

Opinion issued June 18, 2020



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00029-CV

JOHN SANDLIN CHRISTIE, Appellant

V.

TEXAS REAL ESTATE COMMISSION, Appellee

**On Appeal from the 200th District Court
Travis County, Texas¹
Trial Court Case No. D-1-GN-17-001803**

MEMORANDUM OPINION

¹ The Texas Supreme Court transferred this appeal to this Court from the Court of Appeals for the Third District of Texas. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases between courts of appeals).

In this administrative appeal,² appellee, the Texas Real Estate Commission (the “Commission”), revoked the real estate license of appellant, John Sandlin Christie, after he was convicted of a federal offense of misprision of a felony.³ After Christie applied for reinstatement of his license and the Commission issued a final administrative decision denying his application (the “Final Order”), Christie filed suit for judicial review in the 200th District Court of Travis County. The trial court affirmed the Commission’s order, and Christie appeals. In six issues, Christie asserts that the trial court erred in affirming the Commission’s Final Order because the Commission acted arbitrarily and capriciously in denying his application, failed to provide a “rational explanation” for changing its policy and failing to follow its case precedent, and violated his right to equal protection under the United States and Texas Constitutions. Christie further asserts that the Commission’s Final Order resulted in “substantial prejudice” to his “right to engage in the occupation of his choice.”

We affirm.

² *See id.* § 2001.901(a) (“A party may appeal a final district court judgment under this chapter in the manner provided for civil actions generally.”).

³ *See* 18 U.S.C. § 4 (“Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”).

Background

Christie became a licensed real estate agent in 1973. For 40 years thereafter, he operated a real estate business in McKinney, Texas. From 2003 to 2013, Christie focused on commercial real estate development in north Texas. Typically, when Christie identified a tract of land that he deemed ripe for development, he purchased the tract, created a development plan, including verifying that adequate utilities were in place, and then sold the tract. Christie's projects required him to regularly work with various municipalities.

In 2006, Christie had a client interested in purchasing a certain 33-acre development tract in the City of Melissa, Texas. The sale was predicated on there being water and sewer utilities in place. Accordingly, Christie presented a development plan to city officials. In 2007, the Mayor of Melissa, David E. Dorman, informed Christie that a portion of the tract at issue was actually located within the boundaries or jurisdiction of McKinney. However, Dorman offered to ensure that Melissa annexed the property and installed the necessary utilities, in exchange for payment from Christie. Christie paid Dorman \$10,000 in cash and later gave him two \$10,000 checks, which Christie designated as payment for "consulting services." Dorman then arranged for Melissa to annex the land and furnish the utilities. And, Christie finalized his real estate transaction.

In 2012, the Federal Bureau of Investigation contacted Christie and questioned him about the transaction. Subsequently, Dorman was indicted for the offense of bribery. Christie was indicted under federal law for the offense of misprision of a felony.⁴

On June 28, 2013, Christie pleaded guilty as charged in the indictment. The United States District Court for the Eastern District of Texas assessed his punishment at six months' confinement, followed by one year of supervised release. The district court also imposed a fine and assessment totaling \$5,100.00, and it ordered that Christie "forfeit his real estate licenses." Christie surrendered his real estate license to the United States Clerk's Office on June 28, 2013. On November 12, 2013, Christie began serving his sentence, and the Commission revoked Christie's license, effective the date of his incarceration.⁵ On May 8, 2015, Christie completed his term of supervised release.

On September 16, 2015, Christie filed an application with the Commission for reinstatement of his real estate license. The Commission notified him that it proposed to deny his application because it was not satisfied that he would conduct his real estate business with the requisite honesty, trustworthiness, and integrity.

⁴ *United States v. John Christie*, No. 4:12CR00201-002 (E.D. Tex. June 28, 2013).

⁵ *See* TEX. OCC. CODE § 53.021(b) (providing that holder's license "shall be revoked" upon imprisonment following felony conviction).

Christie filed a request for a contested hearing, and the Commission referred the matter to the State Office of Administrative Hearings (“SOAH”). After the hearing, the administrative law judge (“ALJ”) issued a proposal for decision (“PFD”), which included the following evidence:

Christie testified regarding the facts laid out above, that he was remorseful, and that, since his release, he had maintained steady employment and a record of good conduct. He presented several witnesses who testified to his good character.

