, 2013 [May 24, 2013 Staff letter], at 1).

The New York State Attorney General in October 2012 had commenced a special proceeding pursuant to Executive Law § 63(12) and General Business Law article 22-A against Patrick Cunningham and Hudson River Rafting Company, Inc. (HRRC) (see Verified Petition, Hearing Exhibit [Exh] 3, par 1). In the petition, the State alleged that HRRC is a domestic corporation, with its principal place of business located in North Creek, New York, which provides guided rafting and other water craft excursions on various rivers of the State (see id., par 6). The petition further alleged that Mr. Cunningham is the principal owner and president of HRRC and, in those capacities, is in charge of setting the policies and general business practices of HRRC and insuring such policies are followed by staff under his control, including HRRC's guide staff (id., par 4). The petition also alleged that Mr. Cunningham either participated in, directed, or was aware of the practices alleged in the petition (see id.).

The petition charged, in its first cause of action, that since at least 2007, Mr. Cunningham repeatedly violated ECL 11-0533³ by providing unlicensed guides for hire for whitewater

² ECL 11-0533(7) provides that "[a]ny licensed guide who violates any provision of [the ECL] . . . shall in addition to any other penalties, immediately surrender his license to the department, which may be revoked by the department for up to one year following the date of such surrender."

³ ECL 11-0533 provides that "[a]ll guides engaging in the business of guiding on all lands and waters of the state shall possess a license issued by the department" (ECL 11-0533[2]). The term "guide" is defined as "a person who offers services for hire part or all of which includes directing, instructing, or aiding another in fishing, hunting, camping, hiking, white water canoeing, rafting or rock and ice climbing" (ECL 11-0533[1]).

river rafting excursions on the Moose, Black, Indian, and Hudson Rivers (see id., pars 6, 7, 16, 17 and 18). For this and three additional causes of action, the State sought various items of relief authorized by the Executive Law, General Business Law, and the ECL, including civil penalties and injunctive relief.

In a decision dated March 29, 2013, Supreme Court, Hamilton County (Giardino, J.), among other things, granted the State summary judgment on the issue of liability on its first cause of action, holding that Mr. Cunningham and HRRC violated ECL 11-0533 by repeatedly providing rafting guides for hire who were not licensed by the Department (see Decision, Exh 1, at unnumbered fourth page). The court based its determination on evidence that six of Mr. Cunningham's employees were convicted of providing guide services without a license. In a subsequent decision and order, Supreme Court granted various items of injunctive relief against Mr. Cunningham and HRRC, and assessed a total civil penalty of \$12,000 for, among other violations, the documented instances where Mr. Cunningham's employees were issued tickets for guiding without a license (Decision and Order [dated 5-15-13], Exh 2).

Staff, in its consideration of Mr. Cunningham's application to renew his license, stated "[b]ased upon Judge Giardino's Decision, and specifically that Mr. Cunningham repeatedly violated ECL [§ 11-0533], the Department hereby denies Mr. Cunningham's application for New York State Licensed Guide License" (id.). Staff also indicated that, pursuant to 6 NYCRR 197.8(b), Mr. Cunningham could request a hearing within thirty days of his receipt of the May 24, 2013 Staff letter (id.).

By letter dated May 30, 2013, counsel for Mr. Cunningham requested a hearing to contest the Department's denial. The matter was referred to the Department's Office of Hearings and Mediation Services. Administrative Law Judge (ALJ) Edward Buhrmaster was assigned as the presiding ALJ.

After the submission of three documents into the record and briefing by the parties, the ALJ prepared the attached hearing report recommending that staff's denial of Mr. Cunningham's renewal application for a guide license be upheld. I adopt the hearing report as my decision in this matter, subject to the following discussion.⁴

⁴ The three documents are identified in the Exhibit List attached to the ALJ's hearing report.

II. DISCUSSION

Counsel for the parties agreed that the permit application denial would, procedurally, be treated in the manner of a license revocation proceeding under 6 NYCRR 197.8 (see Hearing Report, at 1). Accordingly, the proceeding utilized procedures under the Department's Uniform Enforcement Hearing Procedures at 6 NYCRR Part 622 (see 6 NYCRR 622.3[b][2]), and was decided on the basis of a documentary record and briefing (see Hearing Report, at 1).⁵ Although the parties did not explain their reasoning for this approach, where the denial of an application for renewal of a license is based on violations of the ECL, as was the case here, the use of Part 622 is appropriate (see 6 NYCRR 622.1[a][6]). In such proceedings, staff's denial letter constitutes the complaint and the licensee's request for a hearing constitutes the answer. Department staff bears the burden of proof on all charges and matters which it affirmatively asserts in its denial letter (see 6 NYCRR 622.11[b]).

