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October 23, 1958

Honorable Lynn Brown, Administrator
Texas State Board of Plumbing Examiners
904 Lavaca
Austin, Texas

Opinion No. WW-517

Re: The effect to be accorded the exemption in the Plumbing License Law of 1947, S. B. 188, Acts 50th Legislature, relative to plumbing work done by anyone who is regularly employed as or acting as a maintenance man or maintenance engineer.

Dear Mr. Brown:

Your recent request for an opinion on the above captioned subject reads substantially as follows:

An independent school district in this State is presently engaged in constructing a new twenty room junior high school building. The district regularly employs a man as its Superintendent of Buildings and Grounds and it also has other regular employees, all being paid fixed salaries by the school district.

The school district has not employed a general contractor in this construction program but rather the Superintendent of Buildings and Grounds is doing the work usually done by a general contractor and other regular employees of the district are also doing construction work.

The Superintendent of Buildings and Grounds supervises and gives instructions regarding the plumbing work on the new building as he deems necessary. In particular, he sees that the plumbing installation is done in accordance with the specifications and the applicable

plumbing regulations. He interprets the blueprints and mechanical plans and actually "lays out" or points out the location of the various fixtures and the location and type of fittings and sizes of soil and vent pipes needed to complete the system. He may also be required to use his own judgment in resolving practical problems not foreseen in the original plans and specifications. All of these activities are performed in his supervisory capacity over the "head plumber" and for these duties he receives no extra compensation.

The person in charge of the actual physical plumbing work is a man designated as "head plumber", hired by the district for this particular construction job, and who had, previous to this job been employed by a master plumber and followed the plumbing trade as a means of livelihood. This so-called "head plumber" performs the actual manual installation of the plumbing in accordance with blueprints and mechanical plans. This includes cutting, threading, caulking and/or sweating pipe to form assemblies or installations in accordance with the blueprints and plans, and the installation of fixtures. When necessary, he works with the Superintendent in "laying out" portions of the job.

Under this so-called "head plumber" two full time laborers of the school district do actual plumbing work together with the "head plumber". These laborers or "helpers" assist the "head plumber" in the actual manual installation of plumbing by supplying materials such as pipe, fittings, tools, etc.; by holding or steady-ing pipe; by digging ditches; and by performing numerous other similar functions in connection with the installation as directed by the "head plumber". They receive no compensation for this work other than their normal salaries as employees of the district.

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None of these employees has a plumber's license of any kind issued by the Texas State Board of Plumbing Examiners under the Plumbing License Law of 1947.

Essentially, you have asked the following specific question:

Whether any or all of these persons under such circumstances are exempt from the licensing requirement of the Plumbing License Law of 1947.

The "Plumbing License Law of 1947", which is Senate Bill 188, Acts of the 50th Legislature, Regular Session, 1947, Chapter 115, Page 192, codified as Article 6243-101 of Vernon's Civil Statutes, forbids plumbing work by those who do not hold State licenses with certain exceptions:

Section 2(a) of the "Plumbing License Law of 1947" defines plumbing as follows:

"The word or term 'plumbing' as used in this act means and shall include: (1) all piping, fixtures, appurtenances and appliances for a supply of water or gas, or both, for all personal or domestic purposes in and about buildings where a person or persons live, work or assemble; all piping, fixtures, appurtenances and appliances outside a building connecting the building with the source of water or gas supply, or both on the premises, or the main in the street, alley or at the curb; all piping, fixtures, appurtenances, appliances, drain or waste pipes carrying waste water or sewage from or within a building to the sewer service lateral at the curb or in the street or alley or other disposal terminal holding private or domestic sewage: (2) the installation, repair or maintenance of all piping, fixtures, appurtenances and appliances in and about buildings where a person or persons live, work or assemble, for a supply of gas, water, or both, or disposal of waste water or sewage."