Beverly Rabenberg, a Commission staff attorney, testified that, based on her review of the documentary evidence and the testimony presented at the hearing, Christie’s payment of approximately \$30,000.00 to Mayor Dorman to secure water and sewer utilities for property that Christie was trying to sell, his efforts to conceal the payments, and his failure to report the mayor’s criminal activity to authorities directly related to the duties of a real estate agent and related to Christie’s ability, capacity, or fitness to perform the duties and discharge the responsibilities of a licensed real estate agent.

With respect to the factors set out in Commission Rule 541.1,⁶ discussed below, Rabenberg testified that Christie had no previous criminal history and had served his full sentence, had completed his supervised release, and had satisfied all court-ordered terms and conditions. She noted, however, that although the offense

⁶ 22 TEX. ADMIN. CODE § 541.1.

was committed in 2007, it was not discovered until five years later, in 2012, based, in part, on Christie's concealment. As a result, the investigation and conviction were delayed. She further noted that, the time of the SOAH hearing in 2016, "[n]ine years [had] elapsed since [Christie's] last criminal activity, but [he] was convicted for this crime just three years ago."

Rabenberg acknowledged that Christie had been a licensed sales agent for 40 years without any substantiated consumer complaints and that the Commission could grant him a probationary license with certain stipulations. However, she concluded that granting him a license would afford him an opportunity to engage in further criminal activity of the type for which he was convicted.

Rabenberg expressed "serious concerns that when [Christie] filed his application he had recently completed his supervised release." And, in her opinion, "four months [was] not enough time to show that [Christie] ha[d] the requisite integrity, honesty, and trustworthiness to have his license reinstated." She questioned Christie's accountability for his conduct, noting that he had admitted in his factual statement that, at the time of his payments to Mayor Dorman, he knew that such payments were illicit. However, at the hearing, Christie testified that he had left the payee blank on his checks and was unaware that Dorman intended to make the checks payable to himself. Rabenberg recommended that Christie's application for reinstatement of his real estate license be denied.

In her PFD, the ALJ made the following findings of fact:

7. On June 28, 2013, in Cause Number 4:12CR00201-002, before the United States District Court Eastern District of Texas, . . . Mr. Christie pleaded guilty to and was convicted of the felony offense misprision of a felony.
8. The felony offense of misprision of a felony requires proof that (1) a federal felony was committed; (2) the defendant had knowledge of the felony; (3) the defendant failed to notify an authority as soon as possible about the felony; and (4) the defendant committed an affirmative act to conceal the felony.
9. Mr. Christie represented a client interested in purchasing land that required the installation of water and sewer utilities and agreed to pay the Mayor of Melissa, Texas, money so the Mayor would support the annexation of the land by the city of Melissa, including the installation of water and sewer lines.
10. Mr. Christie knew that the Mayor of Melissa was not entitled to this payment but knowingly and intentionally agreed to make the illicit payments.
11. Mr. Christie paid the Mayor of Melissa, Texas, the following:
 - \$10,000 in cash in order to conceal the nature of the transaction;
 - \$10,000 in the form of check on September 6, 2007, that misrepresented that payment was for consulting services to conceal the nature of the payment; and
 - \$10,000 in another check on September 19, 2007, again misrepresenting that the payment was for consulting services to conceal the nature of the payment.
12. Mr. Christie was sentenced to six months in prison, one year on supervised release, and ordered to pay a \$5,000 fine and \$100 assessment. Mr. Christie was also ordered to surrender his real estate salesperson license.
13. Mr. Christie committed the felony on multiple dates in 2007 through September 19, 2007.
14. Mr. Christie was incarcerated on November 12, 2013.

15. Mr. Christie's real estate sales agent license was revoked by operation of law on November 12, 2013, upon his imprisonment.
16. Mr. Christie did not notify the Commission that he had been incarcerated.
17. The Commission formally revoked Mr. Christie's license on February 21, 2014, effective November 12, 2013.
18. Mr. Christie's crime was a very serious federal crime which involved his license as a real estate agent.
19. Mr. Christie's criminal activity involved intentional and pre-meditated fraud, misrepresentation, and bribery.
20. Although the crime was committed in 2007, it was not discovered until 2012, in part because of Mr. Christie's participation in concealing the nature of his payments to the Mayor of Melissa.
21. Mr. Christie was a mature adult and experienced real estate agent when he committed the crime.
22. Mr. Christie served his time in prison and completed the year of supervised release. He also paid the court-ordered fine and assessment.
23. At the time Mr. Christie filed his application for reinstatement of his license, he had been out of prison for less than two years and had been off supervised release for four months.
24. Since Mr. Christie's release from prison, he has managed his own real estate investments and supported himself and his wife.
25. Several of Mr. Christie's friends and clients attested to his good character and spoke highly of his honesty and integrity.
26. Mr. Christie's conduct since the time of his conviction for his crime has been commendable, but not enough time has passed for Mr. Christie to overcome the gravity of his criminal offense and to show, by a preponderance of the evidence, his fitness, honesty, trustworthiness, and integrity to be licensed at this time.

