

State Office of Administrative Hearings

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April 15, 2024

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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:

Please find attached a Proposal for Decision in this case.

Any party may, within 20 days after the date of issuance of the PFD, file exceptions or briefs. Any replies to exceptions, briefs, or proposed findings of fact shall be filed within 30 days after the date of issuance on the PFD. 30 Tex. Admin. Code § 80.257.

All exceptions, briefs, and replies along with certification of service to the above parties and the ALJ 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 the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

CC: Service List

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

—
**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

V.

WILLIAM BOWLING

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

V.

WILLIAM BOWLING

PROPOSAL FOR DECISION

The principal substantive issue presented in this contested-case proceeding is whether the Texas Commission on Environmental Quality (Commission) should grant the application of William Bowling for licensing as a landscape-irrigation technician. The Commission's Executive Director (ED) would deny Mr. Bowling's application based on criminal history. Although the ED established that Mr. Bowling has committed serious offenses that "on paper" would be grounds for denying licensure, Mr. Bowling proved unique circumstances of his underlying acts, an intervening change for the better, and other countervailing considerations that ultimately belie any present legitimate basis for denying him the license he seeks.

Accordingly, the Administrative Law Judge (ALJ) recommends that the Commission grant the license.

I. REGULATORY BACKGROUND

Under Chapter 37 of the Texas Water Code and Chapter 1903 of the Texas Occupations Code, the Commission is charged with implementing and administering a mandatory-licensing and regulatory regime over persons who engage in business relating to “irrigation systems,” *i.e.*, “assembl[ies] of component parts permanently installed for the controlled distribution of water to irrigate landscape vegetation, reduce dust, or control erosion,” such as the “sprinkler systems” on which Texas homeowners commonly rely in the faint hope of keeping their lawns alive despite the heat.¹ By rule, the Commission has prescribed various categories of licenses in this arena, with correspondingly differing prerequisites, rights, and responsibilities for licensees. The categories include an “irrigator” license, which is apparently also known as a “landscape irrigator” license. That license entitles the licensee to “sell[], design[], offer[] consult[], install[], maintain[], alter[], repair[], service[], or supervise[] the installation of an irrigation system, including the connection of such system to a private or public, raw or potable water supply system or any water supply.”² Further, under a licensed irrigator’s “direct supervision,” other persons may “assist[] in the installation, maintenance, alteration, repair, or service of an irrigation system” without having to be licensed independently,

¹ See Tex. Occ. Code §§ 1903.001(4), .053, .251; Tex. Water Code ch. 37.

² 30 Tex. Admin. Code §§ 30.5(a), .111, .117(2), .120(b).

although they must comply with certain standards for irrigators prescribed elsewhere in the Commission’s rules.³

Another category of irrigation-related license—and the one for which Mr. Bowling applied—is that of “irrigation technician” or “landscape irrigation technician.” That license would entitle a licensee to perform many of the same functions as a licensed irrigator—namely, “install, maintain, alter, repair, service, or supervise installation of an irrigation system, including the connection of such system in or to a private or public, raw or potable water supply system or any water supply”—provided that the licensee “works under the supervision of a licensed irrigator” in doing so.⁴ Other Commission rules elaborate that a licensed irrigation technician, “under the supervision of a licensed irrigator,” is “responsible for” tasks that include “connecting an irrigation system to a water supply”; “conducting irrigation services including maintaining, altering, repairing, servicing, or directing the installation of irrigation systems”; “providing on-site supervision of the installation, maintenance, alteration, repair, [and] service of an irrigation system”; and performing a “final walk through” with the owner or representative of a completed irrigation system installation to explain the system’s operations.⁵ However, an irrigation technician “shall not act as an irrigator nor advertise or offer to perform irrigation services.”⁶

³ Tex. Occ. Code § 1903.002(c)(9); 30 Tex. Admin. Code § 30.129(a)(3), (c).

⁴ 30 Tex. Admin. Code §§ 30.117(1), .120(c).

⁵ 30 Tex. Admin. Code §§ 344.36, .63.

⁶ 30 Tex. Admin. Code § 344.36(d).

To obtain an irrigation-technician license, a person must complete prescribed coursework, pass an examination, and submit an application to the ED with a fee.⁷ The ED “shall determine whether the applicant meets the [applicable] requirements,” and if so, “shall issue the license.”⁸ Alternatively, the ED may deny the application if “insufficient” in this regard, subject to a motion to overturn that decision.⁹ Moreover, “[a]fter notice and hearing,” the Commission may deny an application based on certain additional grounds that include criminal history.¹⁰ As the Commission’s rules in that regard appear to acknowledge, reliance on criminal history would implicate the requirements of Chapter 53 of the Texas Occupations Code.¹¹ As amended in 2019 and applicable here,¹² Chapter 53 emphasizes that “[i]t is the intent of the [L]egislature to enhance opportunities for a person to obtain gainful employment after a person has . . . been convicted of an offense; and . . . discharged the sentence for the offense.”¹³ To that end, Chapter 53 “shall be liberally construed.”¹⁴

Under Chapter 53 (more specifically Texas Occupations Code § 53.0211(b)), a “licensing authority” (including the Commission) is generally required,

⁷ 30 Tex. Admin. Code §§ 30.18, .120(c).

⁸ 30 Tex. Admin. Code § 30.18(i).

⁹ 30 Tex. Admin. Code § 30.33(a)(1).

¹⁰ 30 Tex. Admin. Code § 30.33(c)-(e), (h)-(i).

¹¹ As discussed shortly, the Commission’s rules substantially track several key Chapter 53 provisions.

¹² As discussed below, Mr. Bowling submitted the application at issue in early 2022, after the effective date of the 2019 amendments to Chapter 53. *See* Acts 2019, 86th Leg., R.S., Ch. 765 (H.B. 1342), effective Sept. 1, 2019.

¹³ Tex. Occ. Code § 53.003(a).

¹⁴ Tex. Occ. Code § 53.003(b).

“[n]otwithstanding any other law,” to “issue to an otherwise qualified [license] applicant who has been convicted of an offense” either the license for which the person applied or a six-month provisional license.¹⁵ This requirement does not apply, however, if “the applicant has been convicted of an offense described by Section 53.021(a).”¹⁶ The referenced provision, Texas Occupations Code § 53.021(a), authorizes a licensing authority to disqualify a person from receiving a license (or suspend or revoke an existing license) on the ground that the person has been “convicted of” a criminal offense, generally excluding Class C misdemeanors, that fall within any of the following three categories:

- “an offense listed in Article 42A.054, Code of Criminal Procedure”;
- “a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure”; or
- “an offense that directly relates to the duties and responsibilities of the licensed occupation.”¹⁷

Regarding the latter category, Texas Occupations Code § 53.022 instructs that “[i]n determining whether a criminal conviction directly relates to the duties and responsibilities of a licensed occupation, the licensing authority shall consider each of the . . . factors” listed below:

¹⁵ Tex. Occ. Code § 53.0211. Certain categories of licenses are exempted from this requirement, but these do not include the license at issue here. *Id.* § 53.0211(a).

¹⁶ Tex. Occ. Code § 53.0211(b).

¹⁷ Tex. Occ. Code § 53.021(a), (a-1).

- (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 elements of the crime and the duties and responsibilities of the licensed occupation.¹⁸

The existence of one or more criminal convictions for an offense that “directly relates” to the duties and responsibilities of the licensed occupation, or for either of the other two categories of offenses listed under § 53.021(a)—“an offense listed in Article 42A.054, Code of Criminal Procedure” or “a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure”—would establish the Commission’s discretionary authority under § 53.021(a) to deny licensure,¹⁹ and would also be in the nature of a defense or exception to § 53.021(b)’s requirement that it license or provisionally license an “otherwise qualified” applicant despite a criminal conviction.²⁰ Yet in exercising that discretion with respect to a directly-related-offense conviction—but not the other two § 53.021(a) categories—

¹⁸ Tex. Occ. Code § 53.022.

¹⁹ See Tex. Occ. Code § 53.021(a) (licensing authority “may” deny based on the three grounds enumerated therein); Tex. Gov’t Code § 311.016 (“may” as used in codes generally “creates discretionary authority or grants permission or a power”).

²⁰ See Tex. Occ. Code § 53.021(b).

Texas Occupations Code § 53.023 requires the Commission to consider the following additional factors that bear upon the applicant’s present fitness for licensure despite the 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;
- (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.²¹

The applicant is responsible for obtaining and providing to the licensing authority evidence regarding the above factors, including, “to the extent possible, . . . the recommendations described in [(7)].”²² Of final note, Chapter 53 provides explicitly that the Administrative Procedure Act (APA) governs “[a] proceeding before a

²¹ Tex. Occ. Code § 53.023(a).

²² Tex. Occ. Code §§ 53.0231(b)(2)(B), .023(b).

licensing authority to establish factors required to be considered under this subchapter,”²³ *i.e.*, those in § 53.022 or § 53.023.

The Commission’s rules regarding application denials based on a criminal conviction substantively mirror the aforementioned provisions of Texas Occupations Code § 53.021(a), § 53.022, and § 53.023,²⁴ among others. Moreover, pursuant to Texas Occupations Code § 53.025, the Commission has published *Consequences of Criminal Convictions for Occupational Licenses* (“Guidelines”), which describes criteria on which ED is said to rely in evaluating such matters.²⁵ The Guidelines include a chart that assigns, for each of several categories of licensees, a perceived “low,” “medium,” or “high” opportunity to commit various types of crimes, and in turn an “overall license risk level.” For “Landscape Irrigation”—a grouping of irrigators, irrigation technicians, and also irrigation inspectors—the Guidelines assign a “high” opportunity for each type of crime and a “high” overall licensing risk level.²⁶

If the ED perceives that an application should be denied based on a criminal conviction, the ED is required to send the applicant a “notice of intent” to deny stating the reason for the denial. The notice must also advise “that it is the individual’s responsibility to obtain and provide [the ED] evidence regarding the

²³ Tex. Occ. Code § 53.024.

