

The State of Texas

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Hope Andrade
Secretary of State

March 4, 2009

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The Honorable Greg Abbot
Attorney General of Texas
Post Office Box 12548
Austin, Texas 78711-2548

OPINION COMMITTEE

RQ-0785-GA

Re: Affect of a final conviction for a misdemeanor crime of moral turpitude or a felony on a notary public application or commission

Dear General Abbot:

Secretary Andrade seeks your assistance in resolving certain issues with the Notary Public Act, Government Code Chapter 406 (the "Act").

Background

Section 406.004 of the Act sets forth eligibility requirements for individuals seeking notary commissions. Specifically, Section 406.004 states that "[e]ach person appointed and commissioned as a notary public . . . *must* not have been convicted of a felony or crime involving moral turpitude." (emphasis added). Section 406.004 was amended to its current state in 1995 (the "1995 Amendment"). Prior to the 1995 Amendment, Section 406.005 of the Act required applicants to swear on their applications that they had never been convicted of a "crime involving moral turpitude." Felonies were not separately addressed.

Since the Act's inception, Section 406.009(d)(1) has given the secretary of state the discretion to reject an application or discipline a notary for conviction of a crime of moral turpitude. The secretary of state has exercised this discretion, reading Section 406.005 as merely a procedural requirement. As a result, some applicants with convictions for crimes involving moral turpitude have been commissioned as notaries public.

While the sworn statement regarding criminal convictions in Section 406.005 was restated as an "eligibility requirement" in Section 406.004 as a result of the 1995 Amendment, the secretary of state's interpretation of its discretion did not change. The secretary of state continued to exercise its discretion, among other things, to commission some applications who have been convicted of crimes involving moral turpitude using the factors set forth in Chapter 53 of the Texas Occupations Code as a basis for approving or denying an application.

Felonies, on the other hand, are treated differently because when the 1995 Amendment added felonies to the eligibility requirements, it did not also add a discretionary provision to Section 406.009 authorizing the secretary of state to deny or revoke a commission based on a felony conviction. Accordingly, the secretary of state has interpreted the Act to absolutely bar felons from commission as notaries and to require the secretary of state to institute revocation proceedings upon discovery that a commissioned notary has been convicted of a felony.

The effect of the 1995 Amendment on the secretary of state's interpretation and application of the Act is that misdemeanors involving moral turpitude and felonies are treated differently, despite that both are designated eligibility requirements in Section 406.004. The language of Section 406.004 does not support this disparate treatment, but Section 406.009(d)(1) and longstanding secretary of state practice do. The secretary of state respectfully requests your assistance in reconciling Sections 406.004 and 406.009(d)(1) of the Act.

Specific Issues for Consideration

1. Does an applicant's conviction for a felony preclude the secretary of state from commissioning the applicant as a notary public?
2. Does an applicant's conviction for a felony require the secretary of state to institute commission revocation proceedings?
3. Does an applicant's conviction for a misdemeanor involving moral turpitude preclude the secretary of state from commissioning the applicant as a notary public?
4. Does an applicant's conviction for a misdemeanor involving moral turpitude require the secretary of state to institute commission revocation proceedings?

If you have any questions regarding this request or need further information, please contact Ms. Lorna Wassdorf, Director, Business & Public Filings.

Best regards,



John Sepehri

General Counsel to Secretary of State Hope Andrade

Sec. 406.004. ELIGIBILITY. Each person appointed and commissioned as a notary public shall be at least 18 years of age and a resident of the State of Texas and *must not have been convicted of a felony or crime involving moral turpitude.*

Sec. 406.009. REJECTION OF APPOINTMENT; SUSPENSION OR REVOCATION OF COMMISSION. (a) The secretary of state *may, for good cause,* reject an application or suspend or revoke the commission of a notary public.

(b) An action by the secretary of state under this section is subject to the rights of notice, hearing, adjudication, and appeal.

(c) An appeal under this section is to the district court of Travis County. The secretary of state has the burden of proof, and the trial is conducted de novo.

(d) In this section, "good cause" includes:

- (1) *a final conviction for a crime involving moral turpitude;*
 - (2) a false statement knowingly made in an application;
 - (3) the failure to comply with Section 406.017;
 - (4) a final conviction for a violation of a law concerning the regulation of the conduct of notaries public in this or another state;
 - (5) the imposition on the notary public of an administrative, criminal, or civil penalty for a violation of a law or rule prescribing the duties of a notary public; or
 - (6) performing any notarization when the person for whom the notarization is performed did not personally appear before the notary at the time the notarization is executed.
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