



INSTITUTE FOR JUSTICE

May 28, 2024

Via Email and UPS

Board Members

North Carolina State Board of Dental Examiners
2000 Perimeter Park Dr., Suite 160
Morrisville, NC 27560

Bobby White, Esq.
Chief Executive Officer
North Carolina State Board of Dental Examiners
2000 Perimeter Park Dr., Suite 160
Morrisville, NC 27560
bwhite@ncdentalboard.org

Casie S. Goode
Deputy Operations Officer
North Carolina State Board of Dental Examiners
2000 Perimeter Park Dr., Suite 160
Morrisville, NC 27560
cgoode@ncdentalboard.org

Re: Sarah Smith's Petition To Be Licensed As A Dental Hygienist

Members of the Board, Chief Executive Officer Bobby White, and Deputy Operations Officer Casie Goode,

My name is Erica Smith Ewing. I am a senior attorney at the Institute for Justice, a national civil-liberties law firm. I'm writing regarding the Board's predetermination that Sarah Smith¹ is not eligible to be licensed as a dental hygienist by credential, despite her five years of working as a licensed dental hygienist in other states. According to the Executive Committee's predetermination of Ms. Smith's eligibility on February 22, 2024, Ms. Smith is not eligible for licensure by credential solely because of her criminal history.

In Ms. Smith's former life—before she went to dental school and started working as a dental hygienist—she struggled with drug addiction and was a victim of domestic violence. During this time, she was convicted of felony drug possession of psilocybin in 2014 and two misdemeanors for drug possession in 2015. But Ms. Smith worked hard to become rehabilitated and has been in recovery for eight years. She has not gotten in trouble again.

¹ The Institute for Justice does not currently represent Ms. Smith, and we are hoping such representation will be unnecessary.

To the contrary, Ms. Smith turned her life around. She went to dental school in 2017, graduated with honors, and became licensed as a dental hygienist in Idaho and then Tennessee, with glowing recommendations from her former employers and colleagues. Now, Ms. Smith works for a dentist in North Carolina, who is waiting for her to receive her North Carolina license so that he can be assured that Ms. Smith can remain working there. Yet while Ms. Smith has given herself a fresh start in life, the Board is holding her past against her.

The Executive Committee’s predetermination that Ms. Smith is not eligible for license by credential is not just unjust; it is erroneous under state law. The State Legislature has already made clear that the Board cannot discriminate against a person’s license application solely because of her criminal history, as discussed below. In addition, such discrimination violates the U.S. and North Carolina Constitution’s protections for economic liberty and equal protection.

We ask that you clarify that Ms. Smith—and others like her—are in fact eligible for licensure by credential. To do otherwise would violate state law, be unconstitutional, and would serve only to exacerbate the state’s shortage² of dental hygienists.

I. About the Institute for Justice

The Institute for Justice (IJ) is a national, nonprofit law firm that has fought to protect individuals’ constitutional rights for over 30 years. We have litigated at the U.S. Supreme Court ten times and in state and federal appellate courts around the country.

One of our areas of expertise is economic liberty—the constitutionally protected right to engage in a lawful occupation, free from unreasonable government interference. We have sued dozens of state and local governments for their infringement of this right. We also advise state legislatures and agencies on how they can ensure their statutes, codes, and processes respect this constitutional right and reflect good policy generally.³

We have a particular interest in ensuring that government is not locking people out from stable and much-needed work because of old mistakes they made years ago. We successfully challenged a Pennsylvania law that required people to prove their own “good moral character” before they could work as cosmetologists.⁴ We are now suing Virginia’s Department of Behavioral Health and Developmental Services to end that state’s ban on those with certain convictions from becoming substance abuse counselors.⁵ And we are currently suing the Federal Communications Commission after they tried to bar our client from operating a radio station because of his criminal history.⁶

² See, e.g., Health Professional Shortage Areas: Dental Care, by County, April 2024 - North Carolina, Rural Health Info, <https://www.ruralhealthinfo.org/charts/9?state=NC>.

³ See, e.g., <https://ij.org/report/barred-from-working/>; <https://okcfox.com/news/local/governor-kevin-stitt-senate-house-legislature-politics-sb1691-licensing-barriers-criminal-records-ex-offenders-oklahoma-okc-may-17-2022>.

⁴ See <https://ij.org/case/pennsylvania-collateral-consequences/>.

⁵ See <https://ij.org/case/virginia-fresh-start-2/>.

⁶ See <https://ij.org/case/knoxville-radio/>

IJ also regularly works with state and local governments to reform these types of laws, and our model bill on this topic has been passed by numerous states.⁷

II. About Sarah Smith

Ms. Smith has worked as a licensed dental hygienist for five years in Idaho and Tennessee, with glowing recommendations from her colleagues and former employers.

