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**STATE OF INDIANA**
**BEFORE THE INDIANA FIRE PREVENTION AND BUILDING SAFETY COMMISSION**

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| IN RE: | ) | ADMINISTRATIVE CAUSE NO. |
| | ) | |
| L.M. ZELLER, individually | ) | |
| and d/b/a ZELLER ELEVATOR | ) | 14-12-FPBSC |
| COMPANY, LEO MARK | ) | |
| ZELLER, ANDREW M. BOEGLIN | ) | |
| and LOUIS M. ZELLER III | ) | |
| | ) | |

# FINDINGS OF FACT, CONCLUSIONS OF LAW, AND NON-FINAL ORDER

The Petitioners in this matter, L.M. Zeller, individually and d/b/a Zeller Elevator Company, Leo Mark Zeller, Andrew M. Boeglin, and Louis M. Zeller III, seek administrative review of the denial by the Respondent, the Indiana Department of Homeland Security, of Leo Mark Zeller's, Andrew M. Boeglin's, and Louis M. Zeller III's reciprocity-based applications for elevator mechanic licenses. For the reasons stated below, the Administrative Law Judge concludes that the applications should be **GRANTED**.

## Procedural Background

On or about April 25, 2014, Zeller Elevator Company submitted applications for elevator mechanic licenses on behalf of Leo Mark Zeller, Andrew M. Boeglin, and Louis M. Zeller III. On June 5, 2014, the Respondent issued an order denying the applications. The Petitioners filed a petition with the Indiana Fire Prevention and Building Safety Commission seeking administrative review of that order. On July 1, 2014, the Commission granted the petition and the undersigned Administrative Law Judge was appointed to adjudicate the appeal.

An initial prehearing conference was held on October 15, 2014, at which time the parties agreed to seek informal resolution of the dispute. During a January 7, 2015, status conference, the parties notified the ALJ that they were unable to reach an agreement. This matter was then set for an evidentiary hearing.

That hearing was held on April 2, 2015, and both parties appeared and presented witnesses and evidence. The parties were given thirty days to submit proposed findings. Both parties complied with this deadline.

**Burden and Standards of Proof**

Indiana Code § 4-21.5-3-14(c) provides that at each stage of an administrative review, "the agency or other person requesting that an agency take action or asserting an affirmative defense specified by law has the burden of persuasion and the burden of going forward with the proof of the request or affirmative defense." That burden rests upon an agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). But when it is a petitioner who has sought an agency action or claimed entitlement to an exemption from regulatory requirements, the burden rests upon that petitioner. Ind. Dep't of Natural Res. v. Krantz Bros. Constr. Corp., 581 N.E.2d 935, 938 (Ind. Ct. App. 1991).

Proceedings held before an ALJ are de novo, Ind. Code § 4-21.5-3-14(d), which means the ALJ does not—and may not—defer to an agency's initial determination, Ind. Dep't of Natural Res. v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). Instead, in its role as fact-finder the ALJ must independently weigh the evidence in the record and matters officially noticed, and may base its findings and conclusions only upon that record. Id.; see also Ind. Code § 4-21.5-3-27(d).

At a minimum, the ALJ's findings "must be based upon the kind of evidence that is substantial and reliable." Ind. Code § 4-21.5-3-27(d). "[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support the decision." St. Charles Tower, Inc. v. Bd. of Zoning Appeals, 873 N.E.2d 598, 601 (Ind. 2007). It is "something more than a scintilla, but something less than a preponderance of the evidence." State ex rel. Dep't of

Natural Res. v. Lehman, 177 Ind. App. 112, 119, 378 N.E.2d 31, 36 (1978) (internal footnotes omitted).

When a Fourteenth Amendment interest is put at risk by an agency action, however, a higher standard of proof is required. Pendleton v. McCarty, 747 N.E.2d 56, 64–65 (Ind. Ct. App. 2001), trans. denied. "[I]n cases involving the potential deprivation of . . . protected property interests, the familiar 'preponderance of the evidence standard' [is] used." Id. at 64. But the higher "clear and convincing" standard is required when a protected liberty interest is at stake. Id. That is to say, this standard applies when "individual interests at stake in a particular state proceeding are both 'particularly important' and 'more substantial than the mere loss of money' or necessary to preserve fundamental fairness in a government-initiated proceeding that threaten[s] an individual with 'a significant deprivation of liberty' or 'stigma'." Burke v. City of Anderson, 612 N.E.2d 559, 565 (Ind. Ct. App. 1993), trans. denied (quoting In re Moore, 453 N.E.2d 971, 972 (Ind. 1983)); see also Pendleton, 747 N.E.2d at 64.

## Findings of Fact

At the evidentiary hearing, both parties appeared and presented witnesses.[1] Both parties also submitted documentary evidence during, and following, the hearing.[2] Based solely on the evidentiary record presented by those exhibits, the testimony given at the hearing, and those matters officially noticed, the ALJ hereby makes the following findings of fact:

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[1] The Petitioners' witnesses were Louis M. Zeller, James L. Greeson, Indiana State Fire Marshal, and Thomas Hendricks, Chief Inspector of the Elevator and Amusement Rides Safety Section. Mr. Hendricks was also the Respondent's sole witness.

