ATTORNEY FOR PETITIONER
Matthew G. Langenbacher
Indianapolis, Indiana

ATTORNEYS FOR RESPONDENT
Pamela M. Walters
Chelsea E. Smith
Indianapolis, Indiana

STATE OF INDIANA
BEFORE THE BOARD OF FIREFIGHTING PERSONNEL STANDARDS AND EDUCATION

IN RE:	)	ADMINISTRATIVE CAUSE NO.
	)	
CLINE	)	14-26-BFPSE
	)	
	)	

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

The Petitioner in this matter, John T. Cline, appeals an order issued by the Indiana Board of Firefighting Personnel Standards and Education and permanently revoking his firefighter certifications. For the reasons set forth below, the Administrative Law Judge concludes that no punishment is warranted or may imposed.

Procedural Background

On November 6, 2014, the Indiana Board of Firefighting Personnel Standards and Education issued an order revoking the Petitioner's certifications as a firefighter. On November 12, 2014, the Petitioner filed an administrative appeal of this action pursuant to Indiana Code § 4-21.5-3-7 and also sought a stay of effectiveness of the Board's order. On November 17, 2014, the undersigned Administrative Law Judge set the matter for a hearing as to the Petitioner's request for a stay and, based on the particular circumstances presented, issued an order temporarily staying the Board's order until a final stay ruling was issued after the preliminary hearing.

The stay hearing was held on December 4, 2014. The Petitioner and the Respondent, the Indiana Department of Homeland Security, both appeared and presented evidence. On

December 11, 2014, the ALJ issued a stay order containing preliminary findings of fact and preliminary conclusions of law. The stay order vacated the November 17, 2014, temporary stay order and imposed a stay of effectiveness of the Board's November 6, 2014, order until such time as this matter is resolved on the merits and a final order is issued by the Board.

On January 21, 2015, the Board granted the Petitioner's petition for administrative review and the undersigned was assigned to adjudicate this appeal on its merits. A telephonic initial prehearing conference was held on February 11, 2015. At the initial prehearing conference, the parties stated that informal resolution of the matter would not be possible, but they expressed the belief that little, if any, additional evidence—beyond that admitted at the stay hearing—would be necessary. They therefore did not desire an additional evidentiary hearing and mutually agreed instead to submit written briefs on the legal questions presented, with supplementary evidence only as required.

The ALJ approved this form of proceeding and established a briefing schedule, with which both parties complied. The Respondent filed its brief on April 15, 2015. The Petitioner filed his response on May 15, 2015, with one item of supplementary evidence that was admitted without objection. No additional briefs were filed by either side.

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 the agency when the agency is, in essence, prosecuting a petitioner for a regulatory violation. See Peabody Coal Co. v. Ralston, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). But when it is the petitioner who has sought an agency action or claimed entitlement to an exemption from regulatory requirements, the burden rests upon that petitioner. See 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) (quoting In re Moore, 453 N.E.2d 971, 972 (Ind. 1983)), trans. denied; see also Pendleton, 747 N.E.2d at 64.

Findings of Fact

As noted above, the parties agreed to a procedure by which the findings of fact in this matter would be based on the evidence previously presented at the stay hearing, plus any supplementary evidence included with the parties' substantive briefs. Both parties presented documentary evidence, and at the stay hearing the Petitioner presented testimony from two

witnesses.[1] [2] Based solely on that evidentiary record and those matters officially noticed, the ALJ hereby makes the following findings of fact:[3]

1. The Sellersburg Volunteer Fire Department, in Sellersburg, Indiana, provides fire protection and related services to an area of nearly sixty-five square miles with approximately 21,000 residents.

2. The SVFD has between fifty and sixty active members, spread among five stations, and fields over five hundred calls per year.

3. Each day around 10,000 trucks carrying hazardous materials transit the ten miles of Interstate 65 that run through the SVFD.

4. The SVFD's governing body is its Board of Directors and it operates in accordance with published by-laws. It also has several officer positions, including Chief and Deputy Chief.

5. The positions of Chief and Deputy Chief are elected every four years by the active members of the SVFD. In the event the Deputy Chief is unable to fulfill the four-year term for any reason, a new Deputy Chief is selected by special election to fill the remainder of the term.

6. Under the SVFD's by-laws, to be eligible for a staff officer position such as Deputy Chief, the SVFD member must have been an active member of the SVFD for at least five years and have obtained a minimum of a first class firefighter rating, Fire Officer II or higher. This may be waived by a majority vote of the Board of Directors if the requirement would cause hardship on the SVFD.

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[1] At the hearing, the Petitioner sought to admit into evidence three documents: the Sellersburg Volunteer Fire Department By-Laws and Constitution (Pet. Ex. 1), a Criminal Background Check related to the Petitioner (Pet. Ex. 2), and the agenda from the November 3, 2014, meeting of the Indiana Board of Firefighting Personnel Standards and Education (Pet. Ex. 3). The Petitioner's Exhibit 2, however, was already included in the Respondent's Exhibit B. Accordingly, only the Respondent's Exhibit B is in the record. With his substantive brief, the Petitioner also introduced into evidence an email from the Sellersburg Volunteer Fire Department (Pet. Ex. 4). This additional evidence was admitted without objection from the Respondent.

The Respondent put forth two pieces of documentary evidence at the stay hearing: the minutes from the November 3, 2014, meeting of the Indiana Board of Firefighting Personnel Standards and Education (Resp. Ex. A), and a packet of information concerning the Petitioner that the Indiana Board of Firefighting Personnel Standards and Education considered at its November 3, 2014, meeting (Resp. Ex. B). The Respondent did not supplement its evidence when it filed its brief.

[2] The Petitioner presented two witnesses at the stay hearing: Boyce Adams, Chief of the Sellersburg Volunteer Fire Department, and the Petitioner. The Respondent presented no witnesses.

[3] With the exception the last finding, which is based on the new evidence presented by way of Petitioner's Exhibit 4, these findings of fact are identical to those made following the stay hearing.

7. The Petitioner joined the SVFD as an apprentice member in 1982 and became a full active member in 1984.

8. On February 18, 2000, the Petitioner was charged in Clark County, Indiana, under Cause No. 10D01-0002-CF-000014, with three counts of Class C felony Child Exploitation and nineteen counts of Class A misdemeanor Possession of Child Pornography.

9. The dates of the conduct underlying the Petitioner's charges were March 13, 1999, June 3, 1999, and June 19, 1999.

10. On February 20, 2001, the Petitioner filed a plea agreement in which he pleaded guilty to one count of Child Exploitation and one count of Possession of Child Pornography. The trial court judge accepted his plea and entered judgments of convictions on those two counts. The remaining counts were dismissed.

11. The Petitioner received an eight-year sentence in the Indiana Department of Correction with all but sixty days suspended, two years of home incarceration, and was ordered to pay court costs and probation user fees.

12. The Petitioner served his sentence within DOC and then remained on probation until 2009. He complied with the requirements of his probation.

13. As a result of his convictions, the Petitioner was placed on the Indiana Sex Offender Registry for ten years after his conviction. He was removed from the Registry in 2011.

14. The criminal proceedings against the Petitioner were well-known in the community and within the membership of the SVFD.

15. In 2004, the Petitioner was elected to the position of Deputy Chief of the Sellersburg Volunteer Fire Department to fill the remainder of an expiring term.

16. The Petitioner was re-elected to the position of Deputy Chief in 2006 and 2010.

17. Being Deputy Chief is the Petitioner's full-time job, with the salary set by the SVFD Board of Directors. The Petitioner makes roughly twenty-two dollars an hour as Deputy Chief, plus a two thousand dollar annual incentive pay.

18. As a volunteer fire department, regular active members of the SVFD—aside from a few mechanics, business managers, and staff officers—are not paid.

19. The Petitioner is forty-eight years old, married, and has two young children. His wife works as a trainer at a 911 dispatch center.

