

July 13, 1998

Dianne Middle
Director
Department of Public Safety Standards and Training
550 N. Monmouth Ave.
Monmouth, OR 97361

Re: Opinion Request **OP-1998-5**

Dear Ms. Middle:

You have asked for advice regarding the certification of private security personnel. Your questions and our short answers are set out below, followed by a discussion.

1. Did the 1997 amendments to ORS 181.875 abolish the time limit on disqualifying crimes listed in ORS 181.875(3)(a), (c), (d) and (e)?

Yes.

2. Does the Board of Public Safety Standards and Training (board) have the authority to establish time-limited disqualifying misdemeanor crimes under ORS 181.875(3)(d)?

Yes.

3. How should the term "felony against a person" in ORS 181.875(3)(a) be interpreted?

While we cannot say with certainty, we believe that "felony against a person" in ORS 181.875(3)(a) likely has the same meaning as "person felony" as that latter term is used to reference the Oregon Criminal Justice Commission's classification of certain crimes for purposes of the sentencing guidelines. Accordingly, we recommend that any classification of "felonies against a person" by the board or Department of Public Safety Standards and Training (department) be guided by the Commission's list of person felonies in OAR 213-003-0001(14).

Discussion

1. Time Period for Disqualification

ORS 181.875 establishes the qualifications for private security personnel. The 1997 legislature amended ORS 181.875(3) by inserting the language shown below in bold and deleting the language within brackets:

An applicant for certification as private security officer, **proprietary security manager or security contractor**:

* * * * *

(3) Must not have been[, *within the 10-year period prior to applying for certification*]:

(a) Convicted of a felony **against a person, except for assault in the second or third degrees**, in this, or any other jurisdiction;

(b) **Within the 10-year period prior to applying for certification**, incarcerated, placed on probation or paroled as the result of conviction of [a] **any felony, other**

than those described in paragraph (a) of this subsection, in this, or any other, jurisdiction;

(c) Convicted of violating ORS [162.065,] 162.075, 162.085, [163.365, 163.375, 163.385, 163.395, 163.405, 163.408, 163.411,] 163.415, [163.425, 163.427,] 163.435, [163.515, 163.525, 163.670,] 163.672 (1993 Edition), 163.673 (1993 Edition), 163.677 (1993 Edition), 163.680 (1993 Edition), 167.007, [167.012, 167.017,] 167.062, 167.065, 167.070, 167.075, 167.080 or 167.087 or an equivalent crime in another jurisdiction;

(d) Convicted of a misdemeanor determined by rule of the Board on Public Safety Standards and Training to bear such a relationship to the performance of security services as to constitute a disqualification for certification under ORS 181.878; or

(e) Convicted of any law of this, or another jurisdiction, involving the unlawful use, possession, delivery or manufacture of a controlled substance.

Or Laws 1997, ch 588, § 5 (House Bill 2236).⁽¹⁾

You ask whether the 10-year limit previously stated in ORS 181.875(3) and applicable to all crimes in that section now applies only to the crimes included in ORS 181.875(3)(b).

In interpreting a statute, our goal is to discern the intent of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries (PGE)*, 317 Or 606, 610, 859 P2d 1143 (1993). We first look at the text and context of the statute, which includes other provisions of the same statute and related statutes. In so doing, we consider statutory and judicially developed rules of construction that bear directly on how to read the text, such as "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010; *PGE*, at 611. If the legislative intent is clear from the text and context, the search ends there. Only if the legislative intent is not clear from the text and context of the statute, will we look to the legislative history to attempt to discern that intent. *Id.* at 611-612. If, after considering text, context and legislative history, the intent of the legislature remains unclear, we may resort to general maxims of statutory construction to resolve any remaining uncertainty as to the meaning of the statute. *Id.* at 612.