[2] All documents that were admitted into evidence were done by stipulation or otherwise without objection. The ALJ thanks both attorneys for their cooperation and civility in accomplishing this.

The Respondent submitted seven exhibits. All were admitted by stipulation. The Petitioners' Exhibits 5, 6, and 12 through 24 were admitted by stipulation. The Petitioners' Exhibits 1 and 2 were already admitted as Respondent's Exhibits 1 and 2. The Petitioners' Exhibits 3 and 4 were statutes and regulations of which the ALJ took judicial notice and did not need to be admitted into evidence. The Petitioners' Exhibits 7 through 9 were not submitted at the evidentiary hearing but were incorporated into supplemental exhibits submitted later. The Petitioners' Exhibits 10 and 11 were not submitted. And the Petitioners' Exhibits 25 through 29 were submitted with a Verified Request to Supplement Record of the Case that was filed in conjunction with the Petitioners' proposed findings. The Respondent did not object to those exhibits and the Petitioners' request was granted.

1. Louis M. Zeller ("Mike Zeller") started working as an elevator mechanic in Indiana in 1964.

2. Mike Zeller founded Zeller Elevator Company ("Zeller Elevator"), located in Mt. Vernon, Indiana, on April 1, 1967, and has owned and operated the company continuously as an elevator mechanic and/or contractor.

3. Leo Mark Zeller ("Mark Zeller"), Louis M. Zeller III ("Mike Zeller III"), and Andrew Boeglin have all been employed for periods of time at Zeller Elevator. Each has at least two decades' experience in the elevator trade.

4. Indiana's elevator mechanic licensing program was enacted in 2002. The Respondent, by way of its Division of Fire and Building Safety, Elevator and Amusement Rides Safety Section, is the entity responsible for issuing elevator mechanic licenses in the State of Indiana.

5. In 2003, Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin applied for Indiana elevator mechanic licenses from the Respondent based on a grandfathering clause in the new licensing scheme. The Respondent granted the applications, with the issued elevator mechanic licenses expiring on December 31, 2005.

6. Indiana's elevator mechanic licensing scheme includes a requirement that license holders complete eight hours of continuing education during every licensing period. Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin each completed eight hours of continuing education during their initial licensing period.

7. The Respondent renewed the elevator mechanic licenses of Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin, with a new expiration date of December 31, 2007.

8. Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin applied to renew their licenses in late 2007. The Respondent denied the applications because of questions concerning their continuing education during the licensing period.

9. Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin appealed this denial. In 2008, during the course of that administrative appeal, the Respondent provided information concerning the National Certification Program for Construction Code Inspectors exam "6B Elevator General." The Respondent indicated that Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin could

take the NCPCCI exam and, if they passed, they could then apply for elevator mechanic licenses as if they were new mechanics.[3]

10. Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin all took the NCPCCI exam, passed, and were granted new licenses by the Respondent. The new licenses had expiration dates of December 31, 2010.

11. At the conclusion of that licensing period, the Respondent denied applications for renewal from Mark Zeller, Mike Zeller III, and Boeglin, based on another dispute over whether they had satisfied the continuing education requirements.[4]

12. The Commonwealth of Kentucky established an elevator mechanic license program in 2010. In June 2012, Mike Zeller, Mark Zeller, Mike Zeller III, and Boeglin applied for Kentucky elevator mechanic licenses under a grandfathering provision in Kentucky's licensing scheme.

13. Kentucky issued the requested licenses on or about June 28, 2012.

14. Mark Zeller, Mike Zeller III, and Boeglin appealed the 2010 denial of their renewal application. In 2014, during an evidentiary hearing, the Respondent informed Mike Zeller that it could also grant reciprocity-based elevator mechanic licenses.[5]

15. On April 30, 2014, Mark Zeller, Mike Zeller III, and Boeglin filed applications for reciprocity-based elevator mechanic licenses in Indiana, and attached in support their Kentucky elevator mechanic licenses.

16. The Respondent contacted Kentucky's Department of Housing, Buildings, and Construction, and learned that the Kentucky elevator mechanic licenses held by Mark Zeller, Mike Zeller III, and Boeglin were issued prior to July 1, 2012.

17. On June 5, 2014, the Respondent denied the Petitioners' reciprocity-based applications, stating:

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[3] The ALJ in the 2008 administrative appeal found in favor of the Respondent. This determination was upheld by the Indiana Fire Prevention and Building Safety Commission.

[4] Mike Zeller's license, however, is still valid through the end of the 2015 calendar year.

[5] This administrative appeal was consolidated with another appeal seeking review of sanctions imposed by the Respondent upon the Petitioners for allegedly working as unlicensed elevator mechanics in 2012 and 2013. The matter is pending on judicial review in the Vanderburgh County Circuit Court.

> **Your applications for Mechanic License Reciprocity are being denied due to the following reason(s):**
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> Their Kentucky License was issue[d] before the testing requirements were integrated as of July 1, 2012. This was confirmed with the State of Kentucky Department of Housing, Building & Construction, Division of Building Codes Enforcement, and Elevator Inspection. The licenses issued by the State of Kentucky prior to that date were not based on a licensing program that was at least equivalent to Indiana['s] licensing program. This information was provided to you on April 22, 2014 in the presence of your legal counsel.

