

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Toby Baker, *Executive Director*



*Vic McWherter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

October 12, 2021

Laurie Gharis, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

RE: **MICHAEL GAINES**  
**SOAH DOCKET NO. 582-21-1135**  
**TCEQ DOCKET NO. 2020-1596-LIC**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Exceptions to the ALJ's Proposal for Decision in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda D. Pesonen", with a long horizontal flourish extending to the right.

Amanda D. Pesonen  
Assistant Public Interest Counsel

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**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files its Exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision (PFD) in the above-referenced matter and respectfully submits the following.

OPIC respectfully requests that the Commission decline to adopt the ALJ's Proposal for Decision recommending granting Respondent Michael Gaines's application for a Landscape Irrigator license. OPIC agrees with the ALJ's analysis that the Commission is legally authorized to deny the application because Mr. Gaines has been convicted of offenses that directly relate to the duties of the licensed occupation<sup>1</sup>; however, contrary to the ALJ's recommendation, OPIC contends the Executive Director's (ED) decision to deny the application should not be disturbed. In the interest of protection of public safety, OPIC maintains the most prudent course of action is to deny the application.

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<sup>1</sup> ALJ's Proposal for Decision, pp. 8-9.

OPIC specifically excepts to the following findings of fact and conclusions of law:

**A. Finding of Fact No. 26**

OPIC excepts to Finding of Fact No. 26 that Mr. Gaines is penitent and does not have a temper. The record contains little evidence to support this finding. Although OPIC concurs that Mr. Gaines expressed penitence in his closing briefs, these briefs are not evidence. While testifying during the hearing on the merits, rather than acknowledging and expressing remorse for his past criminal behavior, he repeatedly denied the factual circumstances underlying his criminal convictions and insisted that he has never assaulted anyone. OPIC did not find his testimony on this matter to be credible. To further bring his credibility into question, contrary to his testimony on the record, Mr. Gaines conceded in his Closing brief filed on August 2, 2021, that he used to be “really rough around the edges” and that he “got into a few scrapes in [his] life[,] maybe a few more than most.” His failure to accept responsibility for his past actions while under oath during the hearing causes OPIC to continue to question whether Mr. Gaines recognizes the seriousness of his criminal history and has been sufficiently rehabilitated so as not to jeopardize the safety of the public.

Moreover, OPIC appreciates the ALJ’s opportunity to evaluate a witness’s demeanor and temperament from a neutral perspective during a hearing but also respectfully disagrees with the ALJ’s assessment that the Respondent in this case “does not have a temper.” He has a documented history of violent criminal offenses and even became noticeably agitated during questioning by the ED’s attorney during the hearing on the merits. OPIC does not believe the Respondent’s letters of recommendation are sufficient to establish that he has an even temperament in order to demonstrate he does not pose a risk to the public.

OPIC therefore recommends against the Commission’s adoption of Finding of Fact No. 26.

**B. Conclusions of Law No. 9, 10, and 11**

OPIC excepts to Conclusions of Law No. 9, 10, and 11, concluding that Mr. Gaines satisfied his burden to prove his fitness for the license, that he demonstrated his fitness to be a Landscape Irrigator, and that his application for a Landscape Irrigator license should not be denied. OPIC instead respectfully recommends the Commission find that Mr. Gaines did not satisfy his burden to prove his fitness for the license and has not demonstrated his fitness to be a Landscape Irrigator, and that his application should be denied.

As explained in OPIC’s Closing brief, Mr. Gaines’s Department of Public Safety (DPS) report reflects nine years of criminal activity and contains several convictions for serious violent offenses, including domestic violence assault and assault on a public officer.<sup>2</sup> The license for which he applied is classified by the Commission as “high-risk” because it would grant access to persons at residences or businesses in situations that could have a potential for confrontational behavior related to crimes against persons.<sup>3</sup> The nature of many of Mr. Gaines’s criminal convictions falls squarely within the type of risk this license seeks to prevent.

Regarding whether Mr. Gaines satisfied his burden to prove fitness for the license despite his criminal history, OPIC notes that even the ALJ’s analysis recognizes “[t]here is no evidence in the record regarding Mr. Gaines’s rehabilitation or rehabilitative effort.”<sup>4</sup> Mr. Gaines’s letters of recommendation from his employer and his landlady present a favorable image of his character, but these are mere snapshots compared to the nearly decade-long criminal history documented in

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<sup>2</sup> Ex. ED-8, pp. 0022-0031.

<sup>3</sup> Ex. ED-9, p. 0045.

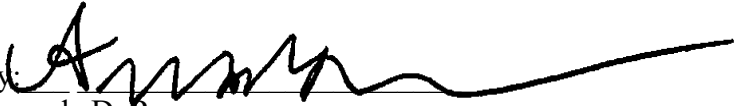
<sup>4</sup> ALJ’s Proposal for Decision, p. 9.

his DPS report. OPIC maintains its position that Mr. Gaines's documentary evidence is insufficient to demonstrate adequate rehabilitation to support a finding of fitness for this occupation.

During the hearing on the merits, the testimony of the ED's witness was clear that a principal reason a license is required for this occupation is because a licensee may have access to the public in settings which could provide the opportunity to engage in the kinds of criminal activity reflected in Respondent's criminal history report. As OPIC concluded in its Closing brief, the extent and seriousness of the offenses at issue as well as the confrontational and violent nature of many of Mr. Gaines's criminal convictions compel a determination that it was proper and in the public's interest for the ED to deny this license application. OPIC reiterates its position that the ED appropriately exercised its discretion in denying this license application and respectfully recommends the Commission affirm the ED's decision.

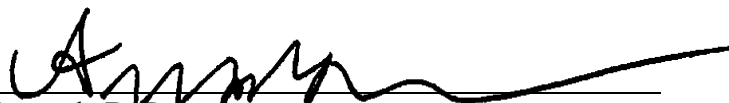
Respectfully submitted,

Vic McWherter  
Public Interest Counsel

By:   
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## CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2021, the Office of Public Interest Counsel's Exceptions to the ALJ's Proposal for Decision was filed with the Docket Clerk of the State Office of Administrative Hearings and the Chief Clerk of the TCEQ, and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
Amanda D. Pesonen

**MAILING LIST**  
**MICHAEL GAINES**  
**SOAH DOCKET NO. 582-21-1135**  
**TCEQ DOCKET NO. 2020-1596-LIC**

The Honorable Heather Hunziker  
Administrative Law Judge  
State Office of Administrative  
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