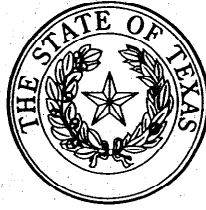


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Texas Board of Architectural Examiners
Architecture / Interior Design / Landscape Architecture

October 31, 2002

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OPINION COMMITTEE

The Honorable John Cornyn
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

FILE # ML-42873-02
I.D. # 42873

Re: Request for an opinion clarifying Chapter 53, Texas Occupations Code

Dear General Cornyn:

I am sending this letter to request from you an opinion regarding the Texas Board of Architectural Examiners' procedures in carrying out the requirements of TEX. OCC. CODE ANN. ch. 53 (Vernon 2002).¹ I also am inquiring about the proper application of TEX. OCC. CODE ANN. §53.021(b), as construed by Tex. Att'y Gen. Op. No. JM-482 (1986), with regard to a criminal conviction entered in another jurisdiction.

The administrative rules of the Texas Board of Architectural Examiners ("Board") require each applicant for registration to provide to the Board information regarding the applicant's criminal history. In addition, the Board requires its registrants to report any criminal conviction, other than a conviction for a minor traffic infraction, to the Board within 30 days after the conviction is entered by the court. The Board's rules also require the Board's registrants, upon the annual renewal of their registration, to confirm that they have reported to the Board any criminal convictions entered since they last renewed their registration. One of the Board's registrants has refused to provide criminal history data upon renewing his registration, citing various constitutional rights. Another of the Board's registrants was convicted of an offense in federal court and completed a term of imprisonment before the Board learned of the conviction. I am inquiring about a series of issues arising from the application of TEX. OCC. CODE ANN. ch. 53 ("Chapter 53"), particularly with regard to these two situations.

¹ Formerly Article 6252-13c and Article 6252-13d, Vernon Texas Civil Statutes, repealed and codified by Act of May 13, 1999, 76th Leg., R.S., ch. 388, §1, 1999 Tex. Gen. Laws 1431 - 1447. For convenience, this request will refer to the current codified provisions except within quotations to the predecessor statutes.

The Board's Regulatory Authority Regarding Misdemeanor and Felony Convictions

The Board administers the statutes governing the registration of architects, landscape architects, and interior designers in Texas. *See generally* TEX. OCC. CODE ANN. chs. 1051-1053 (Vernon 2002).² A person may not engage in the practice of architecture or landscape architecture, subject to certain exceptions, unless the person is registered with the Board. TEX. OCC. CODE ANN. §1051.301, §2, Art. 249c, V.T.C.S.³ A person who is not registered with the Board as an interior designer or as an architect may not use the title "interior designer" or represent the services the person offers or performs as "interior design." TEX. OCC. CODE ANN. §§1053.151 and 1053.002(a)(2). Registration with the Board expires annually and is subject to renewal upon expiration. TEX. OCC. CODE ANN. §§1051.351, 1052.201, and 1053.201.

The Board's enabling legislation does not include any restrictions upon the registration of a person due to the person's misdemeanor or felony conviction. Furthermore, the Board's enabling legislation does not grant the Board specific authority to discipline an architect or a landscape architect upon the criminal conviction of the architect or landscape architect.⁴ The Board is specifically authorized by its enabling legislation to take disciplinary action against an interior designer who has been convicted of a felony or a misdemeanor involving moral turpitude. TEX. OCC. CODE ANN. §1053.252(2). For the most part, the Board's authority and mandate to take disciplinary action upon the criminal conviction of a registrant are derived from Chapter 53.

Consequences of Criminal Conviction – Chapter 53, Texas Occupations Code

Chapter 53 addresses the consequences of criminal convictions with regard to licenses issued by Texas licensing authorities. Pursuant to TEX. OCC. CODE ANN. §53.001, the definitions provided in the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2002), apply to Chapter 53. The word "license" is defined in the Administrative Procedure Act as "the whole or part of a state agency permit, certificate, approval, registration or similar form of permission required by law." The word "licensing" includes "a state agency process relating to the granting, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license." TEX. OCC. CODE ANN. §2001.003(2) and (3). The Board's registration process appears to fit within

² As of the writing of this request, Articles 249a, 249c, and 249e, Vernon Texas Civil Statutes, are in effect but have been repealed and codified, effective June 1, 2003, by Act of June 17, 2001, 77th Leg., R.S., ch. 1421, §1, 2001 Tex. Gen. Laws 4570 – 5020. For purposes of future research and reference, this request will refer to the enabling legislation as codified in the Occupations Code, unless otherwise indicated.