18. The fact that the Petitioners had already passed an Indiana-approved examination, at the Respondent's suggestion, was not factored into the decision-making when the Petitioners' applications for reciprocity-based licenses were denied. It does not appear that the Respondent still had a record of the Petitioners' 2008 examinations at the time the decision was made.

19. On September 4, 2014, Steven Zavislak filed an application for an Indiana elevator mechanic license based on having at least three years' experience in the industry. In support of his application, Zavislak attached a copy of his Kentucky elevator mechanic license, issued on October 14, 2011.

20. Zavislak also submitted documentation showing elevator mechanic licenses for the State of Nevada—issued August 28, 2013, and August 14, 2014—the State of West Virginia—issued expiring May 30, 2015—and the Commonwealth of Virginia—expiring July 31, 2015. No documentation was submitted showing that Zavislak had passed Indiana's approved certification exam or an exam from any other state.

21. The Respondent granted Zavislak's application on the basis of his Kentucky license and issued him an Indiana elevator mechanic license on September 10, 2014. It did not inquire into whether Zavislak had taken an exam equivalent to Indiana's approved certification exam.

22. On December 30, 2014, Arthur Mullarkey filed an application for an Indiana elevator mechanic license. Mullarkey specifically noted on his application that his Kentucky elevator mechanic license was attached. Mullarkey's Kentucky License was issued on February 2, 2012.

23. The Respondent granted Mullarkey's application on the basis of his Kentucky license and issued him an Indiana elevator mechanic license on February 2, 2015. It did not inquire into whether Mullarkey had taken an exam equivalent to Indiana's approved certification exam.

## Conclusions of Law

The issue presented in this administrative appeal is whether the Petitioners are entitled to elevator mechanic licenses under Indiana Code § 22-15-5-12(b)(1).[6] Applying the law set forth in this decision to the factual findings supported by the evidence, the ALJ hereby reaches the following conclusions of law with respect to this issue:

1. The Petitioners here filed applications seeking licenses from the Respondent; they are asking the Respondent to take action as an agency. Accordingly, the Petitioners bear the burdens of proof and production. Ind. Code § 4-21.5-3-14(c); Krantz Bros. Constr. Corp., 581 N.E.2d at 938.

   Because this is not a matter in which the Respondent is seeking to deprive the Petitioners of a protected property or liberty interest, however, the higher standards of proof used in those cases are not applicable here. Cf. Pendleton, 747 N.E.2d at 64. Instead, the usual standard of proof for administrative appeals set forth in Indiana Code § 4-21.5-3-27(d)—that of substantial and reliable evidence—applies.

2. Indiana did not have a licensing scheme for elevator mechanics until the General Assembly added Section 22-15-5-12 to the Indiana Code in 2002. See Act of March 26, 2002, Public Law 119-2002, § 24, 2002 Ind. Acts 1738, 1756.

3. The elevator mechanic licensing statute as it exists today is virtually identical to the version created in 2002, and provides in relevant part:

   > **(a)** After May 1, 2003, an individual may not act as an elevator mechanic unless the individual holds an elevator mechanic license issued under this chapter. A license is not required for an elevator apprentice.

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[6] Mike Zeller, as noted above, has had a valid license throughout the time period relevant to this particular proceeding. His status as a Petitioner—like that of Zeller Elevator—is that of the employer who filed the applications on behalf of Mark Zeller, Mike Zeller III, and Boeglin. Also, Mike Zeller III has apparently ceased working in the elevator trade, but this Non-Final Order should still be viewed as applying to him nonetheless. And for clarity's sake, this order will refer to the collective group as "Petitioners" as they were all represented by the same counsel and did not present independent or conflicting claims or arguments.

Moreover, the Respondent issued elevator mechanic licenses to the Petitioners on alternate grounds on April 2, 2015. But while this action remedied the licensure issue going forward, it did not ameliorate the Petitioners' claim that their applications for reciprocity-based licenses should have been granted in the first place. So there remains a period of time for which the Petitioners were unlicensed, spanning roughly from the end of December 2013 until the Respondent issued licenses in early April 2015.

**(b)** An individual who is an applicant for an elevator mechanic license must meet one (1) of the following eligibility criteria:

**(1)** Hold an active elevator mechanic license issued by a state that has a licensing program that is at least equivalent to the elevator mechanic licensing program established under this chapter.

**(2)** Satisfy both of the following:

**(A)** Have at least one (1) of the following types of work experience or training:

**(i)** Have at least three (3) years of documented work experience in the elevator industry in construction, maintenance, and service or repair.

**(ii)** Have at least eighteen (18) months experience in the elevator industry in construction, maintenance, and service or repair and have at least three (3) years experience in a related field that is certified by a licensed elevator contractor.

**(iii)** Complete an apprenticeship program that is registered with the Bureau of Apprenticeship and Training of the United States Department of Labor or a state apprenticeship program and that the commission determines is at least equivalent to three (3) years of work experience in the elevator industry in construction, maintenance, and service or repair.

**(B)** Successfully complete a written competency examination approved by the commission.

**(3)** Successfully complete an elevator mechanic's program that consists of extensive training and a comprehensive examination that the commission has determined is at least equivalent to both the work experience required under subdivision (2)(A)(i) and the competency examination established under subdivision (2)(B).

