



State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

September 22, 2021

Mary Smith
General Counsel
Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, Room 4225
Austin Texas 78753

Re: **SOAH Docket No. 582-21-1135; TCEQ Docket No. 2020-1596-LIC; Executive Director of the Texas Commission on Environmental Quality v. Michael Gaines**

Dear Ms. Smith:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **October 12, 2021**. Any replies to exceptions or briefs must be filed in the same manner no later than **October 22, 2021**.

This matter has been designated **TCEQ Docket No. 2020-1596-LIC; SOAH Docket No. 582-21-1135**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs, and replies, along with certification of service to the above parties, shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with

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the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,



Heather Hunziker
Administrative Law Judge

Enclosures
cc: Mailing List

**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

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) seeks to deny Michael Gaines’s application to renew his Landscape Irrigator license. The ED asserts that the application should be denied under Texas Occupations Code chapter 53 and 30 Texas Administrative Code § 30.33(h) because of Mr. Gaines’s criminal history. Having considered the evidence in the record and applicable law, the Administrative Law Judge (ALJ) recommends against denial of Mr. Gaines’s license application.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

The Commission has jurisdiction over this matter pursuant to Texas Water Code chapters 5 and 37 and Texas Occupations Code chapter 53. The State Office of Administrative Hearings (SOAH) has jurisdiction over the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Texas Government Code chapter 2003.

In March 2020, Mr. Gaines initially applied for a Landscape Irrigator license. On April 13, 2020, and June 11, 2020, the ED sent letters notifying Mr. Gaines of the ED’s intent to deny the application based on Mr. Gaines’s criminal history. The letters included a short, plain statement of facts and informed Mr. Gaines of the reason for the denial of his application, including a reference to the relevant regulatory provisions. On June 25, 2020, the ED received Mr. Gaines’s

appeal of the ED's decision. The ED referred the case to SOAH, and on January 26, 2021, the Commission issued a Notice of Hearing, which scheduled a preliminary hearing on March 4, 2021. At the March 4, 2021, preliminary hearing, the ALJ admitted ED Exhibit 5 for the limited purpose of establishing notice and jurisdiction.

The hearing on the merits convened remotely via the Zoom videoconferencing platform on July 8, 2021, before ALJ Heather D. Hunziker. Staff attorney Alicia Ramirez represented the ED, Mr. Gaines represented himself, and attorney Amanda Pesonen represented the Office of Public Interest Counsel (OPIC). The record was held open so that Mr. Gaines could file documentary evidence and the parties could file written closing arguments and objections to any evidence submitted by Mr. Gaines. The last brief was filed on August 2, 2021, and the record closed that day.

II. APPLICABLE LAW

Chapter 53 of the Texas Occupations Code provides the framework for licensing agencies to use in evaluating applicants and licensees who have criminal convictions. That chapter authorizes a licensing agency, such as the Commission, to suspend or revoke a license, or disqualify a person from receiving a license, if that person has been convicted of an offense that directly relates to the duties and responsibilities of the licensed occupation.¹

Each licensing authority is directed by chapter 53 to issue guidelines stating the reasons a particular crime is deemed to relate to a given license and outlining any other criteria the agency uses to make licensing decisions.² The criteria to be used by an agency in determining whether a crime is directly related to the occupation are:

¹ Tex. Occ. Code § 53.021(a)(1).

² Tex. Occ. Code § 53.025(a).

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
- (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved;
- (4) the relationship of the crime to the ability or capacity required to perform the duties and discharge the responsibilities of the licensed occupation; and
- (5) any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation.³

Consistent with chapter 53, the Commission has issued guidelines addressing the Consequences of Criminal Convictions for Occupational Licensing (Guidelines).⁴ The Guidelines state that a criminal conviction “above a Class C misdemeanor” may result in a denial of a new or renewal license.⁵ Relevant to Mr. Gaines, the Guidelines further state that Landscape Irrigators have “access to persons at residences or businesses in situations that could have a potential for confrontational behavior related to crimes against persons.”⁶

If it determines that the criminal conviction directly relates to the duties and responsibilities of a licensed occupation, the Commission must consider the following factors in determining whether to deny the license application of a person because of a conviction:

- (1) the extent and nature of the person’s past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person’s last criminal activity;

³ Tex. Occ. Code § 53.022; 30 Tex. Admin. Code § 30.34(a).