³ Section 2 of Article 249e, Vernon's Texas Civil Statutes, was amended by Act of June 15, 2001, 77th Leg., R.S., ch. 1099, §2, 2001 Tex. Gen. Laws 2445-2447, effective September 1, 2001. This amendment was passed separately from the codification bill.

⁴ The Board may take disciplinary action against an architect who has committed a dishonest practice. TEX. OCC. CODE ANN. §1051.402(6). The Board also may discipline a landscape architect for committing an act of misconduct in the practice of landscape architecture. TEX. OCC. CODE ANN. §1052.252(7). Pursuant to this authority, the Board may discipline architects and landscape architects for "dishonesty" or "misconduct," respectively, which may, but need not, result in a misdemeanor or a felony conviction.

the definition of the term "licensing" which is incorporated by reference in Chapter 53. The procedures and mandates of that chapter apply to "licensing authorities." The Board is a state agency that issues licenses and, therefore, is most likely subject to the provisions of Chapter 53 as a "licensing authority."

TEX. OCC. CODE ANN. §53.021(a) empowers a licensing authority to "suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the licensed occupation." TEX. OCC. CODE ANN. §53.021(b) takes this a step further when it states that "[a] license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision, revocation of parole, or revocation of mandatory supervision."

TEX. OCC. CODE ANN. §53.022 lists factors a licensing authority is to consider in determining whether a criminal conviction directly relates to a regulated occupation. TEX. OCC. CODE ANN. §53.053 lists additional factors for a licensing authority to consider in determining the fitness of a person who has been convicted of a crime to discharge the duties of the regulated occupation.

Attorney General Opinion JM-482 (1986) construed the mandatory revocation requirement that is now codified at TEX. OCC. CODE ANN. §53.021(b). *See* Tex. Att'y Gen. Op. No. JM-482 (1986) *reconsidering* Tex. Att'y Gen. Op. No. JM-290 (1984). The Opinion held that the mandatory revocation provision:

should be limited to a felony conviction which results in the licensee's actual incarceration in the Department of Corrections or another penitentiary. An examination of section 4(e) [current TEX. OCC. CODE ANN. §53.021(b)] as a whole shows that the other events requiring license 'revocation' under section 4(e) apply to someone who is already a convicted felon and whose conduct requires him to be incarcerated or reincarcerated in the penitentiary. Section 4(e) implies that a convicted felon on probation or parole or under mandatory supervision may hold a license that will be revoked when his probation, parole, or mandatory supervision is revoked. We believe section 4(e) requires license suspension only while the felon is physically incarcerated. Section 4(e) of article 6252-13c, V.T.C.S., thus does not apply to a licensee placed on probation after a felony conviction; the licensing board's authority to discipline the licensee in such cases is governed by the permissive provisions of section 4(a) through 4(d) of article 6252-13c, V.T.C.S. [Current TEX. OCC. CODE ANN. §§ 53.021(a), 53.022, 53.023, and 53.024.]

Tex. Att'y Gen. Op. No. JM-482 (1986) at 6.

The Opinion goes on to state that although the revocation of a license is mandatory upon the felony conviction of a licensee which results in the licensee's incarceration, the licensee may seek reinstatement of the license following the procedures outlined in sections 4(a) through 4(d) of Article 6252-13c, V.T.C.S. (currently TEX. OCC. CODE ANN. §§ 53.022 – 53.024). Thus, a licensee whose license has been revoked upon incarceration after a felony conviction need not reapply and qualify as a first-time applicant in order to regain the license. See Tex. Att'y Gen. Op. No. JM-482 (1986) at 6.

Mandatory Revocation after Term of Incarceration

Attorney General Opinion JM-482 included a sentence which implied that the mandatory revocation of a convicted felon's license applied only *during* the term of incarceration. The Opinion stated, "We believe section 4(e) requires license suspension *only while* the felon is physically incarcerated." *Id.* (emphasis added). However, the Opinion also held that the statute at issue "does require a license to be revoked when the licensee's felony conviction results in his incarceration, or when his felony probation, parole, or mandatory supervision is revoked." *Id.*

Generally, the Opinion seems to be limited to a construction of the prerequisites for mandatory revocation and does not address whether those prerequisites exist only temporarily. The Opinion does not specifically hold, although it does imply, that the Legislature's intent was to mandate the revocation of a convicted felon's license only during a period when the licensee is incarcerated. The statute requires the revocation of a licensee's license "on" imprisonment. It is unclear whether there is a mandate for an agency to revoke the license of a licensee who has been convicted and imprisoned for a felony but who no longer is incarcerated.