**(4)** Furnish acceptable proof to the department of:

**(A)** at least three (3) years work experience in the elevator industry in construction, maintenance, service or repair; and

**(B)** current performance of the duties of an elevator mechanic in Indiana without direct supervision;

and apply for the license on or before May 1, 2003.

Ind. Code § 22-15-5-12.[7] This statutory program therefore contains four routes to licensure as an elevator mechanic. Subsection (b)(2) allows

[7] The only changes to the statute since its adoption dealt with the effective date of the licensing requirement and the cut-off for a grandfathering application. The 2002 version of subsection (a) did not contain the May 1, 2003, effective date, and subsection (b)(4)'s deadline was originally March 1, 2003. These changes were made during the

licensure by experience and examination. Subsection (b)(3) allows licensure following approved training and examination. Subsection (b)(4) is the grandfathering provision by which the Respondent granted the Petitioners' licenses in 2003. And subsection (b)(1) is the provision at issue in this matter, and allows licensure by reciprocity.[8]

4. So in order to succeed in their claim here, the Petitioners must produce substantial and reliable evidence showing that they are entitled to an Indiana elevator mechanic license because they held an active elevator mechanic license issued by a state that has a licensing program at least equivalent to the elevator mechanic licensing program established under Indiana Code 22-15-5. Cf. Sutto v. Bd. of Med. Registration & Examination of Ind., 242 Ind. 556, 562, 180 N.E.2d 533, 536 (1962).

   It is undisputed that the Petitioners hold active elevator mechanic licenses issued by Kentucky. They claim that Kentucky's licensing program is at least equivalent to the program established in Indiana.

5. Like Indiana, Kentucky did not have a licensing program for elevator mechanics until recently. Its program was established in 2011, see 2010 Ky. Acts 1743–54, and the most relevant portions are codified at Sections 198B.4009, 198B.4013, 198B.4015, and 198B.4017 of the Kentucky Revised Statutes.

6. Section 198B.4009(1) states "[a] person shall not work as . . . an elevator mechanic unless licensed by the department."

7. Section 198B.4013 currently provides, in pertinent part:

> An applicant for an elevator mechanic license or an accessibility and residential elevator mechanic license shall demonstrate one (1) or more of the following to be eligible for licensure:
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> **(a) 1.** Proof the applicant for an elevator mechanic license has not less than thirty-six (36) months of work experience in the elevator industry, in construction, maintenance, service, repair, or any combination of these activities as verified by current and previous employers, or equivalent

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2003 Session of the General Assembly. See Act of May 5, 2003, Public Law 141-2003, § 15, 2003 Ind. Acts 1059, 1070–72.

[8] Indiana Code § 22-15-5-12 also contains subsections (c) through (g), which deal generally with the process for application, the duration of a license, and the requirement that a license be carried by the holder and presented upon request. There is no claim that the Petitioners failed to comply with any of these additional provisions in applying for their reciprocity-based licenses.

experience while serving in the United States military services; and

**2.** Passage of a written, oral, or computerized examination administered by the department or the department's designee based upon the most recent referenced codes and standards for full licensure;

**(b)** **1.** Proof the applicant for an accessibility and residential elevator mechanic license has not less than twelve (12) months of work experience in the elevator industry, in construction, maintenance, service, repair, or any combination of the activities verified by current and previous employers, or equivalent experience while serving in the United States military services; and

**2.** Passage of a written, oral, or computerized examination administrated by the department's designee based upon the most recent referenced codes and standards for full licensure;

**(c)** Proof the applicant has worked without direct and immediate supervision as an elevator constructor, maintenance, or repair person for not less than three (3) years immediately prior to July 1, 2011;

**(d)** Certificate of completion from a nationally recognized training program for the elevator industry such as the National elevator Industry Educational Program, National Association of Elevator Contractors, or an equivalent program approved by the commissioner for elevator mechanic licensure;

**(e)** For accessibility and residential elevator mechanic licensure, a certificate of completion from a nationally recognized training program specifically designed for the accessibility and private residence lift, such as the National association of Elevator Contractors, or an equivalent program approved by the commissioner; or

**(f)** **1.** Certificate of completion of an apprenticeship program for elevator mechanics, having standards substantially equal to those of KRS 198B.400 to 198B.540; and

**2.** Proof of registration with the Bureau of Apprenticeship and Training, United States Department of Labor, or a state apprenticeship council.

Ky. Rev. Stat. § 198B.4013(2). The language regarding accessibility and residential elevator mechanic licenses was added to the statute in 2013. 2013 Ky. Acts 119–20. Also, the current subsection (2)(c) was originally subsection (2)(b) and contained an additional requirement that an application for licensure based on having three years' experience prior to July 1, 2011, must be submitted within one year after July 1, 2011. Id. at 119. This provision—by that time moot—was deleted in the 2013 reorganization and amendment.

