

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: July 11, 2008

OPINION #08-001

TO: Ald. Michael Schumacher

FROM: Michael P. May, City Attorney

RE: Use of Arrest and Conviction Records in Proposed
Alcohol License Review Committee Guidelines for Operator Licenses

You have requested my opinion as to whether the proposed "City of Madison Policy Guidelines for Operator Licenses" (the Guidelines) for use by the Alcohol License Review Committee (ALRC) conflict with anti-discrimination laws. The Guidelines would be used by the ALRC in the review and recommendation process for operator's license (bartender) applications. The Guidelines are to be considered by the Common Council upon recommendation of the ALRC (Legislative File No. 10684).

This opinion will examine the proposed Guidelines, provisions in Chapter 111 and 125 of the Wisconsin Statutes, and the provisions of Sec. 39.03 of the Madison General Ordinances (MGO).

SUMMARY OF CONCLUSIONS

Based upon my review of the relevant legal provisions, the proposed Guidelines do not violate either state law or the Madison General Ordinances. In reviewing the proposed Guidelines (a copy of which is attached to this Opinion), I make several suggestions to clarify them.

Although the Guidelines fall within the legal requirements, there are a number of policy determinations embedded within those guidelines. Those policy issues are outside the scope of this legal opinion, but should be considered carefully by the ALRC and the Common Council.

RELEVANT STATUTES

Sec. 111.335, Wis. Stats., provides in part:

Arrest or conviction record; exceptions and special cases. (1) (a). Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge . . .

(c). . . it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity . . .

Sec. 111.335(1)(cs), Wis. Stats. generally provides that it is not prohibited discrimination to refuse to issue or to revoke or suspend a license under ch. 125 if the person has been convicted of specific violations related to controlled substances.

Sec. 125.04(5), Wis. Stats., provides in part:

(5) **QUALIFICATIONS FOR LICENSES AND PERMITS.** (a) *Natural persons.* Licenses and permits related to alcohol beverages, issued to natural persons under this chapter, may be issued only to persons who fulfill all of the following requirements:

1. Do not have an arrest or conviction record, subject to § . . . 111.335 . . .

(b) *Criminal offenders.* No license or permit related to alcohol beverages may, subject to § . . . 111.335, be issued under this chapter to any person who has habitually been a law offender or has been convicted of a felony unless the person has been duly pardoned.

Sec. 39.03(8) (i) 4., MGO, provides:

4. It is not employment discrimination because of conviction record to deny or to refuse to issue a license or permit under the Madison General Ordinances if the person applying for or holding the license or permit has been convicted of a

felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the licensed activity, and has not been pardoned for that felony, misdemeanor, or other offense.

DISCUSSION

A. General Statutory Scheme.

The Wisconsin Statutes make it a prohibited form of discrimination in licensing to discriminate based upon arrest record or conviction record. Secs. 111.321, 111.322, Wis. Stats. The Wisconsin Statutes, however, make some specific exceptions to the general rule. It is not discrimination to refuse to issue a license to a person “convicted of any felony, misdemeanor, or other offense, the circumstances of which substantially relate to the circumstances of the particular . . . licensed activity.” Sec. 111.335 (1) (c) 1. In addition, Sec. 111.335(1)(cs), Wis. Stats., specifically allows the refusal of a license under the alcohol licensing chapter, ch. 125, for specified convictions for violation of controlled substance statutes.

With respect to arrest records , the statutes do not allow the licensing authority to request an applicant to provide arrest records “except a record of a pending charge.” Sec. 111.335(1) (a). However, such authority may refuse to issue a license to an applicant with a pending criminal charge if the circumstances of the offense substantially relate to the licensed activity.