Section 14 of the Act provides as follows:

"After the expiration of one hundred twenty days from the effective date of this Act, no person, whether as a master plumber, employing plumber, journeyman plumber, or otherwise, shall engage in, work at, or conduct the business of plumbing in this state or serve as a plumbing inspector as herein defined, except as herein specifically exempted from the provisions of this Act, unless such person is the holder of a valid license as provided for by this Act; and after the expiration of one hundred twenty days from the effective date of this Act it shall be unlawful for any person to engage in, work at, or conduct the business of plumbing in this state or serve as a plumbing inspector as herein defined, except as herein specifically exempted from the provisions of this Act . . . and provided for hereby; and it shall be unlawful for any person, firm, or corporation to engage in or work at the business of installing plumbing and doing plumbing work except as specifically herein provided unless such installation of plumbing or plumbing work be under the supervision and control of a plumber licensed under this Act. And it is expressly provided that the provisions of Article 122 of the Penal Code of Texas shall apply to violations of this Act, and said Article 122 of the Penal Code and the penalties therein provided are hereby expressly referred to."

The Plumbers Act of 1947 then is a prohibition against any person, firm, or corporation engaging in, working at, or conducting the business of plumbing (as defined in the Act) without a license unless specifically provided for or specifically exempted.

Reference is made by your request to Section 3(c) of the Article. In this section is found the only exception to the requirement that one engaged in the plumbing business must have a license which might apply in the instant case. The applicable part reads as follows:

"Plumbing work done by anyone who is regularly employed as or acting as a maintenance man or maintenance engineer, incidental to and in connection with the business in which he is employed or engaged, and who does not engage in the occupation of a plumber for the general public; . . ."

The statute is given to two meanings and is ambiguous. In discussing the dissolution of ambiguities and uncertainties in legislation, the Court said in Hidalgo County Drainage Dis-

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trict No. 1 v. Davidson, 102 Tex. 539, 543, 120 S.W. 849, 851, (1909):

". . . In determining the sense in which the language was used by the Legislature, we look to the context and to the purpose of the Legislature in enacting the law."

In Longoria v. State, 126 Tex. Crim. 362, 363, 71 S.W. 2d 268, 269 (1934), the following language is found:

"We further observe that in accordance with settled rules of interpretation of statutes, even when the language used is susceptible of two meanings, the courts are to give it that meaning which will conform to the scope of the act and carry out the purpose of the statute. . . ."

In passing Senate Bill 188, the Legislature, in our opinion, did not intend to exempt either the Superintendent of Buildings and Grounds nor the "head plumber", as described in your opinion request, from the licensing requirements of the Act. For either of the persons to be exempted under the provisions of Section 3(c), they must show that they are regularly employed as maintenance men and that the work being done is incidental to and in connection with the business in which they are employed and further they cannot be engaged in the occupation of plumber for the general public.

The word "maintain" ordinarily means to preserve something which is already in existence, and there must be something in existence before it can be maintained. In this sense the term does not include the concept of erecting or building something which is not already in existence. It has also been defined as to hold or keep in any particular state or condition; to support; to sustain; to uphold; to keep up; not to suffer to fail or decline. Pacific Tank and Pipe Co. v. Pacific Box Corp., 64 P. 2d 773; Anderson v. United States Fidelity & Guaranty Co., 104 P. 2d 906, 907, 44 N.M. 483; 129 A.L.R. 1084. Also see Perkins v. Becker, 157 S.W.2d 550, 552; Verdin v. St. Louis, 27 S.W. 447, 451.

In Madley v. Trustees of Conroe Independent School District, 130 S.W.2d 929, 933 (Tex.Civ.App. 1939), the Court distinguished "building" from "Maintenance" as follows:

" . . . the local tax levied and collected by the trustees of an independent school district for maintenance of the schools can be used only for the purposes of maintenance, to the extent needed for that purpose, . . . the term 'maintenance' of schools does not include the cost of the construction of school houses."