²⁴ 30 Tex. Admin. Code §§ 30.33(h)(1), .34(a)-(c).

²⁵ Exhibit (Ex.) ED-10.

²⁶ Ex. ED-10 at Bates 38-39 & n. 1.

factors listed in [§ 53.023]” and allow the applicant 30 days “to submit any relevant information to the [ED] for further consideration.”²⁷ After that period has run (and assuming the ED has not had a change of mind based on additional information or otherwise), the ED issues a written “final decision” advising of the reason for denial, pointing out the applicant’s right to request a contested-case hearing, and include the deadline for doing so.²⁸ If the applicant timely requests the hearing, the ED will request that the Commission’s Chief Clerk refer the matter to the State Office of Administrative Hearings (SOAH).²⁹ The Chief Clerk handles the referral and issues a notice of hearing.³⁰

The proceedings before SOAH are governed by the Commission’s procedural rules for contested-case hearings, set forth in Chapter 80 of Texas Administrative Code Title 30.³¹ These include a requirement that, after the required notice is issued by the Chief Clerk, the ALJ convene a preliminary hearing to consider the Commission’s jurisdiction over the proceeding, name the parties (which must include the ED, the Office of Public Interest Counsel (OPIC), and the applicant³²), and set a final hearing date and procedural schedule.³³ They further prescribe that an

²⁷ 30 Tex. Admin. Code §§ 30.33(k), .36(a); *see* Tex. Occ. Code § 53.0231 (underlying statutory requirement).

²⁸ 30 Tex. Admin. Code § 30.36(b).

²⁹ 30 Tex. Admin. Code §§ 30.38, 70.109, 80.6.

³⁰ 30 Tex. Admin. Code § 80.6.

³¹ 1 Tex. Admin. Code § 155.1(f); 30 Tex. Admin. Code §§ 30.38, 80.1.

³² 30 Tex. Admin. Code §§ 80.108-.109; *see also id.* § 3.2(24) (“permit” includes occupational licenses).

³³ 30 Tex. Admin. Code § 80.105.

“applicant” (including an applicant for an occupational license³⁴) bears the “burden of proof on [its] application” and also that “[t]he burden of proof is on the moving party by a preponderance of the evidence.”³⁵ A “moving party” would be a party that seeks a particular finding or ruling from the ALJ or Commission.³⁶

The ED assumes that Mr. Bowling bears the “burden of proof” for all purposes because he is the “applicant” on his license application and also the “moving party” because, it reasons, he requested a contested-case hearing rather than waiving that right through inaction.³⁷ The assignment of the burden of proof under the governing statutes and rules is actually more nuanced than this. The ED overlooks both the governing substantive statutory framework under Chapter 53—particularly the implications of Texas Occupations Code § 53.0211(b)—and the hearing’s procedural posture.

Texas Occupations Code § 53.0211(b), as explained above, would require the Commission, “[n]otwithstanding any other law,” and even if Mr. Bowling had a criminal conviction, to issue Mr. Bowling, if “an otherwise qualified [license] applicant who has been convicted of an offense,” either the license for which he applied or a six-month provisional license, unless he “has been convicted of an

³⁴ 30 Tex. Admin. Code § 3.2(3)-(4), (24).

³⁵ 30 Tex. Admin. Code §§ 80.17(a), .117(a)-(b).

³⁶ See Moving Party, Movant, and Motion, *Black’s Law Dictionary* (11th ed. 2019). Black’s defines “Moving Party” as merely a cross-reference to “Movant,” defines “Movant” as “[s]omeone who makes a motion to the court or a deliberative body,” and defines “Motion” as “[a] written or oral application requesting a court to make a specified ruling or order.” There is no Commission rule that defines “moving party” in a manner departing from this ordinary, common meaning.

³⁷ ED Closing Argument (Arg.) at 2.

offense described by Section 53.021(a).”³⁸ That is to say, proof of one or more convictions for § 53.021(a) offenses would be in the nature of a defense or exception to what would otherwise be the Commission’s obligation under § 53.0211(b) to issue Mr. Bowling either the license he seeks or a provisional license. Conversely, the Commission would lack authority to deny the license application outright, as the ED would have it do, absent proof of one or more § 53.021(a) convictions.

And in the procedural posture of this SOAH contested-case hearing, any preceding action by the ED, whether termed a “final decision” or “final notice,” has no binding legal effect on the Commission or ALJ. Rather, the contested-case hearing is a *de novo* proceeding, with all parties starting at “square one” in terms of their respective entitlements to any relief being sought; it is not some sort of appellate-like review based on the record before the ED or that otherwise takes the ED’s “decision” as a material starting point.³⁹ This same conclusion is tacitly supported by the ED’s own actions in this SOAH proceeding—as explained shortly, the ED withheld from its exhibits evidence it admittedly received and purportedly considered that was favorable to Mr. Bowling. While the ED’s litigation tactics are perhaps “fair game” in a *de novo* proceeding in which each party, in theory, must shoulder the burden of presenting any evidence favorable to them, in an

³⁸ Tex. Occ. Code § 53.0211(b).

³⁹ Or in terms of the APA, the ED’s “final decision” would merely be a predicate for an informal disposition that would occur only when and if an applicant “defaulted” by waiving his right to a contested-case hearing through failing to timely request it. *See* Tex. Govt. Code § 2001.056(4); *see also id.* § 53.024 (APA governs “[a] proceeding before a licensing authority to establish factors required to be considered under [§ 53.022 or § 53.023]; 30 Tex. Admin. Code § 30.33(h)(1) (baseline or general requirement that, “[a]fter notice and hearing, the commission may deny . . . a license” based on criminal history (emphasis added)).

appellate-like posture they would be akin to prosecutor concealing exculpatory evidence in a criminal case.

Further, if the parties had each appeared at the *de novo* SOAH hearing and no party presented any evidence, the Commission would be required, per § 53.0211(b), to issue Mr. Bowling either the full license he seeks or a provisional license, because there would be no proof of any § 53.021(a) convictions, the prerequisite for any Commission authority to deny a license application based on criminal history. Rather, if the ED wanted to prevail, it would first have to establish that Mr. Bowling has one or more § 53.021(a) convictions, so as to avoid the effects of § 53.0211(b). The upshot, restated in the terms of the Commission’s rules, is that the ED would be the “movant,” the party seeking the particular finding or ruling, to the extent of establishing the required prerequisite that Mr. Bowling has one or more § 53.021(a) convictions. But if the ED met this burden, the burden would then effectively shift to Mr. Bowling to prove that the Commission should issue him the license despite any such convictions. In that event, in terms of the Commission’s rules, Mr. Bowling would become the “movant” on those issues, as well as being the license “applicant” having the ultimate burden of proving his fitness therefore.

II. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

In this proceeding concerning a landscape-irrigation-technician license, the Commission has jurisdiction pursuant to Texas Water Code chapters 5 and 37, Texas Occupations Code chapter 1903, and Texas Occupations Code chapter 53. 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.

On January 20, 2022, Mr. Bowling submitted to the ED an initial application for a landscape-irrigation-technician license.⁴⁰ On June 30, 2022, the ED, through Jaya Zyman, P.E., Deputy Director of the Commission’s Occupational Licensing and Registration Division, sent Mr. Bowling a notice of its intent to deny his application based on criminal history—specifically, asserting that Mr. Bowling had committed offenses falling within each of the three categories listed in Texas Occupations Code § 53.021(a)(1). The notice further represented that the ED had considered the factors under § 53.022 and § 53.023, alerted Mr. Bowlin to his “responsibility to provide to TCEQ evidence regarding [the § 53.023 factors],” and gave him 30 days to submit “any additional relevant information for the ED to consider in that analysis.”⁴¹ Subsequently, on August 2, 2022, the ED, again through Ms. Zyman, sent Mr. Bowling a “Second and Final Notice” of the ED’s intent to deny his application, stating that it had “considered” “[a]ny additional information you may have submitted in response to our initial notice,” citing the same rationales for denial stated in the initial notice, and advising that he had 30 days to request a “formal hearing” (*i.e.*, a contested-case hearing) on the denial.⁴² Both notices included a short, plain statement of facts and informed Mr. Bowling of the reason for the denial of his application, including a reference to the relevant statutory provisions.

⁴⁰ Ex. ED-9.

⁴¹ Ex. ED-1.

⁴² Ex. ED-2.

Mr. Bowling timely requested a contested-case hearing, which the ED received on August 22, 2022.⁴³ On April 19, 2023, the ED, through Commission Staff Attorney Alicia Ramirez (who would later represent the ED in this proceeding), requested the Commission's Chief Clerk to refer the matter to SOAH.⁴⁴ The Chief Clerk referred the matter to SOAH on May 18, 2023.⁴⁵ On June 15, 2023, the Chief Clerk issued a Notice of Hearing that referenced the ED's denial decision and scheduled a preliminary hearing to be held on July 13, 2023.⁴⁶

The preliminary hearing was convened as scheduled on July 13, 2023. The ED offered and the ALJ admitted ED exhibits 1-6 for the limited purpose of establishing notice and jurisdiction.⁴⁷ The ALJ noted that jurisdiction and notice were established, named the parties (the ED, Mr. Bowling, and OPIC), and set the hearing on the merits and a procedural schedule.⁴⁸

The hearing on the merits was ultimately convened on February 6, 2024, remotely via the Zoom videoconferencing platform, before ALJ Robert Pemberton. Ms. Ramirez, along with Aubrey Pawelka, represented the ED, Mr. Bowling represented himself, and Assistant Public Interest Counsel Jennifer A. Jamison

⁴³ Ex. ED-3.

⁴⁴ Ex. ED-4.

⁴⁵ The ALJ has taken official notice of the SOAH case file, which includes the referral.

⁴⁶ Ex. ED-5.

⁴⁷ In addition to the five preceding exhibits already cited, the ED also offered, and the ALJ admitted, the ED's witness list as Ex. ED-6.