⁴ 30 Tex. Admin. Code § 30.35; *see also* ED Ex. 9, Consequences of Criminal Convictions for Occupational Licensing (Guidelines), *also available at* https://www.tceq.texas.gov/assets/public/comm_exec/pubs/rg/rg-521.pdf.

⁵ Guidelines at 2.

⁶ Guidelines at 10-11.

- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;
- (6) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and
- (7) other evidence of the person's fitness, including letters of recommendation.⁷

An applicant has the responsibility, to the extent possible, to obtain and provide to the licensing authority the recommendations and evidence of fitness discussed above.⁸

III. EVIDENCE

At the hearing on the merits, the ED offered ten exhibits, all of which were admitted without objection.⁹ The ED also presented the testimony of Jaya Zyman, the Deputy Director of the Commission's Occupational Licensing and Registration Division. Mr. Gaines testified on his own behalf and filed two exhibits (including one consisting of multiple discrete documents) after the hearing that were admitted without objection. OPIC did not offer any evidence.

A. Background

The criminal convictions underlying the denial of Mr. Gaines's application are undisputed. In July of 2001, and again in October of 2003, Mr. Gaines was convicted of Class B misdemeanors for evading arrest.¹⁰ In July of 2005, Mr. Gaines was convicted of a Class A misdemeanor for possession of prohibited weapons and a Class B misdemeanor for possession of marijuana (less than 2 ounces).¹¹ In August of 2005, Mr. Gaines was convicted of two counts of third degree felony

⁷ Tex. Occ. Code § 53.023; 30 Tex. Admin. Code § 30.34(b).

⁸ Tex. Occ. Code § 53.023(b); 30 Tex. Admin. Code § 30.34(c).

⁹ ED Exs. 1-10.

¹⁰ ED Ex. 8 at 0022-23.

¹¹ ED Ex. 8 at 0024-25.

for assault causing bodily injury with family violence enhancement.¹² In August of 2010, Mr. Gaines was convicted of a Class A misdemeanor, for assault causing bodily injury, and two Class B misdemeanors—for evading arrest and for possession of marijuana (less than 2 ounces).¹³ In September of 2011, Mr. Gaines was convicted of a state jail felony, for attempting to take a weapon from an officer, and two third degree felonies—for assault on a public servant and for obstruction or retaliation.¹⁴

At the times of his crimes, Mr. Gaines ranged from 17 to 26 years old.¹⁵ For each of his crimes, Mr. Gaines was sentenced to confinement; and for most of his crimes he was additionally ordered to pay a fine and/or court costs.¹⁶ His most recent period of imprisonment ended January 7, 2014, when he was released on parole to a halfway house.¹⁷ He is now 37 years old.¹⁸

B. Testimony

1. Mr. Gaines

Mr. Gaines admitted to his criminal convictions but testified that, when they occurred, he was much younger, he was impoverished, and he succumbed to pressure to plead guilty in exchange for reduced sentences. He explained that the assaults related, first, to a physical dispute with his girlfriend and, later, to a police chase that resulted in his assault of the officer.

Mr. Gaines said that he has changed since his release from prison and his past should not define who he is now. He said that he should receive his license because has paid his debt to

¹² ED Ex. 8 at 0025-26.

¹³ ED Ex. 8 at 0027-29.

¹⁴ ED Ex. 8 at 0030-31.

¹⁵ Testimony of Mr. Gaines under cross-examination by OPIC; Mr. Gaines's closing statement filed July 15, 2021.

¹⁶ ED Ex. 8 at 0022-31.

¹⁷ Testimony of Mr. Gaines under cross-examination by OPIC.

