State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

May 20, 2024

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VIA EFILE TEXAS

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William Bowling
2965 Lavita Lane
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VIA EFILE TEXAS & REGULAR MAIL

RE: Docket Number 582-23-19677.TCEQ; Texas Commission on Environmental Quality No. 2023-0512-LIC; *Executive Director of the Texas Commission on Environmental Quality v. William Bowling*

Dear Parties:

The Administrative Law Judge (ALJ) issued a Proposal for Decision (PFD) with Proposed Order (PO) on April 15, 2024. Counsel for the Executive Director (ED) timely filed exceptions on May 2, 2024. Neither Mr. Bowling nor the Office of Public Interest Counsel (which aligned with the ALJ in recommending that the Commission grant Mr. Bowling's license application) filed a response. Having considered the exceptions, the ALJ recommends no changes to the PFD, but respectfully offers these additional comments for the Commission's consideration.

The ED asserts that the ALJ "erred in shifting the burden of proof." To the contrary, as explained at PFD pages 9-12, the ALJ actually agrees with the ED that Mr. Bowling bears the ultimate burden of proving his fitness for licensure, including overcoming any adverse implications from his criminal history—the issue that truly matters in this case. The point of disagreement is merely the ALJ's conclusion that

the ED bears an initial burden of proving one or more convictions for offenses listed in Texas Occupations Code § 53.021(a) (which it easily met here). This is a burden that the Legislature has imposed on the ED, as with other agency staffs, through § 53.0211(b), as the PFD explains. And this conclusion does not "invalidate" Commission rules, properly read in the context of Chapter 53's statutory framework. Rather, the rules, including those addressing the "movant's" burden of proof, contemplate that the burden can vary or shift between different parties depending on the material issue in dispute—as it does here.

The ED next asserts that Mr. Bowling "failed to meet his burden of proof" as to his fitness for licensing despite his criminal history, further insisting there is "no evidence" to support the ALJ's proposed findings regarding Mr. Bowling's unlikelihood to reoffend if licensed. The discussion at PFD pages 36-44 shows that there *is* evidence to support these findings, indeed preponderant evidence meeting Mr. Bowling's burden of proof.

In arguing otherwise, the ED urges that "the Commission should require some independent, objective evidence that [Mr. Bowling] is sufficiently rehabilitated such that he would not repeat his offenses." The ALJ would refer the Commission to the PFD's discussion of Mr. Bowling's "low-risk" sex-offender rating (pages 21-22 and 38-39), which, by *statutory definition*, "indicat[es] that the person poses a low danger to the community and *will not likely engage in* criminal sexual conduct." That is to say, the rating is authoritative proof, by a preponderance of the evidence (which means more likely than not), that Mr. Bowling will not reoffend.[1] Further "objective evidence" of Mr. Bowling's unlikelihood to reoffend if licensed can be found in, among other things, the objectively vast differences between the idiosyncratic context of Mr. Bowling's offenses and the workaday world of a licensed irrigation technician.

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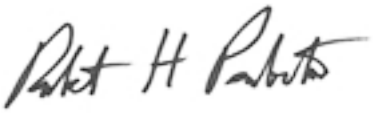
[1] To the extent the ED is suggesting that Mr. Bowling must go further to negate *any* and *all* theoretical risk that he could reoffend (in urging "there is still some risk"), it would be imposing the much higher burden of *conclusive* proof—establishing or negating a fact *as a matter of law*—contrary to Commission rules requiring proof merely by a preponderance of the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 814-817 (Tex. 2005) (discussing the nature of conclusive evidence, including contrasting it with evidence that is merely legally sufficient to support a fact finding by a preponderance of the evidence). Conclusive proof is the same burden imposed on parties who bring motions for summary disposition in SOAH contested cases, which is also the same burden as with "traditional" motions for summary judgment in court. When met, a material fact is considered to be established or negated as a matter of law, obviating the need for a hearing or trial even to be held before a fact finder.

The ED also seems to urge the Commission to categorically discount recommendation letters unless authored by "independent" or "objective" third parties, to the exclusion of those written by "friends" or business associates. Aside from potential APA rulemaking procedure problems, this would be contrary to Chapter 53, which in § 53.023(a) requires consideration of "letters of recommendation" without any such limitation. Indeed, recommendation letters from friends, associates, and others who know an applicant best would tend to warrant greater weight as compared to those from third parties having more limited personal experience with them. The PFD also explains why the ALJ found Mr. Bowling's letters here, along with his testimony, to be credible.

At bottom, the ED has not presented any legitimate or persuasive basis for the Commission to reject the ALJ's analysis, proposed findings and conclusions, or recommendations, only an invitation to second-guess the ALJ's assessments of evidentiary weight and credibility.

With these comments, the PFD and PO are ready for the Commission's consideration.

ALJ Signature:



Robert Pemberton,

Presiding Administrative Law Judge

CC: Service List