⁴⁸ See Order Memorializing Preliminary Hearing, *et. al.* (July 13, 2023).

represented OPIC.⁴⁹ The ED offered and the ALJ admitted a total of eleven exhibits, the six previously admitted for limited purposes during the preliminary hearing and five additional.⁵⁰ The ED also presented the live testimony of Ms. Zyman, who testified that her job duties include serving on an “Executive Review Committee” (“ERC”) that reviews license applications “flagged” for criminal history and whose recommendation precedes any negative licensing action by the ED. Mr. Bowling testified on his own behalf and did not offer any additional exhibits at that time. The hearing concluded that same day.

At the hearing’s conclusion, the ALJ held the record open for two purposes: (1) to allow for written closing arguments, although the parties were also permitted to make oral closing arguments, if they wished to do so, either in lieu of or addition to subsequent written submissions; and (2) to afford Mr. Bowling an additional opportunity to offer documents into evidence that he had referenced during his testimony (as described further below) and other parties a corresponding opportunity to object to their admission. Also of note, OPIC at that time presented a brief oral closing argument in which it aligned with the ED in recommending denial of Mr. Bowling’s application based on the evidence that had been presented as of that juncture.

⁴⁹ The same individuals had also appeared, by the same means, at the preliminary hearing, also before ALJ Pemberton.

⁵⁰ In addition to Mr. Bowling’s license application (Ex. ED-9) and the Commission’s criminal-history Guidelines (Ex. ED-10), both cited previously, the ED offered and the ALJ admitted Ms. Zyman’s biography (Ex. ED-11), a printout of a Texas Public Sex Offender registration concerning Mr. Bowling (Ex. ED-8), and a Texas Department of Public Safety background check reflecting Mr. Bowling’s criminal history (Ex. ED-7).

Following the hearing, Mr. Bowling availed himself of the opportunity to offer the referenced documents into evidence. This triggered both admissibility objections from the ED and various satellite disputes that will be discussed below in the context of the substantive issues to which they pertain most directly. The documents also prompted a change in position by OPIC, which urged their admission into evidence (over the ED's objections) and that the Commission grant Mr. Bowling's license application.

The record ultimately closed on March 8, 2024, the deadline for the parties to file any responsive written closing arguments.

III. MERITS⁵¹

A. CONVICTIONS FOR § 53.021(A) OFFENSES

Through its exhibits and Ms. Zyman's testimony, the ED presented materially undisputed evidence to meet its burden of proof under Chapter 53. This included evidence that, in 2010, Mr. Bowling pleaded guilty to and was convicted of the first-degree felony offense of aggravated sexual assault, the first-degree felony offense of aggravated kidnapping, and the second-degree felony offense of aggravated assault with a deadly weapon, all arising from an incident in 2009.⁵² Based on these convictions, Mr. Bowling was sentenced concurrently to nine years' confinement in the Texas Department of Corrections (TDCJ), or until May 2019,

⁵¹ For purposes of the ensuing discussion, the ALJ has organized material testimony by issue rather than in the sequence in which the witnesses testified.

⁵² Ex. ED-7; *see* Tex. Penal Code §§ 20.04(a)(1)-(6), 22.02(a)(2), 22.021.

but was paroled in June 2018 for the remainder of that sentence.⁵³ Although he has since finished serving that sentence and been discharged, Mr. Bowling is required to register for the rest of his life on the Texas Public Sex Offender Registry by virtue of his conviction for aggravated sexual assault.⁵⁴ His registration reflects that his victim was a 31-year-old female.⁵⁵

On their face, Mr. Bowling’s offenses of conviction establish two of the three § 53.021(a) categories of offenses, “an offense listed in Article 42A.054, Code of Criminal Procedure,” which includes aggravated sexual assault and aggravated kidnapping,⁵⁶ and “a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure,” which includes aggravated sexual assault.⁵⁷ Moreover, each of Mr. Bowling’s offenses, viewed categorically or “on paper” (as opposed to considering any specific underlying facts or circumstances), would establish the third § 53.021(a) category of offenses, “directly relates to the duties and responsibilities” of a licensed irrigation technician, considering the factors in § 53.022 that inform that determination.⁵⁸

⁵³ Ex. ED-7 at Bates 21.

⁵⁴ Ex. ED-8; *see* Tex. Code Crim. P. arts. 62.001(5)-(6), .101(1).

⁵⁵ Ex. ED-8 at Bates 24.

⁵⁶ Tex. Code Crim. P. art. 42A.054(a)(4), (9).

⁵⁷ Tex. Code Crim. P. art. 62.001(6).

⁵⁸ *See* Tex. Occ. Code § 53.022 (considering “the nature and seriousness of the crime,” “the relationship of the crime to the purposes for requiring a license to engage in the occupation,” “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,” “the relationship of the crime to the ability or capacity required to perform the duties and discharge the responsibilities of the licensed occupation,” and “any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation”).

As noted previously, the ED’s Guidelines classify “Landscape Irrigation” licenses, including those for irrigation technicians, as presenting “high” overall licensing risk level,”⁵⁹ *i.e.*, is a “high-risk license,” as Ms. Zyman put it. More specifically, the Guidelines identify a “high” level of “opportunities to engage in sexually violent offenses” by virtue of the licensee’s “[a]ccess to individuals or private residences and deal[ing] directly with the general public” and also the licensee’s “[a]ccess to business facilities and deal[ing] directly with the owners or employees of the businesses.”⁶⁰ Similarly, the Guidelines identify a “high” opportunity for more general “crimes against persons” due to the licensee’s “[a]ccess to persons at residences or businesses in situations that could have a potential for confrontational behavior.”⁶¹ These classifications are consistent with the Commission’s rules governing landscape irrigation technicians, which contemplate that licensees will have in-person contact with property owners and members of the public.⁶² Indeed, Mr. Bowling acknowledged that his work as a licensed irrigation technician would involve interacting with persons of “all ages” and both men and women, though he urged that it would never entail entering a residence, only the exterior.

Moreover, while landscape irrigation technicians are required to work “under the supervision” of a licensed irrigator, Commission rules do not require that this “supervision” be performed in-person or directly, as evident from comparing those

⁵⁹ Ex. ED-10 at Bates 38-39 & n. 1.

⁶⁰ Ex. ED-10 at Bates 38-39.

⁶¹ Ex. ED-10 at Bates 39.

⁶² 30 Tex. Admin. Code §§ 344.36, .63.

rules to others requiring that higher degree of oversight.⁶³ Consequently, as Mr. Bowling acknowledged, his supervising licensed irrigator would “not always” be present on the job. But more to the point, the required “supervision” of a licensed irrigator over an irrigation technician is far less than the sort of monitoring that would be calculated to address a perceived risk of reoffending, such as with the intensive “supervision” that the Commission has mandated for registered sex offenders whose victims were minors, which requires “direct, continuous visual observation of the individual at all times.”⁶⁴

To similar effect, Ms. Zyman emphasized that a licensed irrigation technician not only would be “supervised” by a licensed irrigator who need not actually be present on-site, but could also potentially be the *only* worker present on a job site, with no colleagues at all being present to observe his activities. She further asserted that the Commission lacked authority to require any higher level of supervision (such as with the restricted-license option now available in certain other regulated occupations) or to confine the licensed irrigation technician to working for any particular licensed irrigator, at any particular location, or any particular type of job site (residential, commercial, school, government facilities, *etc.*). Rather, Ms. Zyman observed, an irrigation technician, once licensed, could work anywhere in the state.

⁶³ See Tex. Occ. Code § 1903.002(c)(9) (licensing exemption for persons working under “direct supervision” of licensed irrigator) (emphasis added); 30 Tex. Admin. Code §§ 30.129(a)(3) (same), 344.36(c) (licensed irrigation technician, under “supervision” of licensed irrigator, responsible for “providing *on-site* supervision” of irrigation-system work) (emphasis added). See also the ensuing discussion of the intensive “supervision” required where the licensee is a registered sex offender whose victim was a minor.

⁶⁴ 30 Tex. Admin. Code §§ 30.5(f), .33(h)(3); see Tex. Code Crim. P. art. 62.063. In arguing that this is the nature of “supervision” that would be required over any licensed irrigation technician, OPIC Closing Arg. at 13, OPIC reads this definition of “supervision” out of its context, a limitation addressed solely to registered sex offenders with minor victims. However, see discussion below regarding other potential implications of this limitation.

As further cause for “caution” at the “front end” of issuing a “high-risk” license, Ms. Zyman asserted that “limited resources” relegated the Commission to a “complaint-driven” rather than “proactive” enforcement model, such that bad actors, once licensed, would likely not be found out until after they had already inflicted harm. She likewise insisted that members of the industry and general public rely upon a Commission license as a validation of safety and competence, which if betrayed would damage the agency’s reputation.

B. COUNTERVAILING CONSIDERATIONS

Consequently, the material contested issues reduced principally to whether Mr. Bowling could prove that he should be licensed as an irrigation technician despite being convicted of all three categories of § 53.021(a) offenses. This is necessarily a fact-specific inquiry, as opposed to the merely categorical analysis of his crimes under § 53.021(a) and § 53.022, and ultimately a matter of the Commission’s discretion. That is to say, each of the three categories of § 53.021(a) convictions proven by the ED afford the Commission the *discretion* to deny Mr. Bowling’s application, but it is not *required* to do so, as signaled by the Legislature’s use of “may” rather than “must” in § 53.021(a)’s authorization for negative licensing action. And this is true not only with respect to “directly related” offenses, but also (and even) Article 42A.054 offenses and Article 62.001 offenses. Indeed, by permitting licensure of registered sex offenders with minor victims only

if subject to “direct, continuous visual observation of the individual at all times,”⁶⁵ the Commission has tacitly recognized that it could conceivably license a sex offender, and without any such condition or restriction, if the victim were an adult, as with Mr. Bowling.

