

Opinion No. 63-39

April 18, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Contractors License Board Santa Fe, New Mexico

QUESTION

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1. Can the Contractors License Board issue a license, or add a classification to a license, which relates back, so as to protect the licensee under contracts entered into prior to the issuance of said license or classification?

CONCLUSION

1. No.

OPINION

{*79} ANALYSIS

"In its specific sense, **to license** means to confer on a person the right to do something which otherwise he would not have the right to do." **33 Am. Jur. Sec. 2 Commission and General Nature of License, page 325.**

In accord with the above quotation summarized from numerous leading cases on the point and listed in Am. Jur., supra, it is apparent that adding a "classification" to a contractor's license is for all intent and purposes the same as issuing a new license for the type of work covered thereby. Under Rule 23 of the Contractors License Board published October 20, 1961, a licensee

{*80} "may make application for classification and be classified in more than one classification if he shall meet the qualifications prescribed by the Board for such additional classification. No additional fee shall be charged for qualifying or classifying a licensee in additional classification."

It is readily observed under the above quoted rule that an added classification is not an automatic procedure. An application must be tendered and certain prescribed qualifications must be met by the contractor before such classification can be authorized by the Board. The Board, after approving the contractor's specific qualifications, gives him permission to engage in the work prescribed by a particular classification and which was not previously authorized under his license. Under the above definition of "license" this classification is in effect a different or new license though no formal license for the

classification is actually issued. Therefore, the following analysis shall also apply and includes authorized additional classifications under an existing contractor's license.

The general rule as to the effective date of a business or occupational license is stated in the cases annotated in **118 A. L. R. 659**, and in the following quotation from **53 C.J.S., page 644**:

"As a general rule a license to pursue a given occupation or business takes effect from its actual issuance or delivery or from the date stated in the certificate; and unless there is a statutory provision to that effect it does not relate back so as to protect the licensee for acts done prior to the actual issuance of the license, . . ."

Under the above general rule, a license does not have a retroactive effect unless such intention can be found in the laws governing the issuance of the license. No such intention, express or implied, appears anywhere in the contractors license law. Section 67-16-1 to Section 67-16-20, New Mexico Statutes Annotated, 1953 Compilation. A license can only be issued by action of the Board after the "Board has satisfied itself" as to the integrity and other qualifications of the applicant as set out in Section 67-16-5, supra.

Furthermore, the Board has no **discretion** to issue a license with a retroactive effect. Such has been the interpretation of the law as declared by the Arizona Supreme Court in **Northen v. Elledge**, 72 Ariz. 166, 232 P. 2d. 11, 114 (1951)

It is to be noted that the Arizona contractors license law, **Arizona Revised Statutes**, Section 32-1101 to 32-1164 is almost identical to ours, except that the Registrar of Contractors issues the licenses in Arizona. Section 32-1122 to Section 32-11-22 to Section 32-11-24, supra.

In the **Elledge** case the plaintiff contractor sued for money owed on a construction contract. The court granted a summary judgment for defendant stating that the plaintiff's cause of action accrued after his license had expired, and therefore, he had no right to enforce the obligation. The plaintiff argued that the Arizona Registrar of Contractors gave him permission to keep said construction after the expiration of his license so that his license could be said to be in effect at the time the work was completed for the defendant. The court dismissed plaintiff's argument as being *{*81}* without merit, holding that "no discretion is granted the Registrar of Contractors" **under the law** "and that he was bound to a **strict enforcement of the licensing provision**".

(Emphasis ours).

The Arizona court in **Northen v. Elledge**, supra, also held "It is the general rule of law that where a statute expressly forbids a person from entering into a certain kind of contract until he performs some precedent act, and imposes a penalty upon such person for attempting to enter into the forbidden contract, the contract itself is absolutely void ab initio and the party penalized has no rights thereunder."

The above quoted rule has been consistently followed by the New Mexico Supreme Court and by a great majority of the courts in other states. See **82 A.L.R. 2nd.**, page 1440, 1443 which includes annotations to **Kaiser v. Thomson**, 55 N.M. 270, 232 P. 2d. 142 (1951); **Crawford v. Holcomb**, 57 N.M. 691, 262 P. 2d, 782 (1953) **Campbell v. Smith**, 68 N.M. 373, 362 P.2d. 523 (1961) and **Northen v Elledge**, supra.

Thus, from the foregoing analysis it is our opinion that the New Mexico Contractors License Board has no authority to issue a contractor's license or add a classification thereto having a retroactive effect. A license or added classification takes effect only at the time it is issued by the Board, and affords no legal protection to a contractor on jobs he undertakes prior to the time he is issued a license or a new classification of such license, and, under the cases above the contractor cannot enforce such a contract in the courts of this state.

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