The ALJ made the following substantive conclusions of law:

7. Mr. Christie engaged in conduct that tends to demonstrate that he does not possess the requisite honesty, trustworthiness, or integrity, as set out in the Commission's rule at 22 [TEX. ADMIN. CODE] 535.52(b)(1).

....

9. Mr. Christie did not prove his current fitness to be licensed and his honesty, trustworthiness, and integrity as required by [TEX. OCC. CODE] ch. 53 and § 1101.354.
10. Based upon consideration of the factors set forth in 22 [TEX. ADMIN. CODE] § 541.1, the Commission should deny Mr. Christie's application for reinstatement of his real estate license.

The ALJ recommended that the Commission deny Christie's application for reinstatement of his real estate license.

Subsequently, the Commission issued a Final Order in which it denied Christie's application for reinstatement of his license. The Commission adopted and incorporated the ALJ's findings of fact and conclusions of law into its Final Order.

Christie then filed the underlying suit for judicial review of the Commission's Final Order, challenging the following pertinent findings and conclusions:

- c. Findings of Fact Number 20 and 26 and Conclusion of Law Number 10 . . . are arbitrary and capricious; not supported by substantial evidence in that the [Commission] misapplies the criteria mandated in [TEX. OCC. CODE § 53.023 and 22 TEX. ADMIN. CODE § 541.1(d)(3)] which require [the Commission] to consider the time that has elapsed since [Christie's] last criminal activity. [The Commission] considered when [Christie] was prosecuted and when he completed his probation as part of his last criminal activity instead of when the actual crime was committed.

- d. Finding of Fact Number 23 . . . is arbitrary and capricious and is not supported by substantial evidence in that the [Commission] misapplies the criteria stated in [22 TEX. ADMIN. CODE § 541.1(d)]. Although the [Commission] can consider the time remaining on [Christie's] probation, the fact that [Christie] had successfully completed the terms and conditions of this probation should have been a factor that weighed in favor of granting [Christie's] application for reinstatement of his real estate license as opposed to being considered a detriment supporting denial of [Christie's] application.
- e. Conclusion of Law Number Nine is arbitrary and capricious and not supported by substantial evidence and violates the due process and equal protection clauses of the United States and Texas constitutions. The [Commission] ignored case precedent, failed to consider a prior case with similar facts as [Christie's] case and treated [Christie] differently than other persons with similar backgrounds to [Christie] when determining whether to approve [Christie's] real estate agent license application.

Christie asserted that his substantial rights were prejudiced because the Commission, in its Final Order, denied him the ability to engage in “a profession he has practiced for most of his life.”

After a hearing, the trial court found that the Commission's Final Order was supported by substantial evidence and affirmed the order.

Discussion

In his first and second issues, Christie argues that certain of the Commission's findings and conclusions are arbitrary and capricious because the Commission “failed to follow the clear unambiguous language of the statutory criteria and the agency rules” it was required to consider in evaluating whether he was fit for

licensure. *See* TEX. OCC. CODE § 53.023(a); 22 TEX. ADMIN. CODE § 541.1(d) (Tex. Real Estate Comm’n, Rules Relating to the Provisions of Texas Occupations Code, Chapter 53, “Criminal Offense Guidelines”). Specifically, Christie asserts that, in findings 20, 23, and 26, the Commission considered extra-statutory and legally irrelevant factors. And, based on these findings, the Commission concluded, in conclusions of law 9 and 10, that he “did not prove his current fitness to be licensed and his honesty, trustworthiness, and integrity.” In his third issue, Christie asserts that, even if the Commission’s Final Order is supported by substantial evidence, it must be invalidated as arbitrary and capricious. Because Christie’s first, second, and third issues are interrelated, we address them together.

Further, in his fourth and fifth issues, Christie asserts that the Commission’s Final Order violates his right to equal protection under the United States and Texas Constitutions, and “ignores [its] case precedent and fails to provide a rational explanation . . . [for] why two similarly situated applicants were treated differently.” *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 3. Christie asserts that such unexplained inconsistency also renders the Final Order arbitrary and capricious.