20. On December 8, 2014, the SVFD was set to have elections again for the position of Deputy Chief. The Petitioner was nominated for the position again and was unopposed.

21. If the Petitioner did not meet the certification requirements for being Deputy Chief as set forth in the SVFD by-laws on December 8, he would be ineligible for election to the position of Deputy Chief, absent a waiver from the Board of Directors.

22. If the Petitioner's certifications were revoked after election to the position of Deputy Chief, he would lose his position of Deputy Chief—absent a waiver from the Board of Directors—but might be able to maintain his active membership as he joined the SVFD prior to the establishment of mandatory firefighter certification requirements.

23. As Deputy Chief, the Petitioner assists the Chief by overseeing day-to-day operations within the SVFD and assists in coordinating with other township fire departments and communities.

24. On October 6, 2014, the Respondent received an anonymous letter regarding the Petitioner and addressed to the employee responsible for providing staff support to the Board. The letter stated:

> I am forwarding a copy of the chronological case summary covering the arrest and convictions Mr. John T. Cline.
>
> Mr. Cline pled guilty to 3 class C Felonies of child exploitation and 19 class A misdemeanors, possession of child pornography charges. Mr. Cline was sentenced to an 8 year fixed term of imprisonment at the Indiana Department of Corrections, suspended to 30 days at the Indiana Department of Corrections. This information has been kicked under the carpet and partially kept from the membership of the fire department and the residents of the Tri-Twp. Fire Protection District.
>
> Mr. Cline currently serves as Deputy Fire Chief of the Sellersburg Volunteer Fire Department covering 65 square miles and 21,000 residents.
>
> I am asking the Board to review this situation. Should Mr. Cline be allowed to hold this high ranking positon [*sic*]? Should his certifications be revoked to prevent this?

> I am an employee of the town of Sellersburg and feel I must remain anonymous to avoid possible retaliation.

(Resp. Ex. B.)

25. Attached to the letter was a print-out of a search result from the Indiana Division of State Court Administration's Odyssey case management system, conducted on September 30, 2014, showing the Petitioner with two entries: Cause No. 10D01-0002-CF-000014 and a 1994 traffic citation. Also attached was a print-out of the chronological case summary for Cause No. 10D01-0002-CF-000014, obtained the same day.

26. This letter and the attachments were provided to the Board for consideration at its meeting on November 3, 2014.

27. At the November 3, 2014, Board meeting, the Respondent recommended that the Board revoke the Petitioner's certifications. The Board voted to do so.

28. The minutes from the November 3, 2014, Board meeting state the following with respect to the revocation of the Petitioner's certifications:

> He has been convicted of 3 class C felonies of child exploitation and 19 Class A misdemeanors of possession of child pornography. Chief Cline serves as Deputy Fire Chief of the Sellersburg VFD.

(Resp. Ex. A at 8.)

29. The Petitioner was not present for the November 3, 2014, meeting of the Board.

30. The author of the letter submitted to the Respondent has not been identified.

31. On November 6, 2014, the Respondent issued an order to the Petitioner, revoking his certifications "due to the felony convictions against you." (November 6, 2014, Order at 1.) As a consequence the following certifications were to be revoked:

> Driver Operator Mobile Water Supply;
> Fire Inspector I/II;
> Fire Investigator;
> Fire Officer I and II;
> Fire Class Firefighter;
> Hazmat Awareness, Operations, and Technician;
> Instructor I;
> Second Class Firefighter;

Fire Officer – Strategy and Tactics; and
Technical Rescuer Awareness.

32. A number of these certifications were received or renewed after the Petitioner was charged, convicted, and sentenced, including:

    Driver Operator Mobile Water Supply: 2014
    Fire Inspector: 2010
    Fire Officer I and II: 2001 and 2002
    Instructor I: renewed every two years since 2001[4]
    Technical Rescue Awareness: 2009

33. Without the Petitioner serving as Deputy Chief, the SVFD would lose a considerable resource with respect to the Petitioner's intangible leadership skills and relationships with other entities and organizations.

34. The SVFD has a limited number of certified Hazmat technicians on its roster, of which the Petitioner is one. And only the Petitioner and Chief Adams have actual experience dealing with a Hazmat incident.

35. On December 8, 2014, the Petitioner—unopposed—was re-elected to the position of Deputy Chief for the SVFD. His term runs from January 1, 2015, until December 31, 2018.

Conclusions of Law

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 the issues presented:

1. The Respondent here seeks to impose a sanction upon the Petitioner, in the form of revoking the Petitioner's granted certifications, pursuant to a regulatory scheme. Accordingly, the Respondent bears the burdens of proof and production. Ind. Code § 4-21.5-3-14(c); Peabody Coal, 578 N.E.2d at 754.

   However, the Petitioner has a protectable property interest in his certifications—which permit him to be employed—as they may be revoked only for certain causes. Cf. Burke, 612 N.E.2d at 565 ("members of a police department may be terminated only for cause and, therefore, enjoy a protectable property interest in their continued employment with their police

[4] The Petitioner's Instructor I certification was up for renewal on December 1, 2014, but he testified that owing to these proceedings he did not re-apply because he did not want "to cause any other friction."

department" (quoting Kennedy v. McCarty, 778 F. Supp. 1465, 1470 (S.D. Ind. 1991)). Nevertheless, this protected property interest does not rise to the level of a protected liberty interest, see Moore, 453 N.E.2d at 972–72 (noting that protected interest in law license "pales in significance" in comparison to protected liberty interests), and therefore the evidentiary standard the Respondent must meet is that of a preponderance of the evidence. Pendleton, 747 N.E.2d at 64–65; Burke, 612 N.E.2d at 565.

2. The Indiana Board of Firefighting Personnel Standards and Education is established by statute. Ind. Code § 22-12-3-1. The Board is charged with adopting rules to establish basic training requirements for full-time and volunteer firefighters. Ind. Code § 36-8-10.5-7.

   The Board therefore provides voluntary certification programs for fire service personnel, fire department instructors, and firefighting training and education programs. 655 Ind. Admin. Code 1-1-4. Additionally, the Board imposes a mandatory training program for all new firefighters, including those in volunteer fire companies. 655 Ind. Admin. Code 1-3-5.[5]

3. The Board's regulations also grant it the authority to revoke certifications that it has issued, under certain conditions. The Board's action here was predicated on a regulation currently providing that

> (b) The board may take action with respect to the . . . certification of any fire service person . . . in accordance with provisions of IC 4-21.5-3-6 and IC 22-12-7-7(4) upon information provided to the board that the fire service person . . . has:
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> * * *
>
> (2) been convicted of an offense if the acts that resulted in the conviction have a direct bearing on whether or not the person shall be entrusted to perform the activities permitted under any certification held by the fire service person . . . . Such convictions shall include, without limitation, arson and child molestation;

[5] The Petitioner is not, however, subject to this mandatory training program as he entered the fire service prior to January 1, 1988. See 655 Ind. Admin. Code 1-3-11. For the same reason, the Petitioner is exempt from the statutory requirement that certain basic training requirements be completed before he could be elected to a leadership position within a volunteer fire company. See Ind. Code §§ 36-8-10.5-1, -6(b).

655 Ind. Admin. Code 1-1-7(b)(2) ("the sanction regulation").[6]

4. Indiana Code § 4-21.5-3-6 establishes the notice requirements under Indiana's Administrative Orders and Procedures Act for agency orders that, among other things, "impose[] a sanction on a person or terminate[] a legal right, duty, privilege, immunity, or other legal interest of a person." Ind. Code § 4-21.5-3-6(a)(2)(A). And Indiana Code § 22-12-7-7(4) permits the Board to impose the following sanctions with respect to holders of certificates it has issued:

    (A) Permanently revoke the license.
    (B) Suspend the license.
    (C) Censure the person to whom the license is issued.
    (D) Issue a letter of reprimand to a person to whom the license is issued.
    (E) Place a person to whom the license is issued on probation.