In this proceeding, arguments were raised relating to revocation of the license even though Mr. Cunningham's previous guide license had expired on April 24, 2013, and there was no current license to revoke (see Hearing Report, at 1). At issue was staff's determination to deny Mr. Cunningham's application to renew his guide license, not license revocation. However, in this matter, the basis for the arguments that the parties presented relating to license revocation are identical to the grounds for denial of Mr. Cunningham's application to renew his license.

It has been long recognized that the compliance history of a permit applicant is a relevant consideration when determining whether to renew a permit (see, e.g., Matter of Bio-Tech Mills Inc. v Williams, 105 AD2d 301 [3d Dept 1985], affd for reasons stated below, 65 NY2d 855 [1985]; Matter of Olsen v Town of Saugerties, 161 AD2d 1077, 1078 [3d Dept 1990] [prior or existing violations are "legitimate factors bearing on the

⁵ By e-mail dated June 5, 2014, Department staff raised the issue whether this pending proceeding was moot. Department staff and Mr. Cunningham were then provided, by e-mail dated June 30, 2014, with the opportunity to address this issue. Subsequently, in a communication dated July 21, 2014, Department staff withdrew its contention relating to the mootness of the proceeding.

suitability of an applicant"]; (DEC) Commissioner Policy, DEE-16, Record of Compliance Enforcement Policy, dated March 5, 1993; see also Matter of Bardin, Order of the Commissioner, March 5, 2014, at 4; Matter of Karta Corp., Order of the Commissioner, Aug. 10, 2010, adopting Hearing Report, at 24-26).

As a licensed guide, Mr. Cunningham must comply with the ECL, and the rules and regulations adopted pursuant to its authority, and this record demonstrates that he has not done so. If he offers guided whitewater rafting excursions, he must provide licensed guides for those excursions. Moreover, by sending clients on whitewater rafting trips without licensed guides, Mr. Cunningham exposes members of the public to risks beyond those inherent in a professionally guided activity.

Supreme Court, in its March 29, 2013 decision, expressly held that Patrick Cunningham and HRRC violated ECL 11-0533 based upon the evidence submitted in the special proceeding that six guides employed by Mr. Cunningham were convicted of guiding without a license. Moreover, the petition pleaded that Mr. Cunningham was the principal owner and president of HRRC and, in those capacities, was in charge of setting the policies and general business practices of HRRC and insuring such policies were followed by staff under his control, including HRRC's guide staff. The petition also alleged that Mr. Cunningham either participated in, directed or was aware of the illegal practices that were being conducted. Supreme Court held Mr. Cunningham personally liable for the ECL violations based upon his direct operational control of HRRC and its employees, or his awareness of their actions, as pleaded in the petition.

Under the doctrine of collateral estoppel, or issue preclusion, a party is estopped from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party (see Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]). The party seeking application of collateral estoppel bears the burden of showing that the identical issue was "necessarily decided" in the prior action, while the party opposing application of the doctrine must demonstrate the absence of a full and fair opportunity to contest the prior determination (see Buechel v Bain, 97 NY2d 295, 304 [2001], cert denied 535 US 1096 [2002]; see also Matter of Locaparra, Decision and Order of the

Commissioner, June 16, 2003, at pages 5-6).⁶ Accordingly, Mr. Cunningham's personal liability for the repeated violations of ECL 11-0533 was "necessarily decided" in the prior special proceeding.

Mr. Cunningham here offers no persuasive arguments rebutting the presumption or demonstrating the absence of a full and fair opportunity to litigate in the prior special proceeding. First, he asserts that violations of ECL 11-0533 are "ordinarily" criminal offenses subject to the "beyond a reasonable doubt" standard of proof. Mr. Cunningham argues that the Supreme Court decision was based upon the application of a lower "judicial discretion" standard which does not establish a violation of ECL 11-0533 under the higher "beyond a reasonable doubt" standard. Mr. Cunningham's argument is unpersuasive. While the ECL provides for criminal liability for violations of the Fish and Wildlife Law (ECL articles 11 and 13), including ECL 11-0533 (see ECL 71-0919[1][b]; ECL 71-0923), it also provides for civil penalties for violations of that law (see ECL 71-0919[1][c]; ECL 71-0925).

By regulation, this proceeding is civil in nature and governed by the "preponderance of evidence" standard of proof (see 6 NYCRR 622.11[c]). This is the same standard of proof that applies in civil judicial proceedings, including special proceedings under CPLR article 4 when issues of fact require a trial. In addition, special proceedings under the CPLR and Department regulations applicable to this proceeding allow for summary determination subject to the standards that govern summary judgment under the CPLR (compare CPLR 409[b] with 6 NYCRR 622.12[d]). Thus, contrary to Mr. Cunningham's assertions, both the special proceeding before Supreme Court and the present administrative proceeding are governed by the same legal standards.

