

FOR THE PETITIONER, PRO SE
Richard A. Owens
Fort Wayne, Indiana

ATTORNEYS FOR RESPONDENT
Pamela M. Walters
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**STATE OF INDIANA
BEFORE THE INDIANA EMERGENCY MEDICAL
SERVICES COMMISSION**

IN RE:) ADMINISTRATIVE CAUSE NO.
)
OWENS) 14-24-EMSC
)
)

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

The Petitioner in this matter, Richard A. Owens, appeals the denial of his application for certification as an Emergency Medical Technician by the Respondent, the Indiana Department of Homeland Security. The Administrative Law Judge **GRANTS** the Petitioner's application but places it on probation as explained below.

Procedural Background

On October 23, 2014, the Respondent issued an order denying the Petitioner's application for licensure as an EMT. On October 27, 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 agency's determination. His petition was granted, and this matter was subsequently assigned to the undersigned ALJ for adjudication.

The ALJ set the Petitioner's stay request for a preliminary hearing on November 6, 2014. On November 3, 2014, the Petitioner indicated that he no longer desired to seek a stay of effectiveness, and the preliminary hearing was vacated.

The ALJ held a telephonic prehearing conference on the merits of this appeal on December 10, 2014. The parties attempted to resolve the matter informally but were unable to

reach a settlement agreement. The ALJ therefore set the matter for an evidentiary hearing, held on May 4, 2015. Both parties appeared at the hearing and presented evidence and witnesses.

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

At the evidentiary hearing, both parties appeared and presented witnesses.¹ Both parties also submitted documentary evidence at 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:

1. The Petitioner was born on December 15, 1972. He served in the U.S. Army from 1991 to 1995 and received a General (Under Honorable Conditions) discharge. At some point following his discharge, he began training to be an EMT.
2. On July 13, 2000, the Petitioner and two other men were indicted by a federal grand jury in the Northern District of Indiana for violations of 18 U.S.C. §§ 2133(a), 2133(d), and 18 U.S.C. § 2.³ The indictment alleged that on June

¹ The Petitioner’s witnesses were Mr. Matthew Shady, Paramedic Science Program Chair at Ivy Tech Community College in Fort Wayne, Indiana, and Ms. Ra’Shay Wright, the Petitioner’s daughter. The Petitioner himself also testified in narrative form. The Respondent’s witness was Ms. Robin Stump, the Respondent’s Emergency Medical Services Section Chief.

² All documents were admitted into evidence by stipulation or otherwise without objection. The Petitioner submitted four support letters which he read into the record, from individuals attesting to his character and/or suitability as an EMT. The Respondent submitted the Petitioner’s application for EMT certification, the Respondent’s letter to the Petitioner requesting additional information related to his EMT application, the Respondent’s order denying the Petitioner’s application for EMT certification, and documents related to the Petitioner’s prior conviction, incarceration, and probation.

³ 18 U.S.C. § 2133(a) provides that

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any

22, 2000, the Petitioner and the men committed—or aided and abetted in the commission of—a bank robbery in which handguns were used, in that they

did, by force, violence, and intimidation, take from the person and presence of another money, belonging to and in the care, custody, control, management and possession of the Three Rivers Federal Credit Union, located at 1516 Northland Boulevard, Fort Wayne, Indiana, whose deposits were then insured by the National Credit Union Administration (NCUA), charter number 159, and in committing such offense, did assault and put in jeopardy the life of another person by the use of dangerous weapons, that is, handguns, or aided and abetted in the same.

3. The Petitioner was found guilty on April 11, 2001, and, on November 15, 2001, was sentenced 151 months in prison followed by five years of supervised release and assessed a \$100 fine.⁴
4. The Petitioner was incarcerated from June 22, 2000, until January 4, 2012.

other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(d) provides that

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2 provides that

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

⁴ The other two men eventually pleaded guilty and received sentences of sixty-three months in prison and fifty-seven months in prison, along with four years each of supervised release. The Petitioner, however, was found guilty by a jury after a trial at which his co-defendants testified against him. His sentence was affirmed on appeal. U.S. v. Owens, 308 F.3d 791, 796 (7th Cir. 2002).

