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**DISTRICT ATTORNEY'S OFFICE**  
Fort Bend County, Texas

**RQ-0464-KP**

**FILE# ML-49133-22**

**I.D.# 49133**

BRIAN M. MIDDLETON  
District Attorney

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June 6, 2022

Mr. Ken Paxton  
Office of the Attorney General  
Attention: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

**Re: Request for Opinion regarding TCOLE F-5 Form**

Dear Mr. Paxton:

The Fort Bend County District Attorney's Office respectfully requests your opinion in regard to the F-5 "Separation of Licensee" Form (the "F-5 Form") propounded by the Texas Commission on Law Enforcement ("TCOLE"), a copy of which is attached hereto, as follows:

**Question Requiring an Opinion:**

Is the F-5 Form an "official government document" such that an intentional and knowing false entry therein would subject an individual to criminal prosecution for tampering with a governmental record?

**Discussion**  
**TCOLE Mission**

TCOLE is a regulatory state agency. Its mission is to establish and enforce standards to ensure that the people of Texas are served by highly-trained and ethical law enforcement, corrections, and telecommunications

personnel. As part of that regulatory function, TCOLE records the hiring and discharge of Texas peace officers from law enforcement agencies.

### **Employment Termination Report Requirement: F-5 Form**

Pursuant to Section 1702.452 of the Texas Occupations Code, the head of a Texas law enforcement agency is required to send an employment termination report to TCOLE whenever a Texas peace officer separates from his employment with that agency. Section 1701.452(b) indicates that the head of the law enforcement agency or his designee shall include a statement explaining the type of discharge issued within the report. Use of the word “shall” imposes a duty. TEX. GOV'T CODE ANN. § 311.016 (2). This report is required to be on a form prescribed by TCOLE, which is the F-5 Form. Thus, when a Texas peace officer separates from his employer, the employer must send the F-5 Form to TCOLE as a matter of law.

### **The F-5 Form Components**

The F-5 form specifically delineates three types of termination. The three categories are: (1) honorably discharged,<sup>1</sup> (2) general discharge,<sup>2</sup> and (3) dishonorably discharged. The term “dishonorably discharged” is defined in Texas Occupations Code Sec. 1701.452(3)(A), (B) and set forth in the F-5 form as follows:

- (A) Was terminated, by a law enforcement agency or retired or resigned in lieu of termination by the agency in relation to allegations of criminal misconduct; or
- (B) Was terminated, by a law enforcement agency or retired or resigned in lieu of termination by the agency for insubordination or untruthfulness. (Emphasis Added).

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<sup>1</sup> “Honorably discharged” means a license holder who, while in good standing and not because of pending or final disciplinary actions or a documented performance problem, retired, resigned, or separated from employment with or died while employed by a law enforcement agency. Tex. Occ. Code § 1701.452(b)(1).

<sup>2</sup> “Generally discharged” means a license holder who:

- (A) was terminated by, retired or resigned from, or died while in the employ of a law enforcement agency and the separation was related to a disciplinary investigation of conduct that is not included in the definition of dishonorably discharged; or
- (B) was terminated by or retired or resigned from a law enforcement agency and the separation was for a documented performance problem and was not because of a reduction in workforce or an at-will employment decision. Tex. Occ. Code § 1701.452(b)(2).

The F-5 form also provides the following language, conspicuously bolded, just above the signature of the Agency Administrator or Designee:

I, chief administrator or designee, attest that this is a true and accurate explanation of the circumstances under which this person resigned or was terminated.

The language of the F-5 Form does not request a subjective opinion. Instead, the F-5 Form seems to call for an objective determination of the type of discharge reported and includes definitions of each type of discharge. Further, the chief administrator, by his or her signature, attests that the type of discharge is “a true and accurate explanation of the circumstances” of termination.