¹⁸ *Id.*; Mr. Gaines's closing statement filed July 15, 2021.

society, he wants to be a productive citizen, and he deserves another chance. According to Mr. Gaines, he is no longer the same person—now he is very productive, helps a lot of people, gets good reviews from clients, and has even been employee of the month. He has worked for a series of landscaping companies since his release from prison and currently works as Lead Technician for a landscaping company where he has been for over a year. He has taken irrigation classes, has studied, and is getting better at the job and talking to customers every day. He attested that he is not assaultive and does not have a temper; and this job helps him avoid re-offending. He loves doing irrigation and feels like it “saved him”—with the outdoor work showing him that there are other options in life “besides being a felon.” In his reply brief, Mr. Gaines stated that he is sorry for his “past transgressions.”¹⁹

Mr. Gaines’s exhibits were admitted without objection. They include: a receipt for an irrigation class from 2019; certificates of “Employee of the Month” and “Crew of the Month” for August 2020 and June 2021, respectively; letters of recommendation from Mr. Gaines’s work manager, Jay Jascot, and his housing manager, Mary Villafuerte; and a 2021 work performance evaluation with all “solid” or “excellent” ratings. Mr. Jascot speaks highly of Mr. Gaines’s qualities as an employee and describes him as “reliable,” “self-reliant,” and “motivated.”²⁰ Ms. Villafuerte calls Mr. Gaines “one of our good tenants” and “responsible.”²¹

2. Jaya Zyman

Ms. Zyman testified about the Commission’s review process for occupational licenses. She testified that her division uses data from the applicant and the Texas Department of Public Safety (DPS) to assess the applicant’s criminal history and how it relates to the license sought. Applications revealing more serious convictions or “high level” crimes are automatically elevated to an Executive Review Committee (ERC)—which Ms. Zyman is on—for review beyond staff

¹⁹ Gaines reply brief filed August 2, 2021.

²⁰ Gaines Ex. A at 3.

²¹ Gaines Ex. A at 5.

review. She testified that such applications present a greater public safety risk because licensees can have access to private residences, businesses, and schools.

According to Ms. Zyman, a landscape irrigator license is considered to be a high-risk license because it would provide the licensee the opportunity to come into contact with members of the public. Once licensed, Mr. Gaines could work anywhere in the state, at commercial and residential properties. She testified that the objectives of the criminal history review process are protection of public safety and preventing the opportunity to re-offend.

Ms. Zyman said that the ERC recommended denial of Mr. Gaines's application because he had been convicted of extensive offenses above a Class C misdemeanor that directly relate to the duties and responsibilities of the licensed occupation. She stated that the ERC made this determination by considering the factors set forth in Texas Occupations Code § 53.022: the extensiveness of Mr. Gaines's criminal history, that the license would allow the opportunity to reoffend, and the relationship of Mr. Gaines's crimes to the ability to do irrigation.

Ms. Zyman noted that that irrigators' licenses, specifically, provide access and the opportunity to commit violent crimes and could, thus, put the public at risk. She stated that the public relies on this licensing and the license makes the public more trusting of the licensed individual—often disarming clients into leaving the licensed individual with unattended property, unsupervised minors, and the like.

Ms. Zyman testified that Mr. Gaines had not submitted any certificates of completion of rehabilitation or classes, any letters of recommendation, or any other evidence of rehabilitation. In her opinion, in the absence of such rehabilitative evidence, his technical abilities are not enough to overcome his criminal background.

In conclusion, Ms. Zyman explained that there were other licenses that Mr. Gaines may qualify for, even with his criminal history, where he would pose less risk to public safety. For example, she identified waste water treatment plant and municipal solid waste management

operations as some of the related environmental professional licenses where he would have no access to the public in general.

IV. ANALYSIS AND RECOMMENDATION

It is undisputed that Mr. Gaines was convicted of multiple violent crimes above a Class C misdemeanor. Staff argues, and OPIC agrees, that Mr. Gaines is subject to denial pursuant to Texas Occupations Code § 53.021(a) because several of his crimes directly relate to the duties and responsibilities of a licensed landscape irrigator.

Texas Occupations Code § 53.021(a)(1) authorizes the Commission to deny, suspend, or revoke a license if the person has been convicted of an offense directly related to the duties and responsibilities of the licensed profession. Therefore, the Commission must determine whether Mr. Gaines's offense directly relates to the license he seeks. If it does, the Commission must further determine whether Mr. Gaines is fit to be licensed despite his criminal history. The factors listed in Texas Occupations Code § 53.022 and 30 Texas Administrative Code § 30.34(a) must be considered in determining whether an offense directly relates to the duties of a licensed occupation.