The Opinion determined that the Legislature intended to allow, but not require, agencies to revoke the licenses of licensees who are convicted of felonies but who are not imprisoned as a result of their convictions. The Opinion also may have held that it was the Legislature's intent for no one who is incarcerated for the commission of a felony to be licensed during the period of incarceration. There is little difference between a convicted felon who is not incarcerated and a convicted felon who no longer is incarcerated. Each of them is a convicted felon who is not imprisoned. Therefore, it seems that there would be little reason to treat these two classes of licensees differently, *allowing* license revocation of a felon who has not been imprisoned while *mandating* license revocation of a felon who has been imprisoned. However, it may be that the Legislature concluded that convicted felons who have been imprisoned pose a greater risk to the public than felons who have not been imprisoned. Under this analysis, the Legislature's intent may have been to mandate the revocation of the license of a felon even after he or she has completed the term of imprisonment.

Issues of Statutory Interpretation

There are no procedures within Chapter 53 regarding the means or the manner in which a licensing authority is to ascertain whether a licensee or an applicant for a license has been convicted of a misdemeanor or a felony.⁵ Attorney General Opinion JM-482 (1986) suggested records of admission to state prisons as a source of data to determine whether a person has been incarcerated as result of a conviction for a felony. Tex. Att'y Gen. Op. No. JM-482 (1986) at 8. Presumably, state agencies may exercise discretion in obtaining information in order to fulfill their legislative mandate regarding convictions.

For purposes of Chapter 53, there is no definition of the term "felony," especially with regard to an offense committed under the laws of another jurisdiction. Texas Attorney General Opinion No. JM-482 (1986) noted that the Public Accountancy Board appeared to have obtained information regarding the conviction of a felony under the laws of any state or the United States pursuant to a provision of the Public Accountancy Act which had been repealed at the time the Opinion was issued. The Opinion suggested that the Public Accountancy Board may continue to use the same sources to implement the predecessor to TEX. OCC. CODE ANN. ch. 53. Tex. Att'y Gen. Op. No. JM-482 (1986) at 8. This language implies, without directly holding, that an offense classified as a felony under the laws of another state or under federal law is a "felony" as that term is used for purposes of the mandatory revocation provision at TEX. OCC. CODE ANN. §53.021(b).

Courts have construed professional regulations requiring license revocation upon "conviction of a felony involving moral turpitude" as an expression of the Legislature's intent to provide for revocation upon the licensee's felony conviction in any court, including a federal court or a court of another state. *See generally, Francisco v. Board of Dental Examiners*, 149 S.W.2d 619, 620 (Tex. Civ. App. – Austin 1941) ("felony involving moral turpitude" is not limited to conviction under laws of Texas), *citing State v. Estes*, 130 Tex. 425, 109 S.W.2d 167 (1937) (attorney disbarment upon federal felony conviction); *Goldman v. State*, 277 S.W.2d 217 (Tex. Civ. App. – Amarillo 1954) (revocation of medical license after federal felony conviction); *Muniz v. State*, 575 S.W.2d 408 (Tex. Civ. App. – Corpus Christi 1978) (attorney disbarment after federal felony conviction). Therefore, there is support for the argument that the term "felony" as used in the Occupations Code applies to a felony conviction entered under the laws of another jurisdiction so long as that jurisdiction characterizes the crime as a "felony."