A. *Standard of Review and Governing Legal Principles*

Texas Occupations Code section 53.021 provides that a licensing authority may suspend or revoke a license, or disqualify a person from receiving a license, on the ground that the person has been convicted of an offense that “directly relates to

the duties and responsibilities of the licensed occupation.” TEX. OCC. CODE § 53.021(a)(1). Section 53.022 provides that, in determining whether a conviction “directly relates to the duties and responsibilities of a licensed occupation,” the licensing authority “shall consider” each of the following factors:

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
- (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved;
- (4) the relationship of the crime to the ability or capacity required to perform the duties and discharge the responsibilities of the licensed occupation; and
- (5) any correlation between the elements of the crime and the duties and responsibilities of the licensed occupation.

Id. § 53.022; *see also* 22 TEX. ADMIN. CODE § 541.1(a), (c).

If a licensing authority determines that a conviction “directly relates to the duties and responsibilities of a licensed occupation” under section 53.022, the licensing authority “shall consider” the factors set forth in section 53.023 in determining whether to take an action authorized by section 53.021, as follows:

- (1) the extent and nature of the person’s past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person’s last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;

- (5) evidence of the person’s rehabilitation or rehabilitative effort while incarcerated or after release;
- (6) evidence of the person’s compliance with any conditions of community supervision, parole, or mandatory supervision; and
- (7) other evidence of the person’s fitness, including letters of recommendation.

TEX. OCC. CODE § 53.023(a); *see also* 22 TEX. ADMIN. CODE § 541.1(d).

Proceedings to establish these factors are governed by Government Code Chapter 2001, the Texas Administrative Procedure Act (“APA”). TEX. OCC. CODE § 53.024; *see also* TEX. GOV’T CODE ch. 2001.

Here, after the Commission denied Christie’s application based on the above factors, he requested a hearing. In a contested case, each party is entitled to an opportunity for a hearing and to present evidence and argument to an ALJ. *See* TEX. GOV’T CODE §§ 2001.051, 2001.058, 2003.021; *Tex. Real Estate Comm’n v. Riekers*, No. 14-18-00287-CV, 2020 WL 1026478, at *4 (Tex. App.—Houston [14th Dist.] Mar. 3, 2020, no pet.) (mem. op.) (“An ALJ is a ‘disinterested hearing officer’ to whom the legislature has delegated the duty of basic fact-finding.”). At the close of the hearing in this case, the ALJ issued a PFD, containing findings of fact and conclusions of law necessary to the proposed decision. *See* TEX. GOV’T CODE § 2001.062. The Commission then issued a Final Order adopting the findings and conclusions in the PFD. *Id.* § 2001.141. Once Christie exhausted all administrative remedies within the Commission, he sought judicial review of the Final Order. *See*

§ 2001.171. After the trial court affirmed the Commission’s Final Order, Christie appealed to this Court. *See id.* § 2001.901. The focus of this Court’s review is on the Commission’s Final Order. *See Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 562 (Tex. 2000); *Scally v. Tex. State Bd. of Med. Exam’rs*, 351 S.W.3d 434, 441 (Tex. App.—Austin 2011, pet. denied). Again, the APA governs our review. *See Garcia v. Tex. Real Estate Comm’n*, No. 03-14-00349-CV, 2016 WL 3068408, at *2 (Tex. App.—Austin May 27, 2016, no pet.) (mem. op.).

Section 2001.174, “Review Under Substantial Evidence Rule or Undefined Scope of Review,” provides:

If the law authorizes review of a decision in a contested case under the substantial evidence rule or if the law does not define the scope of judicial review, a court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency discretion but:

- (1) may affirm the agency decision in whole or in part; and
- (2) shall reverse or remand the case for further proceedings if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
 - (A) in violation of a constitutional or statutory provision;
 - (B) in excess of the agency’s statutory authority;
 - (C) made through unlawful procedure;
 - (D) affected by other error of law;
 - (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
 - (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

TEX. GOV'T CODE § 2001.174. Thus, section 2001.174 requires not only that a court not substitute its judgment for the judgment of a state agency on the weight of the evidence, but it allows the court to address other aspects of the decision, including whether the decision was arbitrary or capricious, or characterized by an abuse of discretion. *See Tex. Dep't of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 242 (Tex. App.—Austin 2008, no pet.).