Yet Ms. Smith's life was not always what it is now. Ms. Smith struggled with addiction and was a victim of domestic violence. She received a felony conviction for possessing psilocybin in 2014 and two misdemeanors for drug possession in 2015. But after she served 30 days in jail, she hit rock bottom. Her father and probation officer arranged for her to get into a rehabilitation program, and after a lot of hard work and introspection, Ms. Smith was able to turn her life around. She has now been sober for eight years.

Ms. Smith went to dental school in 2017, graduated with honors, and her life has been on the straight and narrow ever since. Remarkably, she remains friends with her former probation officer who helped save her life. Ms. Smith is also committed to helping others and has even been invited by the North Carolina Caring Dental Professionals to join them as a peer support volunteer.

Ms. Smith is currently employed by a dentist in North Carolina, who is waiting for her to receive her license so that he can be assured that Ms. Smith can remain working there.

III. Ms. Smith's Predetermination Petition

Ms. Smith petitioned the Board for predetermination of her licensure eligibility. On February 22, 2024, she received a response from the Board's Executive Committee, specifically from Chief Executive Officer Bobby White. Mr. White wrote that "[a]lthough the Board has predetermined that you qualify [for a license], please be advised that you may only apply for a provisional license, or you may apply for licensure by exam. In review of N.C.G.S. 90-224.1(c)(3), you do not qualify to apply for credentials."

While Ms. Smith was afterward able to receive a provisional license in April, provisional licenses are only valid for one year, and thus this is not a viable means for her to continue working for her current employer. In addition, she is currently covering for another employee on maternity leave, and will only have part-time hours once the other employee comes back in June. The provisional license ties Ms. Smith to that office, so if she doesn't get a permanent license by June, she will not be able to look for another dental office to pick up the other 2-3 days per week.

Thus, Ms. Smith will be unable to be fully employed unless she becomes licensed by exam. That would require her to study for the ADEX exam, pay a \$1,275 exam fee, and take off work to travel on a plane to the nearest test site. In the next three months, the closest test locations are Florida and Alabama.

⁷ <https://ij.org/legislation/collateral-consequences-in-occupational-licensing-act/>.

Yet if not for the Executive Committee’s predetermination regarding her criminal history, Ms. Smith would be immediately able to become licensed by credential, without taking this exam.

IV. Denying Ms. Smith Licensure by Credential Violates State Law and the State and Federal Constitutions

We ask that you reconsider the Executive Committee’s predetermination and clarify your position on how an applicant’s criminal history affects his or her application. As shown below, the Executive Committee’s predetermination regarding Ms. Smith is not just unjust, but also violates state law and is unconstitutional.

A. Denying Ms. Smith’s License Violates N.C. Gen. Stat. § 93B-8.1

Ms. Smith does not have time or resources to take the ADEX exam—and she shouldn’t have to. Under our reading, the Executive Committee’s preliminary denial of Ms. Smith’s license by credential is a mistake of law. In 2019, the North Carolina Legislature reformed its law to prevent exactly this type of denial based on criminal history. N.C. Gen. Stat. § 93B-8.1. We think it is likely that the Executive Committee either is unaware of the full extent of the reforms in Section 93B-8.1 or has misinterpreted these reforms.⁸

Section 93B-8.1 states that

[A] board may deny an applicant on the basis of a conviction of a crime only if the board finds that the applicant’s criminal conviction history is directly related to the duties and responsibilities for the licensed occupation or the conviction is for a crime that is violent or sexual in nature. Notwithstanding any other provision of law, a board shall not automatically deny licensure on the basis of an applicant’s criminal history, and no board shall deny an applicant a license based on a determination that a conviction is for a crime of moral turpitude.

N.C. Gen. Stat. § 93B-8.1(b). In other words, the Board cannot deny Ms. Smith’s license based on her criminal history alone. Instead, the Board can only deny her license based on her criminal history if they consider “all of the following factors”:

- (1) The level and seriousness of the crime.
- (2) The date of the crime.
- (3) The age of the individual at the time of the crime.
- (4) The circumstances surrounding the commission of the crime, if known.
- (5) The nexus between the criminal conduct and the prospective duties of the applicant as a licensee.

⁸ There is no right of appeal from a preliminary denial of a license. N.C. Gen. Stat. § 93B-8.1(b7). There is only a right to appeal after an applicant has paid a non-refundable \$750 application fee and been officially denied a license. So we wish to clarify with the Board that her preliminary denial is erroneous before Ms. Smith pays to officially apply for the license.

- (6) The prison, jail, probation, parole, rehabilitation, and employment records of the applicant since the date the crime was committed.
- (6a) The completion of, or active participation in, rehabilitative drug or alcohol treatment.
- (6b) A Certificate of Relief granted pursuant to G.S. 15A-173.2.
- (7) The subsequent commission of a crime by the applicant.
- (8) Any affidavits or other written documents, including character references.

