

SOAH DOCKET NO. 582-21-1135
TCEQ DOCKET NO. 2020-1596-LIC

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY
Petitioner
V
MICHAEL GAINES
Respondent

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR’S BRIEF IN RESPONSE TO PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSION:

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this ED’s Brief in Response to the Administrative Law Judge’s (ALJ) Proposal for Decision issued in this case. The ED recommends that the ALJ’s proposal for decision not be adopted by the Commission and that Respondent’s application be denied.

I. Introduction

In March 2020, Respondent applied to the TCEQ for a new Landscape Irrigator license.¹ The ED initially notified Respondent that he intended to deny Respondent’s application, after notice and hearing, pursuant to Texas Occupations Code (TOC) Section (§) 53.021(a)(1) on April 13, 2020.² The ED sent a second denial notice to Respondent on June 11, 2020.³ Respondent requested a hearing on the denial of his Landscape Irrigator application on June 25, 2020.⁴ On January 6, 2021, ED staff asked

¹ ED 1, p. 0001.

² Id.

³ ED 2, p. 0003.

⁴ ED 3, p. 0005.

the TCEQ's Office of the Chief Clerk to refer this matter to the State Office of Administrative Hearings (SOAH) for a hearing.⁵ A preliminary hearing was held in this case on March 4, 2021.⁶ The hearing on the merits was held July 8, 2021.⁷ The ALJ issued a Proposal for Decision on September 22, 2021.⁸

II. Facts

At the hearing, the ED introduced evidence to show that Respondent has been convicted of: 1.) two class B misdemeanors for evading arrest, 2.) a class A misdemeanor for possession of prohibited weapons, 3.) a class B misdemeanor for possession of marijuana, 4.) two counts of assault causing bodily injury with family violence enhancement, both third-degree felonies, 5.) a class A misdemeanor for assault causing bodily injury, 6.) two class B misdemeanors for evading arrest and possession of marijuana, 7.) a state jail felony for attempting to take a weapon from an officer, and 8.) two third-degree felonies for assault on a public servant and obstruction or retaliation.⁹

III. Argument

A. Burden of Proof

The Respondent has the burden of proof in this case. TCEQ rules at 30 TAC § 30.38 state that all hearings regarding occupational licenses issued by the TCEQ are to be conducted according to 30 TAC, Chapters 70 and 80, (relating to Enforcement

⁵ ED 4, p. 0007.

⁶ ED 5, p. 0015.

⁷ Order 3 issued in this case March 12, 2021.

⁸ Proposal for Decision, p. 13.

⁹ Id. pp. 4-5.

and Contested Case Hearings, respectively).¹⁰ As this is a contested case hearing, 30 TAC, Chapter 80 applies to this case.¹¹ 30 TAC, Chapter 80, directs that the burden of proof is on the moving party by a preponderance of the evidence.¹² The Respondent, by requesting a hearing, is the moving party. Further, TCEQ rules state that the *applicant* shall present evidence to meet its burden of proof on the application.¹³ The Respondent, who is also the applicant in this case, has the burden of proof.

B. The Respondent Failed to Meet His Burden

The Respondent failed to meet his burden of proof on his application, and therefore his application should be denied. The ED takes no exception to the ALJ's summary of the evidence or characterization of the law; however, the ED respectfully submits that the ALJ reached several wrong conclusions in this case. In Conclusions of Law numbers 9 and 10, the ALJ concluded that Respondent met his burden of proof on the application and that he proved his fitness to be a Landscape Irrigator.¹⁴ Based on these two erroneous conclusions, the ALJ then finally erroneously concluded in Conclusion of Law number 11 that Respondent's application for a Landscape Irrigator license should not be denied.¹⁵

The ALJ concedes that Respondent failed to submit any evidence of his rehabilitation or rehabilitative effort.¹⁶ The ALJ concluded that despite this, the Respondent's application should not be denied.¹⁷ Evidence of an applicant's

¹⁰ 30 TAC § 30.38.

¹¹ 30 TAC, Chapter 80.

¹² 30 TAC § 80.17(a).

¹³ 30 TAC § 80.117(b).

¹⁴ Proposal for Decision, p. 13.

¹⁵ *Id.*

¹⁶ *Id.* p. 9.