8. Section 198B.4015 states:

> **(1)** An applicant for licensure as an . . . elevator mechanic under KRS 198B.4013 who applies to the department prior to July 1, 2012, shall be licensed by the department without completing the licensure requirements as established in KRS 198B.400 to 198B.540, if the applicant is currently licensed, certified, or registered as an . . . elevator mechanic in another state whose standards are substantially equal to those in KRS 198B.400 to 198B.540.
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> **(2)** Prior to July 1, 2012, an applicant who does not qualify for licensure under KRS . . . 198B.4013 or subsection (1) of this section shall qualify for licensure by showing a minimum of three (3) years of verifiable experience engaging in business as an . . . elevator mechanic in this state.
>
> **(3)** After July 1, 2012, licensure under this section shall cease.

9. Finally, Section 198B.4017 provides:

> Any person, sole proprietor, partnership, or corporation holding a valid elevator or fixed guideway system license from a state that has licensing, education, and experience requirements substantially equal to or greater than those of KRS 198B.400 to 198B.540, and which grants licensing privileges to persons licensed in this state, may be issued an equivalent license in this state upon terms and conditions determined by the department. The terms and conditions shall be promulgated as an administrative regulation by the department.

10. Kentucky's statutory licensing program for elevator mechanics therefore also created multiple paths to licensure. Sections 198B.4013(2)(a) and (2)(b) provide for licensure based on experience and examination. Section 198B.4013(2)(c), in conjunction with Section 198B.4015, provides a limited (and now-expired) process for grandfathering into the license program. Sections 198B.4013(2)(d), (2)(e), and (2)(f) provide for licensure based on

completion of approved training programs. And Section 198B.4017 provides for reciprocity-based licenses.

11. There is no clear standard for when a state's elevator mechanic licensing program is "at least equivalent" to Indiana's, and when it is not. But in Sutto, the Indiana Supreme Court faced a similar issue with respect to whether a Kentucky chiropractic license was issued pursuant to qualifications that were "substantially equivalent" to the qualifications required for an Indiana chiropractic license. Sutto, 242 Ind. at 561, 180 N.E.2d at 536.

    The Court, lacking any other authority for that phrase, looked at the everyday definitions of those two words and determined that "the Legislature, when it used the phrase 'substantially equivalent' in the context of the Chiropractic Act of Indiana meant that which is equal in value in essential and material requirements." Id. at 566, 180 N.E.2d 538. In the absence of any other guideposts, it seems reasonable to apply that same test here with respect to the statutes permitting reciprocity under Indiana's elevator mechanic licensing program.

12. It is apparent that, at a macro level, the statutory scheme for licensing elevator mechanics in Kentucky as it was enacted in 2011 is almost a mirror-image of Indiana's scheme from 2002. Both programs require licensing to practice in the trade and provide four ways to be licensed: grandfathering, reciprocity, experience and examination, and completion of an approved training program and examination.

    Additionally, both states mandate continuing education in order to renew an elevator mechanic license. See Ind. Code §§ 22-15-5-12(d)(2), -15(c), Ky. Rev. Stat. §§ 198B.4023(7), 198B.4025. And each state sets fees for licensing and renewal, imposes certain administrative requirements upon license holders, and authorizes the imposition of sanctions on license holders. Ind. Code §§ 22-15-5-12, -16, 675 Ind. Admin. Code 12-3-15, Ky. Rev. Stat. §§ 198B.4023, 198B.4031, 815 Ky. Admin. Reg. 4:040.

    In fact, perhaps the largest substantive difference between the two programs is that Indiana's license is issued for a two-year period with the eight-hour continuing education requirement only applying to the second year. But Kentucky's license is renewed annually, and each year has an eight-hour continuing education requirement.

    So if anything, Kentucky's licensing program might be viewed as *more* stringent than Indiana's. But regardless, it certainly is at least equal in value in essential and material requirements.

13. An examination of the statutes on a more micro level—specifically, on the level of the states' respective grandfathering provisions—produces similar results.

    Substantively, qualification under Indiana's grandfathering clause requires an applicant to show that they possessed at least three years' experience in the elevator industry and that they were currently working as an elevator mechanic without direct supervision. Ind. Code § 22-15-5-12(b)(4). Kentucky's grandfathering clause also requires three years' experience in the elevator industry, but *all* of those years must consist of work without direct and immediate supervision, rather than Indiana's requirement that the *current* employment be such. Compare id. with Ky. Rev. Stat. § 198B.4013(2)(c).

    So again, Kentucky's grandfathering clause might also be viewed as setting a higher standard than Indiana's. But like the licensing program as a whole, it is at least equal in value in essential and material requirements.[9]

14. The crux of the Petitioners' claim is that this statutory comparison ends the matter: that Kentucky's scheme is clearly at least equivalent to Indiana's, separated only by the different timeframes during which the provisions were enacted. And, the Petitioners argue, this "is a classic distinction without a difference" (Pets. Proposed Findings at ¶ 24) because these sorts of legislative enactments are promoted by the same industry stakeholders and naturally cycle through different state legislatures on different timetables.

15. The Respondent's argument, however, hinges entirely on this gap in time between the statutes' enactment dates. Specifically, the Respondent's argument is that when the Petitioners grandfathered into the Kentucky licensing program—through which they were not required to submit proof of examination—the window for doing the same in Indiana had been closed for nearly a decade. So the Respondent says that Kentucky's licensing scheme was not at least equivalent to Indiana's until after July 1, 2012, when Kentucky's own grandfathering window closed and it required an examination for all new licensees.