“An agency’s decision is arbitrary or results from an abuse of discretion if the agency: (1) failed to consider a factor the legislature directs it to consider; (2) considers an irrelevant factor; or (3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result.” *City of El Paso v. Pub. Util. Comm’n of Tex.*, 883 S.W.2d 179, 184 (Tex. 1994). Further, courts have found agency orders to be arbitrary and capricious when the agency (1) issued an order not supported by substantial evidence, (2) denied a litigant due process, (3) improperly based its decision on non-statutory criteria, (4) based its decision on legally irrelevant factors, or (5) failed to follow the clear, unambiguous language of its own regulations. *Westlake Ethylene Pipeline Corp. v. R.R. Comm’n of Tex.*, 506 S.W.3d 676, 687 (Tex. App.—Austin 2016, pet. denied); *see also Tex. Health Facilities Comm’n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 454 (Tex. 1984) (providing examples of arbitrary and capricious agency actions, including basing decision on non-statutory criteria); *Mont Belvieu Caverns, LLC v. Tex.*

Comm'n on Env'tl. Quality, 382 S.W.3d 472, 485 (Tex. App.—Austin 2012, no pet.) (describing arbitrary and capricious action). “If an agency does not follow the clear, unambiguous language of its own regulations in making a decision, the agency’s action is arbitrary and capricious and will be reversed.” *Harris Cty. Appraisal Dist. v. Tex. Workforce Comm’n*, 519 S.W.3d 113, 119 (Tex. 2017). In sum, “[t]his ground for reversal presents a question of law that we review de novo.” *Pub. Util. Comm’n v. City Pub. Serv. Bd.*, 109 S.W.3d 130, 135 (Tex. App.—Austin 2003, no pet.) (considering, under section 2001.174, whether Commission’s “findings, inferences, conclusions, or decisions were in excess of the agency’s statutory authority”).

B. *Arbitrary and Capricious*

As a preliminary matter, the Commission argues that its Final Order is supported by substantial evidence and that this alone is dispositive of Christie’s issues. However, “it is clear that the legislature intended to distinguish between” review of agency orders for substantial evidence and review for arbitrary and capricious action. *Charter Med.-Dall., Inc.*, 665 S.W.2d at 454. The caselaw has drawn a “line of demarcation” between these concepts and has identified instances in which an action may be arbitrary and capricious even if substantial evidence supports the agency’s order. *Id.*; see also *Tex. Dep’t of Ins.*, 260 S.W.3d at 245 (“Even if supported by substantial evidence, . . . an agency order may be arbitrary

and capricious . . . if the agency has improperly based its decision on non-statutory criteria” or “legally irrelevant factors”); *Schor v. Tex. Real Estate Comm’n*, No. 05-95-00373-CV, 1996 WL 457440, at *5 (Tex. App.—Dallas Aug. 14, 1996, no pet.) (“Even if the TREC’s findings are supported by substantial evidence, its act of suspending Schor’s license may be arbitrary and capricious if it based its decision on legally irrelevant factors . . .”).

Christie argues that the Commission’s findings of fact numbers 20, 23, and 26, and its conclusions of law numbers 9 and 10, are arbitrary and capricious because they constitute extra-statutory grounds and irrelevant factors. *See* TEX. GOV’T CODE ANN. § 2001.174(2)(F). Specifically, Christie complains of the following findings adopted by the Commission:

20. Although the crime was committed in 2007, it was not discovered until 2012, in part because of Mr. Christie’s participation in concealing the nature of his payments to the Mayor of Melissa.

.....

23. At the time Mr. Christie filed his application for reinstatement of his license, he had been out of prison for less than two years and had been off supervised release for four months.

.....

26. Mr. Christie’s conduct since the time of his conviction for his crime has been commendable, but not enough time has passed for Mr. Christie to overcome the gravity of his criminal offense and to show, by a preponderance of the evidence, his fitness, honesty, trustworthiness, and integrity to be licensed at this time.

And, he complains of the following conclusions:

9. Mr. Christie did not prove his current fitness to be licensed and his honesty, trustworthiness, and integrity as required by [TEX. OCC. CODE] ch. 53 and § 1101.354.
10. Based upon consideration of the factors set forth in 22 [TEX. ADMIN. CODE] § 541.1, the Commission should deny Mr. Christie's application for reinstatement of his real estate license.