As amended, ORS 181.875(3) disqualifies an applicant from certification as a private security officer, proprietary security manager or security contractor if the person has been convicted of a felony against a person (except the felonies of second or third degree assault), ORS 181.875(3)(a); convicted of any of a series of enumerated felonies and misdemeanors, ORS 181.875(3)(c); convicted of other misdemeanors listed by rule by the board, ORS 181.875(3)(d); or convicted of any law involving the use, possession, delivery or manufacture of a controlled substance, ORS 181.875(3)(e). Paragraphs (a), (c), (d) and (e) do not contain express time limits on disqualification for conviction of the crimes listed in those paragraphs. In contrast, paragraph (b) disqualifies an applicant if, within the 10-year period before applying for certification, the person has been incarcerated, placed on probation or paroled as the result of a conviction of any felony other than those described in paragraph (a).

In interpreting the text of ORS 181.875(3), we follow the rule of statutory construction that directs us "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010.

Applying that rule here, we do not read a time limit into paragraphs (a), (c), (d) and (e) because none is provided for the crimes identified in those paragraphs.⁽²⁾

Another rule of construction for interpreting the text and context of a statute is that use of a term in one provision and not in another provision indicates a purposeful omission. *Emerald PUD v. PP&L*, 302 Or 256, 269, 729 P2d 552(1986); *PGE*, at 611. The legislature included an express time limit of 10 years in ORS 181.875(3)(b). Because that time limit in paragraph (b) is not in paragraphs (a), (c), (d) or (e), we conclude that the omission of such a time limit from those paragraphs other than (b) was purposeful and that the legislature did not intend the disqualification for conviction of crimes listed in ORS 181.875(3)(a), (c), (d) and (e) to be time-limited.

Because the text and context leave no ambiguity as to the length of disqualification that ORS 181.875(3) imposes, further inquiry is unnecessary. *PGE*, at 611. Accordingly, we may not consider the legislative history of the 1997 amendments to ORS 181.875.⁽³⁾ We conclude that ORS 181.875(3), as amended, places no time limit on how long an applicant will be disqualified for conviction of a crime included in paragraphs (a), (c), (d) and (e). Applicants convicted of the crimes identified in paragraphs (a), (c) and (e) are permanently disqualified from certification as a private security officer, proprietary manager or security contractor. We discuss the paragraph (d) disqualification, below.

2. Board's Authority under ORS 181.875(3)(d)

We concluded above that the legislature did not intend to impose a limit on the length of time for which a conviction for misdemeanors under ORS 181.875(3)(d) will disqualify an applicant. This conclusion does not necessarily mean that the legislature intended to deny the board the authority to adopt time limits for those misdemeanors.

An agency has authority to adopt a rule if the legislature intended to give the agency authority to promulgate rules and if the rule is within the range of discretion allowed by and is consistent with the legislative policy of the agency's statutes. *Salem Police Employees Union v. City of Salem*, 308 Or 383, 389, 781 P2d 335 (1989); *Clark v. Schumacher*, 103 Or App 1, 5, 795 P2d 1093 (1990). ORS 181.875(3)(d) expressly authorizes the board to promulgate rules in this area. Thus, the question is whether a board rule setting out time-limited misdemeanor disqualifiers is within the range of discretion allowed by and is consistent with the legislative policy of ORS 181.875 and other relevant statutes.

ORS 181.875(3)(d) provides that an applicant must not have been

Convicted of a misdemeanor determined by rule of the Board on Public Safety Standards and Training to bear such a relationship to the performance of security services *as to constitute a disqualification for certification under ORS 181.878*[.]

(Emphasis added). The emphasized language directs the board to be guided by ORS 181.878 in determining which misdemeanors will cause a disqualification. ORS 181.878(2) provides:

In accordance with any applicable provision of ORS 183.310 to 183.550, to promote consistent standards for private security services by improving the competence of private security officers, the Board on Public Safety Standards and Training, in conjunction with the Advisory Committee on Private Security Services, shall

establish reasonable minimum standards of physical, emotional, intellectual and moral fitness for private security officers.