On the other hand, the Commission is required to consider the § 53.023 factors when exercising its discretion whether or not to deny licensure based on a “directly related” offense of conviction, but neither Chapter 53 nor Commission rules extend that requirement to an Article 42A.054 offense or an Article 62.001 offense.⁶⁶ Yet the Commission is also not *prohibited* from considering the § 53.023 factors, either. In fact, the ED advised during the hearing that its practice is to consider the § 53.023 factors with respect to all three categories of § 53.021(a) offenses. The ALJ will accordingly assume the § 53.023 factors might inform the Commission’s exercise of discretion with respect to Mr. Bowling’s Article 42A.054 offenses and/or Article 62.001 offenses, as with the “directly related” offenses, while recognizing that the Commission is not bound to consider those factors, strictly speaking.

As an initial observation regarding the § 53.023 factors or other considerations that might weigh in favor of licensing, Mr. Bowling’s sex-offender registration, in

⁶⁵ See 30 Tex. Admin. Code §§ 30.5(f) (requiring “direct, continuous visual observation of the individual at all times”), .33(h)(3) (same). In arguing that this is the nature of “supervision” required over a licensed irrigation technician, OPIC takes this definition of “supervision” out of its context, a limitation addressed solely to registered sex offenders with minor victims. OPIC Closing Argument (Arg.) at 13. However, see discussion below regarding this limitation.

⁶⁶ Tex. Occ. Code § 53.023(a) (analysis of factors conditioned on “[i]f a licensing authority determined under Section 53.022 that a criminal conviction directly relates to the duties and responsibilities of a licensed occupation”); 30 Tex. Admin. Code § 30.34(b) (parallel language).

evidence as one of the ED’s exhibits, reflects a “low” sex-offender risk assessment.⁶⁷ Per statute, this “low” rating represents “a designated range of points on the sex offender screening tool indicating that the person poses a low danger to the community and will not likely engage in criminal sexual conduct.”⁶⁸

Further evidence relevant to these matters came from Mr. Bowling himself.

1. Mr. Bowling’s Testimony

Mr. Bowling testified that he had grown up in Dallas, Texas, in a “Christ-like, centered family” and graduated high school with a 3.8 grade point average. However, after going off to college, as he described it, Mr. Bowling “kinda went wayward,” got “away from the church,” and left college around his fourth year, without finishing his degree, to work in an operations position with Aaron Rents “running a few stores, larger stores” and earning “almost six figures.” Subsequently, Mr. Bowling continued, he went to work for a “beer company” now known as Miller/Coors, first as an account manager and later area manager, and thereafter for the Ashley’s furniture company. He described his professional life as “very successful” at this juncture.

Meanwhile, Mr. Bowling added, he had met and married a woman—the eventual victim of his crimes, he divulged. According to Mr. Bowling, about three or four years into their marriage, he had discovered that his wife was “having an affair”

⁶⁷ Ex. ED-8 at Bates 23.

⁶⁸ Tex. Code Crim. Proc. art. 62.007(c)(1).

with a “close friend” of his who also was his wife’s boss at work. And, while acknowledging that this discovery “didn’t give me the right to do what I did,” Mr. Bowling recounted that he “lost control” in reaction and, as he put it, “the crimes were committed.”

After receiving a nine-year sentence and being incarcerated, Mr. Bowling testified, he “felt like God was calling me back,” further drawing a parallel to Biblical accounts of individuals who “did their own things” and “went to prison,” yet “God used it for their testimony.” He recounted that he finished his college course work while behind bars, obtaining (with the help of transferred prior credits) a Bachelor of Arts in Biblical studies. Meanwhile, Mr. Bowling attested, he was able to serve as an “inmate pastor,” facilitating “hundreds” of classes during his incarceration, on a “consistent, daily basis,” while “teaching and preaching within the church.” In this role, he added, he ministered to inmates, both “newer guys” and those who had been incarcerated for decades, “helping rehabilitate them.” Mr. Bowling perceived his work to be especially beneficial for inmates who had committed crimes similar to his because their shared experiences had helped them to “open up” and “talk about” those crimes with him. In this regard, Mr. Bowling explained that those sorts of “heinous” acts were “looked down upon” even in the prison setting and were thus difficult for the inmates to discuss.

Further, Mr. Bowling emphasized, he had been paroled in June 2018, after serving approximately eight years and two months of his sentence. Preceding his release, he recounted, he had taken a required six-month “rehabilitation” course aimed at preparing exiting prisoners for life on the “outside,” including

requirements he would be required to “abide by” and overcoming “things that get in your way.” Thereafter, during his ten months of parole, Mr. Bowling continued, he attended more than five classes on a weekly basis, “checked in” regularly, and wore an ankle monitor. According to Mr. Bowling he “didn’t have any issues” during his approximately ten months of parole (which ended when his sentence expired in 2019), nor any “legal issues” since. He added that his SOAH hearing was the first and only instance in which he had been involved in any sort of legal proceeding since being incarcerated.

Additionally, within a “few weeks” after being released from incarceration, Mr. Bowling recounted, he had managed to obtain a job with Ashley’s, one of his prior employers. During this most recent stint, according to Mr. Bowling, he had risen through the ranks “within about three months” from “loading trucks” to an “operations manager” position in which he oversaw “over 170 men” and earned roughly \$90,000 per year. Mr. Bowling “felt God moving” through this opportunity, elaborating that many of his subordinates were themselves on parole or probation.

More recently, Mr. Bowling attested, he had begun working for his current employer, Outdoor Creations, in 2021. Outdoor Creations, Mr. Bowling indicated, is a Dallas-area landscape-architecture company owned by Neal Schirato, the father of a childhood friend, that has been in business since 1983. He added that Mr. Schirato, who is licensed as both an irrigator and landscape architect,⁶⁹ is nearing

⁶⁹ See Tex. Occ. Code § 1903.002(b)(2) (exempting landscape architects from irrigator licensing requirements).

retirement and desires for him to take over the business thereafter. To avail himself of this professional opportunity, Mr. Bowling reasoned, he needs and is thus seeking licensing as a landscape irrigation technician.

In addition to his pursuit of professional opportunity with Outdoor Creations, Mr. Bowling continued, he serves within his church and also “go[es] back into the prisons.” Elaborating, Mr. Bowling testified that he participates in Thursday night sessions at Hutchins State Jail, “to help rehabilitate” male inmates and also “do[es] a Kairos” (a prison ministry) in one of the same units where he was formerly incarcerated, the Beto Unit. Describing his Kairos work at Beto, Mr. Bowling stated that “I teach and preach and just show God’s love.”

Of further note, Mr. Bowling testified that he had remarried about one-and-a-half years after his release (approximately February 2020), to a woman who has a now-thirteen-year-old daughter and nineteen-year-old son. According to Mr. Bowling, he and his wife are now putting her son (his step-son) through college.

Under questioning from OPIC, Mr. Bowling testified that he underwent psychological counseling and medication for possible underlying mental-health issues when initially confined in county jail and early during his time in TDCJ. However, he attested, he had been determined to have no issues or further issues of this sort after about two years. Mr. Bowling denied that he was currently receiving any mental-health treatment.

Additionally, in response to questions about his work with Outdoor Creations, Mr. Bowling testified that Mr. Schirato “does all the architect designing, including the irrigation” while he “kinda runs the business” as far as sales, showing customers designs, picking up supplies, “anything and everything.”⁷⁰ In this role, Mr. Bowling attested, he interacts with customers and the public “everyday and continuously” — the evident point being that he can be trusted not to harm others with whom he interacts through the sort of work he would do as a licensed irrigation technician.

2. The “Documentation” Issues

The chief thrust of Ms. Zyman’s opposing testimony was that any proof of Mr. Bowling’s rehabilitative efforts, compliance with parole conditions, or other matters potentially bearing favorably on Mr. Bowling’s fitness for licensure was not “evidence,” at least as far as she, the ERC, or the ED was concerned, unless he had presented it in documentary form. In the absence of such “documentation,” Ms. Zyman testified, the substance of Mr. Bowman’s testimony had not persuaded her that the Commission should grant his application in the face of his criminal history.

Ms. Zyman further testified—initially—that Mr. Bowling had wholly failed to provide the ED any “documentation” regarding his rehabilitative efforts or compliance with parole conditions in response to the ED’s first notice letter calling for information relevant to the § 53.023 factors. Mr. Bowling disputed that assertion through both testimony not previously summarized and his questioning of

⁷⁰ In fact, Mr. Bowling observed—reflective of the present era of remote SOAH hearings—he was giving his testimony while parked at a Lowe’s, with intent to go inside and make purchases for the business once the hearing concluded.

Ms. Zyman. According to Mr. Bowling, he had sent the ED documents that included four recommendation letters, which he recalled as including one from Mr. Schirato, one from a “college friend,” one from a “college friend’s father,” and one from a “friend’s mother.” Further, although he did not have copies of these documents in his immediate possession and did not recall precisely, Mr. Bowling believed that he had also included a copy of his college degree, which hung “on [his] wall.” However, Mr. Bowling acknowledged that he had not succeeded in locating or providing what he described as “hundreds” of certificates reflecting his completion of various rehabilitative programs while in prison. He thought he likely had misplaced or discarded these documents following his release from prison, not perceiving any particular need at the time to retain them.

Mr. Bowling maintained that he sent the described documents via U.S. mail to the Commission in a single envelope. But subsequently, Mr. Bowling recounted, he was told by Commission personnel that the agency had not received this mailing, and he had then resent the same set of documents to the Commission via email. As Mr. Bowling put it, “I did it [sending the documents to the Commission] twice, once via snail mail, once via email.”