5. While incarcerated, the Petitioner assisted with a GED program for prisoners, taught classes, and continued his EMT coursework.
6. The Petitioner is set to be released from his supervised release term on January 3, 2017. He is applying for an early release from this program.
7. The Petitioner has had no issues complying with the conditions of his supervised release, and those terms require certain check-in obligations with his probation officer but do not restrict his movement throughout Indiana.
8. Since his release from incarceration, the Petitioner has continued (and completed) his EMT coursework through Ivy Tech Community College in Fort Wayne, Indiana. His criminal conviction required certain additional hurdles to be cleared in order for him to work at certain clinical sites, but otherwise was not an impediment.
9. The Petitioner was an excellent student, came to class early, stayed late, assisted other students, and took more advanced courses to obtain a broader level of preparation to be an EMT.
10. The Petitioner is motivated to succeed, maintains a positive mental attitude and outlook, and seeks to lead and serve as an example to others. He does not hide his criminal past or shy away from it; he faces it head on, has learned from his mistakes, and seeks to better himself and those around him.
11. On March 20, 2014, the Petitioner submitted an application to the Respondent in order to be certified as an EMT. On his application, in response to the question of whether he “ha[d] ever been charged or convicted of a crime as an adult other than a minor traffic violation,” the Petitioner checked “Yes.”
12. On April 7, 2014, the Respondent mailed a letter to the Petitioner and requested documentation so that it could evaluate the Petitioner’s charge and/or conviction.
13. On May 2, 2014, the Respondent received a letter from the Petitioner’s probation officer responsive to its April 7 request for additional documentation. The letter identified the Petitioner’s sentence and term of supervised release, and included his indictment, judgment of conviction, and docket report.
14. The Respondent reviewed the Petitioner’s submitted information. Because the Petitioner committed a crime of violence that was a felony, using a handgun, and because the Petitioner was still on probation for that offense, the Respondent concluded that the acts leading to the Petitioner’s convictions had a direct bearing on whether he should be entrusted to provide emergency

medical services. On October 23, 2014, the Respondent issued an order denying the Petitioner's application.⁵

15. It is undisputed that the Petitioner has otherwise met all the qualifications to be certified as an EMT. His prior conviction was the sole reason why the Respondent denied his application.

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 Petitioner here filed an application seeking a certification from the Respondent; he is asking the Respondent to take action as an agency. Accordingly, the Petitioner bears 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 Petitioner 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. The Indiana Emergency Medical Services Commission is created by statute, Ind. Code § 16-31-2-1, and is empowered to “[d]evelop training and certification standards for emergency medical responders” and “[r]equire emergency medical responders to be certified” under those standards. Ind. Code § 16-31-2-8(1), -8(2). The Commission is also charged to establish the application process for certification as an emergency medical responder. Ind. Code § 16-31-3-8.

Pursuant to the Commission's standards, an applicant for certification as an EMT must be at least eighteen years of age, successfully complete the Indiana basic EMT training course as approved by the Commission and conducted at a certified institution, and pass an approved EMT written and practical skills examination. 836 Ind. Admin. Code 4-4-1(a). The application must be made

⁵ The Respondent's order identified the Petitioner's indictment for aiding and abetting an armed bank robbery, but stated that on November 15, 2001, the Petitioner “pled guilty to Count II, as a Class A Misdemeanor.” There was no Count II or guilty plea, and this statement appears to be an error in the order. Nevertheless, it was clear from the testimony at the evidentiary hearing that the Respondent considered the correct charge and conviction in reaching its decision.

on forms provided by, and submitted to, the Respondent and must include the applicant's name, address, and criminal history, the name of the approved training institution, and any other information required. 836 Ind. Admin. Code 4-4-2(a).

It is undisputed that the Petitioner here complied with these requirements.

3. The Respondent, however, is authorized by statute to deny an applicant's certification if the applicant "would be subject to disciplinary sanctions under [Indiana Code § 16-31-3-14(b)] if that person were a certificate holder." Ind. Code § 16-31-3-14(d). Subsection (b) lists the sanctions that the Respondent may impose if a certificate holder is found to be subject to discipline under Indiana Code § 16-31-3-14(a). Ind. Code § 16-31-3-14(b).