Mr. Gaines does not contest his convictions of serious crimes—felony assaults causing bodily injury with family violence, a state jail felony for attempting to take a weapon from an officer, and felony assault on a public servant. The Commission has classified the Landscape Irrigator license as a high-risk license because of the amount of access it provides to the public. The Commission's Guidelines for determining whether a crime is directly related to the occupation state that a Landscape Irrigator license may present "access to persons at residences or businesses in situations that could have a potential for confrontational behavior related to crimes against persons."²² Mr. Gaines's criminal history includes crimes against persons—namely, assaults on his girlfriend and a police officer in 2005 and 2011, respectively. Therefore, a Landscape Irrigator license might offer Mr. Gaines an opportunity to engage in further criminal activity of the same

²² Guidelines at 11.

type as that in which he was previously involved. Based on these factors, the ALJ agrees that the assault offenses directly relate to the duties and responsibilities of a Landscape Irrigator.

Therefore, the Commission is legally authorized to deny Mr. Gaines's application pursuant to Texas Occupations Code § 53.021(a)(1), based on the two 2005 felony assaults causing bodily injury with family violence and the 2011 felony assault on a public servant.

The question, then, is whether the Commission *should* exercise that authority. That determination is made after consideration of the factors set forth in Texas Occupations Code § 53.023, in view of the evidence on his fitness to perform the duties and discharge the responsibilities of a licensed Landscape Irrigator. Weighing those factors here, the record shows that Mr. Gaines has other criminal offenses in his past—some of them serious. Mr. Gaines was approximately 17-27 years old at the times of his offenses, thus they cannot be characterized solely as acts of youthful indiscretion. There is no evidence in the record regarding Mr. Gaines's rehabilitation or rehabilitative effort.

On the other hand, ten years have passed since Mr. Gaines's last criminal conviction and seven since his most recent confinement period ended—all without incident. He has maintained continuous employment, mostly in landscaping, since his release; and his current manager praises him and recently gave him a good performance evaluation. Additionally, his housing manager describes him as a good tenant and responsible.

Mr. Gaines testified credibly that he has changed since his release from prison and that he wants to be a productive citizen and set an example for his younger relatives. He wants to help people—recently helping several people acquire jobs. He is an excellent employee and has taken irrigation classes and studied to better himself and become a Landscape Irrigator. Landscaping work helps him avoid re-offending. He is penitent and does not have a temper.

In view of these factors,²³ the ALJ recommends against denial of Mr. Gaines's license application. Despite his prior criminal history, Mr. Gaines has shown that he is currently fit to perform the duties and responsibilities of a Landscape Irrigator.

V. FINDINGS OF FACT

1. In March 2020, Michael Gaines applied to the Texas Commission on Environmental Quality (Commission) for a Landscape Irrigator license.
2. On April 13, 2020, and June 11, 2020, the Executive Director (ED) of the Commission notified Mr. Gaines that his license application would be denied based on his criminal history.
3. Staff sent a notice of hearing to Mr. Gaines dated January 26, 2021, at his address of record with the Commission.
4. The notice of hearing provided the date, time, and place of a preliminary hearing; the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and either a short, plain statement of the factual matters asserted or an attachment that incorporated by reference the factual matters asserted in the complaint or petition filed with the state agency.
5. On March 4, 2021, Administrative Law Judge (ALJ) Heather D. Hunziker convened the preliminary hearing via videoconference and admitted ED Exhibit 5 for the limited purpose of establishing notice and jurisdiction.
6. Pursuant to the parties' agreement, the ALJ entered a procedural schedule for a videoconference merits hearing to be held July 8, 2021, in Order No. 3.
7. On July 8, 2021, the ALJ convened the hearing on the merits via videoconference. Mr. Gaines represented himself. Staff Attorney Alicia Ramirez represented the ED. Amanda D. Pesonen represented the Office of Public Interest Counsel.
8. The ALJ gave the parties until July 16, 2021, to submit exhibits; until July 29, 2021, to file closing briefs and objections to any exhibits filed post-hearing; and until August 5, 2021, to file replies to closing briefs. The last reply was filed August 2, 2021, and the record closed that day.

²³ See Tex. Occ. Code § 53.023(a).

