

**COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF HOUSING, BUILDINGS AND CONSTRUCTION
ADMINISTRATIVE ACTION NO. 2014-0007-ELEC**

JASON G. BREWER

COMPLAINANT

v.

**DEPARTMENT OF HOUSING,
BUILDINGS AND CONSTRUCTION**

RESPONDENT

FINAL ORDER

The Hearing Officer in the above-styled case issued his Recommended Findings of Fact, Conclusions of Law, and Recommended Order (“Recommendation”) on August 22, 2014, wherein he recommended the issuance of a final order finding that Complainant is disqualified from licensure pursuant to KRS 335B.020 and affirming the Electrical Division’s denial of renewal of said licensure. On September 2, 2014, counsel for the Department of Housing, Buildings and Construction (HBC) filed an Exception to Recommended Finding of Fact #2 in order to clarify that Complainant’s felony charges are not final convictions at this time, but rather pending under pretrial diversion agreements. Complainant filed no exceptions. The Commissioner considered the Recommendation and Exception on September 15, 2014, and HBC hereby issues its Final Order fully adopting all findings of fact and conclusions of law set forth in the Recommendation, which is attached hereto and incorporated herein by reference, other than Recommended Finding of Fact #2, which is modified as clarified herein.

The denial of renewal of Complainant's master electrician license, #ME8493, is
AFFIRMED.

SO ORDERED this the 15th day of September, 2014.



Ambrose Wilson IV
Commissioner, Department of Housing,
Buildings & Construction

NOTICE

A final order of the Kentucky Department of Housing, Buildings & Construction
may be appealed pursuant to KRS 13B.140, which states:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

(2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

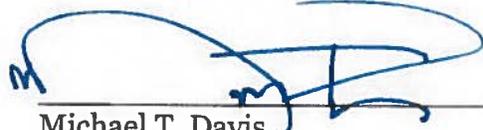
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was served via U.S. Mail and/or electronic mail on this the 15th day of September, 2014, upon the following:

Jason G. Brewer

Complainant

Mike Wilson
P.O. Box 4275
Lexington, Kentucky 40544-4275
mikewilsonattorney@earthlink.net
Hearing Officer



Michael T. Davis



COMMONWEALTH OF KENTUCKY
PUBLIC PROTECTION CABINET
DEPARTMENT OF HOUSING, BUILDINGS AND CONSTRUCTION
ADMINISTRATIVE ACTION NO. 2014-0007-HVAC

JAMES G. BREWER

COMPLAINANT

V.

RECOMMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDED
ORDER

DEPARTMENT OF HOUSING,
BUILDINGS AND CONSTRUCTION

RESPONDENT

At issue in this case is Complainant's appeal of Respondent's denial of Respondent's application to renew his Kentucky Master Electrician license, based on Respondent's conviction of crimes. Referenced in justification of the decision were KRS 335B.020 and KRS 227A.110(1)(d). The parties have stipulated to the relevant facts and by prior order herein same were admitted into the record.

Respondent filed a motion for judgment as a matter of law, and Complainant was given the opportunity to file a response to same but did not do so. The important facts concerning the violations are undisputed and have been stipulated to by the parties. Regarding rehabilitation, based upon Complainant's statements during phone conferences, this hearing officer will assume for purposes of this recommendation that Complaint would assert as facts that he is extremely sorry for what he did and that he is fully complying with all orders of restitution.

Having reviewed the arguments of the parties and being sufficiently advised, the hearing officer makes the following recommendations.

RECOMMENDED FINDINGS OF FACT

1. The parties have stipulated to facts set forth in Respondent's "Motion for Prehearing

Order on Stipulations of Fact,” which by prior order have been admitted to the record and are hereby incorporated by reference as if set forth fully herein.

2. The crimes for which Complainant was convicted include nine counts of felony theft.

3. The crimes for which Complainant was convicted include three misdemeanors for which a jail sentence can be imposed.

4. Based upon information set forth in the stipulations, the three misdemeanors were committed in the course of Complainant’s practice of his occupation as an electrician, involved theft or dishonesty towards those who contracted for his services, and are evidence of a lack of ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the occupation of an electrician.

5. All of the crimes for which Complainant was convicted involved theft or dishonesty, which make them crimes involving moral turpitude.

RECOMMENDED CONCLUSIONS OF LAW

1. The agency may determine that an individual is disqualified from holding a license based upon conviction of certain crimes

KRS 335B.020, as interpreted by the Kentucky Court of Appeals in *Fisher v. Com., Public Protection Cabinet, Dept. of Housing, Bldgs. and Const., Div. of Plumbing* 403 S.W.3d 69 (Ky.App. 2013), disqualifies persons who have been convicted of certain crimes of holding HVAC licenses unless DHBC also has first determined that the licensee has been successfully rehabilitated. The same principal applies to the license in this case.

The crimes to which KRS 335B.020 applies can be either of two types. One type consists of crimes defined in KRS 335B.010(4), which consists of “convictions of felonies, high misdemeanors, and misdemeanors for which a jail sentence may be imposed. No other criminal conviction shall be considered unless moral turpitude is involved.”

The second type consists of any other crime that “otherwise directly relates to the position of employment sought or the occupation for which the license is sought.” Whether a crime directly relates to the occupation for which the license is sought is determined by considering:

- (a) The nature and seriousness of the crime for which the individual was convicted;
- (b) The relationship of the crime to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;
- (c) The relationship of the crime to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.