5. In order to satisfy its burden of proof and production in this matter, the Respondent must therefore show by a preponderance of the evidence that the Petitioner has been convicted of an offense, and the acts resulting in that conviction have a direct bearing on whether he should be entrusted to perform the activities permitted under the certifications he holds.

   Assuming this burden is met, the Respondent must also show that the appropriate sanction to be levied upon the Petitioner is to permanently revoke all of his firefighting certifications.

   The ALJ concludes that neither burden is met.

   There Is No Evidence of the Acts Resulting in the Petitioner's Convictions

6. It is undisputed that the Petitioner has been convicted of crimes. But there is no evidence at all of the actual acts that resulted in the convictions. All that exists in the record is the fact of the convictions themselves, but that is not enough—that is not what the sanction regulation requires. See 655 Ind. Admin. Code 1-1-7(b)(2) (sanctions permissible upon conviction "*if the acts that resulted in the conviction* have a direct bearing on whether or not the person shall be entrusted to perform the activities permitted" under his or her certifications).

[6] The Board is therefore both the initiating body to the disciplinary action and the ultimate authority following this administrative appeal. The Respondent is charged with providing staff support to the Board, Ind. Code § 22-12-3-7, but does not independently issue orders imposing sanctions upon holders of firefighting certificates. Nevertheless, the Respondent made the staff recommendation to revoke the Petitioner's certificate and takes the Board's initial action as its own for the purposes of this administrative appeal.

The Respondent argues that convictions "like child molestation . . . bring into question whether the fire service person . . . can be given the public's trust." (Resp. Br. at 4.) A fire service person "is tasked with interacting the public at large generally in a time of crisis" and "the public expects to have a certain amount of trust in these individuals who are tasked with providing the assistance needed for the crisis." (Resp. Br. at 4.) "Actions like child molestation bring into question the trustworthiness of the offender as the action demonstrates that this trust has been broken," the Respondent claims (in a rather circular argument), and "[i]t is the Board's responsibility when presented with these types of convictions to review whether the person should be entrusted to care for the public at large." (Resp. Br. at 4.) This position is flawed.

For one thing, the Petitioner was not convicted of child molesting. The Petitioner was convicted of child exploitation and possession of child pornography. Those crimes, while obviously having some commonality with respect to the nature of the victim, are different in their requisite elements. Compare Ind. Code § 35-42-4-3 (child molesting) with Ind. Code § 35-42-4-4 (child exploitation—child pornography). Additionally, the risks and rates of cross-over between offenders of those two classes of crimes—specifically, any likelihood of non-production possession offenders committing "contact" offenses—are not at all clear. See U.S. Sentencing Commission, Report to Congress: Federal Child Pornography Offenses 169–206 (Dec. 2012) (analyzing links between prior criminal sexually dangerous behavior and non-production child pornography offenders in federal sentencing schemes). Put more simply, it would be an over-generalization to automatically equate the crimes or the criminals who commit them.

And regardless of any similarities in the crimes, the offenders, or whether the doctrine of *ejusdem generis* might apply here, see Town of Avon v. W. Cent. Conservancy Dist., 957 N.E.2d 598, 602–03 (Ind. 2011), the express mention of a specific crime in the sanction regulation as an example of convictions the Board is concerned about does not vitiate the requirement that the acts underlying the conviction be considered—even if information is brought forward concerning a child molesting or arson conviction. The express mention is not a blanket authorization to impose a sanction simply "when presented with these types of convictions," as the Respondent claims.

In fact, the Respondent states the opposite view in its very next sentence: "When the Board is given information about the conviction, the Board must examine whether the actions committed would have a direct bearing on how the person will perform as a fire service person." (Resp. Br. at 4.) Yet no such analysis is presented in this case.

7. To illustrate the point a little more clearly, the substantive provisions underlying the Petitioner's were Indiana Code §§ 35-42-4-4(b)(2) and -4(c). As they existed in 1999, those provisions provided that

> (b) A person who knowingly or intentionally:
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> * * *
>
> (2) disseminates, exhibits to another person, offers to disseminate or exhibit to another person, or sends or brings into Indiana for dissemination or exhibition matter that depicts or describes sexual conduct by a child under eighteen (18) years of age;
>
> commits child exploitation, a Class D felony. However, the offense is a Class C felony if it is committed using a computer network (as defined in IC 35-43-2-3(A)).

Ind. Code § 35-42-4-4(b)(2). And

> (c) A person who knowingly or intentionally possesses:
>
> (1) a picture;
> (2) a drawing;
> (3) a photograph;
> (4) a negative image;
> (5) undeveloped film;
> (6) a motion picture;
> (7) a videotape; or
> (8) any pictorial representation;
>
> that depicts or describes sexual conduct by a child who is less than sixteen (16) years of age, or appears to be less than sixteen (16) years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography, a Class A misdemeanor.

Ind. Code § 35-42-4-4(c).

There are therefore a virtually limitless myriad of factual permutations that might underlay convictions under these two statutes. It is not enough to claim that any—or all—of the permutations would constitute conduct having a direct bearing on whether a firefighter should be entrusted to perform his duties or distill the acts underlying the convictions into such basic concepts as "possessing child pornography" or "exploiting a child."

Such a view would equate to saying that merely being convicted of the offense is sufficient by itself and would therefore render the "acts that resulted in the conviction" language superfluous. Both the rules of statutory and regulatory interpretation and the plain and unequivocal language of the sanction regulation dictate otherwise. Spaulding v. Int'l Bakers Servs., Inc., 550 N.E.2d 307, 309 (Ind. 1990) ("Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute."); cf. Natural Res. Def. Council v. Poet Biorefining—North Manchester, LLC, et. al, 15 N.E.3d 555, 561, 564 (Ind. 2014) ("We will not interpret a regulatory phrase in a way that both produces absurd results and vitiates other regulatory provisions for the sake of strictly applying the 'plain meaning' canon of regulatory interpretation.").

8. The sanction regulation also requires consideration specifically of whether the acts underlying the conviction bear on whether person should be entrusted "to perform the activities permitted" under his or her certifications. 655 Ind. Admin. Code 1-1-7(b)(2). Again, there is no evidence to support this level of analysis.

   It was the Respondent's burden to prove this specific link by a preponderance of the evidence and that burden was not met. To the contrary, the evidence in the record shows that not only *can* the Petitioner be entrusted to perform the duties authorized by his certifications, but he *has* been performing those duties—admirably—since his convictions.

The Sanction Is Inappropriate

9. Even if the Respondent had proven, by a preponderance of the evidence, that the acts underlying the Petitioner's conviction bore on whether he should be entrusted to perform the duties authorized by his certifications, the question then follows as to whether permanently revoking those certifications is an appropriate response. It is not.

10. As the Respondent correctly notes, the Board has a number of potential sanctions available to it and "has the option to use one sanction or a combination of sanctions."[7] (Resp. Br. at 5); Ind. Code § 22-12-7-7(4). "The Board is afforded the opportunity to examine each issue presented on a case by case basis and to apply the sanction that best fits the Board's concerns." (Resp. Br. at 5.) The sanction regulation also, it is worth noting, contemplates the possibility that no sanction be imposed despite a proper showing that a

[7] The Respondent, however, says that "[t]he options range from revocation to fine." (Resp. Br. at 5.) This is not correct. The sanction regulation authorizes the Board to take action in accordance with Indiana Code § 22-12-7-7(4). 655 Ind. Admin. Code 1-1-7(b). The sanctions authorized under Indiana Code § 22-12-7-7(4) do not include imposing a civil penalty, as the Respondent claims—that power falls under Indiana Code § 22-12-7-7(5).

certification holder has been convicted of an offense whose underlying acts bear on his or her trustworthiness. Compare 655 Ind. Admin. Code 1-1-7(b) ("board *may* take action" (emphasis added)) with655 Ind. Admin. Code 1-1-7(a) ("board *shall* impose an appropriate sanction" (emphasis added)).