Christie complains that these findings and conclusions reflect that the Commission considered, as factors in denying his application for reinstatement, (1) the amount of time that had elapsed since his conviction, (2) the amount of time since his release from prison, and (3) the amount of time since completing his term of supervised release. He asserts that nothing in the language of the governing statute and rule authorized the Commission to consider such factors. *See* TEX. OCC. CODE § 53.023(a); *see also* 22 TEX. ADMIN. CODE § 541.1(d).

Again, sections 53.023(a) and 541.1(d) required the Commission, once it determined that Christie's conviction "directly relate[d] to the duties and responsibilities of a licensed occupation," to consider the following factors:

- (1) the extent and nature of the person's past criminal activity;
- (2) the age of the person when the crime was committed;
- (3) the amount of time that has elapsed since the person's last criminal activity;
- (4) the conduct and work activity of the person before and after the criminal activity;
- (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;
- (6) evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and

- (7) other evidence of the person’s fitness, including letters of recommendation.

See TEX. OCC. CODE § 53.023(a); *see also* 22 TEX. ADMIN. CODE § 541.1(d).⁷

Christie acknowledges that subsection (3) of both sections 53.023(a) and 541.1(d) required the Commission to consider “the amount of time that ha[d] elapsed since [his] *last criminal activity*.” TEX. OCC. CODE § 53.023(a)(3) (emphasis added); *see also* 22 TEX. ADMIN. CODE § 541.1(d)(3). He asserts that this language solely authorized the Commission to consider the amount of time that had elapsed since his commission of the offense, which “ended” on September 17, 2007, some eight years prior to his 2015 application for reinstatement of his license. He asserts that this language did not authorize the Commission to deny his application based on a lack of time since his conviction or his having been “out of prison for less than two years and [having] been off supervised release for four months,” i.e., a lack of time since his release from prison or completion of supervised release. He asserts that “the pertinent inquiry is what is meant by the term ‘criminal activity.’”

⁷ Administrative Code section 541.1(d) requires the Commission, in determining a person’s fitness for licensure, to consider the same factors set forth in Occupations Code section 53.023, but adds:

- (6) the time remaining, if any, on the person’s term of parole, supervised release, probation, or community supervision[.]

22 TEX. ADMIN. CODE § 541.1(d).

The Commission states in its brief that it “agrees with Christie’s assertion” that the term “last criminal activity” means “when the crime is committed.” The Commission asserts, however, that Christie’s “last criminal activity” extended into 2012 and that he “fails to consider the charge to which [he] pleaded guilty and the elements of that crime.” Namely, the elements of the federal offense of misprision of a felony are: (1) the principal committed and completed the felony alleged; (2) the defendant had full knowledge of that fact; (3) the defendant failed to notify the authorities; and (4) the defendant took an affirmative step to conceal the crime. *Duncan v. Bd. of Disciplinary Appeals*, 898 S.W.2d 759, 761 (Tex. 1995). The Commission asserts that Christie’s offense “began with the surreptitious payments to the mayor in 2007 and continued through 2012, ceasing only after Christie was confronted by the [FBI].” And, “the record clearly shows Christie’s concealment of [the 2007] events into 2012 was, itself, a criminal activity.”

We note that the Commission’s findings include that Christie “committed the felony on multiple dates in 2007 through September 19, 2007.” (Emphasis added.) And, the United States District Court’s judgment against Christie, contained in the administrative record, states that, on June 28, 2013, Christie was convicted of the offense of misprision of a felony and that the “Offense Ended 09/19/2007.” (Emphasis added.)

We need not resolve this issue, however, because we note that subsection (4) of the statute and the rule authorized the Commission to consider Christie’s “conduct . . . *after the criminal activity.*” See TEX. OCC. CODE § 53.023(a)(4) (emphasis added); see also 22 TEX. ADMIN. CODE § 541.1(d)(4) (considering “the conduct . . . following the criminal activity”). Similarly, with respect to the periods of time after Christie’s release from prison and after his completion of supervised release, subsection (5) of the statute authorized the Commission to consider evidence of Christie’s “rehabilitative effort . . . *after release.*” See TEX. OCC. CODE § 53.023(a)(5) (emphasis added); see also 22 TEX. ADMIN. CODE § 541.1(d)(7) (considering rehabilitative effort “following release”).

Thus, the Commission was authorized to consider, as reflected in its findings, Christie’s conduct *after* the 2007 criminal activity and *after* his release:

20. *Although the crime was committed in 2007, it was not discovered until 2012, in part because of Mr. Christie’s participation in concealing the nature of his payments to the Mayor of Melissa.*

.....