### **TCOLE Technical Assistance Bulletin**

Nevertheless, the Executive Director of TCOLE issued a Technical Assistance Bulletin dated April 8, 2022 (the “Bulletin”), attached hereto, contrary to the attestation and Chapter 1701 of the Texas Occupation Code. The Bulletin is published on the TCOLE web page and is available to the public. The Bulletin specifies that TCOLE considers “the discharge designations to be subjective ratings by the chief administrator.”

The Bulletin explains:

There is a virtually unlimited number of fact patterns that a chief administrator may be expected to apply to the F-5 statutory discharge categories. As a result, TCOLE considers discharge designations to be a subjective rating by the chief administrator. Thus, TCOLE will continue to defer to their discretion in determining the provable facts, applying the F-5 standards, and choosing an appropriate designation.

The Bulletin suggests that the F-5 discharge designation is an overall subjective rating of the terminated officer’s work performance related to the termination. Thus, the Bulletin implies that the selections on the F-5 Form are *not necessarily* a true and accurate explanation of the circumstances under which the officer was terminated. Accordingly, if a Texas peace officer is terminated for untruthfulness and receives a termination letter from his or her employer indicating the peace officer was terminated for untruthfulness, the chief administrator would be allowed to indicate that the termination was

honorable based entirely upon his or her own subjective opinion as to the proper designation of discharge. This contradiction between the actual cause for separation and the type of discharge reported would be contrary to definitions on the F-5 Form, which specifically cite untruthfulness within its definition of a dishonorable discharge. Same concern would be apparent if a chief administrator falsely designated a dishonorable discharge.

The Bulletin effectively re-defined the F-5 Form as a subjective designation in contravention of the law and in contradiction to the language of the form. There is no support in the law for the position expressed in the Executive Director's Bulletin.

### **Law Prohibits False Entry on Government Document**

The F-5 Form is by statute an "official government document." TEX. OCC CODE ANN. § 1701.452(g). Consequently, making a false entry on an F-5 Form is a criminal offense pursuant to Section 37.10 of the Texas Penal Code. TEX. PENAL CODE Ann. § 37.10.<sup>3</sup>

### **Prosecution was Anticipated by Venue Statute**

Further, Section 1701.458 of the Texas Occupations Code indicates that venue for the prosecution of an offense under Section 37.10 of the Texas Penal Code ("Tampering with a Governmental Record") arising from a report required under Subchapter J, such as the F-5 Form, lies in the county where the offense occurred or in Travis County. By specifically describing venue for prosecution, it is clear that the legislature anticipated viable prosecutions for tampering with the F-5 Form.

### **Terminations for Untruthfulness Require Dishonorable Discharge**

Therefore, if an officer is terminated for untruthfulness, the only lawful way to report the termination on the F-5 Form is to check the box as "Dishonorably Discharged." If a Chief administrator checked any other category, the F-5 Form would be inaccurate and deceptive. Accordingly, a false statement of this nature on an F-5 Form would be subject to

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<sup>3</sup> (a) A person commits an offense if he:

(1) knowingly makes a false entry in, or false alteration of, a governmental record; (in pertinent part) TEX. PENAL CODE Ann. § 37.10

prosecution under the tampering statute for “making a false entry on a government document.”

### **Bulletin May Improperly Serve as a Mistake of Law Defense**

The Bulletin states that the discharge designation on the F-5 Form is a “subjective rating by the chief administrator.” We find no legal support for this interpretation of the law and this pronouncement in the Bulletin may unjustly serve as the basis for a “mistake of law” defense. See TEX. PENAL CODE § 8.03(b).<sup>4</sup>

### **Allowing Subjective Opinion on F-5 Form would violate Legislative Intent**

Moreover, proving the falsity of a subjective rating beyond a reasonable doubt would be nearly impossible. Under the interpretation of the law as set forth in the Bulletin, the Chief Administrator could set forth any type of discharge he subjectively believes is appropriate, without any regard for the truth asserted, without regard for the specific definitions for each type of discharge, and without any ramifications for falsifying a governmental record. This contradicts the legislative intent of the statute, which clearly makes it an offense to make a false statement in a governmental record, including the F-5 Form.