    Thus, the Respondent claims that the Petitioners "do not hold an active elevator mechanic license issued by a state that has a licensing program that is at least equivalent to the elevator mechanic licensing program established in the State of Indiana as the *current* State of Indiana program requires a testing component." (Resp. Proposed Findings at ¶ 12 (emphasis added).) In effect,

[9] By way of comparison, the Kentucky licensing program from Sutto required "attendance of at least four thousand 45-minute academic hours" of certain classes, whereas Indiana's just required "four thousand hours." Sutto, 242 Ind. at 564, 180 N.E.2d at 537. Presuming that the word "hours" as used in the Indiana statute meant 60-minute hours, the Court viewed completion of only 4,000 45-minute hours—75% of the Indiana requirement—as not a "substantially equivalent" program. Id. at 566, 180 N.E.2d at 538.

the Respondent stakes out the position that no reciprocity licenses will ever be granted to any individual whose out-of-state license was obtained after May 1, 2003, if that out-of-state license was obtained without an examination submitted to the reciprocal state (e.g., any out-of-state grandfathered licenses issued after May 1, 2003).[10]

16. This issue largely turns on a question of statutory interpretation, which is a question of law. Moryl v. Ransone, 4 N.E.3d 1133, 1137 (Ind. 2014). For several reasons the ALJ concludes that the Petitioners' argument in this matter stands on better ground.

17. To begin with, "[t]he first and often the only step in resolving an issue of statutory interpretation is the language of the statute. Nothing may be read into a statute which is not within the manifest intention of the legislature as ascertained from the plain and obvious meaning of the words of the statute." State v. Indianapolis Newspapers et. al, 716 N.E.2d 943, 946 (Ind. 1999) (internal quotations and citations omitted). And here it is reasonable, from the plain and obvious language of the statutes, to read Indiana's reciprocity provision in the manner that the Petitioners implicitly assert—i.e., as permitting issuance of a license whenever the out-of-state license was obtained in a manner that is at least equivalent to *any* of the avenues laid out in Indiana's program.

    This is because the Indiana licensing program to which a reciprocity applicant must show equivalence, by definition, includes *all* of Indiana's statutory licensing scheme for elevator mechanics—not just the provisions which require an examination. See Ind. Code § 22-15-5-6(7) ("'Licensing program' means the program for licensing elevator contractors, elevator inspectors, and elevator mechanics established under this section and sections 7 through 16 of this chapter.") A plain reading of the reciprocity provision itself leads to the same result. See Ind. Code § 22-15-5-12(b)(1) ("at least equivalent to the elevator licensing program established *under this chapter*" (emphasis added)). And as it remains, the chapter of the Indiana Code specified in the reciprocity provision and the definition of "licensing program" still contains a grandfathering provision.

    Nothing in the statute indicates any contrary purpose to this. See Cox v. Worker's Comp. Bd., 675 N.E.2d 1053, 1057 (Ind. 1996) (words in statutes are given their plain and ordinary meaning "unless a contrary purpose is clearly shown by the statute itself"). Certainly it would have been an easy step for the General Assembly to clearly exclude the grandfathering provision, either by saying so in subsection (b)(1) or by repealing the grandfathering provision after its availability closed.

[10] Unless, presumably, the General Assembly extends the expiration date of Indiana's grandfathering clause; which has happened once before.

So when interpreting the statute, and given that the "primary goal is to determine and give effect to the intent of the legislature," Moryl, 4 N.E.3d at 1137, an obvious conclusion to draw from the constancy of the statute here is that the General Assembly intended to allow holders of out-of-state grandfathered licenses to be granted reciprocity in Indiana even after May 1, 2003. Nothing in the statute says otherwise, and while this is not as straightforward as legislative acquiescence, "[i]t is just as important to recognize what the statute does not say as it is to recognize what it does say." Dugan, 793 N.E.2d 1034, 1036 (Ind. 2003). And the statute here simply does not say what the Respondent claims.

Likewise, there are no administrative regulations or other published guidelines promulgated by the Respondent or any other responsible entity to indicate that the reciprocity provision excludes or limits any of the other avenues to licensure. This also could have been done, see Ind. Code § 22-13-2-13, but again the absence of action over the course of a decade strongly indicates a level of acceptance with the language of the statutes as they are plainly written.

18. Additionally, prior to July 1, 2012, Kentucky's program did not require an examination. And the Petitioners could not have received their Kentucky licenses during the window of time that grandfathering was permissible in Indiana because Kentucky had no statutory licensing program in effect at all. There was no Kentucky license to be sought; no examination to take.

    The Respondent does not contest the validity of the Petitioners' Kentucky licenses now, though, or argue that they were not issued in accordance with Kentucky's statutory licensing program. Rather, Respondent says that the Petitioners needed those valid Kentucky licenses *and* an Indiana examination—but that particular combination of prerequisites does not parallel *any* of the licensing provisions of Indiana's program.

19. Moreover, Indiana's licensing renewal provisions do not require the applicant to take an examination. See Ind. Code § 22-15-5-12(d). An Indiana elevator mechanic who grandfathered into the licensing program in 2003 would never have to take a written examination at any point, yet could remain fully qualified to hold an elevator mechanic license in Indiana.