23. *At the time Mr. Christie filed his application for reinstatement of his license, he had been out of prison for less than two years and had been off supervised release for four months.*

.....

26. *Mr. Christie’s conduct since the time of his conviction for his crime has been commendable, but not enough time has passed for Mr. Christie to overcome the gravity of his criminal offense and to show, by a preponderance of the evidence, his fitness, honesty, trustworthiness, and integrity to be licensed at this time.*

(Emphasis added.) And, the Commission’s conclusions of law 9 and 10, that Christie did not prove his “current fitness” to be licensed or his “honesty, trustworthiness, and integrity,” are based on its above findings made pursuant to chapter 53 and section 541.1:

9. Mr. Christie did not prove his current fitness to be licensed and his honesty, trustworthiness, and integrity as required by [TEX. OCC. CODE] ch. 53
10. Based upon consideration of the factors set forth in 22 [TEX. ADMIN. CODE] § 541.1, the Commission should deny Mr. Christie’s application for reinstatement of his real estate license.

Because the Commission’s conclusions demonstrate a connection between its decision and the factors made relevant to its decision by applicable statutes and rules, we hold that the Commission’s decision is not arbitrary and capricious. *Cf. Schor*, 1996 WL 457440, at *5 (“TREC’s decision is arbitrary when its final order fails to demonstrate a connection between the decision and the factors made relevant to its decision by applicable statutes and regulations.”).

We overrule Christie’s first, second, and third issues.

C. *Equal Protection and Rational Explanation*

In his fourth and fifth issues, Christie asserts that the Commission’s Final Order violates his right to equal protection under the United States and Texas Constitutions, and “ignores [its] case precedent and fails to provide a rational explanation . . . [for] why two similarly situated applicants were treated differently.”

See TEX. GOV'T CODE § 2001.174(2)(A), (F); see also U.S. CONST. amend. XIV; TEX. CONST. art. I, § 3. Relying on *Texas Real Estate Commission v. Smith*, Christie asserts that he and the applicant in *Smith* are similarly situated, yet the Commission treated Christie differently and without providing a rational explanation for the inconsistency. (State Office of Admin. Hearings, Docket No. 329-12-3454.REC (Aug. 13, 2012) (Final Order)). Christie asserts that such unexplained inconsistency also renders the Commission's Final Order arbitrary and capricious. See TEX. GOV'T CODE § 2001.174(2)(F).

“An agency is not bound to follow its decisions in contested cases in the same way that a court is bound by precedent.” *Flores v. Emps. Ret. Sys. of Tex.*, 74 S.W.3d 532, 544 (Tex. App.—Austin 2002, pet. denied). “Courts, however, frequently require that an agency explain its reasoning when it appears to the reviewing court that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations.” *Id.* at 544–45 (internal quotations omitted).

A licensing authority “acts arbitrarily and unlawfully if it treats similarly situated applicants differently without an articulated justification.” *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 335 (Tex. 2017). The Fourteenth Amendment provides, in pertinent part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”

U.S. CONST. amend. XIV; *see* TEX. CONST. art. I, § 3; *see also* *Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 257 n.4 (Tex. 2002) (evaluation of equal protection claim is same under federal and state constitutions); *Pierce v. Tex. Racing Comm'n*, 212 S.W.3d 745, 757 (Tex. App.—Austin 2006, pet. denied). “The Equal Protection Clause does not . . . require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious.” *Pierce*, 212 S.W.3d at 757 (quoting *Avery v. Midland Cty.*, 390 U.S. 474, 484 (1968)); *see also* *Neeley v. W. Orange–Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 784 (Tex. 2005) (requiring rational basis when no suspect class or fundamental right is involved).

To establish an equal-protection claim, a deprived party must show (1) that he was treated differently from other similarly situated persons and (2) that no reasonable basis exists for the disparate treatment. *Cadena Comercial USA Corp.*, 518 S.W.3d at 335.