Mr. Cunningham's assertion that Supreme Court applied a lower "judicial discretion" standard in determining that he violated ECL 11-0533 is mistaken. The judicial discretion

⁶ To determine whether an issue was "necessarily decided" in the prior action, the prior judgment and the pleadings upon which it is based are examined (see Bronxville Palmer, Ltd. v State, 18 NY2d 560, 563-564 [1966]; Wheeler v Village of Saugerties, 216 AD2d 733, 734-735 [3d Dept 1995]). There is a rebuttable presumption that the issues involved or determined in a prior proceeding are those "pertinent to the subject of the controversy as defined by the pleadings" (Bronxville Palmer, 18 NY2d at 563 [citations omitted]).

standard was applicable in the special proceeding on the issue whether to grant the State injunctive and other relief (see State v Princess Prestige Co., Inc., 42 NY2d 104, 108 [1977]; see also State v Cortelle Corp., 38 NY2d 83, 85-86 [1975] [addressing Executive Law § 63 (12)]; Decision and Order, Exh 2, at unnumbered second and third pages). However, the determination that Mr. Cunningham violated ECL 11-0533 was not made in the exercise of judicial discretion. Rather, the court made that determination applying summary judgment standards (see Decision, Exh 1, at the unnumbered second through fourth pages). Thus, because Supreme Court's determination was made under the same legal standards as apply to the administrative enforcement of ECL 11-0533 violations, the applicable standards of proof do not provide a basis for declining to give the Supreme Court decision issue preclusive effect in this proceeding.

Second, Mr. Cunningham argues that the Supreme Court decision may not be given issue preclusive effect because ECL 11-0533 does not authorize revocation of a guide license based upon vicarious or accomplice liability, and the provision of the ECL that authorizes vicarious or accomplice liability for violations of the Fish and Wildlife Law is subject to the higher standard applicable to criminal proceedings. Accordingly, Mr. Cunningham asserts that the applicable elements in each proceeding are different. Again, Mr. Cunningham's arguments are unpersuasive.

Supreme Court held Mr. Cunningham personally liable on the ground that HRRC and he "repeatedly provided rafting guides who were not licensed by the Department of Environmental Conservation . . . in violation of ECL § [11-0533]" (Decision and Order, Exh 2, unnumbered second page n 2). As HRRC was engaged in the business of providing rafting services for hire, HRRC was required to provide licensed guides, and its failure to do so constituted violations of the ECL (see ECL 11-0533[1], [2]; see also ECL 1-0303[18][definition of "person"]; Decision, Exh 1, at unnumbered fourth page).

As to Mr. Cunningham's personal liability, that liability is based upon the allegations that Mr. Cunningham, as the owner and president of HRRC, "is in charge of setting the policies and general business practices of HRRC and insuring such policies are followed by staff under his control, including . . . guides," and that Mr. Cunningham "either participated in, directed, or was aware of the practices" of HRRC alleged in the

petition (see Petition ¶ 4, Exh 3). Responsible corporate officers, such as Mr. Cunningham, are personally liable for the acts of a corporation (such as HRRC here) that are in violation of public health and safety laws, such as the ECL, over which they exercise decision-making authority, direction, and control (see, e.g., Matter of Carney's Restaurant, Inc. v State of New York, 89 AD3d 1250, 1253-1254 [3d Dept 2011]; see also Matter of Galfunt, Order of the Commissioner, May 3, 1993, at 2 [citing United States v Park, 95 S Ct 1903 (1975); United States v Dotterweich, 64 S Ct 134 (1943); and United States v Hodges X-Ray, Inc., 759 F2d 557 (1985)]). Thus, contrary to Mr. Cunningham's assertions, the ECL does provide for Mr. Cunningham's personal liability for the violations involved in this proceeding.

Even assuming the elements for Mr. Cunningham's personal liability in the special proceeding were different from those involved in this proceeding, the underlying facts determined by Supreme Court -- that he was responsible for setting the business policies and practices of HRRC, and that he either participated in, directed, or was aware of HRRC's illegal practices -- provide sufficient support in this proceeding that Mr. Cunningham is personally liable under the responsible corporate officer doctrine. The facts determined by Supreme Court in the special proceeding are sufficient to establish that Mr. Cunningham was the responsible corporate officer who exercised decision-making authority, direction, and control with respect to the violations of the ECL by HRRC and its employees (see, e.g., Matter of Carney's Restaurant, 89 AD3d at 1253-1254).⁷

Because the issue of, and facts establishing, Mr. Cunningham's personal liability for violations of ECL 11-0533 were "necessarily decided" in the proceeding before Supreme Court in which he had a full and fair opportunity to litigate, he is estopped from relitigating in this proceeding the issue or

⁷ Although not raised by staff in this proceeding, the facts as determined by Supreme Court would have been sufficient to hold Mr. Cunningham liable as an accessory under ECL 71-0903. Under that provision, "[a] person who counsels or aids in a violation of any provision of the Fish and Wildlife Law . . . is guilty of the violation which he counsels or aids." Nothing in ECL 71-0903 limits its application only to criminal violations of the ECL. Thus, Mr. Cunningham's liability could have been based upon his role as an accessory to the six guides that Supreme Court found violated ECL 11-0533.