    Had the disputes concerning the Petitioners' continuing education not arisen, this would have been true of them. So even assuming that the language of the statue is ambiguous, it is challenging to endorse an interpretation that an examination is a missing "essential and material requirement" for a holder of a grandfathered out-of-state license when that same essential and material requirement would *never* exist for a holder of a grandfathered in-state license.

20. Perhaps most significant, however, is the fact that both Zavislak and Mullarkey were issued elevator mechanic licenses by the Respondent pursuant to subsection (b)(1) and on the basis of possessing elevator mechanic licenses issued through Kentucky's licensing program prior to July 1, 2012, by way of that state's grandfathering provision. Yet their Indiana licenses were issued immediately, without incident or inquiry.

    The Respondent's interpretation of this statute loses force when it so clearly applied the statute in the opposite manner just two months later—particularly when its interpretation was not (and is not) set forth in any rule, regulation, or policy document. This undercuts the Respondent's bright-line position in two distinct and persuasive ways.

21. First, this makes it appear that the Respondent is applying different standards to different individuals—or forcing individuals to play by different, shifting, rules—without predictability or uniformity, and without an identifiable or rational distinction between the applicants. The Respondent had no explanation, at least, for the disparate treatment between the Petitioners and Zavislak and Mullarkey.

    Such a position would be perilous to carry forward. Agencies are allowed to change their mind on standards and guidelines, see Natural Res. Def. Council v. Poet Biorefining—North Manchester, LLC, et. al, 15 N.E.3d 555, 564 (Ind. 2014) (just because agency's past interpretation of regulation was reasonable "does not foreclose the possibility that a different (and even opposite) interpretation might be equally reasonable"), but that does not mean that standards and guidelines can be applied randomly or invented on the fly for certain individuals. "[P]arties are entitled to fair notice of the criteria by which their petitions will be judged by an agency, and . . . judicial review is hindered when agencies operate in the absence of established guidelines." Cnty. Dep't of Public Welfare of Vanderburgh Cnty. v. Deaconess Hosp., Inc., 588 N.E.2d 1322, 1327 (Ind. Ct. App. 1992), trans. denied.

    Whether this sort of agency behavior is arbitrary, capricious, or an abuse of discretion would be a question on judicial review rather than a determination to be made by an ALJ hearing evidence as an initial fact-finder. See United Refuse Co., Inc., 615 N.E.2d at 104 (remanding for new hearing where ALJ conducted reasonableness review of agency action rather than de novo hearing).[11] But consistency and fairness should be hallmarks of an agency's application of the laws it charged with enforcing, just as they are for

[11] An agency action is arbitrary and capricious when "it is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case, or without some basis which would lead a reasonable and honest person to the same conclusion." Ind. Dep't of Nat. Resources v. Ind. Coal Council, Inc., 542 N.E.2d 1000, 1007 (Ind. 1989), cert. denied, 493 U.S. 1078.

courts. Cf. A.B. v. State, 949 N.E.2d 1204, 1215 (Ind. 2011) ("[u]niformity in the interpretation and application of the law is the keystone of our system of jurisprudence" (quoting Warren v. Ind. Tel. Co., 217 Ind. 93, 103, 26 N.E.2d 399, 405 (1940))).

22. Second, that the Respondent granted reciprocity-based licenses to Zavislak and Mullarkey just months after denying the Petitioners' applications is factually very significant, especially when there is no indication that the Respondent has revoked the licenses of Zavislak and Mullarkey out of concern that they are unqualified to work as elevator mechanics in Indiana because they have not taken an examination.

    At this stage of the proceeding, this constitutes uncontroverted evidence of exactly what the Petitioner is seeking to prove: that in the Respondent's own view and actual practice, a license issued by Kentucky pursuant to that state's grandfathering provision *is* a license issued by a state with a licensing program that is at least equivalent to Indiana's licensing program.

23. Finally, and in a related sense, there is an element of simple fairness and common sense to consider in light of the facts and background of this matter.

    Here, the Petitioners applied for grandfathered licenses in Indiana in 2003, when that option was available and based on their years of experience in the elevator industry. The Respondent granted those licenses.

    The Petitioners completed the necessary continuing education requirements and the Respondent renewed their licenses in 2005. But in 2007, a dispute arose with respect to the pre-approval requirement for in-house continuing education and their licenses were not renewed.

    During administrative review of that agency action, the Respondent informed the Petitioners of the NCPCCI exam and that passage of it would entitle them to licenses. The Petitioners then took the exam, passed it, and the Respondent issued their licenses in 2008.

    In 2010, another dispute arose with respect to the Petitioners' continuing education and the 2008 licenses were not renewed. During administrative review of *that* agency action in early 2014, the Respondent informed the Petitioners of the reciprocity-based licensing process.[12]

[12] The ALJ does not intend to imply that either the reciprocity-based licensing process or the license by examination process were secrets kept by the Respondent, only divulged to the Petitioners because of the administrative appeals. To the contrary, both processes were clearly written into Indiana Code § 22-15-5-12 and available for the Petitioners—experienced practitioners in the very industry regulated by that statute—to utilize without needing to be told of them by the Respondent.