Here, in support of his argument that he was treated differently than other similarly situated persons, Christie relies on the final order in *Smith*, which he presented to the ALJ and which appears in the administrative record before us. (State Office of Admin. Hearings, *Tex. Real Estate Comm'n v. Smith*, Docket No. 329-12-3454.REC (Aug. 13, 2012) (Final Order)). There, the applicant, Smith, applied for a probationary real estate salesperson license, and the Commission proposed to deny

the application based on Smith's criminal history. *Id.* (adopting and incorporating findings and conclusions of ALJ contained in Proposal for Decision). Namely, Smith had pleaded guilty to the offense of bribery, a second-degree felony. *Id.* After a hearing, however, the ALJ recommended that Smith be granted a probationary license. *Id.* And, the Commission ultimately agreed and adopted the ALJ's findings. *Id.*

Specifically, the Commission in *Smith* adopted the ALJ's finding that, according to the charging instrument, in 2003, Smith and two others offered benefits to the Streets and Drainage Superintendent for the Public Works Department of the City of College Station in exchange for his assigning business to Smith's construction company and approving its invoices. *Id.* The ALJ heard Smith's testimony that the offense occurred in the context of his business operations, at a time when his company was "very large," with offices in three cities and hundreds of employees. *Id.* Smith testified that it was his general superintendent, who no longer worked for the company, who had actually provided benefits to the City employee in exchange for the approval of invoices. *Id.* After considerable legal expense, Smith "took the rap" in order for his company to survive—that is, he took a plea deal in 2009 in order to release his company. *Id.* The trial court deferred its adjudication, ordered Smith to serve 180 days' confinement and 10 years' community supervision, and ordered him to pay \$150,000.00 in restitution. *Id.*

Thereafter, Smith closed his Houston and Dallas offices and reduced his workforce to 50–60 employees—a number he could personally oversee. *Id.* He no longer utilized a general superintendent or delegated the task of striking deals with city officials. *Id.*

The Commission further adopted the ALJ’s findings in *Smith* that, at the time of the 2012 hearing on Smith’s application, although he was still on community supervision, he had paid restitution as assessed, had “demonstrated six years of law-abiding behavior after the commission of the offense and before he was placed on community supervision,” and had not had any criminal or ethical issues in the nine years since the offense was committed. *Id.* The Commission concluded that the general superintendent was the “primary malefactor” and that Smith took responsibility for the superintendent’s actions because they took place on Smith’s “watch.” *Id.* Based on the factors in section 53.023, the Commission concluded that Smith had demonstrated his “current fitness to be licensed and his honesty, trustworthiness, and integrity.” *Id.* And, the Commission concluded that the issuance of a probationary license was appropriate, subject to certain conditions. *Id.*

In the instant case, Christie asserts that he and Smith are similarly situated. Christie notes that Smith was similarly convicted⁸ of bribing a public official. He

⁸ See TEX. OCC. CODE § 53.021(d) (providing licensing authority may deem person to have been convicted, despite deferred adjudication, if person has not yet completed term of supervision).

complains that Smith, who was still on community supervision at the time, which was subject to being revoked, was granted a probationary license. Yet, despite Christie having successfully completed his term of supervised release, the Commission denied his application. Christie asserts that there is no reason that he “should not receive a probationary license” as well.

Importantly, however, in *Smith*, Smith was not the primary actor. Rather, the Commission adopted the ALJ’s findings and conclusions that Smith was running a “very large” company, with offices in three cities and hundreds of employees, that his general superintendent was the “primary malefactor,” and that, because the acts at issue happened on Smith’s “watch,” Smith took a plea deal in order to save his company. It was “incumbent upon the ALJ to determine the credibility of witness testimony.” *Tex. Dep’t of Pub. Safety v. Sanchez*, 82 S.W.3d 506, 511 (Tex. App.—San Antonio 2002, no pet.).

Conversely, in the instant case, Christie is the primary actor. There is no allegation that anyone other than Christie made concealed payments to Mayor Dorman. Thus, Christie has not demonstrated that he and Smith are similarly situated. *See Cadena Comercial USA Corp.*, 518 S.W.3d at 335 (holding that, to establish equal-protection claim, deprived party must show that he was treated differently from another similarly situated). Accordingly, he has not established an equal-protection violation. *See id.* Further, because Christie has not demonstrated

that the Commission departed from its earlier policies or applicable precedent, or that there exists an inconsistency in its determinations, an explanation of such reasoning was not necessary. *See Flores*, 74 S.W.3d at 544–45.

We hold that the Commission’s decision is not arbitrary and capricious on the grounds that Christie asserts. *See* TEX. GOV’T CODE § 2001.174(2)(A), (F).

We overrule Christie’s fourth and fifth issues.

Conclusion

We affirm the trial court’s judgment.⁹

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Kelly and Goodman.

⁹ Having overruled Christie’s first through fifth issues, we do not reach his sixth issue, in which he argues that he was harmed by the alleged errors.