



TEXAS EDUCATION AGENCY

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OPINION COMMITTEE

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

RQ-0820-GA

Re: Opinion Request Regarding Implementation of New Texas Occupations Code Subchapter D, Chapter 53

Dear General Abbott:

I am writing to ask your advice regarding the provisions of Subchapter D of Chapter 53 of the Texas Occupations Code, as enacted by House Bill No. 963 of the 81st Texas Legislature. That subchapter requires Texas occupational licensing authorities to adopt rules by September 1, 2010 allowing a person who is a potential applicant for licensing to request a determination of the effect of a criminal history upon the person's eligibility for a license.

Pursuant to Texas Education Code (TEC) § 21.035, the Texas Education Agency (TEA) provides the administrative functions and services for the State Board for Educator Certification (SBEC), which is responsible for the licensing and certification of Texas public school educators¹. The TEA employs a staff of investigators and attorneys to evaluate applicants and resolve issues involving criminal history and other conduct that may have an effect on fitness to hold a Texas educator certificate.

Applicants for certification are evaluated on a broad range of criteria due to their unique, often unsupervised access to students. A potential educator's record of criminal convictions or deferred adjudications may not be the only factor that is considered in determining eligibility for certification. SBEC administrative rules² provide for denial of an application for certification not necessarily for a criminal history, but also based on consideration of whether the applicant's conduct related to the duties and responsibilities of the education profession. An application may also be denied based on a determination that the applicant lacks good moral character or is unworthy to instruct or to supervise the youth of this state³. While some serious or violent criminal offenses would of course disqualify an applicant from certification, not all criminal offenses will in all cases. Thus, the simple fact of a criminal conviction or deferred adjudication may not provide sufficient

¹ Texas school districts may not employ certain professional staff unless those individuals possess a certificate in that field issued by SBEC. See, Texas Education Code Section 21.003

² 19 Texas Administrative Code (TAC) § 249.12.

³ 19 TAC §§ 249.12, 249.3.

information for TEA staff to make a determination regarding the applicant's eligibility for certification.

TEA staff currently evaluates applications for certification based on a complete national criminal history⁴, as well as copies of court and other law enforcement records to determine eligibility for certification. The determination of TEA staff as to the eligibility of an individual for certification is also not binding on SBEC and may be subject to administrative appeal before a final decision by that separate agency⁵.

My questions are as follows:

1. May an agency require a potential applicant seeking a criminal history evaluation letter to submit an application containing complete information to allow investigation?

Section 53.103 of the Occupations Code provides that "a licensing authority has the same powers to investigate a request submitted under this subchapter and the requestor's eligibility that the authority has to investigate a person applying for a license". TEA currently requires all applicants to submit fingerprint information necessary to obtain the applicant's national criminal history information as part of the normal application process. Even after an investigation is begun, it may be necessary to obtain additional documents from the relevant courts or law enforcement agencies. Please confirm that TEA may require submission of the same information allowing investigation of a criminal history as for any applicant for a certificate, and that the time limit for investigation imposed by Section 53.104(c) does not begin until that information is complete.

2. Must an agency consider all facts involved in the criminal history at the time of issuing a criminal history evaluation letter?

This question involves the relationship between two provisions of Subchapter D, Chapter 53 of the Occupations Code. Section 53.102(a) authorizes a request for a criminal history evaluation letter if the requestor "has reason to believe that the person is ineligible for the license *due to a conviction or deferred adjudication for a felony or misdemeanor offense*" (emphasis added). We understand this sentence to limit the scope of the inquiry to whether the conviction or deferred adjudication is a per se disqualification from the license involved. However, Section 53.104(b) provides that "[i]n the absence of new evidence known to but not disclosed by the requestor or not reasonably available to the licensing authority at the time the letter is issued, the authority's ruling on the request determines the requestor's eligibility with respect to the grounds for potential ineligibility set out in the letter." This section could be read as requiring the licensing agency to evaluate and make a determination regarding the factual circumstances that led to the conviction.

A requirement to evaluate any "evidence...reasonably available" beyond the existence of a criminal history could require a licensing agency to commit significant resources to investigate criminal history records. For example, TEA and SBEC have not generally considered a single conviction for driving while intoxicated to disqualify an applicant. However, a determination that the offense took place while transporting students at a

⁴ All applicants for certification are required to submit fingerprints sufficient to conduct a national criminal history check pursuant to Section 22.0831, Texas Education Code.

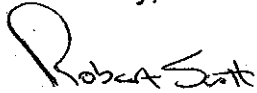
⁵ Tex. Gov't Code Ch. 2001, Subchapter C; 19 TAC Ch. 249.

school event might result in a denial. Criminal history records may not have sufficient detail to allow that type of evaluation.

Additionally, a criminal conviction may reflect an agreement to plead guilty to a lesser offense in circumstances where TEA or SBEC might reject an application based on conduct, regardless of whether an additional criminal prosecution took place. We would appreciate your advice regarding the extent to which an agency that did not disqualify a potential applicant could later base a refusal to issue a license on aggravating facts involving the same transaction.

Thank you for your attention to this request. Should you need any additional information, please contact David Anderson, General Counsel, at 463-9720.

Sincerely,

A handwritten signature in black ink that reads "Robert Scott". The signature is written in a cursive style with a large, looped initial "R".

Robert Scott
Commissioner of Education