the facts underlying that determination. Accordingly, I conclude that Department staff has established that Mr. Cunningham repeatedly violated ECL 11-0533 by providing rafting guides who were not licensed by the Department and that denial of his application to renew his application was justified and warranted. I hereby uphold the determination of Department staff to deny Mr. Cunningham's application to renew a guide license.⁸

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Patrick Cunningham is adjudged to have violated ECL 11-0533 by repeatedly providing rafting guides for hire who were not licensed by the Department for whitewater rafting excursions.
- II. Department staff's determination, as set forth in its letter dated May 24, 2013, to deny Patrick Cunningham's application to renew his New York State Guide License, is affirmed.
- III. All communications from Patrick Cunningham to the Department concerning this decision and order shall be made to Scott Crisafulli, Esq., at the following address:

Scott Crisafulli, Esq.
Deputy General Counsel
New York State Department of Environmental Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500.⁹

⁸ Department staff contended that Mr. Cunningham would not be eligible to apply for a guide license until "on or after March 29, 2014" (May 24, 2013 Staff letter, at 1). Presumably staff was relying on language in the regulations that allows for a revocation period of up to one year where a license is revoked (see 6 NYCRR 197.8[d]). However, at issue here was staff's denial of Mr. Cunningham's application to renew and not a revocation of a license (which, by its terms, had expired). Staff provided no legal authority for imposing a revocation period where an application to renew a permit is denied, and, absent staff providing a legal justification, its request for a revocation period is not granted.

⁹ The Department attorney who handled this matter has transferred to another State agency. Mr. Crisafulli is hereby designated to serve as the agency attorney contact on this matter.

IV. The provisions, terms and conditions of this decision and order shall bind Patrick Cunningham, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Marc

Gerstman

Acting Commissioner

Dated: August 24, 2015
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter of
the Application of

PATRICK CUNNINGHAM

for Renewal of a Guide License (#434)
pursuant to Section 11-0533 of the
New York State Environmental Conservation
Law and Part 197 of Title 6 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York

HEARING REPORT

- by -

/s/

Edward Buhrmaster
Administrative Law Judge

August 23, 2013

PROCEEDINGS

This report addresses the challenge by Patrick Cunningham to a determination by Staff of the Department of Environmental Conservation ("DEC") to deny his application for renewal of his New York State guide license (#434). DEC Staff's determination was based on a March 29, 2013, decision of Acting State Supreme Court Justice Richard C. Giardino, which, DEC Staff maintains, found that Mr. Cunningham repeatedly violated Environmental Conservation Law ("ECL") Section 11-0533.

DEC Staff's determination was embodied in a letter of May 24, 2013, from DEC Staff attorney Mary Wojcik to Mr. Cunningham's attorney, Jason T. Britt, Esq., of McPhillips, Fitzgerald & Cullem, LLP, in Glens Falls. By letter of May 30, 2013, to DEC's Region 5 office in Ray Brook, Mr. Britt requested a hearing pursuant to Section 197.8(b) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR 197.8(b)"). Upon DEC Staff's referral of the hearing request to DEC's Office of Hearings and Mediation Services, I was assigned to the matter by James T. McClymonds, DEC's Chief Administrative Law Judge, as confirmed by his letter of June 4, 2013.

On June 7, 2013, I conducted a conference call with Mr. Britt and Ms. Wojcik to discuss hearing procedure. As confirmed in my letter of June 11, 2013, the parties agreed that this matter would proceed on the basis of a documentary record which would include, at the least, Justice Giardino's March 29, 2013, decision. The parties agreed that legal briefing would be appropriate, but that witness testimony would not be necessary. Furthermore, they agreed that the hearing would be governed by 6 NYCRR 197.8, and treated as one for license revocation, even though Mr. Cunningham's previous guide license expired on April 24, 2013, and there is no current license to revoke. There was also agreement that 6 NYCRR Part 622 would apply to the extent that this matter may be considered as one involving a DEC-initiated license revocation, where the basis for the revocation is founded on matters which, in whole or in substantial part, constitute a violation of the ECL (6 NYCRR 622.1(a)(6)).

During the June 7, 2013, conference call, Mr. Britt said that he would compile the documents that were relevant to his arguments and submit them to Ms. Wojcik, with the goal of achieving agreement as to what should be presented to me. However, on July 11, 2013, Mr. Britt wrote that the parties had been unable to reach an agreement, and requested a conference call to attempt to resolve the dispute or, alternatively, to set a briefing schedule on that issue.

On July 11 and 12, 2013, I conducted conference calls with Mr. Britt and Ms. Wojcik. During the call on July 11, 2013, the parties agreed that the record should include Justice Giardino's Decision of March 29, 2013, as well as his Decision and Order of May 15, 2013, which concluded the proceeding before him. Copies of both were subsequently hand-delivered to me by Ms. Wojcik, and have been received as Exhibits No. 1 and 2. (An exhibit list is attached to this report.)