Several provisions of Sec. 39.03, MGO, track the above provisions. Sec. 39.03(8) (a) prohibits discrimination in employment based on arrest record or conviction record. Sec. 39.03(8) (f) bars requesting information on an arrest record, except a pending charge, with some exceptions for law enforcement officers. Sec. 39.03 (8) (i) 4., MGO, makes a similar exception to the one provided in the Wisconsin Statutes that allows discrimination in the issuance of a license for a conviction for a felony, misdemeanor, or other offense, “the circumstances of which substantially relate to the circumstances of the licensed activity . . .”¹

1 This subdivision of the Madison Ordinances clearly relates to licensing. However, in one of the many anomalies in the Equal Opportunities Ordinance, it is placed within the employment discrimination section of the ordinance. The Wisconsin Statutes, Sec. 111.321 and 111.322 Stats, explicitly bring licensing agencies and determinations on licensing with the ambit of its provisions on discrimination in employment. Unlike the state statutes, the Madison Ordinances do not clearly define licensing as a part of employment discrimination. While it is possible that licensing might fall within the section barring discrimination in the use of City facilities, sec. 39.03(7), MGO, this exception for licensing is not placed there. At least one of my predecessors opined that licensing was not encompassed within the use of City facilities. Regardless of these anomalies, I interpret this provision of the ordinances to track the state statutes that allow for consideration by the licensing authority of specified conviction records that substantially relate to the licensed activity. An ordinance amendment clarifying this and other anomalies might be in order.

Finally, both the State Statutes and the Madison General Ordinances regulating alcohol beverages contain licensing restrictions relating to an applicant's arrest and conviction records. In the alcohol beverage control chapter, Sec. 125.04(5), Wis. Stats., states that a license for alcohol beverages may not be issued to a person who "has habitually been a law offender" or has been "convicted of a felony unless the person has been duly pardoned." Sec.38.031 MGO incorporates Chapter 125 by reference. In addition, the City's general license qualifications in Chapter 38 provide that licenses and permits related to alcohol beverages may only be issued to persons who "do not have an arrest or conviction record subject to Sec. 111.321, 111.322, 111.335 and 125.12(1)(b) Stats."

The sum of these exceptions to the general rule of anti-discrimination can be summarized as follows, with respect to issuing operators licenses under Chapter 125 of the Wisconsin Statutes, and Chapter 38 of the Madison General Ordinances:

1. The City may not request information on an individual's arrest record, except pending charges.
2. The City may ask and may rely upon conviction records, so long as those records substantially relate to the licensed activity.²

The Wisconsin Supreme Court has noted that the Legislature balanced two interests in adopting these statutes that bar discrimination based on arrest and conviction records, with some exceptions: "... society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. ... On the other hand, society has an interest in protecting its citizens." *County of Milwaukee v. Labor and Industry Rev. Com'n.*, 139 Wis. 2d 805, 821, 407 N.W. 2d 908 (1987).

The next section of this opinion will examine these rules as applied to the proposed ALRC Guidelines.

B. Policy Guidelines for Operator Licenses.

This section of the memorandum will examine each portion of the proposed Guidelines and make any comments thereon.

1. Intent. The first section of the Guidelines sets out the intent of the ALRC and the Madison Common Council. I see no legal objection to the language in the intent section. In order to clarify and to be certain that the Guidelines comply with state and local law, the second to last paragraph of the intent section should state that the "ALRC may consider all offenses the circumstances of which are substantially related to the license . . ."

² Unlike use of conviction records in the employment context, in which the Madison Ordinances impose a three-year limitation on use of convictions or release from incarceration (with some exceptions), sec. 39.03(8)(i)(i) 3.b., the exception for licensing does not have any time limit.

2. What is meant by substantially related? This introductory paragraph also appears to be in conformance with state and local law, although I believe the first sentence unduly suggests that the term “substantially related” cannot be defined. I would add to that sentence the parenthetical (“although there are many court decisions on the topic. The Wisconsin Supreme Court has stated that the purpose of the test is to assess ‘... whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed ... “ ”).³

3. Guideline 1. This Guideline provides that a person convicted of a felony, unless duly pardoned, does not qualify for an operator’s license, if the offense is substantially related to the circumstances of the licensed activity. This is in accord with Sec. 125.04(5) (b), Wis. Stats. I suggest that specific statutory citation be added to this Guideline. In addition, this requirement is one embodied in chapter 125 of the Statutes. The City may impose some more stringent requirements than those in chapter 125, but may not adopt regulations “in conflict with this chapter [125].” Sec. 125.10(1), Wis. Stats. Thus, the requirements of this Guideline are mandatory.