9. In July of 2001 and again in October of 2003, Mr. Gaines was convicted of Class B misdemeanors for evading arrest.
10. In July of 2005, Mr. Gaines was convicted of a Class A misdemeanor for possession of prohibited weapons and a Class B misdemeanor for possession of marijuana (less than 2 ounces).
11. In August of 2005, Mr. Gaines was convicted of two counts of third degree felony for assault causing bodily injury with family violence enhancement.
12. In August of 2010, Mr. Gaines was convicted of a Class A misdemeanor, for assault causing bodily injury, and two Class B misdemeanors—for evading arrest and for possession of marijuana (less than 2 ounces).
13. In September of 2011, Mr. Gaines was convicted of a state jail felony, for attempting to take a weapon from an officer, and two third degree felonies—for assault on a police officer and for obstruction or retaliation.
14. For each of his crimes, Mr. Gaines was sentenced to confinement; and for most of his crimes he was additionally ordered to pay a fine and/or court costs.
15. Mr. Gaines's most recent period of imprisonment ended January 7, 2014, when he was released on parole to a halfway house.
16. At the times of his crimes, Mr. Gaines ranged in age from 17 to 26.
17. Mr. Gaines is now 37 years old.
18. Landscape Irrigators have access to persons at residences or businesses in situations that could have a potential for confrontational behavior related to crimes against persons.
19. Felony assault is a serious offense, and a crime against persons.
20. Felony assault directly relates to the duties and responsibilities of a Landscape Irrigator.
21. Ten years have passed since Mr. Gaines's last conviction.
22. Mr. Gaines has maintained continuous employment since his release from prison, mostly in landscaping, and has been with his current employer for over a year.
23. Mr. Gaines completed his prison sentences.

24. Mr. Gaines provided letters of recommendation from his current work manager and housing manager; certificates of “Employee of the Month” and “Crew of the Month” for August 2020 and June 2021, respectively; and a 2021 work performance evaluation with all “solid” or “excellent” ratings.
25. Mr. Gaines has taken irrigation classes to become a Landscape Irrigator.
26. Mr. Gaines is penitent and does not have a temper.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction and authority over Landscape Irrigator licensing decisions. Tex. Water Code ch. 37; 30 Tex. Admin. Code ch. 30, subch. A.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to the conduct of a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov’t Code ch. 2003; 30 Tex. Admin. Code §§ 30.38, 80.1, *et seq.*
3. Mr. Gaines received proper notice of the petition and of the hearing on the merits. Tex. Occ. Code § 53.0231; Tex. Gov’t Code §§ 2001.051-.052.
4. Mr. Gaines has the burden of proving by a preponderance of the evidence that he is fit for licensure despite his criminal history. 1 Tex. Admin. Code § 155.427; 30 Tex. Admin. Code §§ 80.17(a), .117(b).
5. Mr. Gaines has the responsibility, to the extent possible, to obtain and provide to the ED letters of recommendation and other evidence of his fitness. Tex. Occ. Code § 53.023(b); 30 Tex. Admin. Code § 30.34(c).
6. Mr. Gaines was convicted of felony assaults, which are above a Class C misdemeanor. Tex. Pen. Code § 22.01(b).
7. Mr. Gaines’s felony assault offenses directly relate to the occupation of Landscape Irrigator because they are crimes against the person, and the license might offer an opportunity to engage in further criminal activity of the same type. Tex. Occ. Code § 53.022; 30 Tex. Admin. Code § 30.34(a)(3); *and see* Commission Guidelines RG-521, “Consequences of Criminal Convictions for Occupational Licensing” 2, 11.
8. The Commission must consider many factors to determine whether Mr. Gaines is fit to hold a Landscape Irrigator license despite his criminal history. Tex. Occ. Code §§ 53.022-.023; 30 Tex. Admin. Code § 30.34.

9. Mr. Gaines satisfied his burden to prove his fitness for the license despite his criminal history. He testified and presented documentary evidence including letters of recommendation and employment certificates. Tex. Occ. Code § 53.023; 30 Tex. Admin. Code § 30.34(b)(7).
10. Mr. Gaines has demonstrated his fitness to be a Landscape Irrigator. Tex. Occ. Code § 53.023; 30 Tex. Admin. Code § 30.34.
11. Based on the evidence and consideration of the required factors, Mr. Gaines's application for Landscape Irrigator license should not be denied.

SIGNED September 22, 2021.



**HEATHER HUNZIKER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**