In other words, which—if any—sanction(s) are to be imposed is a matter of discretion based on the facts and circumstances of the case and within the limits of the sanction regulation and Ind. Code § 22-12-7-7(4).

11. But the Respondent then argues that "the Board reviewed the actions that resulted in the conviction and determined that a sanction was appropriate" and "[b]ased on the action associated with the convictions presented, the Board chose to revoke the Petitioner's certifications." (Resp. Br. at 5.) As an argument here in support of imposing that same sanction, this is both incorrect and irrelevant.

    As noted above, the Board did *not* consider the acts underlying the Petitioner's convictions and fashion a sanction to fit those acts. It could not have, as there is no evidence whatsoever of those acts. What the Board did was consider the facts of the convictions themselves—and an erroneous view of the number of those convictions at that—and impose a sanction based solely on the convictions.

    But more significantly, the Respondent cannot prove that a sanction is appropriate here by using as evidence that the Board imposed it. The Board's action in imposing the sanction is exactly what is being appealed, and it is not determinative. As the ALJ wrote in the Stay Order:

> [I]n an administrative proceeding, the review by an ALJ is de novo. Ind. Code § 4-21.5-3-14(d). The ALJ does not—and cannot—defer to the initial determination or order made by the agency, and does not simply conduct a post-hoc analysis of whether that initial determination or order is reasonable, arbitrary, or capricious. Ind. Dep't of Natural Res. v. United Refuse Co., Inc., 615 N.E.2d 100, 104 (Ind. 1993). The ALJ sits as an independent fact-finder, weighs the evidence presented by the parties, and reaches an independent conclusion. Id. In other words, rather than simply reviewing the agency order or action giving rise to the administrative proceeding, the ALJ sits as a form of administrative trial court before which that agency action must be freshly prosecuted, challenged, or sought.

    (Stay Order at 7–8.) It was therefore the Respondent's responsibility in this proceeding to prove anew that in *this* case, with *this* Petitioner and based on the acts that underlay his convictions, the appropriate sanction was permanent

revocation of the Petitioner's certifications. This was not done, nor does the Respondent argue for any alternative sanction(s).

12. In fact, all the evidence points to a result opposite from imposing the most extreme sanction available under Indiana Code § 22-12-7-7(4). The evidence here shows that no sanction would be appropriate.

13. For starters, the Petitioner pleaded guilty to a Class C felony. In 2001, this carried a fixed sentence of four years' incarceration and up to an additional four years added for aggravating circumstances (or two years removed for mitigating circumstances). Ind. Code § 35-50-2-6(a). He also pleaded guilty to a Class A misdemeanor, which then carried a maximum sentence of one year in prison. Ind. Code § 35-50-3-2. Following his plea, the trial judge sentenced the Petitioner to eight years' incarceration, with all but sixty days being suspended.

    As noted in the Stay Order, the CCS in the record does not indicate the factors that led the Petitioner's trial judge to impose the maximum sentence allowable and yet suspend so much of it that the Petitioner spent almost no time incarcerated. A reasonable inference from this evidence, however, is that the judge considered the Petitioner to be a minimal threat to the community—or a minimal risk to re-offend—and felt safe allowing the Petitioner to return to his life, subject to the terms of his probation and the requirements of the Sex Offender Registry.

14. Given this form of criminal sentence, it seems inappropriate to impose the harshest administrative penalty possible—particularly in light of the timeliness (or lack thereof) of the penalty being imposed.

    The Respondent is correct that "[t]he regulation does not provide any timetables," (Resp. Br. at 4), and that the Board is not expressly prohibited from imposing an administrative sanction when it learns of a conviction after the fact—which makes sense, because it would obviously be impossible for the Board to impose a sanction based on actions underlying a conviction *before* the conviction happened. But here, the Respondent seeks that sanction fourteen years after the Petitioner was convicted, sentenced, and released from prison; five years after the Petitioner successfully completed his probation; and three years after the Petitioner was removed from the Sex Offender Registry. Such an intervening span of time between wrongdoing and administrative action—and when that span of time is free of any legal entanglement—weighs heavily against imposing any sanction at all, much less the most extreme sanction available.

"Indiana should be the worst place in the nation to commit a crime and the best place to get a second chance once you've done your time."[8] Following that guidance, the ALJ does not ignore that Petitioner here committed serious crimes. But he admitted responsibility by pleading guilty and served his criminal sentence, term of probation, and time on the Sex Offender Registry without incident. In the absence of a contrary showing from the Respondent, the Petitioner should therefore be permitted to return to society as a productive and respectable citizen and public servant.

And the evidence unequivocally shows that the Petitioner has done just that, and more. He has remained clear of legal trouble, advanced himself professionally by obtaining training and emergency response certifications, and has now been re-elected three times to a key leadership position—with critical responsibilities—in a growing and active volunteer fire department that protects both a substantial community and a significant stretch of Indiana's infrastructure. Permanently revoking all of the Petitioner's firefighter certifications—or imposing any form of sanction—would therefore be an unnecessary obstacle to his opportunity to continue life on the right path, a loss to the fire station he helps lead, and a disservice to the community over which he stands watch.

Application of the Sanction Regulation to the Petitioner in this Case Violates the Ex Post Facto Clauses of the U.S. and Indiana Constitutions

15. The Petitioner also argues that the sanction imposed violates the Ex Post Facto Clauses of both the United States and Indiana Constitutions.[9] (Pet. Br. at 10–13.) His argument is that a previous version of the sanction regulation applied only to specific certificates—not all certificates. (Pet. Br. at 10.) The

[8] Press Release, Office of Indiana Governor Mike Pence, Governor Pence Signs Law Enforcement, Public Safety Bills on Final Day of Session (April 29, 2015) available at http://www.in.gov/gov (select "Newsroom" drop-down menu at left; follow "News Releases" hyperlink; follow "View All Press+Releases"; then select April 29, 2015 in calendar).

[9] Because of the conclusions with respect to the Respondent's failure to carry its burden of proof in the issues above, this constitutional issue might easily be considered moot. See Citizens Nat'l Bank v. Foster, 668 N.E.2d 1236, 1241 (Ind. 1996) (discussing constitutional avoidance). But the final authority in this matter is within its power to view the same evidence, or order additional fact-finding, and ultimately reach a different conclusion on those same factual questions. Ind. Code § 4-21.5-3-29. And if the Petitioner's constitutional claims were not also in this non-final order, they then might never be addressed at the agency level at all.

It is therefore likely in the best interest of both parties, the final authority, and any reviewing court(s), to have all of the issues presented in this case addressed at this stage. Cf. Natural Res. Def. Council v. Poet Biorefining—North Manchester, LLC, et. al, 15 N.E.3d 555, 561, 564 (Ind. 2014) (though reviewing courts are not bound by agency conclusions of law, on judicial review courts grant deference to agency interpretations of statutes and regulations agency is charged with enforcing). Whether any of those issues eventually drop out as being unneeded in reaching a decision is a choice for those subsequent reviewing authorities.

sanction regulation was not amended to incorporate all certificates until 2009, he says, and therefore it is inappropriately being applied in a retroactive and punitive manner.[10] (Pet. Br. at 10–11.) The Petitioner is not claiming that the sanction regulation is facially unconstitutional. Instead, he claims that it is unconstitutional as it is applied to him. An as-applied challenge asks only for a declaration that "the challenged statute or regulation [is] unconstitutional on the facts of the particular case." Dowdell v. City of Jeffersonville, 907 N.E.2d 559, 564–65 (Ind. Ct. App. 2009) (quoting Sanjour v. E.P.A., 56 F.3d 85, 92 n.10 (D.C. Cir. 1995)), trans denied.