The Canons of Statutory Construction as defined by the Texas Code Construction Act support the conclusion that false entries onto the F-5 Form are prohibited by law. The Code Construction Act, Chapter 311 of the Texas Government Code, applies to the construction of Texas Occupations Code Section 1701.452 (3) (A) (B). See TEX. OCC. CODE ANN. § 1.002 (2022) (Construction of Code). The Code Construction Act specifically indicates that words and phrases shall be read in context and construed according to the rules of grammar and common usage. TEX. OCC. CODE ANN. §. 311.011.

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<sup>4</sup> (b) It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:

- (1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or
- (2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question....

Tex. Pen. Code §8.03 (b)

The Texas Supreme Court has held that the truest manifestation of what legislators intended is what the lawmakers enacted, the literal text they voted on. *Alex Sheshunoff Mgmt. Servs. L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006). The Texas Court of Criminal Appeals as also indicated that when attempting to discern this legislative intent or purpose, the courts focus on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); see also *Russell v. Wendy's Int'l Inc.*, 219 S.W.3d 629, 636 (Tex. App. – Dallas 2007, writ dismissed by agreement.) (“We read every word as if it were deliberately chosen and presume that omitted words were excluded purposefully”). In the instant matter, Section 1701.458 of the Texas Occupations Code expressly indicates that venue for the prosecution of an offense under Section 37.10 of the Texas Penal Code (“Tampering with a Governmental Record”) arising from a report required under Subchapter J, such as the F-5 Form, lies in the county where the offense occurred or in Travis County. Thus, the legislature clearly defined its intent in Chapter 1701 of the Texas Occupation Code, which is to criminalize false entries on the termination report. Accordingly, the literal text of Section 1701.452 requires an accurate, objective determination of the type of discharge.

### **Summary**

In summary, the plain language of the applicable statutes indicate that if an officer is terminated and separated from his employment with a law enforcement agency for “untruthfulness,” the chief administrative officer of that agency has no discretion and is required to fill out the F-5 Form indicating a dishonorable discharge. The F-5 Form specifically identifies untruthfulness as a basis for dishonorable discharge, which therefore precludes an honorable discharge if the basis of termination includes untruthfulness. The Administrative Bulletin contravenes the clear language of the statute and violates the legislative intent of the statute by making it near impossible to prosecute a violator for making a false statement in a F-5 Form, a governmental record.

It is evident that the F-5 Termination Form was intended to record the actual reason for the termination. If the Legislature intended to permit inaccurate or a general subjective assessment of the terminated officer’s overall job performance in grading the type of discharge, the Legislature

would not have provided definitions for the types of discharge or specifically provided a venue for prosecution for false entries on an F-5 Form. Instead, the legislature defined the F-5 Form as a government document and thereby subjected it to criminal prosecution for tampering with a governmental record as expressly stated in Section 1701.458 of the Texas Occupations Code. Thus, the April 8, 2022 Administrative Bulletin is inconsistent with prevailing law.

Lastly, the policy enunciated in the Administrative Bulletin will likely promote the proliferation of so-called wandering cops. "Wandering cop" is a term commonly used to describe peace officers with a pattern of poor performance and/or misconduct who continually move from one police agency to the next, with impunity, due to a lack of accurate termination reporting and/or inaccurate employment records. This lack of accurate reporting will result in a continual stream of incompetence and injustice. Clearly, the Texas Legislature enacted Section 1701.452 to prevent this cycle by providing criminal consequences for false entries.

### **Conclusion**

This office respectfully requests an opinion on the above-referenced questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "B. Middleton", with a long horizontal flourish extending to the right.

Brian Middleton  
District Attorney  
Fort Bend County, Texas