The Petitioners promptly filed applications for reciprocity-based licenses, using in support licenses validly issued by Kentucky almost two years prior in accordance with Kentucky's statutory licensing program. And the Petitioners were then told by the Respondent that their Kentucky licenses were not good enough; that they needed to have taken an examination as well, even though that was not required under Kentucky's program when their licenses were issued and the Petitioners had already taken an Indiana exam. But now, the Respondent has again issued licenses to the Petitioners, based again on the NCPCCI exam.[13]

So the Petitioners have the years of experience in the trade required under any of the statutory provisions of either state licensing program. They successfully grandfathered into Indiana's licensing program and then into Kentucky's under a more stringent grandfathering provision. And they successfully completed an approved examination that allowed them to twice receive licenses in Indiana—with one issuance occurring before and one issuance occurring after the denial of the reciprocity-based licenses. In short, no-one disputes that the Petitioners possess (or possessed) the necessary skills to work safely as elevator mechanics in Indiana or Kentucky.

"Context may disambiguate," McDonald v. Schweiker, 726 F.2d 311, 313 (7th Cir. 1983), whether that be in clarifying a statutory term, id., assessing a political campaign statement, Bauer v. Shepard, 620 F.3d 704, 716 (7th Cir. 2010), cert. denied 131 S.Ct. 2872, or assigning responsibility under an agreed order, SEC v. First Choice Mgmt. Servs., 678 F.3d 538, 543 (7th Cir. 2012). Here, context helps disambiguate an agency's denial of applicants on the basis of a narrow, unstated—and then singularly used—interpretation of a statute.

In light of the background here, the history of disputes between the parties that has vividly colored their past interactions, and the subsequent issuance of licenses to other similarly qualified individuals, the 2014 denial of reciprocity-based licenses smacks of vindictiveness. See Walczak v. Labor Works—Fort Wayne, LLC, 983 N.E.2d 1146, 1148 (Ind. 2013) ("[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck").[14] And while not in and of itself dispositive, this context tips the scales farther in the Petitioners' favor.

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[13] It is not clear from the record whether these new licenses are based on the Petitioners taking the NCPCCI exam a second time, or if they are based on the 2008 exam. The ALJ's assumption is that it was a new exam—otherwise the Petitioners could just continue seeking new licenses based on the 2008 exam and the question of needing a reciprocity-based license would never have arisen.

[14] It should be emphasized, however, that there are now new players in many of the roles here. And counsel of record for the parties here have been exceptionally civil and professional throughout each proceeding over which this ALJ presided.

24. To summarize, as a matter of statutory interpretation Kentucky's statutory licensing program for elevator mechanics is at least equivalent to Indiana's, just as the specific provision that permitted the Petitioners to grandfather into the Kentucky program is at least equivalent to the same provision in Indiana's licensing program. If anything, Kentucky's licensing program and grandfathering provision have more stringent requirements than Indiana's.

    The fact that Indiana no longer permitted applicants to grandfather into its licensing program by the time Kentucky enacted its licensing program and permitted limited grandfathering does not change this result. Not when the statutory scheme would have permitted the Petitioners to continue as licensed elevator mechanics without ever taking an examination had the issues related to continuing education requirements never arisen. And not when the evidence in the record unequivocally shows that reciprocity-based Indiana licenses have been issued to other applicants with grandfathered Kentucky licenses with no concern for if those applicants had also passed approved examinations.

    Accordingly, the ALJ concludes that the Petitioners have met their burden. They have shown by substantial and reliable evidence that they were entitled to Indiana elevator mechanic licenses pursuant to Indiana Code § 22-15-5-12(b)(1), on the basis of their Kentucky elevator mechanic licenses, when they applied in April 2014. Those applications should therefore have been granted and the Respondent should have issued the Petitioners Indiana elevator mechanic licenses.

25. Indiana Code § 22-15-5-12(e) provides that "[a]n initial elevator mechanic license issued under this chapter expires on December 31 of the second year after the license was issued."

    Here, that means the Petitioners' reciprocity-based elevator mechanic licenses would have had expiration dates of December 31, 2016. The Petitioners have instead requested that these licenses expire on December 31, 2015, to align with the renewal period for Mike Zeller's license. But in the ALJ's view, the language of the statute above does not afford the flexibility they seek.

26. Additionally, Petitioners Mark Zeller and Andrew Boeglin currently hold licenses issued by the Respondent on April 2, 2015. Presumably, these licenses would then expire on December 31, 2017. The ALJ leaves it to the parties to determine whether those two Petitioners will operate under their new license, their reciprocity-based license, or both.

**Decision and Non-Final Order**

The applications submitted by Mike Zeller and Zeller Elevator Company, seeking elevator mechanic licenses for Mark Zeller, Mike Zeller III, and Andrew Boeglin on the basis of the reciprocity provision set forth in Indiana Code § 22-15-5-12(b)(1) are hereby **GRANTED**. The Respondent is directed to issue elevator mechanic licenses to those three individuals, effective as of the date the applications were received by the Respondent and expiring on December 31, 2016.

The Indiana Fire Prevention and Building Safety Commission is the ultimate authority in this matter. It will consider this non-final order in accordance with the provisions of Indiana Code §§ 4-21.5-3-7 thru -29 and the terms of the Notice of Non-Final Order also issued today.

Date: June 3, 2015

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