An alternative argument may be constructed that TEX. OCC. CODE ANN. §53.021(b) applies only to conduct that is classified as a felony under Texas law or would be classified as a felony under Texas law if the conviction had been entered in a Texas court. PENAL CODE ANN. §1.07(a)(23) (Vernon's 2002) defines the term "felony" for purposes of the Penal Code as "an offense so designated by law or punishable by death or

⁵ Section 3 of Article 6252-13c, V.T.C.S., authorized state agencies to obtain records of convictions from the Department of Public Safety and local law enforcement agencies. This section was not included within the codification at TEX. OCC. CODE ANN., ch. 53, apparently because it had no substantive effect because state agencies may obtain that data without specific statutory authority to do so.

confinement in a penitentiary.” Under PENAL CODE ANN. §12.41(1), for purposes of Subchapter D of the Penal Code, a conviction not obtained through prosecution under the Penal Code is classified as a “felony of the third degree” if imprisonment in a penitentiary is affixed to the offense as a possible punishment. . . .” Both definitions of the term “felony” appearing in the Penal Code are expressly limited to the use of that term for purposes of all or a portion of the Penal Code. Furthermore, it is unclear whether PENAL CODE ANN. §12.41(1) applies to convictions obtained through prosecution involving the laws of the federal government or of another state.

Both definitions from the Penal Code specify that a felony is an offense which, at a minimum, is punished by confinement in a penitentiary. In addition, the Attorney General’s Opinion construed the term “licensee’s felony conviction” as being limited to a felony conviction which results in the licensee’s incarceration “in the Department of Corrections or another penitentiary.” Texas Attorney General Opinion No. JM-482 (1986) at page 6. In determining whether a conviction and imprisonment in another jurisdiction would be a felony for purposes of the mandatory revocation provision in the Occupations Code, it would appear that imprisonment in a penitentiary may be a determinative factor. If a licensee is convicted for committing a crime and sentenced to a term of imprisonment in a facility other than a penitentiary, it is debatable whether the licensee has been imprisoned upon conviction of a felony. According to these statutory definitions, an offense may not be a felony if it is not punishable by imprisonment in a penitentiary.

The Board’s Procedures Regarding Registrants’ Criminal History Data

The Board does not have the resources to obtain and review state and local criminal history records of all of its registrants and applicants for registration. In order to implement the requirements of Chapter 53 in an efficient manner, the Board has adopted procedures by which it relies largely upon registrants and applicants to disclose criminal history information to the Board. The rules require applicants for registration to provide information regarding their criminal histories, excluding minor traffic infractions, to the Board as part of the application process. 22 TEX. ADMIN. CODE §§1.149(a)(1), 3.149(a)(1), 5.158(a)(1) (2002) (Tex. Bd. Architectural Exam., Criminal Convictions – Architects, Landscape Architects, Interior Designers, respectively). The rules also require each registrant to report any criminal conviction, other than a conviction for a minor traffic offense, to the Board within 30 days after the conviction is entered. *Id.* Upon renewing registration annually, each registrant also must confirm that he or she has reported all convictions to the Board.⁶ *Id.*

⁶ In order to carry out the requirements of the Board’s rules, the Board’s registration renewal form includes a question which prompts each registrant to affirm or deny whether the registrant has reported all convictions, excluding convictions for minor traffic infractions. The question on the Board’s renewal form provides a convenient and practical means of complying with the disclosure requirements.

An applicant or registrant who has been convicted of a crime is required to provide a summary of each conviction in sufficient detail to allow the executive director to determine whether it appears to directly relate to the duties and responsibilities of the regulated profession. 22 TEX. ADMIN. CODE §§1.149(a)(2), 3.149(a)(2), 5.158(a)(2) (2002). Upon the executive director's determination that a conviction might directly relate to the professional duties and responsibilities, the Board's staff obtains sufficient detail for the Board to determine the person's eligibility for registration or fitness to maintain registration. *Id.* The Board's rules identify the factors appearing in TEX. OCC. CODE ANN. §§53.022 and 53.023 as the factors the Board and the executive director are to consider in determining the relationship between the conviction and the person's professional duties and responsibilities.

The Board's rules include guidelines which specify certain crimes that relate to the professions regulated by the Board. 22 TEX. ADMIN. CODE §§1.149(d), 3.149(d), 5.158(d) (2002). These guidelines are required by TEX. OCC. CODE ANN. §53.025. The substance of the remaining provisions from Chapter 53 is included in these three rules.

The Board's Procedures in Specific Factual Situations

Federal Conviction for Bank Fraud

The Board received a renewal application from a registered architect who lives outside of Texas. The architect indicated on his renewal application that he had been convicted of bank fraud and sentenced to eight months' incarceration. At the time the Board received the renewal application, the architect was no longer incarcerated.