In response to Mr. Bowling’s assertions, Ms. Zyman conceded that she had “misspoke” —she acknowledged that the ED had received a single recommendation letter, “from Outdoor Creations, Inc.,” corresponding to Mr. Bowling’s references to a letter from Mr. Schirato. However, Ms. Zyman was adamant that the ED had received no other documents from or concerning Mr. Bowling. She added that she had double-checked agency files during the hearing and verified that the ED had in

its present possession only the single letter, in a transmittal envelope containing no other documents. And in the absence of much more substantial documented proof of Mr. Bowling’s rehabilitation, Ms. Zyman insisted, the ERC (and in turn ED) had properly concluded that the § 53.023 factors did not weight in favor of licensing him. For example, Ms. Zyman represented that the ERC had “considered” Mr. Bowling’s “low”-risk sex-offender status as a factor potentially favoring him, but deemed it “not to weigh as much” due to his failure to present more substantial documentation bearing on his propensity to reoffend and because it related to only one of his three offenses (the aggravated sexual assault).

Having learned that Mr. Bowling had preexisting documentary evidence that could be relevant to his fitness for licensing, at least some of which he had provided to the ED prior to the hearing, the ALJ granted Mr. Bowling leave to offer any such documents into evidence following the hearing, subject to other parties’ rights to object to their admission. The ALJ set a deadline of February 9, 2024, for Mr. Bowling to do so. Thereafter, on February 9, Mr. Bowling timely filed with SOAH, via email, a PDF file containing several documents:

- A recommendation letter dated April 4, 2023, from Mr. Neal Schirato, as the President of Outdoor Creations, Inc., and on company letterhead (which would correspond to the recommendation letter described by both Ms. Zyman and Mr. Bowling during the hearing).⁷¹
- An emailed “Letter of Recommendation” dated April 13, 2023, from Bill Kressler, who indicated that he had met Mr. Bowling while they were in college, that Mr. Bowling had been “my little brother in our

⁷¹ Bowling Ex. C. The labeling on Mr. Bowling’s exhibits was added by SOAH Docketing staff.

fraternity,” and that the two had remained friends thereafter (which would correspond to the letter from a “college friend” that Mr. Bowling had referenced in testimony).⁷²

- A recommendation email dated April 17, 2023, from Donald Kresser, who stated that he had “supervised people in the military, clothing business and warehousing for 40 years” and had known Mr. Bowling since he was in college (which, along with the surname in common with Bill Kressler, would correspond to the letter from a “college friend’s father” that Mr. Bowling had referenced in testimony).⁷³
- An undated letter from Marc Stern, on behalf of Kairos Prison Ministry at the TDCJ’s Beto Unit.⁷⁴
- A written statement dated April 8, 2023, from Mr. Bowling himself.⁷⁵
- A diploma issued by Nations University, West Monroe, Louisiana, reflecting that Mr. Bowling had completed 120 semester-hour credits at the university level and been conferred the degree of “Bachelor in Religious Studies” on February 10, 2014.⁷⁶
- Court papers reflecting Mr. Bowling’s convictions for aggravated kidnapping and aggravated assault, as well as parole conditions.⁷⁷
- A TCEQ “Criminal Charges/Conviction Attestation” form in which Mr. Bowling had disclosed his aggravated assault conviction.⁷⁸

⁷² Bowling Ex. E.

⁷³ Bowling Ex. F.

⁷⁴ Bowling Ex. G.

⁷⁵ Bowling Ex. D.

⁷⁶ Bowling Ex. H.

⁷⁷ Bowling Ex. I.

⁷⁸ Bowling Ex. B.

The PDF file containing these documents was transmitted to SOAH under a cover email from Mr. Bowling that forwarded an earlier, internal cover email, also dated February 9, 2024, and written by a JennaLee Bowling.⁷⁹ In her email, Ms. Bowling stated that she is Mr. Bowling’s wife and made various favorable comments in support of his licensure.

Thickening the plot further, OPIC thereafter filed a motion emphasizing what it perceived to be proof that Mr. Bowling had, in fact, emailed the same PDF file, containing the same documents, to Ms. Ramirez, now the ED’s legal representative but also an ERC member, on April 20, 2023. OPIC explained that it had provided logistical guidance to Mr. Bowling regarding his post-hearing filing with SOAH and that, in the process, he had forwarded to OPIC the PDF file. That transmission, OPIC asserted, had turned out to include an email history appearing to reflect that he had previously sent the same attachment to Ms. Ramirez. OPIC attached a copy of that email history, along with the PDF file (which matches the filing he later made at SOAH) as exhibits to its motion. The history indeed appears to reflect that Mr. Bowling, on April 20, 2023, sent an email to Ms. Ramirez with the subject line “William Bowling hearing” and his date of birth,⁸⁰ using the same respective email addresses the two have used for serving copies of their SOAH filings. However, OPIC and the ED agree that, upon inquiry, they were advised by Commission technology staff that any copy of such an email on Ms. Ramirez’s end would have

⁷⁹ Bowling Ex. A.

⁸⁰ As reflected in the copy of the PDF attached to OPIC’s motion.

since been automatically deleted under a records-retention schedule and presently not susceptible to recovery.

OPIC urged the ALJ to reopen the hearing for additional testimony regarding whether the ED had considered the documents in the PDF file when determining to deny Mr. Bowling’s license application. The ED opposed the motion, chiding Mr. Bowling for failing (at least in his follow-up email) to comply with the method of delivery prescribed in the first notice letter for transmitting documents to the ERC, which had provided a mailing address for the ERC rather than any email address.⁸¹ Similarly, the ED emphasized that the transmission would have happened before the ALJ formally authorized service by email in this case, which did not occur until the immediate aftermath of the preliminary hearing a few months later. And the ED (through Ms. Ramirez herself) also represented that Ms. Ramirez “never saw the email in question before it was sent to her by counsel for OPIC . . . on February 9, 2024” and, further, questioned its authenticity.

The ALJ overruled OPIC’s motion,⁸² as the question of whether the ERC or ED considered all of Mr. Bowling’s documents, *per se*, is not a material issue in this contested-case hearing—as explained previously, the hearing is a *de novo* proceeding rather than some sort of appellate-like review based on the record before the ED. The real issue, in other words, was whether the ALJ should admit or exclude Mr. Bowling’s exhibits, and if admitted, the evidentiary weight they should be given.

⁸¹ Ex. ED-1 at Bates 2.

⁸² See Order Denying Motion for Further Proceedings But Modifying Post-Hearing Briefing Deadlines (Feb. 16, 2024).

As noted previously, the ED objected to the admission of Mr. Bowling’s “late exhibits” into evidence. In part, the ED asserted that it had served discovery requests on Mr. Bowling calling for all of the exhibits and to which he had wholly failed to respond or object.⁸³ The ED’s arguments implicate provisions of the Texas Rules of Civil Procedure, made applicable here through the Commission’s procedural rules, that would impose a presumptive automatic exclusion of evidence that is requested in discovery and a party “fails to make, amend, or supplement a discovery response in a timely manner.”⁸⁴ To establish its factual predicate, the ED attached copies of the discovery requests on which it relies, along with a cover email reflecting transmission to Mr. Bowling on October 19, 2023.⁸⁵ However, the ED did not present any competent proof that Mr. Bowling failed to respond to those requests thereafter, such as an affidavit—only the bare, unsupported statements of its counsel in briefing.⁸⁶ Accordingly, the ALJ overrules the ED’s objection to the documents on discovery grounds. The ALJ would add that even if he sustained this objection, the scope of the information requested by the ED, and any ensuing evidentiary exclusion, extended only to documents or contents that “relat[ed] to” Mr. Bowling’s three offenses; they did not request and would not require exclusion of materials or information about Mr. Bowling’s subsequent rehabilitation efforts, work history, or other intervening behavior, the chief material substance of his four recommendation letters. Consequently, even if the ALJ sustained the ED’s

⁸³ ED Closing Arg. at 9; ED Reply at 6.

⁸⁴ 30 Tex. Admin. Code § 80.151(a); *see* Tex. R. Civ. P. 193.6(a)-(b).

⁸⁵ ED Closing Arg., Exs. A and B; *see also* ED Response to Motion for Further Proceedings, Ex. C (same).

⁸⁶ *Compare* Order Denying Motion for Further Proceedings at 2 (emphasizing that the ED would need “proper support” for any objection or motion seeking to exclude the documents from evidence, in contrast to that which the ED had presented in opposition to the motion).

discovery-based objection, that ruling would not affect the most critical components of Mr. Bowling’s proof favoring his licensure.

Alternatively, the ED grounded its objection in prior SOAH orders that had required the parties, in advance of the hearing, to pre-submit to SOAH and exchange with other parties copies of any documentary exhibits they intended to offer into evidence.⁸⁷ As the ED emphasized, Mr. Bowling did not comply with either requirement—indeed, he did not even have the documents on hand for his own reference during the hearing. The ED urged the ALJ to enforce an additional proviso of the orders cautioning that “[a] failure to comply with the requirements [to pre-submit and exchange exhibits] may result in exclusion of the associated evidence.”⁸⁸

But “*may* result in exclusion of the associated evidence” denotes discretion of the ALJ in deciding whether to exclude the evidence—or not—as opposed to any categorical requirement that the ALJ do so. The guideline accordingly leaves room for some leniency by the ALJ where, *inter alia*, a party has some reasonable basis for noncompliance, noncompliance will not unfairly prejudice another party, or both.⁸⁹ And bearing upon both considerations is the extent to which the ED had already received actual or constructive possession of the documents at some earlier juncture prior to the hearing. The ALJ is persuaded that the ED did. Mr. Bowling testified

⁸⁷ See Order Memorializing Preliminary Hearing, *et. al.* (July 13, 2023), at ¶ 5; Order Granting Motion for Continuance (Jan. 9, 2024), at 2; *see also* General Order Relating to Submission of Exhibits for General Docket Hearings (<https://www.soah.texas.gov/general-order-relating-submission-exhibits>).

⁸⁸ Order Memorializing Preliminary Hearing, *et. al.* (July 13, 2023), at ¶ 5.