KRS 335B.020.

2. Where disqualification is based upon KRS 335B.020, Respondent has the burden to prove conviction of a crime of the type set forth in KRS 335B.020.

Applicants who are not disqualified have the right to have their applications for licenses, renewals, and reapplications considered without first proving rehabilitation of their criminal disposition or character. In addition, as explained below, disqualification destroys any right to renew a license by complying with the requirements set forth in the statute, may bar reapplication for a period of time, and requires the individual reapplying to prove rehabilitation before the license application or reapplication need be considered. Thus, the agency’s determination that an individual is disqualified penalizes that individual by imposing upon that individual burdens and obstacles to obtaining a license that other applicants do not have.

KRS 13B.090(7) provides that the agency has the burden to show the propriety of a penalty imposed.

3. Complainant is disqualified to hold the licenses at issue in this case.

Complainant committed a total of 12 crimes. Each of them, alone, is sufficient to mandate disqualification. In addition, three of them directly relate to and were committed in course of practicing Complainant's occupation as an electrician. All of them involve moral turpitude. Respondent has met its burden as a matter of law.

4. Complainant has the right to present evidence of rehabilitation upon reapplication.

KRS 335B.030 provides that where an agency disqualifies an individual from engaging in an occupation for which a license is required, notice must be given that includes (1) the earliest date the person may reapply for a license and (2) that evidence of rehabilitation may be considered upon reapplication.

In the present case, the notice to Complainant did not bar reapplication before a certain date, from which the hearing officer infers that Complainant may present evidence of rehabilitation in this appeal of his disqualification in furtherance of a reapplication.

5. Complainant has the burden of proof regarding rehabilitation.

Complainant proposes that the agency find that Complainant is rehabilitated. KRS 13B.090 provides that the individual proposing agency action has the burden of proving the propriety of that action. Where rehabilitation is argued in conjunction with an appeal of disqualification, same also could be characterized as an affirmative defense, which Complainant would have the burden of proving.

6. Complainant failed to prove that he is successfully rehabilitated.

Some states other than Kentucky have “certifications of rehabilitation” programs under which a felon can apply to be certified as “rehabilitated” that appear in part intended to address disqualification for some occupational licenses. The eligibility requirements and proof of rehabilitation required varies by state. Neither party has cited any Kentucky program under which one can be certified as rehabilitated for purposes of applying for occupational licenses.

Complainant’s crimes are recent - the sentencing for most of these crimes occurred only a few months ago. The conditional discharge period imposed for some of the sentences will not be completed until some time in 2016. Even if Complainant is extremely sorry and is complying with court-ordered restitution, past behavior is the best predictor of future behavior and there has not been time to establish a track record of good behavior to support Complainant’s contention that he has been rehabilitated. In states that have rehabilitation programs, the passage of certain number of years without commission of another offense ordinarily is a requirement. By way of analogy, in Kentucky, KRS 431.078 requires a minimum of five crime-free years before a request to expunge a misdemeanor can be considered.

Under these circumstances, construing the facts most favorably to Complainant, this hearing officer finds as a matter of law that Complainant failed to prove that he is successfully rehabilitated.

7. Disqualification renders application of KRS 227A.110(1)(d) moot.

Respondent’s notice to Complainant that his renewal application was denied referenced conviction of a crime as grounds for denying license renewal under KRS 227A.110(1)(d). KRS 335B.060 states that KRS 335B.020 to 335B.070 prevails over all other laws and regulations that purport to authorize negative licensing decisions based upon convictions of crime. However, given that Complainant is disqualified under KRS 335B.020, and that a finding of rehabilitation

is a prerequisite to reapplication, neither a renewal application nor a reapplication can be considered, rendering the application of KRS 227A.110(1)(d) to this case moot.

RECOMMENDED ORDER

The following order is recommended:

1. The Complainant Jason G. Brewer is disqualified under KRS 335B.020 from receiving or holding a Kentucky Master Electrician license or any other license that the Department of Housing, Buildings and Construction is authorized to issue, and has not been rehabilitated.
2. The agency's action in denying Complainant's application for renewal of said license was correct and is affirmed.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13B.110(4), each party shall have fifteen (15) days from the mailing of the Recommended Order within which to file exceptions with the agency head.

The final order of the agency head may be appealed pursuant to KRS 13B.140 which states:

(1) All final orders of an agency shall be subject to judicial review in accordance with the provisions of this chapter. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on

which the review is requested. The petition shall be accompanied by a copy of the final order.

(2) A party may file a petition for judicial review only after the party has exhausted all administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

Dated August 22, 2014.

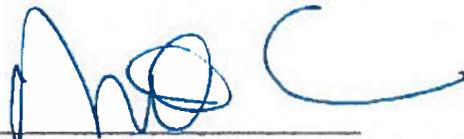


MIKE WILSON, HEARING OFFICER

CERTIFICATE OF SERVICE:

The original of the foregoing was mailed to Tiffany West, Docket Clerk, DHBC, 101 Sea Hero Road, Suite 100, Frankfort KY 40601, with copies to John C. Allender, DHBC, 101 Sea Hero Road, Suite 100, Frankfort KY 40601, and James Brewer, :

August 22, 2014.



MIKE WILSON, HEARING OFFICER