The Board obtained information that the architect had been adjudicated guilty in federal court for bank fraud in violation of 18 U.S.C. §1344. The court sentenced the registrant to imprisonment for a term of eight months. The court also imposed a monetary penalty of \$100 and ordered restitution in the amount of \$395,007.85. The court found two co-defendants jointly and severally liable for the payment of restitution. The court recommended "[i]ncarceration as close to home as possible." In addition, the court stated it had "no objection to the placement [of the architect] in any facility deemed appropriate by the Bureau of Prisons, including a halfway house." The federal court judgment did not specify whether the architect's offense was classified as a felony or a misdemeanor under federal law. However, because the offense was sentenced under federal guidelines as a "Level 11" offense, which carries jail time of 8-14 months, it appears to have been a felony conviction.

The architect indicated that he had participated in a charter boat business. He indicated that "there was no boat" and a bank loan was fraudulently obtained. It appears that the offense was unrelated to the practice of architecture. After consideration of the factors listed at TEX. OCC. CODE ANN. §§53.022 and 53.023 and included in the Board's administrative rules, it appears that the architect's registration would not be subject to revocation for this offense unless the conviction is subject to the mandatory revocation

provisions of Chapter 53. Assuming the Board must revoke the registrant's registration, he would immediately qualify for reinstatement of his registration after consideration of the same factors. From a practical standpoint, revocation would accomplish little and would lead to a significant amount of work for agency staff.

Refusal to Disclose Criminal History

Over a period of approximately four years, the Board has received the annual registration renewal application of a registered landscape architect who refuses to disclose criminal history information. The Board has contacted him in writing and met with him in an informal conference. In the past, the Board has checked his criminal history record through the Department of Public Safety and determined that he has not been convicted of a misdemeanor or a felony. The registered landscape architect indicated that he believes the request for criminal history information "violates the principles of double jeopardy[,] freedom from self-incrimination as well as other individual rights."

Request for Opinion

The Board would appreciate your providing answers to the following questions:

1. Whether the Board is exceeding the bounds of its authority or is encroaching upon registrants' constitutional rights by requiring them to report criminal convictions within thirty days of conviction?
2. Whether the Board is exceeding the bounds of its authority or is encroaching upon registrants' constitutional rights by requiring them annually to confirm that they have reported all criminal convictions to the Board?
3. Whether the Board is exceeding the bounds of its authority or is encroaching upon applicants' constitutional rights by requiring them to provide information regarding their criminal histories as part of the registration application process?
4. Whether the Board, by virtue of Chapter 53 of the Texas Occupations Code and the Board's authority to adopt rules to implement Chapter 53, may revoke the registration of or otherwise take disciplinary action against a registrant or may disqualify an applicant solely on the basis of his or her refusal to provide requested information regarding criminal convictions?
5. Whether TEX. OCC. CODE ANN. §53.021(b) requires the Board to revoke the registration of a registrant who was incarcerated as the result of a felony conviction unrelated to the registrant's profession but is no longer incarcerated at the time the revocation proceeding is commenced?
6. If TEX. OCC. CODE ANN. §53.021(b) requires the Board to revoke the registration of a registrant who was incarcerated as the result of a felony conviction unrelated to the

Honorable John Corn, Texas Attorney General
October 31, 2002
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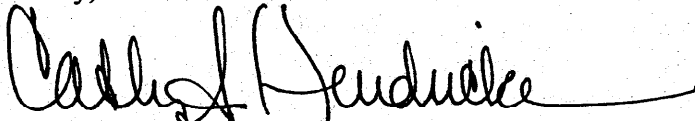
registrant's profession but is no longer incarcerated at the time the revocation proceeding is commenced, whether the registration may be reinstated immediately after revocation? If so, *must* the Board reinstate the registration immediately upon receipt of a proper reinstatement application and all applicable fees so long as no other issues preclude reinstatement?

7. Whether the Board, in applying TEX. OCC. CODE ANN. §53.021(b) to a conviction entered by a federal court or another state's court, should refer to the classification of the crime as determined by the jurisdiction that entered the conviction or should refer to the definitions of "felony" under the Texas Penal Code to determine whether the conviction is for a "felony" for purposes of Chapter 53?

8. Whether the fact that a registrant was sentenced to incarceration in an institution other than a penitentiary, such as a halfway house, excludes that registrant from the class of persons who are subject to mandatory revocation pursuant to Chapter 53?

Thank you for your consideration of this request for a formal opinion. I look forward to receiving your response.

Sincerely,



Cathy L. Hendricks, ASID/AIDA
Executive Director

CLH/kkc