N.C. Gen. Stat. § 93B-8.1(b1).

Moreover, Section 93B-8.1 makes clear that these factors apply to “predeterminations” as well as final decisions. N.C. Gen. Stat. § 93B-8.1(b6). Accordingly, predetermination denials need to explain the “grounds and reasons” for the denial “in writing.” *Id.*

Here, however, the Executive Committee did not reference any of these factors in its letter. Nor did it state any of the grounds or reasons for the denial. Instead, the letter simply stated, without further explanation, that Ms. Smith was not eligible for licensure by credential. This violates Section 93B-8.1.

The only support the letter cited for its conclusion was the statute regarding licensure by credential, N.C. Gen. Stat. § 90-224.1(c)(3). We believe Section 90-224.1(c)(3) is what is causing the confusion here. It seems the Legislature never amended Section 90-224.1(c)(3) to comply with Section 93B-8.1, and Section 90-224.1(c)(3) still states that the Board may deny an applicant based on a “felony conviction” or “other criminal convictions.” But Section 90-224.1(c)(3) is irrelevant, as Section 93B-8.1(b) unequivocally states that it must apply, “[n]otwithstanding any other provision of law.”

Thus, Section 93B-8.1 trumps Section 90-224.1(c)(3). The Board may not rely on Section 90-224.1(c)(3) to deny Ms. Smith her licensure by credential because of her convictions.

B. Denying Ms. Smith’s License is Unconstitutional

Not only is denying Ms. Smith’s license a violation of state law, it is also unconstitutional.

Around the country, state and federal courts alike have repeatedly held that it is unconstitutional to restrict people the right to work in their chosen field based on years-old criminal convictions. Courts have held that such restrictions violate both the substantive due process right to economic liberty and the right to equal protection. They have held such in fields as sensitive as childcare and school counseling. And they have done so for crimes as serious as robbery and homicide.⁹ These courts sensibly conclude

⁹ See, e.g., *Fields v. Dep’t of Early Learning*, 434 P.3d 999 (Wash. 2019) (childcare); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003) (eldercare); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (public school counseling);

that convictions for these offenses years ago do not reflect on the person's *present* ability to engage in that field of work safely and responsibly.

That is true here as well. Ms. Smith's old drug convictions have nothing to do with her current career as a dental hygienist. Dental hygienists have no power to prescribe drugs and have no access to drugs. The only time Ms. Smith would be administering a "drug" is topical fluoride treatments or numbing agents, neither of which are prescription strength drugs. And moreover, concerns regarding Ms. Smith's access to drugs cannot justify the Board's predetermination here. Otherwise, the board would not be allowing Ms. Smith to have a provisional license or license by exam.

Indeed, it makes no sense to allow Ms. Smith to become licensed by exam but not credential because of her criminal history. Ms. Smith's criminal history is unrelated to whether she has the requisite knowledge to be a dental hygienist. Ms. Smith has been a successful dental hygienist for five years, with several letters of recommendation from her former colleagues and employers. She shouldn't have to study for an exam, pay a \$1,275 exam fee to take the ADEX exam, and take off work and pay to travel to another state so that she can take an exam when it is clear she is already qualified for her position. And nothing in her criminal history undermines those qualifications.

Instead, the exam seems to be a completely arbitrary punishment of Ms. Smith for a crime she already served time for. Ms. Smith should be allowed licensure by credential, just like everyone else who shares her credentials.

Conclusion

We hope we can work together to resolve this matter harmoniously. We urge you to clarify Ms. Smith's eligibility for licensure by credential with all deliberate speed. We also hope that you clarify your own licensure policies so that this will not happen to anyone else.

Ms. Smith and I remain available to discuss this matter further if needed. My phone number is (631) 383-5302, and my email is esmith@ij.org.

Sincerely,



Erica Smith Ewing
Senior Attorney
INSTITUTE FOR JUSTICE

Cronin v. O'Leary, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001) (health and human services role with unsupervised client contact); *Chunn v. State ex rel. Dep't of Ins.*, 156 So. 3d 884 (Miss. 2015) (bail bonding); *Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978) (massage parlors); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977) (private detectives and security guards); *Shimose v. Haw. Health Sys. Corp.*, 345 P.3d 145 (Haw. 2015) (radiology); *Warren Cmty. Hum. Servs. v. State Civ. Serv. Comm'n*, 844 A.2d 70 (Pa. Commw. Ct. 2004) (child-protective services); *Lewis v. Ala. Dep't of Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993) (public tow-truck lists).

CC:
Ms. Precious Lee, at plee@ncdentalboard.org