16. In actuality, the sanction regulation has changed more significantly than the Petitioner believes and has actually undergone substantial evolution in the past fifteen years. It originally stated:

> (a) Upon receipt of evidence that information provided to the board was falsified, upon which a certification was issued, the board shall impose an appropriate sanction following the provisions of IC 4-21.5-3-6 and IC 22-12-7-7(4).
>
> (b) Review may be initiated by the board in the absence of external written requests or complaints.

655 Ind. Admin. Code 1-1-7 (1999). So at the time the Petitioner committed his crimes, the sanction regulation only permitted the Board to revoke a firefighter's certifications if the firefighter was found to have provided false information on his or her application. This was also the regulatory language at the time the Petitioner pleaded guilty and was sentenced. See 655 Ind. Admin. Code 1-1-7 (2001).

It was not until after the Petitioner's conviction that the sanction regulation was substantively amended to permit the Board to revoke a firefighter's certifications based on acts resulting in convictions. But even then, as the Petitioner highlights, the language only addressed specific certifications:

> (a) Upon receipt of evidence that information provided to the board, upon which a certification was issued was falsified, the board shall impose an appropriate sanction following the provisions of IC 4-21.5-3-6 and IC 22-12-7-7(4).
>
> (b) The certification of any Instructor I or II/III may be suspended or revoked by the board in accordance with the

[10] The Respondent did not provide any counterarguments as to this issue. The Respondent, as the party carrying the burden of proof, filed its brief first and addressed only the acts underlying the Petitioner's convictions and the particular sanction imposed. The Petitioner's constitutional claims—first presented in the stay hearing—were then briefed in his response. The Respondent had the opportunity to file a reply brief but chose not to do so.

provisions of IC 22-12-7-7(4) upon information provided to the board that such Instructor I or II/III has:

> (1) failed to uphold and respect a student's right to privacy, dignity, and safety; and
> (2) been convicted of an offense if the acts that resulted in the conviction have a direct bearing on whether or not the person shall be entrusted to serve as an Instructor I or II/III.

(c) Review may be initiated by the board in the absence of external written requests or complaints.

655 Ind. Admin. Code 1-1-7 (2004); 25 Ind. Reg. 1159 (filed Nov. 16, 2001). So at this point, the sanction regulation only permitted the Board to suspend or revoke a firefighter's Instructor I and Instructor II/III certifications based on prior criminal conduct. And even then, the required showing was much higher than it is now—subsections (b)(1) and (b)(2) were written in the conjunctive, meaning *both* needed to be satisfied before the sanction could be imposed.

Several more years would pass before the sanction regulation was amended to reflect its current form. See Ind. Admin. Code 1-1-7 (West Supp. 2010); 20090114 Ind. Reg. 655080429FRA (filed Dec. 15, 2008). In fact, the Petitioner had completed his term of probation for his conviction and had only two years left on the Sex Offender Registry—during which time he had been serving as a firefighter, to include being elected and re-elected as Deputy Chief—before the sanction regulation permitted the Board to revoke all of his certifications.

17. Generally speaking, absent "strong and compelling reasons," statutes are to be given prospective application, unless they address "merely procedural and remedial matters." Gosnell v. Ind. Soft Water Serv., Inc., 503 N.E.2d 879, 880 (Ind. 1987). Even in the case of a procedural or remedial statute, however, retroactive application is to be the exception and not the requirement. Id. This rule applies with equal force to administrative regulations. Indpls. Convention & Visitors Ass'n v. Indpls. Newspapers, Inc., 577 N.E.2d 208, 215 (Ind. 1991). And as discussed in greater detail below, the sanction regulation as it was applied here addresses neither procedural nor remedial matters.

18. Again, there is some obvious support for retroactive *operation* of the sanction regulation. Specifically, the regulation is written to allow the imposition of sanctions based on acts resulting in a conviction; so in that respect, the regulation will *only* apply to past conduct. But that makes it no different than any criminal statute, all of which—by logical necessity— punish only past

conduct. That alone does not allow the regulation to survive an ex post facto challenge or even make retroactive application permissible.

19. Retroactive *application* is different than the necessarily retroactive operation that occurs with the sanction regulation. Retroactive application asks whether a regulation is intended to apply to conduct that occurred before the enactment of the relevant regulatory language. Some statutes and regulations are so intended, and some are not. See, e.g., Bourbon Mini-Mart v. Gast Fuel & Servs., 783 N.E.2d 253, 260–61 (Ind. 2003) (noting that federal Comprehensive Environmental Response Compensation and Liability Act was remedial and consistently interpreted to apply retroactively despite absence of explicit language to that effect, and that General Assembly intended Indiana's Underground Storage Tank laws to operate in similar fashion); Indpls. Convention & Visitors Ass'n, 577 N.E.2d at 215–16 (holding that Indiana Public Records Act was intended to operate prospectively and did not grant public right to access records existing prior to effective date of Act).

    Here, an initial question is therefore whether the sanction regulation—when it was amended to permit the imposition of sanctions, on any certifications, for acts resulting in a conviction that bear on the firefighter's trustworthiness to perform his or her duties—was intended to apply to acts underlying convictions that occurred prior to that amendment.

20. No strong and compelling reasons for such an application can be found or were identified, either in the record or in the regulatory scheme. Certainly the evidence is clear that the regulation was not amended in response to the acts underlying the Petitioner's convictions specifically, or intended to apply retroactively because of those acts, as the Board was wholly unaware of the Petitioner's criminal conduct until the Respondent received the anonymous letter on October 6, 2014. And again, the sanction regulation goes beyond mere remedial or procedural matters.

    The only conclusion to draw from the language of the sanction regulation is that it applies prospectively, with some required retroactive operation.[11] Whether the critical date at which it may apply is the date of the acts underlying the conviction or the date of the conviction itself is not an issue in this proceeding. But regardless, the sanction regulation cannot apply to the Petitioner here, where the acts, the conviction, and even the incarceration all occurred well before the language existed.

21. The conclusion that the sanction regulation could not be applied to the Petitioner's convictions, however, does not fully resolve whether the

[11] Considering the statutory and regulatory scheme as a whole, with its various grandfathering provisions and exemptions, provides additional support to this conclusion as it makes it apparent that the scheme in its entirety was meant to operate prospectively.

Petitioner has a valid ex post facto claim. That requires analysis of the nature of the sanction regulation and the intended and practical impact of its application.

22. The Ex Post Facto Clauses of the United States and Indiana Constitutions[12] prohibit the enactment of "any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." Wallace v. State, 905 N.E.2d 371, 377 (Ind. 2009) (internal quotations omitted). "The underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties." Id.

    Ex post facto protections "appl[y] only to laws which deprive a person accused or convicted of a crime of a substantial personal right which he would have had at the time he committed the offense. . . . not to laws which change private or civil rights." Warner v. State, 265 Ind. 262, 267, 354 N.E.2d 178, 182 (1976); see also Locke v. New Orleans, 71 U.S. 172, 173 (1867) (law authorizing retroactive levy of tax not subject to ex post facto prohibition because "[e]x post facto laws embrace only such as impose or affect penalties or forfeitures; they do not include statutes having any other operation").[13]

    In some instances, the threshold question is whether the statute is criminal or non-criminal; more frequently, however, the question is whether the law is procedural or substantive. Warner, 265 Ind. at 267, 354 N.E.2d at 182. Procedural law includes "that portion of the law which prescribes the method for enforcing a right or obtaining redress for the invasion of that right," whereas substantive law "is that portion of the law which creates, defines, and regulates rights." Hayden v. State, 771 N.E.2d 100, 102 (Ind. Ct. App. 2002) (quoting State v. Fletcher, 717 P.2d 866, 870 (Ariz. 1986)), trans. denied. "[A] procedural change is not ex post facto." Ritchie v. State, 809 N.E.2d

[12] The U.S. Constitution prohibits ex post facto laws in two places. U.S. Const. art. I, § 9 ("No bill of attainder or ex post facto law shall be passed."); U.S. Const. art. I, § 10 ("No state shall . . . pass any . . . ex post facto law."). Indiana's constitutional protection from ex post facto laws states that "[n]o ex post facto law . . . shall ever be passed." Ind. Const. art. 1, § 24.