During the call on July 12, 2013, the parties further agreed that the record should include the petition in the civil court matter, but not the attachments to the petition. By e-mail of July 15, 2013, Mr. Britt furnished a copy of the petition that he said had been approved by the parties. The e-mail submittal (received as Exhibit No. 3) included the petition, dated October 10, 2012; the verification for the petition; and an unsigned copy of an Order to Show Cause and Temporary Restraining Order, dated October 11, 2012.

Consistent with a schedule they negotiated, Mr. Britt and Ms. Wojcik submitted briefs addressing the documentary record. On behalf of Mr. Cunningham, an affirmation and memorandum of law, both dated July 19, 2013, were submitted by Mr. Britt. Ms. Wojcik submitted DEC Staff's memorandum of law, dated July 29, 2013, and Mr. Britt submitted a reply memorandum, dated August 1, 2013. The hearing record closed on August 1, 2013, upon completion of the briefing schedule.

POSITIONS OF THE PARTIES

Position of DEC Staff

As part of a special proceeding brought by the State pursuant to Executive Law Section 63(12) and General Business Law Article 22-A, Justice Giardino determined that both Mr. Cunningham, the holder of a DEC-issued guide license, and Hudson River Rafting Company, Inc., of which Mr. Cunningham is principal owner and president, repeatedly violated ECL Section 11-0533 by providing rafting guides for hire who were not licensed by DEC. Pursuant to ECL Section 11-0533(7), this warrants denial of Mr. Cunningham's application to renew his guide license, though Mr. Cunningham may again be eligible to apply on or after March 29, 2014, one year from Justice Giardino's determination. In the court proceeding, Justice Giardino found that neither Mr. Cunningham nor Hudson River Rafting Company Co. had raised a material issue of fact concerning their violations of ECL Section 11-0533. Furthermore, in this administrative appeal, Mr. Cunningham has raised no material issue of fact concerning DEC Staff's licensing determination.

Position of Patrick Cunningham

The violation of ECL Section 11-0533 found by Justice Giardino was not an independent cause of action, but was a component of an Executive Law Section 63(12) proceeding. Justice Giardino's decisions do not disclose any actions that Mr. Cunningham took in his capacity as a guide that acted as a basis for finding that he violated ECL Section 11-0533. The decisions instead appear to find Mr. Cunningham vicariously liable for the incidents of unlicensed guiding proven to have been committed by his employees. This is factually and legally insufficient to support suspension or revocation of Mr. Cunningham's personal rafting license, because of the divergent standards of proof between the Executive Law and the ECL, and the absence of clear authority to allow for a license suspension through vicarious or accomplice liability under ECL Section 11-0533.

FINDINGS OF FACT

1. In October 2012, the New York State Attorney General commenced a special proceeding pursuant to his authority under Executive Law Section 63(12) and General Business Law Article 22-A, against respondents Hudson River Rafting Company, Inc., and Patrick Cunningham.

2. According to the petition filed by the Attorney General (Exhibit No. 3), the special proceeding was brought "to enjoin respondents' fraudulent, deceptive and illegal conduct in connection with their business providing guided river excursions on various New York rivers, to recover restitution and damages for consumers victimized by respondents' practices, and to recover penalties and costs, as authorized by statute."
(Verified Petition, paragraph 1.)

3. Respondent Hudson River Rafting Company was described in the petition as "a domestic corporation that was incorporated in New York on or about April 23, 1981, with its principal place of business located at 1 Main Street, North Creek, New York."
(Verified Petition, paragraph 3.)

4. Respondent Patrick Cunningham was described in the petition as "the principal owner and president" of Hudson River Rafting Company, and, as such, "in charge of setting" its policies and general business practices, and "insuring such policies are followed by staff under his control, including, but not limited to, guides, bus drivers and administrative staff."
(Verified Petition, paragraph 4.)

5. The petition said that since on or about 1981, Hudson River Rafting Company and Patrick Cunningham have provided guided river excursions with rafts, kayaks and canoes on various New York rivers, including white water excursions on the Hudson, Black, Moose, and Sacandaga Rivers. (Verified Petition, paragraph 5.)

6. The petition contained four separate causes of action against Hudson River Rafting Company and Patrick Cunningham:

(1) Repeatedly providing guides for hire for rafting who were not licensed by DEC in violation of ECL Section 11-0533;

(2) False and misleading advertising in violation of General Business Law Section 350, by advertising that they provide "safe" guided rafting excursions;

(3) Repeated violation of Vehicle and Traffic Law Section 509-b, to the extent that their bus was operated by employees and/or guides without the requisite drivers license; and

(4) Statutory fraud in violation of Executive Law Section 63(12), by misrepresenting their services.

(Verified Petition, paragraphs 16 to 27.)