Thus, ORS 181.875(3)(d) grants the board the discretion to specify those misdemeanors for which a conviction will be disqualifying and instructs the board to consider two things in selecting the disqualifying misdemeanors: (1) the relationship the misdemeanor bears to the performance of security services; and (2) the relationship the misdemeanor bears to "fitness" as determined by the board under ORS 181.878. Within these parameters, it is not clear from the text of ORS 181.875(3) whether the board's rules may identify disqualifying misdemeanors based only upon the crime committed or also upon the length of time since the conviction for that crime.

Because the text of the statute is ambiguous, we turn to the legislative history. That history does not discuss paragraph (d) or the board's authority, but only the legislature's intent to permanently disqualify persons convicted of "person felonies." Conference Committee (HB 2236), June 12, 1997, tape 2, side A at 354-431. That the legislature intended a permanent disqualification for applicants convicted of felonies against a person does not necessarily resolve whether the legislature intended to permit the board to determine, under ORS 181.875(3)(d), the period of time since conviction for which particular misdemeanors would be disqualifying.

Therefore, we resort to the third level of statutory interpretation under *PGE*, and consult general maxims of statutory construction to discern the meaning of the statute. *PGE* at 612. One such maxim is that in construing a statute, we should avoid a construction that would produce an absurd or unreasonable result. *McKean-Coffman v. Employment Div.*, 312 Or 543, 549, 824 P2d 410 (1992). This maxim applies when there are two or more plausible meanings that the legislature may have intended. See *State v. Vazquez-Rubio*, 323 Or 275, 283, 917 P2d 494 (1996) ("In such a case, the court will refuse to adopt the meaning that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole."). See also *J.L. Ward Co. v. Landscape Contractors Board*, 142 Or App 438, 442, 921 P2d 416 (1996) ("It is appropriate to reject a proposed construction that leads to absurd results in favor of a construction that remains faithful to the language of the statute but leads to no such consequence.").

ORS 181.875(3)(d) is susceptible to two plausible interpretations, i.e., that the legislature intended to authorize the board only to identify those misdemeanors that are permanently disqualifying or that the legislature intended to authorize the board to identify misdemeanors as disqualifying based upon the length of time since the conviction for the particular misdemeanor, as the legislature did for "non-person felonies" in ORS 181.875(3)(b). We believe that application of the "absurd results" maxim requires the conclusion that the legislature intended to authorize the board under ORS 181.875(3)(d) to identify disqualifying misdemeanors and to specify the time period following conviction for which each misdemeanor will be disqualifying.

A construction of ORS 181.875(3)(d) denying the board the authority to specify the post-conviction period of disqualification would require the board to face an "all or nothing" choice for misdemeanors. Any misdemeanor listed by the board pursuant to ORS 181.875(3)(d) would become a permanent disqualifier; conviction of any other misdemeanor would have no effect at all on an applicant's certification.

With the "all or nothing" construction, conviction of misdemeanors identified by the board under paragraph (d) would have harsher consequences for applicants than conviction of those

"non-person felonies" that disqualify an applicant only for ten years under paragraph (b). For example, if the board, pursuant to ORS 181.875(3)(d), listed the Class C misdemeanor of initiating a false report, ORS 162.375, making it a permanent disqualification, conviction of that misdemeanor would have more severe consequences for an applicant than second or third degree assault or second degree burglary, each of which has only a 10-year disqualification under ORS 181.875(3)(b). On the other hand, if the board did not list the misdemeanor of initiating a false report, an applicant convicted of that misdemeanor would not be disqualified, even if the conviction occurred only two months before applying for certification as a private security officer. The outcomes under the "all or nothing" construction for other misdemeanors such as third degree theft, ORS 164.043, or negotiating a bad check, ORS 165.065, are equally extreme -- a permanent disqualification or no disqualification.

Because the certification decisions under an "all or nothing" approach may not bear appropriately on the applicant's fitness for a private security officer position, we believe that such a construction of the statute leads to absurd results. For many misdemeanors, it may be equally absurd to have a permanent disqualification as it would be to have no disqualification.