[13] It is not absolutely clear under Indiana law whether ex post facto protections extend to administrative regulations. Both the U.S. and Indiana Constitutions use the word "law," which is generally viewed as different than a "regulation." But the U.S. Supreme Court has applied ex post facto analysis to federal regulations, see Peugh v. United States, 133 S.Ct. 2072 (2013) (Ex Post Facto Clause violated by retroactive application of Federal Sentencing Guidelines promulgated by U.S. Sentencing Commission that imposed higher sentence), and ex post facto analysis has been used in Indiana with respect to local ordinances, see Dowdell v. City of Jeffersonville, 907 N.E.2d 559 (Ind. Ct. App. 2009) (local ordinance barring sex offenders from city parks violated Ex Post Facto Clause when defendant had been charged, convicted, served his sentence, and completed his Sex Offender Registry time prior to ordinance being enacted), trans. denied. There appears to be little difference, if any, between those challenged provisions and the one here—an administrative regulation promulgated by a statutory board pursuant to its statutory authority—particularly in light of the regulation's impact and the fact that the sanction itself is provided for in a law.

258, 263–65 (Ind. 2004) (citing Dobbert v. Florida, 432 U.S. 282, 293 (1977)), cert. denied.

Here, the sanction regulation affects more than mere procedure. By way of comparison, it does more than change the standard of review for a matter, see Mediate v. Indianapolis, 407 N.E.2d 1194, 1195–96 (Ind. Ct. App. 1980) (ex post facto protections not applicable when statutory amendment deleted "de novo" standard of review from administrative appeals before police merit board), or change the manner by which a sanction or charge may be brought, see Crawford v. State, 669 N.E.2d 141, 150 (Ind. 1996) (statutory amendment allowing murder charge to be brought by information or indictment not subject to ex post facto analysis), or impose court fees upon defendants, see Hayden, 771 N.E.2d at 103–04 (imposition of fees was to both criminal and civil cases and served procedural function of funding court operations).

Rather, the sanction regulation as it was used retroactively in this matter vitiated a substantial right of the Petitioner—his vested interest in his continued professional certification as a firefighter and employment as Deputy Chief of the SVFD as a direct result of his criminal convictions. Cf. Hibler v. Globe American Corp., 128 Ind. App. 156, 173, 147 N.E.2d 19, 23 (1958) (contract of employment granted litigant substantial right "just as valuable, just as essential, and just as enforceable as [his] potential right to compensation"). As such, it is appropriate to consider whether this use violated the Ex Post Facto Clauses.

23. The operative question now is therefore if, in being applied as it was here, the sanction regulation imposed additional punishment on the Petitioner. Wallace, 905 N.E.2d at 377–78.

    This question is resolved using the same "intent-effects" test enunciated in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963), for claims under both the U.S. and Indiana Constitutions. See Wallace, 905 N.E.2d at 378–79 (adopting intent-effects test for ex post facto claims under Indiana Constitution).[14] The only difference is in the required standard of proof. For

[14] In Taylor v. State Election Bd., 616 N.E.2d 380 (Ind. Ct. App. 1993), overruled on other grounds by Snyder v. King, 958 N.E.2d 764, 777 (Ind. 2011), the Court of Appeals examined whether a statutory amendment that operated to remove an elected official from office for criminal convictions occurring before enactment of the amendment was a violation of Indiana's Ex Post Facto Clause. The Court of Appeals concluded that there was no violation "merely because [the statutory amendment] dr[ew] upon facts which occurred prior to the passage of the statute." Id. at 383. The Court of Appeals said that "[t]he legislature's aim here was not to punish past activities but to regulate elected officials and candidates based upon their general characteristics, one of which is trustworthiness. The public considers trustworthiness to be a relevant and basic qualification of persons who serve the citizens as elected officials." Id. at 383–84. Because the statute was not intended to punish but instead to "regulat[e] a present situation based on trustworthiness," there was no additional punishment imposed and thus no ex post facto violation. Id. at 384.

the federal claim, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id. at 378 n.7 (quoting Smith v. Doe, 538 U.S. 84, 92 (2003)). But for the state claim, the standard is lower. "Instead, a statute is presumed constitutional, and the party challenging its constitutionality has the burden of overcoming the presumption by a contrary showing." Id.

The Petitioner raises both state and federal protections in his claim.[15] Under both—and under AOPA in presenting the claim as an affirmative defense—he bears the burden of proof. But regardless of the level of proof required for the intent-effects test, be it the "contrary showing" or the "clearest proof," the uncontroverted evidence that the Petitioner has presented in this matter meets the hurdle.

24. The first step in the intent-effects test is "to determine first whether the Legislature intended the Act to be a regulatory scheme that is civil and non-punitive." Id. at 379. If so, then the next step would be to "further examine whether the statutory scheme is so punitive in effect as to negate that intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty." Id. at 378. But "[i]f the intention of the legislature was to impose punishment, then that ends the inquiry, because punishment results." Id.

    In Wallace, the Indiana Supreme Court noted the difficulty in assessing the General Assembly's intent in enacting the statutory scheme in question—the Indiana Sex Offender Registration Act—because there was no legislative history available and the Act did not contain a purpose statement. That challenge is not present here because the administrative rule in question contains a purpose statement. It expressly provides that

> (b) The purpose of this rule is to provide for the administration of a voluntary program for certification of:

Taylor is notably similar to the facts of the Petitioner's case and would very persuasive—if not outright dispositive—on the Petitioner's claim were it not for Wallace and the fact that Taylor precedes Wallace's adoption of the intent-effects test. The Court of Appeals in Taylor identifies the legislative intent of the statute and stops; it does not go further as the intent-effects test now requires and conduct an analysis of any punitive effect of the statute's application. It is not clear whether Taylor would have a different outcome post-Wallace, but regardless that case loses much of its persuasive impact here.

[15] He cites, however, almost exclusively to Wallace in his brief. (Pet. Br. at 10–13.) The defendant in Wallace raised both state and federal claims as well, but the court resolved the case only on the state constitutional claim. Wallace, 905 N.E.2d at 384. This was likely because the U.S. Supreme Court had already found a similar statute from another state to survive a challenge under the U.S. Constitution. See Wallace, 905 N.E.2d at 378; see also Lemmon v. Harris, 949 N.E.2d 803, 809 n.14 (Ind. 2011). Here, however, there is no such federal precedent that could be located.

(1) fire service personnel;
(2) fire department instructors
(3) firefighting training and education programs; and
(4) nonfire service persons

by the board.

655 Ind. Admin. Code 1-1-1(b).

This stated civil regulatory purpose is at least somewhat undercut by the evolution of the sanction regulation, though. While it began as a regulation promulgated to ensure that applicants are honest in the information provided on applications to the Board—a fair regulatory aim—and then expanded to create higher standards for certified instructors and protect the dignity of students—another fair regulatory aim—it later expanded further to provide the Board with a mechanism by which to respond to more generalized acts of misconduct, by any certification holder.

This last iteration of the sanction regulation might still be viewed as having a purpose "aimed at regulating the profession and protecting the public," In re Rabideau, 306 N.W.2d 1, 9 (Wis. 1981) (reviewing ex post facto claim related to rules for attorney discipline), although it is a closer call. But regardless, given the clear language of the administrative rule and the overall history of the sanction regulation—and in light of the presumption that the regulation is constitutional—it is safe to at least assume that it was intended as a civil and non-punitive scheme.