The character of work being done by both the Building and Grounds Superintendent and the "head plumber" cannot be said to come within the meaning of the word maintenance as used in the Act. The plumbing being done by these men consists of the installation of a complete plumbing system in a new building. This obviously is not maintenance work. The "head plumber" was hired by the school system specifically for this new construction job and had not been previously employed by the district in their maintenance department. Nor is there any evidence to show that he had ever done any maintenance work for the school district.

In the opinion of this office, reliance upon the requirement that the plumbing work being done by the individuals in the present case is incidental to and in connection with the business in which they are employed or engaged is not sufficient to exempt them from the licensing requirements of the Act.

The word "incidental" has reference to something which is subordinate to and dependent upon the existence of another and principal thing. It has been said to be dependent upon something else as primary and something incidental to the main purpose. Biggart v. Lewis, 192 Pac. 437, 440; The Robin Goodfellow, et al, 20 F. 2d 924, 925; Kelly v. Hill, 230 P. 2d 864, 867, 104 Cal. App. 2d 61.

It would be impossible to say that the work involved in the construction of a brand new multi-classroom unit school building, costing many thousands of dollars, is incidental to the work of maintaining those structures already in existence in the school district. Nor can the "head plumber", who has been employed specifically to install the new plumbing system in the building, be exempted merely because the school district chooses to give him the title "maintenance man".

The courts, in writing concerning exceptions and their application, will generally construe the exception according to its fair and proper meaning. If the Act contains one or more exceptions that is evidence that the Legislature did not intend to provide any other exceptions, thus the Act should apply in

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all cases not excepted. It is not ordinarily permissible to imply or to enlarge upon an exception to include cases not within its terms. Nor may a Court engraft an exception upon a statute by implication merely because there seems to be a good reason for doing so. Snoddy v. Cage, 5 Tex. 106; Missouri, Kansas and Texas Railway Company of Texas v. Thomason, 280 S.W. 325; Federal Crude Oil Co. v. Yount-Lee Oil Co., 122 Tex. 21, 52 S.W.2d 56, also 53 S.W.2d 1119; City of San Antonio v. Spears, Civ. App. 206 S.W. 703, affirmed 110 Tex. 618; 223 S.W. 166; Nail v. McCue, 55 S.W.2d 211; Holmes v. Coalson, 154 S.W. 661; Roberts v. Yarboro & Wimberly, 41 Tex. 449; Bradley v. Gilliam, 260 S.W. 289.

The very nature of plumbing work demands a degree of expertness and competence. The health and safety factors involved in the plumbing business are many and complex and it is reasonable to believe that the Legislature never intended for the exceptions provided to be enlarged upon. Trewitt v. City of Dallas, Civ.App. 242 S. W. 1073. In that case the Court described the nature of plumbing and its importance as follows:

"It is universally regarded as essential that all plumbing work should be planned and installed with a degree of skill which will insure and safeguard lives and health of people from dangers well known to flow from improper plumbing. This being true, the calling of a plumber bears a close relation to and does concern the public health. It is accordingly a business which is the proper subject of police regulation."

In view of the foregoing it is the opinion of this office that the Superintendent of Buildings and Grounds and the "head plumber", as they are described in your request, are not exempt from the licensing requirements of the Plumbing License Law of 1947 by Section 3(c). To hold otherwise would be to impose upon the statute an exemption not provided by the Legislature. The statute is not applicable to the laborers or "helpers" while performing their duties as you have set out.

All prior opinions by this office, which are in conflict with this opinion, are hereby overruled to the extent of that conflict.


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S U M M A R Y

When doing plumbing work consisting of the installation of a complete plumbing system in a new building, the Superintendent of Buildings and Grounds and the "head plumber" are not exempt from the licensing requirements of the Plumbers License Law of 1947 by Section 3(c) of the Act relative to plumbing work done by anyone who is regularly employed as or acting as a maintenance man or maintenance engineer.

Yours very truly,

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