Moreover, an "all or nothing" interpretation appears to be inconsistent with the legislative direction of ORS 181.875(3)(d) to commit the treatment of most misdemeanors to the expertise of the board. ORS 181.875(3)(d), with its reference to ORS 181.878, gives to the board the responsibility of determining misdemeanor disqualifiers except for those misdemeanors specifically identified by the legislature in other paragraphs of ORS 181.875(3). Under an "all or nothing" approach, misdemeanors identified by the board would have the same effect of permanently disqualifying applicants as do those crimes specifically identified by the legislature in paragraphs (a), (c) and (e) of ORS 181.875(3).⁽⁴⁾ Presumably, had the legislature intended absolute treatment for all misdemeanors, the legislature could have made those choices as it did in the other paragraphs of ORS 181.875(3). Instead, the legislature committed the matter of disqualifying misdemeanors to the board. It is consistent with this reading of the statute to conclude that the legislature intended to give the board the authority to create time-limited misdemeanor disqualifiers.

This alternative construction of ORS 181.875(3)(d) -- that the legislature intended to give the board the authority to adopt time-limited misdemeanors -- does not lead to absurd results. The board can carry out its mandate of identifying misdemeanors the conviction of which reflects upon an applicant's fitness under ORS 181.878. In doing so, the board may find that convictions for certain misdemeanors reflect an absolute lack of fitness and should be permanently disqualifying. The board reasonably may find that the passage of time since conviction for certain other misdemeanors is relevant to fitness, in which case the board may specify that the misdemeanor is disqualifying if the conviction occurred within a certain number of years.

We conclude that the legislature intended to permit the board to adopt a rule for disqualifying misdemeanors that incorporates a specific length of time since conviction.⁽⁵⁾ Adoption of such a rule is within the range of discretion allowed by and is consistent with the legislative policy contained in the board's statutes. Accordingly, we conclude that pursuant to ORS 181.875(3)(d) the board may identify disqualifying misdemeanor crimes based upon the length of time since conviction for the particular misdemeanor.⁽⁶⁾

3. "Felony Against a Person" under ORS 181.875(3)(a)

ORS 181.875(3)(a) disqualifies an applicant from certification as a private security officer, proprietary security manager or security contractor if the applicant has been convicted of "a felony against a person, except for assault in the second or third degrees." You ask what felonies are "felonies against a person."

The legislature has not defined "felony against a person" in the Oregon Revised Statutes.⁽⁷⁾ As used in ORS 181.875(3)(a), "felony against a person" is, on its face, susceptible to at least three interpretations. First, the legislature may have intended to cover all felonies that include a person among the specified elements of the crime. Second, the legislature may have intended to include all felonies that have human victims. Third, the legislature may have been referring to felonies within ORS chapter 163 which Legislative Counsel has titled "Offenses Against Persons."

When the text and context of a statute permit more than one plausible interpretation, we turn to legislative history to ascertain its meaning. *State v. Allison*, 143 Or App 241, 251, 923 P2d 1224 (1996); *see also Coultas v. City of Sutherlin*, 318 Or 584, 590, 871 P2d 465 (1994). In the Conference Committee's discussions of the 1997 amendments to ORS 181.875, which would permanently disqualify those convicted of a "felony against a person," that phrase was never actually used; instead, references were repeatedly made to a "person felony." Conference Committee (HB 2236), June 12, 1997, tape 2, side A at 354-431.⁽⁸⁾ We conclude from this history that the legislature likely intended "felony against a person" to mean the same thing as "person felony," which is a term that the legislature has used in five statutes.⁽⁹⁾ In each of those statutes, "person felony" means the group of felonies that the Oregon Criminal Justice Commission has classified as person felonies for sentencing guidelines purposes.