25. The next step, then, is to analyze the effect of the sanction regulation as it has been applied to the Petitioner. Under this prong of the intent-effects test, there are seven factors to be considered as guides:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connect is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Wallace, 905 N.E.2d at 379 (quoting Mendoza-Martinez, 372 U.S. at 168–69). No single one of these factors is dispositive and the test is not simply a counting of factors on either side of the scale; rather, the factors must be weighed against each other based on the particular facts of the case. Id.

26. *Affirmative Disability or Restraint*. The sanction here involves a substantial affirmative disability or restraint. If the sanction were imposed, the Petitioner would lose his paid employment as Deputy Chief of the SVFD and only be able to serve, possibly, as an uncompensated volunteer. His career accomplishments, achieved over a span of more than thirty years, would be stripped away. Though the sanction would not require any affirmative action on the Petitioner's part, he would have only a limited recourse to seek a waiver from the SVFD's Board of Directors. Cf. Dowdell, 907 N.E.2d at 566–67 (challenged ordinance did not require affirmative action but to seek exemption, sex offenders "must make a proverbial jump through a number of hoops").

    Additionally, though the affirmative disability and restraint here is not to the level of that imposed through the Sex Offender Registry—a level of restraint with which the Petitioner is already familiar—the sanction here will likely have a degree of the same practical effect of exposing the Petitioner to "profound humiliation," "community-wide ostracism," and "'vigilante justice' which may include lost employment opportunities, housing discrimination, threats, and violence." Wallace, 905 N.E.2d at 380.

    Thus, this factor somewhat favors treating the sanction regulation as punitive when applied to the Petitioner.

27. *Sanctions That Have Historically Been Regarded as Punishment*. The sanction regulation, as it is being applied here, revoked the Petitioner's professional certifications, effectively disqualifying him from his chosen profession. This action has historically been considered—and used as—punishment. See Cummings v. Missouri, 71 U.S. 277, 319–22 (1867).

    In Cummings, the U.S. Supreme Court considered a provision of the Missouri Constitution imposing an oath upon citizens of that state. Id. at 316. The oath contained more than thirty different affirmations; refusal to take the oath rendered the individual incapable of holding "any office of honor, trust, or profit . . . or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private . . . or of acting as a professor or teacher." Id. at 317. Additionally, taking the oath was required "to practice as an attorney or counsellor-at-law," as well as to be "a bishop, priest, deacon, minister, elder, or other clergyman." Id.

    The Supreme Court noted that "[t]he disabilities created by the constitution of Missouri must be regarded as penalties—they constitute punishment." Id. at 320. The Court noted that "[d]isqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." Id. As Blackstone himself said,

"[s]ome punishments . . . induce a disability of holding offices or employments." Id. at 321 (quoting 4 William Blackstone, Commentaries *377). As the Cummings Court summarized,

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. *Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.*

Id. at 321–22 (emphasis added); see also id. at 327 (constitutional clauses did not expressly define crime or declare punishment "but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment were declared" and "they were intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avocations"). "This deprivation is punishment." Id.

The disqualification of the Petitioner from his chosen profession is, as it historically has been, regarded as a punishment. This factor therefore also favors treating the sanction regulation as punitive as it was applied to him.

28. *Finding of Scienter*. "The existence of a *scienter* element is customarily an important element in distinguishing criminal from civil statutes." Wallace, 905 N.E.2d at 381 (quoting Kansas v. Hendricks, 521 U.S. 346, 362 (1997)). "If a sanction is not linked to a showing of *mens rea*, it is less likely to be intended as a punishment." Id.

    The sanction regulation here—much like the Sex Offender Registration Act considered in Wallace—applies to a few strict liability offenses, such as child molesting, that would not include a *scienter* requirement. See id. "However, it overwhelmingly applies to offenses that require a finding of *scienter* for there to be a conviction." Id. And specifically, the two offenses to which the Petitioner pleaded guilty—child exploitation and possession of child pornography—both have express *mens rea* requirements. Ind. Code §§ 35-42-4-4(b)(2), -4(c).

    Thus, as in Wallace, "the third Mendoza-Martinez factor slightly favors treating the effects of the [regulation] as punitive when applied here." Id.

29. *The Traditional Aims of Punishment*. The aims of punishment, traditionally, are retribution and deterrence. Id. Under Indiana's Constitution, however, "the primary objective of punishment is rehabilitation" and not "vindictive

justice." Id. (quoting Ind. Const. art. 1, § 18). Additionally, "there are other objectives including the need to protect the community by sequestration of the offender, community condemnation of the offender, as well as deterrence." Id

In Wallace, the Indiana Supreme Court highlighted that Indiana's Sex Offender Registration Act was different than others around the country that might apply to individuals who are not necessarily convicted of sexual offenses. Instead, Indiana's "applies only to offenders convicted of specified offenses." Id. at 381–82. And while the deterrent effect of the Act's registration and notification requirements might be, in some way, merely incidental to its regulatory purpose, "it strains credulity to suppose that the Act's deterrent effect is not substantial or that the Act does not promote 'community condemnation of the offender.'" Id. at 382 (quoting Abercrombie v. State, 441 N.E.2d 442, 444 (Ind. 1982)). It therefore found this factor to slightly favor treating the Act as punitive.

But in Gonzalez v. State, 980 N.E.2d 312, 318–19 (Ind. 2013), the Indiana Supreme Court considered an amendment to the Sex Offender Registration Act, requiring a lifetime registration in certain instances, as it was applied to a defendant who had already served his time and sentence under a ten-year registration requirement. In that case, this factor weighed in favor of treating the amended Act's effects as non-punitive because the lifetime registration requirement "serve[d] a valid regulatory function by providing the public with information related to community safety" and—significantly—the offender was required to register before the amendment, just for a more limited time. Id. at 319. In other words, the critical distinction was that the statute promoted punitive aims, "but it promoted these aims even when [the defendant] committed his offense and pled guilty" and "these effects apply the same to an offender who is required to register for ten years as to one who is required to register for life." Lemmon v. Harris, 949 N.E.2d 803, 812 (Ind. 2011).

This case hews closer to Wallace than Gonzalez and Lemmon, in that even though the sanction regulation might serve a valid regulatory function, the Petitioner was not subject to the deleterious effects of the sanction regulation when he committed his offenses and served his sentence. That came much later. Moreover, the sanction regulation furthers traditional aims of punishment as it has been applied.

It certainly is meant to protect the community by sequestering the Petitioner—the Respondent says as much when it argues that "[i]t is the Board's responsibility when presented with these types of convictions to review whether the person should be entrusted to care for the public at large" (Resp. Br. at 4)—and, to a lesser extent, might be seen as promoting community condemnation of the Petitioner; at least within the Petitioner's professional community. And while there might be some slight deterrent effect flowing

from the sanction regulation—it is more likely that the criminal penalties for convictions are the real substantial deterrent to firefighters committing crimes—in light of the excessiveness of the penalty available and imposed, it is hard to say that it does not promote a retributive aim of punishment.

Therefore, this factor weighs slightly in favor of the sanction regulation being punitive as it was applied to the Petitioner.

30. *Application Only to Criminal Behavior*. "The fact that a statute applies only to behavior that is already, and exclusively, criminal supports a conclusion that its effects are punitive." Wallace, 905 N.E.2d at 382. While protecting the community from a recidivist offender might be a concern, the Wallace Court noted, "if recidivism were the only concern, the statute would apply not only to convicted sex offenders, but also to other defendants who might pose a threat to society even if they are not convicted." Id.

    In Wallace, the court highlighted that Indiana's Sex Offender Registration Act "applies only to defendants 'convicted' of certain specified offense" and not to those, for example, who plead guilty to another charge not requiring registration or whose convictions are reversed for non-evidentiary reasons. Id. "In sum, it is the determination of guilt of a sex offense, not merely the fact of the conduct and potential for recidivism, that triggers the registration requirement." Id.