And Indiana Code § 16-31-3-14(a) permits the Respondent, among other things, to impose disciplinary sanctions upon a certificate holder if the Respondent "determines that the certificate holder . . . is convicted of a crime, if the act that resulted in the conviction has a direct bearing on determining if the certificate holder or license holder should be entrusted to provide emergency medical services." Ind. Code § 16-31-3-14(a)(5).

In other words, if a certified EMT has been convicted of a crime and the acts underlying the conviction have a direct bearing on whether the EMT should be entrusted to provide emergency medical services, the Respondent can impose disciplinary sanctions. And if the individual is *applying* for certification as an EMT, the Respondent may use the same grounds to deny the application outright. This is what happened here.

4. It is important to note that it is not simply the Petitioner's conviction itself that matters—it is his specific criminal conduct that matters. Cf. Ind. Code § 16-31-3-14(a)(5) ("the act that resulted in the conviction"); -14(f) (except as provided for specific convictions, denial is not appropriate "because the applicant . . . has been convicted of an offense," but instead "[t]he acts from which the applicant's . . . conviction resulted may be considered as to whether the applicant . . . should be entrusted to serve the public in a specific capacity.").

The Respondent followed this requirement here, looking not just at the fact of the conviction but examining the particulars of the underlying offense being a felony, a violent crime, and one that included the use of a handgun.

5. Admittedly, however, the documentary evidence and the testimony provided at the evidentiary hearing lack specifics and particulars with respect to the Petitioner's actual criminal conduct. The Seventh Circuit Court of Appeals opinion affirming the Petitioner's sentence, though, provides more detail:

At approximately 4:00 p.m. on June 22, 2001, an African-American man wearing a fake beard, sunglasses, work boots, a reflector vest (similar to those worn by highway workers) and an orange hardhat walked into the Three Rivers Credit Union in Fort Wayne, Indiana with a gun in his right hand. The oddly costumed individual, observed by witnesses carrying two duffel bags along with the dangerous weapon, approached the tellers and demanded that they fill the bags with money. After obtaining his loot, he fled the scene in a white Plymouth Sundance, with an alert off-duty police officer in hot pursuit. After a brief chase, the suspect abandoned the vehicle and ran into a nearby wooded area, leaving behind two duffel bags full of money in the car with the fake beard and the orange hardhat. The suspect also left behind clear footprints of work boots in the muddy ground. The sunglasses and construction vest he wore at the time of the robbery were later discovered nearby.

Owens testified that on the day of the robbery, he had been a passenger in a car driven by Ronald Fowlkes (“Fowlkes”) and James David Thompson (“Thompson”). Owens claimed at trial that while a passenger in the car that day, Fowlkes had invited him to participate in a bank robbery, but that he refused and demanded to be let out of the car. According to Owens, after Fowlkes stopped the car, Owens exited the vehicle and made his way to a nearby gas station and asked to use the telephone. Pursuing police officers came upon Owens in the gas station, and after observing that he matched the description of the bank robbery suspect and that his work boots were covered with fresh mud, they arrested him. The defendant (who is black) protested to the officers, claiming that his car had just been stolen by a black man wearing a construction vest and an orange hardhat and that he had only come to the station to call police. A detective who interviewed Owens shortly after his arrest filled out a stolen vehicle report on the basis of this story, complete with a description of the alleged car thief, which was subsequently signed by Owens himself. After he was taken into custody, Owens was brought back to the credit union (crime scene), whereupon he was identified by several eyewitnesses.

Owens, 308 F.3d at 792–93. The opinion also notes that the Petitioner’s sentence was enhanced because he initially told the police his car had been stolen, and then denied—under oath at trial—that he had done so. Id. at 794–95. Additionally, the Petitioner was identified—albeit by his partners in crime who had then pleaded guilty—as the leader, recruiter, and planner of the robbery. Id. at 793–94.

6. It would be an understatement to say that this was a substantial crime. The Petitioner threatened innocent bank employees with a deadly weapon, stole money, fled from police, and then fabricated a cover story when he was apprehended. Those are acts that have a direct bearing on determining whether the Petitioner should be entrusted to provide emergency medical services.
7. Were only those facts available at this point—as it was for the Respondent when it issued its order—the ALJ would likely reach the same conclusion and deny the Petitioner’s application. But this is not a required outcome from the conclusion that the Petitioner committed acts bearing on his worthiness to serve as an EMT.