Because the legislature specifically authorized the Oregon Criminal Justice Commission to define the term "person felony," ORS 137.667(1), we believe the legislature likely understood the phrase "felony against a person" in ORS 181.875(3) to refer to those crimes classified by the Commission as person felonies.⁽¹⁰⁾ Nevertheless, the legislature did not reference the Commission's rules in ORS 181.875(3). ORS 181.878(5) authorizes the board and the department to adopt rules necessary to carry out their duties under ORS 181.870 to 181.889. Pursuant to this grant of authority, the board or department may promulgate rules to define "felony against a person" for purposes of ORS 181.875(3). Any such rules must be consistent with the legislature's intent in using the term⁽¹¹⁾ and should not conflict with other provisions of ORS 181.875(3).

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

1. ORS 181.875(3) disqualifies from certification as private security personnel those persons who have been convicted of various felonies and misdemeanors. ORS 670.280 provides, with exceptions not relevant here, that

no licensing board or agency shall deny, suspend or revoke an occupational or professional license or certification solely

for the reason that the applicant or licensee has been convicted of a crime, but it may consider the relationship of the facts which support the conviction and all intervening circumstances to the specific occupational or professional standards in determining the fitness of the person to receive or hold such license or certificate.

We do not consider these two statutes to be in conflict. ORS 670.280 precludes a **board or agency** from taking licensing action solely because of a conviction. Whereas, in ORS 181.875(3), the legislature itself has disqualified those applicants with convictions for the crimes identified in that statute.

Even if the statutes were in conflict, we would conclude that because ORS 181.875(3) is a specific statute relating to certification of private security personnel, it would take precedence over ORS 670.280, which relates to occupational and professional licenses and certifications generally. See ORS 174.020; **Smith v. Multnomah County Board of Commissioners**, 318 Or 302, 309, 865 P2d 356 (1994) (citing **Colby v. Larson**, 208 Or 121, 126-27, 297 P2d 1073, 299 P2d 1076 (1956)) (specific statute considered an exception to general statute).

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2. To the extent that, by permanently disqualifying persons convicted of the felony of violating ORS 163.672 (1993), ORS 163.673 (1993), ORS 163.677 (1993) or ORS 163.680 (1993), paragraph (c) of ORS 181.875(3) might conflict with paragraph (b) of that statute, which imposes a more limited disqualification for "any felony, other than those described in paragraph (a) of this subsection," we conclude that the permanent disqualification in ORS 181.875(3)(c) controls. We believe that the more specific reference in paragraph (c) takes precedence over the more general statement in paragraph (b). See also ORS 174.020; **Smith v. Multnomah County board of Commissioners**, 318 Or at 309 (specific statute controls over general).

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3. It appears from a brief review of the legislative history of ORS 181.875 that the legislature may actually have intended to eliminate the time limit only for those crimes listed in paragraph (a). It might also be argued that the legislature could not have intended the "absurd result" of permanently disqualifying applicants for those crimes listed in paragraph (c), such as the Class A misdemeanor of engaging in prostitution, ORS 167.007, or the Class B misdemeanor of

unsworn falsification, ORS 162.085, while disqualifying for only 10 years after incarceration an applicant who has been convicted of a Class A felony such as racketeering, ORS 166.720, or a Class B felony such as aggravated theft in the first degree, ORS 164.057, or assault in the second degree, ORS 163.175. Nevertheless, we are bound by the text of the statute. When the operational language of a statute is clear and unambiguous, we may not refuse to give literal application to the statutory text either by relying on legislative history or by applying the "absurd result" maxim. **State v. Vasquez-Rubio**, 323 Or 275, 282-83, 917 P2d 494 (1996); **State ex rel Juv. Dept. v. Ashley**, 312 Or 169, 192 n 19, 818 P2d 1270 (1991) (Unis, J. dissenting); **Southwood Homeowners v. City Council of Philomath**, 106 Or App 21, 24, 806 P2d 162 (1991) (and cases cited therein).

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4. Most of the crimes listed in ORS 181.875(3)(c) are Class A misdemeanors. ORS 162.085 is a Class B misdemeanor. ORS 163.672 (1993), ORS 163.673 (1993), ORS 163.677 (1993) and ORS 163.680 (1993) are felonies. The remaining crimes listed in ORS 181.875(3)(c) are Class A misdemeanors. In addition, some of the crimes covered by ORS 181.875(3)(e), offenses involving the use, possession, delivery or manufacture of controlled substances, are misdemeanors.