7. On March 29, 2013, Justice Giardino issued a Decision (Exhibit No. 1) granting summary judgment to the New York State Attorney General on the first, third and fourth causes of action.

8. On May 15, 2013, after additional submissions from the parties, Justice Giardino issued a Decision and Order (Exhibit No. 2) dismissing the second cause of action without prejudice.

9. To support its motion for summary judgment on the first cause of action, the New York State Attorney General alleged 11 instances where the respondents' employees were issued tickets by DEC agents for guiding without a license. (Decision, page 4.)

10. Out of those 11 instances, the New York State Attorney General submitted either a certificate of disposition or certificate of conviction showing that six of those tickets resulted in convictions, while the others were dismissed. (Decision, page 4.)

11. Justice Giardino found that, when viewing the evidence in the light most favorable to the respondents, the New York State Attorney General had met his burden of proof with regards to the first cause of action, thus shifting the burden to the respondents to produce evidence sufficient to demonstrate a material issue of fact to avoid summary judgment. (Decision, page 4.)

12. In response, Justice Giardino wrote, the respondents submitted proof that several of the guides who were convicted received their licenses shortly afterwards. (Decision, page 4.)

13. Justice Giardino held that this evidence failed to raise a material issue of fact necessitating denial of summary judgment on the first cause of action. (Decision, page 4.)

DISCUSSION

This matter involves a challenge to DEC Staff's denial of Patrick Cunningham's application to renew his guide license. As noted in Ms. Wojcik's letter of May 24, 2013, the denial was based on DEC Staff's understanding of the Decision of Justice Giardino, which is that the decision found that Mr. Cunningham repeatedly violated ECL Section 11-0533.

ECL Section 11-0533 governs the licensing of guides who offer their services for hire in relation to particular activities, including whitewater rafting on designated portions of certain New York State rivers, including rivers on which the respondents operate. (See 6 NYCRR 197.2(k), identifying the particular river portions on which whitewater guiding is regulated.)

As used in ECL Section 11-0533, the term "guide" means "a person who offers services for hire part or all of which includes directing, instructing, or aiding another" in rafting or other specified activities. (ECL Section 11-0533(1); 6 NYCRR 197.2(g).) Also, "for hire" means "providing or offering to provide services to the public at large for which compensation is demanded or received, directly or indirectly." (6 NYCRR 197.2(e).)

With certain statutory exceptions, guides engaged in the business of guiding on all lands and waters of the state must possess a license issued by DEC. (ECL Section 11-0533(2).) Pursuant to ECL Section 11-0533(6), DEC is charged to establish standards and procedures for testing and licensing of guides,

which are set out in Part 197 of DEC's regulations ("6 NYCRR Part 197").

A license to guide, valid for five years, will be issued to a person at least 18 years old who submits a complete application with proof of identity, age and residence; application and licensing fees; a recently completed physician's statement of physical condition; and satisfactory proof of current American Red Cross certifications in first aid, cardiopulmonary resuscitation and water safety, or equivalents of such certifications. (Whitewater guides may substitute equivalent whitewater guides' training, approved by DEC, in place of basic water safety, but must submit acceptable documentation of that training, along with a course description.) An applicant must also pass a written examination. (6 NYCRR 197.3(a).)

Applicants for a license to guide for whitewater rafting must also provide DEC with documentation of at least five whitewater trips on the river for which a license is being sought. Such licenses are issued for the specific river or rivers on which the applicant has received the required experience or training, and guides are prohibited from guiding on any river not specified in their license. (6 NYCRR 197.3(b).)

In order to renew a license to guide, the holder must submit to DEC a completed renewal application; a new physician's statement of physical condition; current American Red Cross first aid and CPR certificates, or their equivalents; and the appropriate license renewal fee. (6 NYCRR 197.4.)

According to ECL Section 11-0533(6), guides shall be skilled in the use of boats and canoes whenever use of these craft is required and shall be persons competent to guide in the activity for which they are licensed.

Any licensed guide who violates any provision of the ECL or who makes a false statement in his application for a license shall in addition to other penalties, immediately surrender his license to DEC, and such license may be revoked by DEC for up to

one year following the date of such surrender. (ECL Section 11-0533(7); 6 NYCRR 197.8.)

In its brief of July 29, 2013, DEC Staff argues that the Decision and Order of Justice Giardino found both Hudson River Rafting Company and Patrick Cunningham in violation of ECL Section 11-0533. This determination, DEC Staff contends, was made as a matter of law, there being no material issue of fact, after a full and fair adjudication in a court of competent jurisdiction.

ECL Section 11-0533(2) requires that guides, while engaged in the business of guiding on the state's lands and waters, possess a license issued by DEC. Like other provisions of the New York State's Fish and Wildlife Law (ECL Articles 11 and 13), this requirement may be enforced criminally pursuant to Title 9 of ECL Article 71, as argued in Mr. Cunningham's July 19, 2013, brief. According to Justice Giardino's decision, that is what happened here: There were 11 instances in which the respondents' employees were ticketed by DEC agents for guiding rafts without a license, and six of these tickets resulted in convictions for those employees.