¹⁷ *Id.* pp. 9-10.

rehabilitation or rehabilitative effort while incarcerated or after release is one of the factors a licensing authority *must* consider if it determines that a criminal conviction directly relates to the duties and responsibilities of a licensed occupation.¹⁸ The ALJ agreed that, “the assault offenses [of which Respondent was convicted] directly relate to the duties and responsibilities of a licensed Irrigator.”¹⁹

If the Respondent has not shown any evidence of his rehabilitation or rehabilitative efforts, particularly regarding his propensity to commit assaults, there is no objective way to ascertain how likely Respondent is to commit another assault. If Respondent were issued a license and committed another assault while in the performance of his duties as a licensed Landscape Irrigator, the ED would not know of the new assault until the license came up for renewal or if the incident were brought to the attention of the ED through a complaint. ED witness Ms. Jaya Zyman, the director of TCEQ’s Occupational Licensing and Registration Division, testified that one of the main objectives of the TCEQ’s criminal history review process was the protection of public safety.²⁰ Issuing a license in this case where there is no evidence of Respondent’s rehabilitation or rehabilitative efforts would significantly impair that objective.

Similarly, the ALJ made an assertion that Respondent is “penitent and does not have a temper.”²¹ This statement is also included as Finding of Fact number 26.²² There is just no evidence in the record to support the assertion that Respondent “does not have a temper.” Respondent introduced no professional evaluations of his behavior or any testimony from a behavioral expert or anyone with the professional

¹⁸ Texas Occupations Code (TOC) § 53.023(a)(5).

¹⁹ See Proposal for Decision, p. 9.

²⁰ Id., p. 7.

²¹ Id., p. 9.

²² Id., p. 12.

qualifications to provide an opinion about Respondent's temperament.²³ As to whether Respondent is "penitent," it was the ED's observation that at hearing, the Respondent minimized his behavior and repeatedly placed blame on others for his convictions. For example, Respondent has two convictions for assault causing bodily injury during a domestic violence incident, but claimed that he did not injure his domestic partner.²⁴ Respondent also has a 2011 state jail felony for taking a weapon from an officer. When questioned by ED counsel about this offense, Respondent stated that the police made up charges against him.²⁵ During cross examination, Respondent repeatedly refused to take accountability for his actions.

Based on the foregoing, the ED objects to the adoption of Finding of Fact number 26 and Conclusions of Law numbers 9, 10, and 11.

C. Additional Objection to the PFD

The ALJ concluded that Respondent is an "excellent employee,"²⁶ however the Proposal for Decision does not address at all the fact that evidence was brought out at the hearing that Respondent has been performing irrigation work for past five years without having the necessary licenses.²⁷ Respondent testified that for the past five years he has been "doing irrigation" and "fixing sprinklers".²⁸ Respondent testified that at various jobs he has held over the past five years he has performed tasks such as inspecting, maintaining, and repairing irrigation systems.²⁹ TCEQ rules state that anyone who works under a licensed irrigator to install, maintain, alter, repair, or

²³ Proposal for Decision, pp. 4-6, which summarizes Respondent's evidence.

²⁴ Hearing recording.

²⁵ Id.

²⁶ Proposal for Decision, p. 9.

²⁷ See Id.

²⁸ Hearing recording.

²⁹ Id.

service a landscape irrigation system must be licensed as an irrigation technician.³⁰ Similarly, anyone who inspects an irrigation system must be a licensed irrigation inspector or a licensed plumbing inspector.³¹ Respondent holds neither license.³² Respondent's work activity since his incarceration indicates his disregard for the requirements applicable to the Landscape Irrigator license. Based on his failure to obtain the necessary license to engage in the landscape irrigation work he admitted to doing at the hearing, the ED does not find that the evidence in the record supports the characterization of Respondent as an "excellent employee."

III. Conclusion

The decision of the ED should be affirmed. The ALJ found that Respondent has been convicted of crimes that directly relate to the duties and responsibilities of the licensed occupation. The Landscape Irrigator license is a high-risk license that would grant the Respondent access to persons at residences and businesses in situations that could have potential for confrontational behavior related to crimes against persons. Respondent introduced no evidence of his rehabilitation or rehabilitative efforts to show that he would not be likely to engage in another violent or assaultive episode. He also failed to introduce any evidence from any behavioral expert pertaining to his temper. Therefore, Respondent failed to meet his burden on the application. There has not been enough evidence presented in this case to justify putting the public at risk by granting Respondent a Landscape Irrigator license. For the foregoing reasons, the ED concludes that Respondent's application for a new Landscape Irrigator license

³⁰ 30 TAC § 344.30(b).

³¹ 30 TAC § 344.30(d).

³² Hearing recording.

should be denied. The ED objects to the adoption of Finding of Fact number 26 and Conclusions of Law numbers 9, 10, and 11.

Respectfully submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Toby Baker, Executive Director

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CERTIFICATE OF SERVICE

I certify that on October 12, 2021, the foregoing “Executive Director’s Brief in Response to Proposal for Decision” was filed with the TCEQ’s Office of the Chief Clerk, the State Office of Administrative Hearings, and mailed to the persons listed below.



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