    This case is similar. Unlike the Sex Offender Registration Act, the sanction regulation requires examination of the actual acts underlying the conviction and bases the imposition of any sanction on those acts—and not simply the fact of the conviction itself. Nevertheless, "it is the criminal conviction that triggers" the sanction regulation. Id. The regulation does not anticipate imposing sanctions for misconduct that—while perhaps indicating a firefighter presents a threat to the public or should not be entrusted to perform his or her public safety function—does not result in a criminal conviction. Compare, e.g., 655 Ind. Admin. Code 1-1-7(b) with Ind. Code § 16-31-3-14(a) (permitting Respondent to impose sanctions upon holders of emergency medical services certificates or licenses in event of conviction and also if, among other things, holder "engaged in fraud or material deception" in the course of professional services or "engages in a course of lewd or immoral conduct" in connection with professional services). It is only when a conviction is had that the regulation may be applied.

    This factor therefore weighs in favor of treating the sanction regulation as punitive as it was applied to the Petitioner.

31. *Advancing a Non-Punitive Interest.* The next factor requires examination of whether "an alternative purpose to which [the statute] may rationally be connected is assignable for it." Wallace, 905 N.E.2d at 382

(quoting Mendoza-Martinez, 372 U.S. at 168–69). More plainly, does the sanction regulation advance a legitimate regulatory purpose? Id. at 383. This does not require a "close or perfect fit with the nonpunitive aims." Id. (quoting Smith, 538 U.S. at 103). Instead, the requirement is only that "the [sanction regulation] advances a legitimate purpose of public safety." Id.

The Petitioner concedes that this factor weighs in favor of treating the sanction regulation as non-punitive. (Pet. Br. at 12.) This is the result in most cases conducting this analysis. See, e.g., id.; Dowdell, 907 N.E.2d at 570 (defendant conceded that ordinance served regulatory purpose of protecting members of community). Here, in addition to the broad public safety purpose of "protect[ing] the public from repeat offenders," Wallace, 905 N.E.2d at 383, there is also the Petitioner's proffered purpose of "making sure those persons certified by the state can be entrusted with performing those skills," (Pet. Br. at 12), and the administrative rule's stated purpose to provide for the administration of the Board's voluntary certification program, 655 Ind. Admin. Code 1-1-1(b).

Therefore, this factor clearly weighs in favor of treating the effects of the sanction regulation as regulatory and non-punitive as it was applied to the Petitioner.

32. *Excessiveness In Relation to State's Articulated Purpose*. This last factor is often given the greatest weight in the application of the intent-effects test. Wallace, 905 N.E.2d at 383. Courts have looked to several different considerations when examining this factor.

In Wallace, the significant consideration was that "the registration and disclosure [were] not tied to a finding that the safety of the public is threatened" and there was no "individualized finding of future dangerousness." Id. Here also, there was no analysis taken to determine whether such an extreme sanction was merited in the Petitioner's particular case. There was no evidence or examination of the acts underlying his convictions; no investigation; no questioning of the Petitioner or other members of his community.

In short, there was no determination made that the Petitioner was a threat to any member of his community—child or otherwise—as a result of his convictions, nor an individualized determination that he could not be entrusted to perform his duties. And even a cursory attempt to do either reveals the excessiveness of this sanction. Cf. Bleeke v. Lemmon, 6 N.E.3d 907, 918–19 (Ind. 2014) (parole conditions assigned by Parole Board prohibiting offender from interacting with children impermissible when evidence showed offender posed no threat to children).

Also considered in Wallace was that once an offender was on the registry, there was no mechanism for relief—even when there was proof of rehabilitation. Wallace, 905 N.E.2d at 384; see also Gonzalez, 980 N.E.2d at 320 ("The degree to which a prior offender has been rehabilitated and does not present a risk to the public is thus integral to our evaluation of whether an extension of the ten-year registration requirement is reasonable in relation to public protection."). Here too, there is no future recourse for the Petitioner outside of this administrative challenge. The Respondent seeks to "permanently" revoke his certifications—this cannot be undone later by any administrative process through which the Petitioner can show he might once again be entrusted to perform his duties.

Finally, the fact that the Petitioner has served his time and according to our criminal justice system no longer poses a threat to society weighs heavily here. As the Court of Appeals said in Dowdell,

> In other words, the State of Indiana has determined that public safety will no longer be served by tracking Dowdell's whereabouts and imposing the burdens of registration upon him. Indeed, as far as the State was concerned, Dowdell had served his time and met all obligations before the City enacted the Ordinance. The Wallace court observed that if the substance of the law at issue is not tied to a finding that the safety of the public is threatened, there is an implication that the law is excessive. Here, as applied to Dowdell, any connection between enforcement of the Ordinance and protection of the public is attenuated at best, given the fact that the State has determined he is no longer required to register.

Dowdell, 907 N.E.2d at 570–71.

The Petitioner's case is strikingly similar in this sense as well. To summarize, here the Petitioner was charged, pleaded guilty, was sentenced, released, and served his time on probation—and nearly all of his time on the Sex Offender Registry—before the sanction regulation was ever amended to ostensibly permit the action taken here. And yet it was still not for several more years that the Board sought to apply the sanction regulation to the Petitioner. And during all that time, he had been faithfully serving as a firefighter and Deputy Chief, and had even been awarded additional certifications by the Board. To claim that he must be removed from all these pursuits *now*, because suddenly *now* he poses a threat to the public, does not comport with the facts of this case.

Taking these considerations together, this factor therefore weighs strongly in favor of finding the sanction regulation to be punitive as it was applied to the Petitioner.

33. "In summary, of the seven factors . . . relevant to the inquiry of whether a statute has a punitive effect despite legislative intent that the statute be regulatory and non-punitive, only one factor in our view—advancing a non-punitive interest—points clearly in favor of treating the effects of the Act as non-punitive." Wallace, 905 N.E.2d at 384. "The remaining factors particularly the factor of excessiveness, point in the other direction." Id.

    The same result is reached in the Petitioner's case. Only the sixth factor, whether the sanction regulation advances a legitimate non-punitive purpose, weighs in favor of treating the regulation as non-punitive. All others weigh in favor of a conclusion that the effect of the sanction regulation was to impose a punishment upon the Petitioner. And collectively, they far outweigh any contrary conclusion.

    Accordingly, application of the sanction regulation to the Petitioner as occurred in this case is a violation of the Ex Post Facto Clauses of the U.S. and Indiana Constitutions "because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed." Id.

Decision and Non-Final Order

The Respondent has failed to prove by a preponderance of the evidence that the acts resulting in the Petitioner's convictions had a direct bearing on whether the Petitioner should be entrusted to perform the activities permitted under his certifications, and also failed to show that the appropriate sanction in this proceeding would then have been to permanently revoke all of the Petitioner's certifications. In fact, there is no factual basis impose any sanction here—much less the one the Respondent seeks.

Additionally, the Petitioner's misconduct, convictions, and sentence all occurred before such conduct was subject to sanction by the Board, and nothing in 655 Indiana Administrative Code 1-1-7 indicates that it was intended to apply retroactively as was done here. And the resulting retroactive application of that regulation to the Petitioner, in this case, has the effect of imposing additional punishment beyond that which he was subject to when he committed his crimes and is therefore a violation of the Ex Post Facto Clauses of the U.S. and Indiana Constitutions.

The Indiana Board of Firefighting Personnel Standards and Education 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 Notice of Non-Final Order also issued today.

Date: July 17, 2015

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HON. JUSTIN P. FORKNER
Administrative Law Judge
Indiana Department of Homeland Security
302 W. Washington Street
Indiana Government Center South, Rm W246
Indianapolis, Indiana 46204
Telephone: (317) 234-8917
Fax: (317) 232-0146
E-mail: jforkner@dhs.in.gov