⁸⁹ *Cf.* Tex. R. Civ. P. 193.6(a) (exceptions to automatic exclusion for failure to make, amend, or supplement discovery responses).

that he mailed the documents to the Commission, and it is undisputed that at least one of the documents, the letter from Mr. Schirato, actually made it to the ERC.⁹⁰ Moreover, while the ALJ will take Ms. Ramirez at her word that she “never saw” Mr. Bowling’s follow-up email re-transmission, at least in the sense of not presently recalling whether she ever received it, the proof attached to OPIC’s motion to reopen tends to show that she did.⁹¹ In the very least, Mr. Bowling made a good-faith attempt—indeed, two—to provide the documents to the ED.

In this context, Mr. Bowling’s failure to pre-submit and—for a third time—provide the documents to the ED is consistent with the misimpression—common among self-represented parties like him—that both the referring agency and the SOAH ALJ already had in their possession whatever documents he had previously provided the referring agency (or thought he had provided them). That Mr. Bowling may have labored under this misimpression was evident to the ALJ throughout the hearing. For example, Mr. Bowling voiced an initial misperception that the ALJ was merely part of the same Commission machinery that had “already made up their

⁹⁰ Although the ALJ need not decide why or how the other documents purportedly did not make it to the ERC, he would observe that Mr. Schirato’s letter is the only one of the documents that explicitly states the ERC’s mailing address that the first notice letter instructed Mr. Bowling to use. These circumstances are consistent with ED staff receiving the envelope Mr. Bowling described, opening it, extracting the contents, and then either culling out the documents lacking an explicit reference to the ERC’s prescribed mailing address (a comically obstructionist elevation of form over substance, but not inconceivable considering other circumstances in this case) or simply misrouting them. Or Mr. Schirato conceivably could have mailed an additional copy directly to the ERC, although this seems unlikely given the first notice’s instructions requiring “you” (Mr. Bowling) to “submit any relevant information,” as opposed to anyone else.

⁹¹ In this regard, the ALJ would note that the date of the evident email transmission, April 20, 2023, is one day after Ms. Ramirez had already requested the Chief Clerk to refer the matter to SOAH and several months past the ERC’s previously prescribed deadline for submitting documents to the ED. These circumstances suggest that the email could have been deemed “too late” or otherwise disregarded at that juncture, and perhaps easily forgotten thereafter.

mind” against him and, as noted, did not even have his own copy of the documents on hand.

Conversely, even if one credits the ED’s claims that it received or was previously aware only of Mr. Schirato’s recommendation letter, any perceived unfairness from the exhibits’ post-hearing admission would be substantially mitigated by the opportunity given the ED to address Mr. Bowling’s documents in two rounds of post-hearing briefing. Indeed, it was precisely “[t]o afford the parties the full and fair opportunity” to address both the “admissibility and evidentiary weight to be afforded the new documents” that the ALJ extended the original post-hearing briefing deadlines (already a rarity in most agencies’ criminal-history licensing cases) to afford the parties three entire weeks to file any initial closing arguments and another nine days beyond to file any responses.⁹² And the ED availed itself of that opportunity.⁹³

Accordingly, the ALJ overrules the ED’s objection based on the SOAH pre-submission and exchange-of-exhibits requirements. The documents contained in the PDF file are each admitted into evidence.⁹⁴ However, to the extent Mr. Bowling intended to offer it, the ALJ does not admit the cover email from his

⁹² Order Denying Motion for Further Proceedings at 2.

⁹³ ED Closing Arg. at 9-10.

⁹⁴ *I.e.*, Bowling Exs. B-I.

wife,⁹⁵ which on its face was created after the hearing and is otherwise beyond the scope of the ALJ's leave to file.

3. The Final Analysis

Whatever the internal review practices of the ERC or ED may be, the ALJ in this contested-case proceeding is not confined to considering only evidence that is the form of “documentation,” but may (indeed, must) also consider witness testimony, as judges of our legal tradition have done for hundreds of years. And when Mr. Bowling's testimony is considered alongside his exhibits, they prove to be materially consistent, corroborating several of the key factual assertions he made in testimony, as will become apparent shortly. Significantly, Mr. Bowling's exhibits did not appear suddenly out of “thin air” following the hearing, but bear dates from April 2023, accompanied by the further indicia that Mr. Bowling, as he claimed, actually sent or at least attempted to send them to the ED's current representative within that same time frame. That these documents predating the hearing by several months corroborate important facets of Mr. Bowling's subsequent testimony tends to make both ring true, especially considering that Mr. Bowling did not have the documents with him during the hearing to reference while testifying. And in combination, Mr. Bowling's testimony and exhibits ultimately weigh in favor of granting his license application despite his criminal history.

To be sure, Mr. Bowling committed a horrible, horrible crime—indeed “heinous,” as he acknowledged, considered shameful even among the community

⁹⁵ Bowling Ex. A.

of fellow offenders with whom he was once incarcerated. His written statement now in evidence elaborates upon and clarifies the shorthand description of the underlying acts he gave in testimony. Rather than “lost control” in the sense of an immediate reaction, Mr. Bowling wrote that after he “found out that my wife was having an affair with her boss,” he had first persisted in “tr[ying] to win back my wife from this man,” although had “moved her” and a roughly one-year-old daughter of their marriage “out of our house” for “nearly 5 months” prior to committing his crimes. But eventually, as he described it, “I went over to her place one morning and held her at gun point and made her have intercourse with me.” That is to say, after a prolonged period in which he had attempted unsuccessfully to salvage or regain the relationship, Mr. Bowling escalated violently, holding his estranged then-wife against her will and raping her, using the gun as a means of coercive threat.⁹⁶

Yet in Chapter 53 of the Texas Occupations Code, our Legislature has emphasized its “intent . . . to enhance opportunities for a person to obtain gainful employment after a person has . . . been convicted of an offense; and . . . discharged the sentence for the offense”—as Mr. Bowling undisputedly succeeded in doing in 2019. And the Legislature has commanded also that Chapter 53 “shall be liberally construed” to these ends—with no exceptions or distinctions that would categorically exclude the offenses for which Mr. Bowling was convicted, however “heinous” they might be. Nor, as previously observed, does (or can) the nature of Mr. Bowling’s crimes create a categorical bar to licensing him; on the contrary, the Commission’s own rules tacitly acknowledge that possibility.

⁹⁶ Bowling Ex. D.

Though “heinous,” Mr. Bowling’s crimes were committed during a single and isolated episode, and one for which he expressed regret in both testimony and his earlier written statement, acknowledging the wrongful nature of his conduct and the lack of any justification.⁹⁷ There is no hint of any other criminal wrongdoing during Mr. Bowling’s life, either before or after, aside from a misdemeanor conviction for possessing less than two ounces of marijuana dating back to the late 1990s, for which he was sentenced to three days in jail (time served) and the ED has not bothered to mention as a factor potentially weighing against his present fitness.⁹⁸ Similarly, while Mr. Bowling may not have stated in so many words that he had complied with his parole conditions, his discharge would reasonably signal that he did, or at least did so well enough to satisfy authorities. Those parole conditions, notably, included participating in a sex-offender treatment program, a domestic-violence prevention or counseling program, and substance-abuse treatment and relapse-prevention programs.⁹⁹

Moreover, Mr. Bowling’s lone material criminal episode occurred in a context far removed and quite distinct from the workaday world of a licensed irrigation technician. The plight of a cuckold or other sufferer of marital strife differs markedly from the nature of relationships and interactions in which Mr. Bowling would engage while installing or servicing lawn sprinkler systems and the like. (To be abundantly clear, the ALJ is not asserting that the context of Mr. Bowling’s crimes *justify* them

⁹⁷ Bowling Ex. D.

⁹⁸ ED Ex. 7 at Bates 18.

⁹⁹ Bowling Ex. I.

(nor does Mr. Bowling); the ALJ’s point, rather, is that the crimes’ unique and divergent circumstances tend to undermine any knee-jerk assumptions that he would, *ergo*, present a risk of inflicting rape or other violent mayhem on irrigation customers or members of the public were he licensed to work in that field). Pointing to the same conclusion is Mr. Bowling’s “low” sex-offender risk-assessment rating, a professional determination that he “poses a low danger to the community and will not likely engage in criminal sexual conduct.”¹⁰⁰

But despite the isolated nature and idiosyncratic circumstances of Mr. Bowling’s crimes and his “low” assessed risk of any future sexual crimes, the ED insists that the crimes are nonetheless probative of some broader capacity for violent conduct.¹⁰¹ To the extent such a capacity would be demonstrated by Mr. Bowling’s acts committed back in 2009, this would properly weigh against his licensing in 2024 only if and to the extent that capacity has remained within Mr. Bowling’s character during the intervening years, at least if one is to remain faithful to Chapter 53’s policies. And Mr. Bowling presented strong proof of an intervening change for the better, one that makes his violent reoffending unlikely, especially in the already-divergent setting of performing the duties and responsibilities of a licensed irrigation technician.

That proof included, in addition to Mr. Bowling’s testimony, the recommendation letter from Mr. Schirato.¹⁰² Mr. Schirato evinced a close personal

¹⁰⁰ Ex. ED-8 at Bates 23; *see* Tex. Code Crim. Proc. art. 62.007(c)(1).

¹⁰¹ ED Closing Arg. 10; ED Reply at 8-9.

¹⁰² Bowling Ex. C.

relationship with Mr. Bowling, having known him “since he was a young boy,” explaining that Mr. Bowling had been the “very best of friends” with Mr. Schirato’s since-deceased son. Consequently, Mr. Schirato was aware of Mr. Bowling’s crimes and imprisonment, and attested that Mr. Bowling had even “lived with me and my wife” during his year under supervision following release. (Mr. Bowling, similarly, had testified that Mr. Schirato and wife had also visited him during his imprisonment.) Echoing Mr. Bowling’s account, Mr. Schirato wrote:

Going to prison is never looked upon as a positive thing. However, in William’s case it turned his life around. He was a model prisoner and spent time in various facilities proving he was very serious about making some life changing decisions. He became involved with Prison Fellowship Ministries and continues to work and serve with them today. William has a heart for helping others. He counsels from experience and is committed to his Lord, family, and church.