Also, with respect to this Guideline and the others herein, I suggest a slight change in the “substantially related” language. The statutes and case law state the test as “the circumstances of the offense substantially relate to the circumstances of the job or licensed activity.” Sec. 111.335(1)(b), Wis. Stats. This exact language should be used throughout the Guidelines.

4. Guideline 2. This Guideline specifies certain types of convictions that would disqualify the license applicant. It generally covers violent crimes, crimes involving resistance or obstructing justice, and crimes involving controlled substances. The Guideline explicitly provides that the [circumstances of the] offense must be substantially related to the circumstances of the licensed activity, a requirement under the state or local law. As such, the Guideline falls within the law.

The third set of these offenses, involving controlled substances, should explicitly refer to the state statute which bars a person from obtaining a license related to alcohol beverages for those offenses. Sec. 111.335 (1) (cs), Wis. Stats.

There is a policy issue reflected in this Guideline because it indicates that one or more offenses within five years and two or more offenses within ten years would trigger the potential disqualification. Neither the state statutes nor the City of Madison ordinances contain any limitation on the time of an

3 This language comes from *County of Milwaukee v. Labor and Industry Review Com’n*, *supra*.

offense for such potential disqualification, and thus the ALRC and Common Council should carefully consider the policy question of the time limitations contained in these Guidelines.

5. Guideline 3. This Guideline relates to offenses that generally involve alcohol beverages, or other offenses at licensed establishments that serve alcohol beverages. The Guideline suggests that two or more offenses within five years would disqualify the proposed licensee. As with other Guidelines, it explicitly provides that the [circumstances of the] offense must be substantially related to the circumstance of the licensed activity.

This Guideline does not conflict with state law or the local ordinances.

6. Guideline 4. This Guideline relates to habitual law offenders. The Guideline should explicitly cite Sec. 125.04(5)(b), Wis Stats., which refers to the disqualification of those who have “habitually been a law offender.” This section should be somewhat reorganized to place the discussion of what constitutes “habitual” offender prior to the list of the offenses. The list of the offenses does not appear to violate either state law or local ordinance. Because it is within chapter 125, the City is bound by this requirement.

7. Guideline 5. This Guideline requires applicants to truthfully and completely fill out applications. This Guideline is not implicated by any of the statutes cited above. It presents a policy choice for the ALRC and the Common Council.

8. Guideline 6. This Guideline allows the ALRC to make exceptions under certain circumstances if the applicant can present evidence of rehabilitation. This Guideline does not conflict with the statutes or the ordinances set out above, except to the extent it might conflict with the mandatory provisions set out in chapter 125, as noted above.

9. Guideline 7. This Guideline simply restates that the ALRC must follow the Guidelines and clearly state the reason for denial in its denial of the applications. The laws with respect to discrimination based on arrest or conviction records are not implicated by this Guideline.

CONCLUSION

Based upon my review of the Guidelines and the relevant statutory provisions, including the Madison General Ordinances, the Guidelines do not conflict with any of the legal requirements related to non-discrimination in the issuance of licenses. I suggest some minor changes to clarify the Guidelines. The ALRC and the Common Council should carefully consider the policy issues inherent in the Guidelines.

Michael P. May
City Attorney

CC: Mayor Cieslewicz
Alders
City Clerk
Katherine Plominski, Alcohol Policy Coordinator

SYNOPSIS: The proposed Policy Guidelines for Operators Licenses for use by the Alcohol License Review Committee in the issuance of individual operators licenses (bartenders) do not conflict with state or local laws related to non-discrimination based upon arrest or conviction records.