Instead, the statute affords some discretion. See Ind. Code § 16-31-3-14(d) (Respondent “*may* deny certification” (emphasis added)). And as the Respondent alluded to at the evidentiary hearing, the benefit of the administrative appeal process is that it allows a fuller presentation of evidence to resolve whether this discretion should be exercised.

8. Here, that evidence now also shows that the Petitioner has owned up to his offense, served his time (with the exception of his remaining supervised release term), stayed out of trouble since his arrest, completed his EMT training, and is actively endeavoring to better himself and, by doing so, be a positive example to others. He wants to be an EMT—and is willing to fight through this process for the chance to be one—and sees it as a way to apply his skills and give back to others. He is, as he said during his opening statement, more than “the person that [we] have read about in black and white.”

So with the benefit of the additional facts elicited through the administrative appeal, it is the ALJ’s belief that the Petitioner deserves an opportunity to serve as a productive, law-abiding member of society as an Emergency Medical Technician in Indiana. Accordingly, his application for certification as an EMT is granted.

9. Nevertheless, the Petitioner’s criminal conviction remains. And the Respondent is correct to be concerned about the prospect of such a serious offense being in the (relatively) recent history of an EMT entrusted by members of the public to respond in times of need—especially when the EMT is still under the terms of his supervised release. It is therefore reasonable to grant the Petitioner’s application for certification, but to then impose certain limitations upon the certification to mitigate those concerns.
10. As noted above, Indiana Code § 16-31-3-14(b) permits the imposition of certain sanctions upon a certificate holder under certain conditions—including

when the certificate holder has been convicted of a crime and, like here, the acts underlying the conviction have a direct bearing on whether the holder should be entrusted to provide emergency medical services. Among those sanctions authorized is the “[p]lacement of a certificate holder . . . on probation status and requirement of the certificate holder . . . to:

(A) report regularly to the department of homeland security upon the matters that are the basis of probation;

(B) limit practice to those areas prescribed by the department of homeland security;

(C) continue or renew professional education approved by the department of homeland security until a satisfactory degree of skill has been attained in those areas that are the basis of the probation; or

(D) perform or refrain from performing any acts, including community restitution or service without compensation, that the department of homeland security considers appropriate to the public interest or to the rehabilitation or treatment of the certificate holder or license holder.

The department of homeland security may withdraw or modify this probation if the department of homeland security finds after a hearing that the deficiency that required disciplinary action is remedied or that changed circumstances warrant a modification of the order.

Ind. Code § 16-31-3-14(b)(6). This sanction is appropriate here.

11. The Petitioner’s application for EMT certification is therefore granted, but the certification is placed on probation. Such probation contains the following conditions:

- a. The Petitioner shall submit his current home address and all telephone numbers (home, cell, and work) to the Respondent. Any change in this information must be reported to the Respondent within seven days of the change; and
- b. The Petitioner shall provide a list of EMS providers with which he is (or becomes) affiliated, either as a paid provider or volunteer, to the Respondent. Any change in this information must be reported to the Respondent within seven days of the change; and

- c. The Petitioner must submit an affirmation signed by each provider and medical director with whom he is (or becomes) affiliated, indicating that the provider and medical director are aware of the Petitioner's probationary certification and the reason for it, within fifteen days of his affiliation; and
- d. The Petitioner must notify the Respondent of any arrest or summons for a criminal charge received during this period of probation, or alleged violation of the conditions of his supervised release, within seventy-two hours of such occurrence.
- e. If the Petitioner fails to comply with the terms of this probation, the Respondent may issue an order imposing any of the sanctions listed under Indiana Code § 16-31-3-14(b).
- f. Should the Petitioner commit any of the acts listed under Indiana Code § 16-31-3-14(a) during this period of probation, the Respondent may consider the probationary status of the Petitioner's certification as an aggravating factor in assessing the appropriateness of any additional sanction(s).
- g. The Petitioner's certification will remain on probation until he is released from his term of supervised release. The Petitioner must provide the Respondent with official documentation showing his release for his certification to be taken off probation.

Decision and Non-Final Order

The Petitioner's application for certification as an Emergency Medical Technician is hereby **GRANTED**. The Petitioner's certification is placed on probation in accordance with the terms listed above.

The Indiana Emergency Medical Services 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 Notice of Non-Final Order also issued today.

Date: June 24, 2015

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