Similarly, Donald Kresser—who indicated that he had “corresponded frequently” with Mr. Bowling during his imprisonment and has since welcomed Mr. Bowling and his new family to visits in Mr. Kresser’s home—wrote that Mr. Bowling “was very troubled when he went to jail,” but “became a Christian” there and underwent “a major change in his personality.” He praised Mr. Bowling for “get[ting] his life together [in] both family and work.”¹⁰³ Likewise, son Bill Kresser—the college friend, who attested that he continued to “talk on a regular basis and hang out when time permits” with Mr. Bowling—observed that Mr. Bowling had “change[d]” and “grown up” while in prison and become “a true Christian not just in his words but in his actions.” He praised Mr. Bowling as “an

¹⁰³ Bowling Ex. F.

excellent, strong and faithful man,” “truly reformed and better than ever,” and one who “leads a life of purpose in business and family.”¹⁰⁴

Like Mr. Schirato, the Kesslers also corroborated Mr. Bowling’s account of his continuing service in prison ministries.¹⁰⁵ And the letter from the Kairos Prison Ministry representative, Mr. Stern, is effusive in its praise of him:

I am writing to express my deepest appreciation and admiration for the remarkable dedication and selfless service of William Bowling to the Kairos Prison Ministry at the TDCJ [Beto] unit. William’s unwavering commitment, generosity, and compassionate presence have left an indelible mark on both the volunteers and the incarcerated individuals he serves.

William Bowling’s exceptional work ethic, coupled with his genuine care and empathy, have significantly enriched the lives of those within the prison community. His willingness to give his time, gifts, and presence without reservation exemplifies the true essence of volunteerism and embodies the core values of the Kairos Prison Ministry.

Throughout his tenure with the ministry, William has consistently demonstrated a profound understanding of the unique challenges faced by incarcerated individuals. His ability to foster a sense of belonging, hope, and spiritual renewal among those he serves is truly inspiring. Whether through leading discussions, offering guidance, or simply lending a listening ear, William has touched the lives of countless individuals with kindness and compassion.

¹⁰⁴ Bowling Ex. E.

¹⁰⁵ Bowling Exs. E, F.

Moreover, William Bowling’s exemplary leadership skills have played a pivotal role in the success and effectiveness of the Kairos Prison Ministry at the TDCJ [Beto] unit. His dedication to upholding the values of integrity, respect, and inclusivity has fostered a supportive and nurturing environment where individuals can experience healing and transformation.

...

Thank you, William, for your extraordinary service, dedication, and unwavering compassion. Your presence in the Kairos Prison Ministry is a beacon of hope and a testament to the transformative power of love and service.¹⁰⁶

Meanwhile, Mr. Bowling’s crimes have progressively receded farther and farther into his past, now approaching fifteen years’ distant, while he has aged correspondingly. And he has remarried, as of 2020—now four years and counting—has two step-children, and with his wife is helping fund the college education of the oldest. Mr. Bowling’s April 2023 written statement also reflects that, since his release from prison, he had been making weekly payments of accrued child support owed on his child from the earlier marriage (who would have been a legal adult by then) and was “close” to paying off those arrears.¹⁰⁷

Mr. Bowling has also maintained a steady—and by all accounts, successful—employment history since his release from prison. This includes his work since 2021 with Outdoor Creations, where he has already developed a strong track record of performing work entailing regular and considerable interaction with landscaping

¹⁰⁶ Bowling Ex. G.

¹⁰⁷ Bowling Ex. D.

customers and members of the public—the very sort of work that would implicate the ED’s professed concerns about licensing him. And Mr. Bowling has performed this work not only without incident, but also in a manner that has earned the high praise of Mr. Schirato:

[Mr. Bowling] is one of the most loyal, faithful, and honest employees I have ever had. Before he started work, I was planning to retire and close the company. Because of his abilities, talents, and work ethic our production has doubled in the last two years. I work side by side with him and have the opportunity to observe his actions and reactions with various people in all types of situations and circumstances. I get compliments on him on a regular basis. I believe hiring him is one of the best decisions I have ever made.

Mr. Schirato added that he “saw during the year [Mr. Bowling] lived with us how determined he was to overcome his past mistake” and, for that reason, “did not hesitate to hire him.”¹⁰⁸

In sum, while Mr. Bowling committed crimes that “on paper” would present grounds for the Commission to deny his licensing application, the remote-at-best nexus between the specific circumstances of his offenses and the duties and responsibilities of an irrigation technician, his intervening transformation for the better, and other countervailing considerations under § 53.023 and Chapter 53’s broader policies ultimately weigh in favor of granting his license application here. Denying his application on this record would amount to the gratuitous infliction of additional, collateral punishment for criminal convictions for which Mr. Bowling has

¹⁰⁸ Bowling Ex. C.

already discharged his sentence, by depriving him of licensing and attendant work opportunities, without justification by any risk he would currently present in performing the duties and responsibilities of an irrigation technician. This would be contrary to the Legislature’s manifest intent in Chapter 53.¹⁰⁹

Accordingly, the ALJ recommends that the Commission decline to exercise its discretion to deny Mr. Bowling’s license application, and instead grant the application. Although these recommendations differ from the ED’s preferred outcome, the ALJ would note again that OPIC—the only other neutral participant in this proceeding¹¹⁰—now supports the same disposition.¹¹¹

In further support of the ALJ’s recommendations, the ALJ has prepared the Findings of Fact and Conclusions of Law incorporated within the accompanying proposed Order of the Commission. The Order would adopt the incorporated proposed Findings of Fact and Conclusions of Law and, in turn, grant Mr. Bowling’s license application. The ALJ respectfully recommends that the Commission, for the reasons stated, adopt the proposed Order.

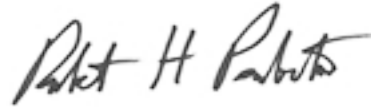
¹⁰⁹ Tex. Occ. Code § 53.003.

¹¹⁰ *See* Tex. Water Code § 5.273(a) (“[OPIC] shall represent the public interest and be a party to all proceedings before the commission.”).

¹¹¹ OPIC Closing Arg. at 9-14.

Signed April 15, 2024

ALJ Signature:



Robert Pemberton

Presiding Administrative Law Judge

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
GRANTING THE APPLICATION OF WILLIAM BOWLING
FOR A LANDSCAPE IRRIGATION TECHNICIAN LICENSE,
TCEQ DOCKET NO. 2023-0512-LIC,
SOAH DOCKET NO. 582-23-19677**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the application of William Bowling for a landscape irrigation technician license. A Proposal for Decision (PFD) was drafted by Robert Pemberton, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing via videoconference concerning the application on February 6, 2024.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. On January 20, 2022, William Bowling submitted to the Commission's Executive Director (ED) an initial application for a landscape irrigation technician license.
2. On June 30, 2022, the ED sent Mr. Bowling a notice of intent to deny his application, citing criminal history.

3. On August 2, 2022, the ED sent Mr. Bowling a “Second and Final Notice” of its intent to deny his application.
4. Mr. Bowling timely requested a contested-case hearing on his application, which the ED received on August 22, 2022.
5. On April 19, 2023, the ED requested the Commission’s Chief Clerk to refer the matter to the State Office of Administrative Hearings (SOAH).
6. On May 18, 2023, the Chief Clerk referred the matter to SOAH.
7. On June 15, 2023, the Chief Clerk issued a notice of hearing that referenced the ED’s denial decision and scheduled a preliminary hearing to be held on July 13, 2023.
8. The notice of hearing provided the date, time, and place of the 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.
9. On July 13, 2023, Administrative Law Judge (ALJ) Robert Pemberton convened the preliminary hearing via videoconference. The ALJ admitted ED exhibits 1-6 for the limited purpose of establishing notice and jurisdiction; noted that notice and jurisdiction were established; named the parties (the ED, Mr. Bowling, and the Office of Public Interest Counsel (OPIC)); and set the hearing on the merits, to convene via videoconference, and a procedural schedule.
10. The hearing on the merit was originally scheduled for January 9, 2024, but was subsequently continued by agreement to February 6, 2024.
11. On February 6, 2024, the ALJ convened the hearing on the merits via videoconference. The ED was represented by Commission Staff Attorneys Alicia Ramirez and Aubrey Pawelka; Mr. Bowling represented himself, and OPIC was represented by Assistant Public Interest Counsel Jennifer A. Jamison. The hearing concluded that same day.

12. At the conclusion of the hearing, the ALJ held the record open for post-hearing written closing arguments, if the parties wished to file them, and to afford Mr. Bowling a further opportunity to offer documents into evidence that he had referenced in his testimony, subject to the rights of other parties to object to their admission into evidence.
13. The deadline for Mr. Bowling to offer any documents into evidence following the hearing was February 9, 2024. On that date, Mr. Bowling offered documents into evidence, to which the ED objected. The ALJ overruled the ED's objections and admitted Mr. Bowling's documents into evidence, with the exception of a cover email written by his wife after the hearing.
14. The record ultimately closed on March 8, 2024, an extended deadline for the parties to file any responsive written closing arguments.
15. In 2010, Mr. Bowling pleaded guilty to and was convicted of the first-degree felony offense of aggravated sexual assault, the first-degree felony offense of aggravated kidnapping, and the second-degree felony offense of aggravated assault with a deadly weapon.
16. Based on his convictions, Mr. Bowling was sentenced concurrently to nine years' confinement in the Texas Department of Corrections (TDCJ), or until May 2019.
17. By virtue of his conviction for aggravated sexual assault, Mr. Bowling is required to register for the remainder of his life on the Texas Public Sex Offender Registry.
18. The duties and responsibilities of a licensed irrigation technician could permissibly entail direct personal contact with customers and members of the public without in-person supervision by a licensed irrigator or the presence of other co-workers. These circumstances, in theory, could potentially create opportunities to commit violent or sexually violent crimes, if a licensee had such malevolent designs.
19. The duties and responsibilities of a licensed irrigation technician could permissibly entail direct personal contact with customers under circumstances that could potentially become adversarial. In turn, those

situations, in theory, could lead to violent acts by a licensee who was disposed to commit violent acts.

