

The Current Statutory System Unnecessarily Limits the CCB's Authority to Act before Harm Occurs.

According to the Oregon CCB Contractor License Instructions and Application (revised March 2012), a person applying for a contractor's license (or the officer or member of an entity applying for a license) is required to disclose certain criminal indictments or convictions that occurred within five years of the date of application. The criminal convictions that must be disclosed on the application are listed in ORS 701.098(1)(i). See ORS 701.046(1)(j).

ORS 701.098(1)(i) is the source of the CCB's authority to consider the specific criminal convictions that may be the basis to "revoke, suspend or refuse to issue or reissue a license" after notice and opportunity for a hearing. The statutory list of criminal convictions lists certain crimes against a person such as murder, first degree assault or robbery, sexual abuse, and property, such as first degree theft (items worth \$1,000) or arson, or theft by extortion. Theft by extortion is a crime that involves theft accompanied with acts that instill fear of physical harm to person or property or commission of additional crimes.

The above-list of crimes, however, draws a line that excludes several similar felony crimes, as well as felonies involving dishonesty. Similarly, the CCB's implementation of ORS 701.046(1)(j) (the authority to require listing criminal convictions as part of the license application process), strongly suggests that applicants need not list *federal* felony convictions on the license application.

As a result, the CCB's authority to act prospectively to deny licenses to the small minority of applicants with felony criminal histories is limited. Instead, the current statutory framework generally only equips the CCB to react after a problem has already occurred.

So, in light of these limitations, here are a few suggestions:

SHOULD THE CCB'S AUTHORITY BE EXPANDED RE: PAST CRIMINAL CONDUCT?

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Does a felony conviction in the past five years for federal bank fraud or sexual assault on federal lands prevent a person from obtaining a contractor's license (whether in the person's own name or as an officer or member of a company)? How about a state felony conviction of false swearing, perjury, forgery or knowingly negotiating bad checks?

You might be surprised to learn that the Oregon Construction Contractor's Board ("CCB") does not have clear authority to require disclosure of such information as part of the license application process or to use such a conviction itself as a basis for suspending a current licensee.

This article is a call to legislators to expand the CCB's authority to better weed out the very small minority of people seeking to become contractors *before* they harm consumers and construction businesses alike.

commanding Abraham to offer his son Isaac as a sacrifice. (Genesis 22:5 and 22:8). After Abraham bound Isaac to an altar and was prepared to make the sacrifice, God intervened at the last minute, stopped Abraham, and told him that he had adequately tested Abraham's faith.

Clarify CCB Authority to “Revoke, Suspend or Refuse” Based Upon “Equivalent” Federal Felony Crimes.

ORS 701.098(1)(i) refers to the statutory list of felonies as “crimes of this state” and extends the CCB’s authority to consider an “equivalent crime in another state.” By referring to crimes of “this state” or “another state,” however, the statute does not answer the CCB’s authority extends to a federal equivalent crime.

If ORS 701.098(1)(i) is limited only to crimes of “states,” then some truly unfortunate consequences may result. For example, felony sexual assault of a person under state law is clearly a basis the CCB may consider for refusing to license an applicant or revoking a current licensee under the current statute, yet felony sexual assault under the equivalent *federal* statute (such an assault committed on federal lands) would *not* be a basis for refusing to license an applicant or revoking a licensee.

As ORS 701.098(1)(i) is implemented by the CCB, the lack of clarity in the statute is carried through to the current CCB license application (revised March 2012). In the section regarding prior criminal convictions, the application form requires listing the “state” and “county” where a conviction occurred. Does the form lead applicants to the conclusion that someone convicted of a federal “equivalent” felony is not required to make any disclosure? A statement on the application that “federal equivalent” convictions must be listed on the application would put any ambiguity to rest.

CCB Should Be Authorized to Request that Applicants Disclose Additional Felony Convictions, Including Lesser Degree Felonies and Felonies Involving Dishonesty.

As noted above, the CCB’s authority under ORS 701.046(1)(j) to request information about felony convictions on the license application is limited to the crimes that may serve as the basis of license refusal or revocation under ORS 701.098(1)(i). So if the problem is that ORS

701.098(1)(i) lists too few crimes, why not simply pass legislation that adds more?

A significant reason is that the CCB’s authority to discipline or revoke licenses based on criminal convictions is limited by ORS 607.280(3). This statute provides in general that most state agencies may not discipline or deny a license to a person for a crime that is not “substantially related to the fitness and ability of the applicant or licensee to engage in the activity for which the license is required.” Whether a crime is “substantially related” to an applicant or licensee’s fitness to engage in a certain activity requiring state licensure can be a very fact-specific issue. *See e.g. Dearborn v. Real Estate Agency*, 334 Or 493 (2002) (conviction on drug possession charges based on plea agreement, after indicted crimes of promoting prostitution, endangering a child and providing obscene materials to a child were dismissed, did not deny a realtor a license) and *Macks v. Dep’t of Educ.*, 241 Or.App. 333(2011) (telephonic harassment of ex-boyfriend did not deny school bus driver certificate).