In the special proceeding commenced by the New York State Attorney General, Mr. Cunningham was alleged to have violated ECL Section 11-0533 not for guiding without a license, but for repeatedly providing unlicensed guides for hire through Hudson River Rafting Company, for which he is principal owner and president. This was the first cause of action, as to which summary judgment was granted.

The special proceeding was brought pursuant to Executive Law Section 63(12), under which the Attorney General is empowered to seek injunctive relief, restitution and damages whenever any person has engaged in repeated illegal acts or otherwise demonstrated illegality in the conduct and transaction of business. As part of his order concluding the proceeding, Justice Giardino permanently enjoined Mr. Cunningham and Hudson River Rafting Company from violating ECL Section 11-0533, and from owning or operating a business that offers guided rafting excursions on any rivers or parts of rivers in the state, where

licensed guides are required by the DEC, unless and until a \$50,000 performance bond is posted. (Decision and Order, page 4.) Also, Justice Giardino ordered that the respondents pay a \$1,200 civil penalty for each of the six different documented instances where respondents' employees were issued tickets for rafting without a license. (Decision and Order, page 5.)

In his brief of July 19, 2013, Mr. Cunningham argues that because Justice Giardino did not specify how Mr. Cunningham's liability was determined, it must be presumed that the liability was vicarious. I find no basis for this presumption. The petition said that as principal owner and president of Hudson River Rafting Company, Mr. Cunningham was in charge of setting the company's policies and general business practices and insuring such policies are followed by staff under his control, including guides and administrative staff. Furthermore, the petition said that Mr. Cunningham "either participated in, directed, or was aware of" the practices alleged in the petition. (Verified Petition, paragraph 4.)

Justice Giardino did not make explicit written findings confirming these assertions. However, to find Mr. Cunningham liable as a corporate officer under Executive Law Section 63(12), it would have to be established that, as was actually alleged, Mr. Cunningham "personally participated in or had actual knowledge of" the illegality in question. Matter of People v. Frink America, Inc., 2 A.D.3d 1379, 1381-82 (4th Dept. 2003). Therefore, one may presume that Justice Giardino found that Mr. Cunningham was, at the least, aware of his company's illegal use of unlicensed guides, six instances of which are confirmed by the criminal convictions.

Contrary to the assertion in Mr. Cunningham's August 1, 2013, brief, the fact that his employees violated ECL Section 11-0533 does not preclude a finding that Mr. Cunningham, by providing the unlicensed guides, violated this provision as well. His violations are related to theirs, but grounded in his own duties as a business operator. They do not substitute for the guides' violations, and, for that reason, are not vicarious. Nor was Mr. Cunningham alleged or found to be an accomplice or accessory to his employees' illegal acts.

Because the violation of ECL Section 11-0533 found by Justice Giardino was a component of an Executive Law Section 63(12) proceeding, Mr. Cunningham suggests that the violation was not an independent cause of action. That is not the case. Executive Law Section 63(12) "does not create any new causes of action, but does provide the Attorney General with standing 'to seek redress and additional remedies for recognized wrongs' based on the violation of other statutes" (Frink, id. at 1380, quoting State v. Cortelle Corp., 38 N.Y.2d 83, 85.) Despite the petition's assertion that the repeated violation of ECL Section 11-0533 constitutes a violation of Executive Law Section 63(12), Justice Giardino's decisions omit the Executive Law citation in describing the first cause of action and the violation established in reference thereto. (Both the petition and the decisions include errors referring to ECL Section 11-0533 as ECL Section "11-05333," which does not exist.) The first cause of action was established solely in relation to ECL Section 11-0533, independent of the Executive Law and the other three causes of action, the determinations on which are not relevant to this licensing matter.

I find that Mr. Cunningham's violations of ECL Section 11-0533, as determined in the special proceeding, are sufficient to warrant loss of his guide license. According to ECL Section 11-0533(7), any licensed guide who violates any provision of the ECL shall immediately surrender his license to DEC, which may be revoked by DEC for up to one year following the date of such surrender. As DEC Staff argues, the statute does not require that the violation be criminal in nature, or that a conviction be obtained. In other words, the violation may be determined in the context of a civil proceeding, as this one was, rather than in a criminal proceeding, where the guides' own violations were determined.

On the understanding that a violation of ECL Section 11-0533 is a criminal offense requiring proof beyond a reasonable doubt, Mr. Cunningham argues that a violation determined in a civil proceeding, where a lesser burden of proof applies, cannot be used against his license. I disagree. Mr. Cunningham's violation of ECL Section 11-0533 was determined on the basis of

the Attorney General's motion for summary judgment, as to which Justice Giardino found, on review of the parties' papers, that there was no material issue of fact that would warrant a trial. As to the six instances of unlicensed guiding by his employees, Mr. Cunningham provided the court with evidence only that several of the guides received their licenses shortly after their convictions, which actually confirms that, at the time of their violations, the licenses did not exist. In the absence of an issue of fact, burden of proof is immaterial.