20. Mr. Bowling was paroled in June 2018 for the remainder of his sentence.
21. Mr. Bowling completed his term of parole and was discharged in May 2019.
22. All three of Mr. Bowling's aforementioned offenses of conviction were committed during a single incident in 2009, against his then-estranged, now-former wife, in the context of marital discord that included her having an affair with another man.
23. Although not a justification for Mr. Bowling crimes, their context differs markedly from the nature of relationships and interactions Mr. Bowling would be expected to have with landscaping customers or members of the public while performing the duties and responsibilities of a licensed irrigation technician.
24. Mr. Bowling feels remorse for the 2009 incident and acknowledges that he acted wrongly and without justification.
25. Mr. Bowling has no other criminal history, before or since, aside from a 1998 misdemeanor conviction for possessing less than two ounces of marijuana, for which he was sentenced to three days in jail (time served) and the ED has not raised as a material factor weighing against his licensure.
26. In addition to rehabilitative programs in which he participated while imprisoned, Mr. Bowling's parole terms included participating in a sex-offender treatment program, a domestic-violence prevention or counseling program, and substance-abuse treatment and relapse-prevention programs.
27. Mr. Bowling completed the terms of his parole to the satisfaction of authorities.
28. While imprisoned, Mr. Bowling underwent transformative change, grounded in Christian faith, that close friends who wrote recommendation letters on his

behalf have credited with “turn[ing] his life around,” “truly reform[ing]” him, and making him now “an excellent, strong and faithful man.”

29. In 2014, while imprisoned, Mr. Bowling earned a Bachelor’s degree in Religious Studies.
30. While imprisoned, Mr. Bowling began serving as an “inmate pastor,” counseling and ministering to fellow inmates and assisting in their own rehabilitative efforts.
31. Since his release from prison, Mr. Bowling has had a steady work history, including working since 2021 for Outdoor Creations, a landscaping-design business that he aspires to take over upon the current owner’s anticipated retirement within a few years.
32. Mr. Bowling’s work for Outdoor Creations has entailed frequent interaction with customers and members of the public, in contexts similar to those he would encounter as a licensed irrigation technician, without incident.
33. The current owner of Outdoor Creations wrote a recommendation letter praising Mr. Bowling as “one of the most loyal, faithful, and honest employees I have ever had”; crediting Mr. Bowling’s “abilities, talents, and work ethic” with a twofold growth of the business; and terming his hiring of Mr. Bowling “one of the best decisions I have ever made.” He added that he “work[s] side by side with [Mr. Bowling] and ha[s] the opportunity to observe his actions and reactions with various peoples in all types of situations and circumstances,” and “get[s] compliments on [Mr. Bowling] on a regular basis.”
34. Since his release from prison, in addition to his employment, Mr. Bowling has continued to serve in two prison ministries, including at a unit where he was previously incarcerated, the Beto Unit.
35. Mr. Bowling’s recommendation letters include one written by a representative of the prison ministry in the Beto Unit, Kairos Prison Ministries. The letter lauds Mr. Bowling for traits and contributions that include a “truly inspiring” “ability to foster a sense of belonging, hope, and spiritual renewal among those he serves.”

36. Mr. Bowling's 2009 offenses were committed almost fifteen years ago, and he is correspondingly now almost fifteen years older than when he committed the offenses.
37. Mr. Bowling has been remarried since approximately February 2020, and is presently helping his wife fund college for her son.
38. Mr. Bowling has a "low" sex-offender risk-assessment rating, a professional determination that he poses a low danger to the community and is unlikely to engage again in criminal sexual conduct.
39. Mr. Bowling is unlikely to reoffend, particularly in the context of performing the duties and responsibilities of a licensed irrigation technician, circumstances markedly different from those in which he committed the offenses at issue.
40. Mr. Bowling is presently fit to be licensed as a landscape irrigation technician.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction and authority over the licensing of landscape irrigation technicians. Tex. Occ. Code §§ 1903.001(4), .053, .251; 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, ch. 80
3. Mr. Bowling received proper notice of the hearing on his license application. the merits. Tex. Gov't Code §§ 2001.051-.052; *see* Tex. Occ. Code § 53.0231.
4. Under Chapter 53 of the Texas Occupations Code, the Commission must, [n]otwithstanding any other law," issue to Mr. Bowling either the license for which he applied or a six-month provisional license unless he "has been convicted of an offense described by [Texas Occupations Code] Section 53.021(a)." Tex. Occ. Code § 53.0211(b).

5. An offense described by Texas Occupations Code section 53.021(a) is: “an offense listed in Article 42A.054, Code of Criminal Procedure”; “a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure”; or “an offense that directly relates to the duties and responsibilities of the licensed occupation.” Tex. Occ. Code § 53.021(a); *accord* 30 Tex. Admin. Code § 30.33(h)(1).
6. In determining whether an offense of conviction “directly relates to the duties and responsibilities of the licensed occupation,” the Commission is to consider each of the factors listed in Texas Occupations Code section 53.022. Tex. Occ. Code § 53.022; *accord* 30 Tex. Admin. Code § 30.34(a).
7. If Mr. Bowling has been convicted of one or more offenses described by Texas Occupations Code section 53.021(a), the Commission has discretion to deny the application, although it is not required to do so, and may instead grant it. Tex. Occ. Code § 53.021(a); *accord* 30 Tex. Admin. Code § 30.33(h)(1).
8. If the Commission determines, based on the factors in Texas Occupations Code § 53.022, that Mr. Bowling was convicted of one or more offenses that “directly relate” to the duties and responsibilities of a licensed irrigation technician, it must consider the factors listed in Texas Occupations Code section 53.023(a) when exercising its discretion whether or not to deny Mr. Bowling’s application on that basis. Tex. Occ. Code § 53.023(a); *accord* 30 Tex. Admin. Code § 30.34(b).
9. If exercising its discretion whether or not to deny Mr. Bowling’s application based on an offense listed in Code of Criminal Procedure Article 42A.054 or “a sexually violent offense” as defined by Code of Criminal Procedure Article 62.001, the Commission is not required to consider the factors in Texas Occupations Code § 53.023(a), but is not prohibited from doing so. *See* Tex. Occ. Code §§ 53.021(a), .023(a); *accord* 30 Tex. Admin. Code § 30.34(b).
10. Chapter 53 emphasizes that “[i]t is the intent of the [L]egislature to enhance opportunities for a person to obtain gainful employment after a person has . . . been convicted of an offense; and . . . discharged the sentence for the offense.” Tex. Occ. Code § 53.003(a). To that end, Chapter 53 “shall be liberally construed.” Tex. Occ. Code § 53.003(b).

11. The ED has the initial burden of proving that Mr. Bowling was convicted of one or more offenses by described by Texas Occupations Code section 53.021(a), while Mr. Bowling, in that event, would have the burden of proving that he is fit or otherwise should be licensed despite any such convictions. Tex. Occ. Code § 53.0211(b); 30 Tex. Admin. Code §§ 80.17(a), .117(a)-(b); *see also* Moving Party, Movant, and Motion, *Black's Law Dictionary* (11th ed. 2019).
12. The standard of proof is by a preponderance of evidence. 30 Tex. Admin. Code §80.17(a); *see also Granek v. Tex. St. Bd. of Med. Exam'rs*, 172 S.W.3d 761, 777 (Tex. App.—Austin 2005, no pet.); *Sw. Pub. Serv. Co. v. Pub. Util. Comm'n of Tex.*, 962 S.W.2d 207, 213-14 (Tex. App.—Austin 1998, pet. denied).
13. Aggravated sexual assault, one of Mr. Bowling's offenses of conviction, is both a "sexually violent offense" as defined by Code of Criminal Procedure Article 62.001 and an offense listed in Code of Criminal Procedure Article 42A.054. Finding of Fact No. 15; Tex. Code Crim. P. arts. 42A.054(a)(9), 62.001(6).
14. Aggravated kidnapping, another of Mr. Bowling's offenses of conviction, is an offense listed in Code of Criminal Procedure Article 42A.054. Finding of Fact No. 15; Tex. Code Crim. P. arts. 42A.054(a)(4).
15. Mr. Bowling's offenses of conviction—aggravated sexual assault, aggravated kidnapping, and aggravated assault—are each "directly related" to the duties and responsibilities of a licensed irritation technician, considering the opportunity that might be afforded a licensee to reoffend with the same type of criminal activity and other factors prescribed in Texas Occupations Code section 53.022. Findings of Fact Nos. 15, 18-19; Tex. Occ. Code § 53.022; *accord* 30 Tex. Admin. Code § 30.34(a); *see also Consequences of Criminal Convictions for Occupational Licensing* (Apr. 2021), at 10-11 (ED Ex. 10 at Bates 38-39).
16. The ED met its burden to prove that Mr. Bowling was convicted of one or more offenses described by Texas Occupations Code § 53.021(a), proving all three categories of offenses described there. Tex. Occ. Code § 53.021(a); *accord* 30 Tex. Admin. Code § 30.33(h)(1).

17. Mr. Bowling met his burden to prove that he is presently fit to be licensed as a landscape irrigation technician, and should be licensed despite his criminal history. Findings of Fact Nos. 20-40; Tex. Occ. Code §§ 53.003, .023(a); 30 Tex. Admin. Code § 30.34(b).

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Mr. Bowling's initial application for a landscape irrigation technician license is granted.
2. All other motions, any requests for specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted, are denied.
3. The effective date of this Order is the date the Order is final as provided by 30 Texas Administrative Code section 80.273 and Texas Government Code section 2001.144.
4. The Commission's Chief Clerk shall forward a copy of this Order to Mr. Bowling.
5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Jon Niermann, Chairman
For the Commission