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5. You also asked whether the board should establish its list of disqualifying misdemeanors in policy or administrative rule. ORS 181.875(3)(d) requires that the board establish the disqualifying misdemeanors by rule.

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6. The board's adoption of a rule for disqualifying misdemeanors under ORS 181.875(3)(d) cannot be inconsistent with other provisions of ORS 181.875 or other statutes. In other words, the board cannot include in that list crimes that the legislature has expressly included without time limit elsewhere in ORS 181.875(3). For example, the board may not include sex abuse in the third degree in the list of misdemeanors promulgated under ORS 181.875(3)(d) because the legislature has listed sex abuse in the third degree under ORS 181.875(3)(c).

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7. "Felony against a person" appears in ORS 181.875 and ORS 181.876 only; the legislature has not used that term in any other statute.

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8. The following testimony is illustrative of the discussion at the Conference Committee meeting on June 12, 1997, concerning the disqualification for those convicted of a "felony against a person."

Kevin Campbell (Lobbyist): The last issue deals with person felonies. People convicted of person felonies. * * * we have here before you, it's on BPSST's stationery, which would basically say that if you've committed a **person felony** that you would not be able to be certified * * *

* * * * *

Rep. Shetterly: I was just - they're talking about upping the time limitation, they're talking about taking off the time limitation entirely so that if you've ever been convicted of a **person felony** then you may not be a security officer.

Chair Minnis: Yes.

* * * * *

Chair Minnis: A **person felony**. Because we have members of this body who are convicted felons who are allowed to serve under the constitution of the State of Oregon. Okay. We'll do that conceptually that if you have been convicted of a **person crime** - period.

Rep. Prozanski: A **felony person crime**.

Conference Committee (HB 2236), June 12, 1997, tape 2, side A at 354-431 (emphasis added).

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9. ORS 135.406(2) defines the term "violent felony" as "a person felony as defined in the rules of the Oregon Criminal Justice Commission" for purposes of that statute's requirement that the victim be consulted concerning plea discussions with defendants charged with such crimes. ORS 137.667(1) provides that the Oregon Criminal Justice Commission "may classify offenses as person felonies or person misdemeanors for purposes of the [sentencing guideline] rules." ORS 137.712(4)(k), relating to a court's ability to impose sentences that depart from the sentencing guidelines, refers to Burglary in the first

degree "when it is classified as a person felony under the rules of the Oregon Criminal Justice Commission." ORS 163.732 states that when stalking is a Class C felony, it "shall be classified as a person felony and as crime category 8 of the sentencing guidelines grid of the Oregon Criminal Justice Commission." Finally, ORS 163.750(2)(c) states that the crime of violating a court's stalking protective order, when a Class C felony, "shall be classified as a person felony and as crime category 8 of the sentencing guidelines grid of the Oregon Criminal Justice Commission."

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10. The rules adopted by the Oregon Criminal Justice Commission under ORS 137.667(1) must be approved by the Legislative Assembly; if not so approved, they are automatically repealed. ORS 137.667(4).

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11. The Oregon Supreme Court has identified three classes of statutory terms -- exact, inexact and delegative. See **Springfield Education Assn. v. School Dist.**, 290 Or 217, 223, 621 P2d 547 (1980) (describing three types of statutory terms and the respective responsibilities of administrative agencies and courts for interpreting those terms). The term "felony against a person" in ORS 181.875(3)(a) is an inexact term because, although the legislature understood and expressed its meaning completely in that term, the board and the department must interpret the term as it applies the term to various crimes in their rules or orders. *Id.* at 224-27. While we cannot say with certainty that the term "felony against a person" refers to those crimes classified by the Oregon Criminal Justice Commission as "person felonies," we believe it is likely that is what was intended. Accordingly, we recommend that any classification of "felonies against a person" by the board or department be guided by the Commission's list of person felonies in OAR 213-003-0001(14).

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