Notwithstanding these limitations, the question of why not amend ORS 701.098(1)(i) to permit the CCB to require license applicants to listing “all felony convictions” within the prior five years is worth examining. For example, the crime of assault in the first degree provides *in part*:

ORS 163.185 Assault in the first degree.

(1) A person commits the crime of assault in the first degree if the person:

(a) Intentionally causes *serious* physical injury to another *by means of a deadly or dangerous weapon*; [or]

(b) Intentionally or knowingly causes serious physical injury to a child under six years of age; (*Emphasis added*).

Given that contractors work in a person’s home, clearly most convictions of an assault crime is “substantially related” to the person’s fitness to be a contractor. Accordingly, “Assault in the First Degree” is listed in ORS 701.098(1)(i). Yet an applicant is *not* required to disclose the felony

crime of “assault in the second degree,” which provides *in part*:

ORS 163.175 Assault in the second degree. (1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes *serious physical injury* to another;

(b) Intentionally or knowingly causes *physical injury to another by means of a deadly or dangerous weapon*; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

Ultimately, what difference does it matter if a person caused “*serious physical injury*” with a deadly weapon (first degree assault) or *only “physical injury*” with a deadly weapon (second degree assault)? Since the crimes listed in ORS 701.098(1)(i) still must pass muster with the ORS 607.280(3) requirement that the crime must be “substantially related” to the fitness and ability of the applicant applying for a contractor’s license, why not require disclosure of second degree felonies?

The same question regarding the expansion of crimes listed in ORS 701.098(1)(i) should be asked about felonies based on a person’s dishonesty. Any felony based on a person’s dishonest conduct proved to the criminal standard of “beyond a reasonable doubt” or entered into as part of a criminal plea – *should be* a basis for denying a license to a contractor.

Contractors handle large sums of consumers’ money with significant risk to consumers, particularly because a consumer’s home is often the consumer’s most valuable asset. A dishonest person may falsify payment applications to construction lenders that results in the project running out of funds before the home or remodel is completed. A dishonest person may mishandle monies owed to other parties with the ability to record a construction lien that may result

in the owner paying twice for the same work or materials. A dishonest person may seek to obtain a substantial “down payment” from consumers without the intention of performing any work. Given these risks – which are significantly higher financial risks to a homeowner than are posed by many other licensed professions – it seems the CCB should be entitled to at least *request* this information of an applicant.

Interestingly, the CCB already recognizes that “dishonest or fraudulent conduct” or financial responsibility is substantially related to the contractor’s fitness to engage in construction contracting. See OAR 812-005-0280(1). The problem is, without statutory authority to require information as part of the application process, how is the CCB to learn of a new applicant’s “dishonest or fraudulent conduct” or financial responsibility? In such a situation, the CCB is left to react to problems caused by dishonest people who are already licensed, rather than preventing those same dishonest people from obtaining a license in the first place.

Expansion of Crimes Disclosed By Applicants Also Enables CCB To Make Better Use Of Other Tools.

The CCB has other tools in the toolbox beyond the power to revoke or refuse to license a contractor. These tools include increasing bond amounts and self-reporting rules. While both tools likely would remain constrained by ORS 607.280(3)’s requirement that a criminal conviction must be substantially related to the person’s fitness to be a contractor, disclosure of additional criminal convictions information would seemingly make these tools more effective to prevent harm sooner.

The CCB has broad authority under ORS 701.068(6) to require a bond that is up to five times the amount otherwise required by the applicant or licensee’s endorsement should the applicant or licensee have a prior history of claims that exceeds the bond amount ordinarily required by the specific endorsement type (i.e. the \$20,000 residential bond or the \$20,000 commercial bond).

The CCB does not purport to have authority to consider criminal convictions to initially increase a contractor's bond requirement. Yet once the bond amount is increased, CCB regulations do provide for the *absence* of the crimes currently listed under ORS 701.098(1)(i) as a factor showing financial responsibility to *decrease* a bond amount. Clear statutory authority requiring disclosure of felonies based on dishonesty in the application would seemingly enhance the CCB's ability to exercise its authority to require a higher bond of certain applicants at the outset by providing more information about a licensee's financial responsibility.

An additional tool is the requirement that a current licensee must also self-report the conviction of a crime listed in ORS 701.098(1)(i) to the CCB within thirty (30) days. See OAR 812-003-0440. One might expect that current licensees who are convicted of various felony crimes might not be inclined to report the conviction. Yet if ORS 701.098(1)(i) is expanded, a revocation of a license based on a crime committed during the time the person is a licensed contractor (or an officer or member) would strengthen the CCB's ability to discipline and potentially revoke the licensee. How? The CCB could point to the failure to *report* the crime – not the criminal conviction itself – as a basis for discipline, including potentially revoking the licensee. See ORS 701.098(1)(b) (authorizing discipline, after notice and a hearing, for violation of a board rule).

Conclusion.

Statutory limitations that authorize the CCB to require disclosure of only certain felonies and the lack of clear authority to request "federal equivalent" convictions unnecessary limits the CCB's ability to weed out bad actors during the application process. As a result, the CCB can generally only be reactive – acting after a problem occurs – rather than proactive in the protection of consumers and maintaining the integrity of the industry.