Mr. Cunningham also argues that because of the discretion afforded to courts in proceedings under Executive Law Section 63(12), findings made in such proceedings may not be used for license revocation under the ECL, since DEC cannot establish identity of issue, which bars the application of collateral estoppel. I see no basis for this conclusion. According to the cases cited by Mr. Cunningham, there is judicial discretion to fashion injunctive or other relief, not to adjust standards of proof. Matter of State v. Avco Financial Service of New York, 50 N.Y.2d 383, 389 (1980) (citing State v. Princess Prestige Co., Inc., 42 N.Y.2d 104, 108 (1977)).

According to counsel for the parties, Mr. Cunningham's previous guide license was suspended and surrendered in the fall of 2012 due to an unrelated matter, and remained suspended until its expiration on April 24, 2013. On April 14, 2013, DEC received from Mr. Cunningham an application for a new license, and it is that application which was denied in Ms. Wojcik's letter of May 24, 2013.

Not only does Mr. Cunningham's violation of ECL Section 11-0533 provide a legal basis for denying his application, denial is warranted due to the nature of the violation. The repeated provision of unlicensed rafting guides, where licensure is required in light of the nature and location of the activity, shows disregard for the public safety interests that the licensing scheme is intended to protect. As discussed above, the licensing statute, as implemented by DEC regulation, is intended to assure that guides are competent to perform the functions for which they are hired. Where this competence is not demonstrated by licensure, there is risk of harm to the

public, given the hazards inherent to activities such as whitewater rafting.

The denial of Mr. Cunningham's application is justified even in the absence of evidence of illegality in Mr. Cunningham's conduct as a licensed guide, and despite Justice Giardino's findings that Mr. Cunningham "was a pioneer in the industry" and "has provided guided river excursions with rafts, kayaks and canoes for over thirty years," during which he and Hudson River Rafting Company "have successfully guided thousands of customers down various rivers without incident." (Decision and Order, page 3.) DEC's action does not concern Mr. Cunningham's conduct as a guide, but as the operator of a business that provides guides for hire. It does not concern his capacity to comply with the law, but his trustworthiness to do so.

Except to the extent that it would prevent Mr. Cunningham from serving as a guide himself, denying his application would not affect the operations of Hudson River Rafting Company. The company is not subject to DEC licensure, only the individuals who serve as guides. The company's operations are conditioned by the order of Justice Giardino, which stems from the action taken by the Attorney General under Executive Law Section 63(12).

During a call with the parties' counsel on July 12, 2013, Mr. Britt said that Hudson River Rafting Company was posting a letter of credit in lieu of a bond, which he understood would allow the business to re-open imminently. Mr. Britt said that the company can operate with other licensed guides, but that having Mr. Cunningham available to guide rafters himself would serve as a "release valve" during particularly busy periods for the business. Because the rafting season ends in October, Mr. Britt said Mr. Cunningham would appreciate an expedited determination in this matter.

CONCLUSIONS

Through his position with Hudson River Rafting Company, Patrick Cunningham has repeatedly violated ECL Section 11-0533 by providing rafting guides for hire who were not licensed by DEC. This was determined as a matter of law, in the absence of a material issue of fact, in a civil court proceeding brought under Executive Law Section 63(12), after Mr. Cunningham had a full and fair opportunity to be heard, with the evidence viewed in the light most favorable to him.

Mr. Cunningham's violation of ECL Section 11-0533, as a violation of the ECL, provides a legal basis to deny his application to renew his guide license, despite the fact it was not determined in a criminal proceeding. Furthermore, denial of the application is warranted given the threat to public safety when guides for hire are not licensed.

Mr. Cunningham has not provided any factual information or material relevant to DEC Staff's determination to deny his license renewal. Also, his legal objections to DEC Staff's action are not persuasive.

RECOMMENDATION

The Commissioner should uphold DEC Staff's determination to deny Mr. Cunningham's application for a new guide license.

EXHIBIT LIST

**MATTER OF APPLICATION OF PATRICK CUNNINGHAM
(NYS GUIDE LICENSE #434)**

1. Decision of Justice Richard C. Giardino, Acting Supreme Court Justice, dated March 29, 2013, in People v. Hudson River Rafting Company, Inc. and Patrick Cunningham (Index No. 2012-6972)
2. Decision and Order of Justice Richard C. Giardino, Acting Supreme Court Justice, dated May 15, 2013, in People v. Hudson River Rafting Company, Inc. and Patrick Cunningham (Index No. 2012-6972)
3. Verified Petition of New York State Attorney General (G. Nicholas Garin, of counsel), dated October 10, 2012, with unsigned copy of Order to Show Cause and Temporary Restraining Order