STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 13BMS08447 / 13BMS17605

NC BOARD OF FUNERAL SERVICES Petitioner v. JOHN DOUGLAS BEVELL JR. Respondent	**ORDER ALLOWING SUMMARY JUDGMENT FOR RESPONDENT AND DENYING SUMMARY JUDGMENT FOR PETITIONER**

THIS MATTER comes before the Honorable Donald W. Overby, Administrative Law Judge presiding, for consideration of all pending motions.

I. PROCEDURAL HISTORY

A contested case petition was filed February 13, 2013 by the Petitioner North Carolina Board of Funeral Services in the Office of Administrative Hearing (OAH) file number 13 BMS 08447 (hereinafter "Bevell 1"). On March 1, 2013, Respondent Bevell filed a pleading captioned as a petition and response to Petitioner's petition. On March 7, 2013, Respondent Bevell moved this Court for a special provisional license, which was denied by Order dated March 27, 2013. Petitioner Board moved for partial summary judgment on June 21, 2013. Respondent Bevell filed with OAH on July 3, 2013 its Motion for Summary Judgment or in the Alternative for Inactive Status and Response to Petitioner's Motion for Summary Judgment.

By Order dated July 22, 2013, this Tribunal issued an Order for Stay. There had been a statutory change which had the potential for affecting Respondent's application. Respondent Bevell filed another renewal application with Petitioner Board on July 2, 2013 so that the Board could consider the new application in light of those statutory changes. By letter dated September 6, 2013, Petitioner Board denied Bevell's second renewal application. Bevell filed a contested case petition with OAH on September 12, 2013, OAH file number 13 BMS 17605 (hereinafter "Bevell 2"). By its Documents Constituting Agency Action filed with OAH on October 14, 2013 Petitioner Board acknowledges that the two letters of denial dated December 21, 2012 and September 6, 2013 respectively constitute the bases for the two contested cases. Chief Administrative Law Judge Julian Mann III consolidated the two actions by Order dated October 2, 2013.

There is no disagreement as to the facts of these contested cases. The pertinent facts were articulated in Petitioner Board's Prehearing Statement, filed with OAH on March 28, 2013, and were restated and updated to reflect the action taken on the second application on October 14,

2013. Those recitations are an accurate recitation of the facts. In as much as both parties have moved for summary judgment and each acknowledge that there is no genuine issue of material facts, summary judgment is appropriate.

II. "OLD" LAW—N.C.G.S. 90-210.25

After his criminal convictions in the State of Virginia, Respondent Bevell first applied for re-licensure from Petitioner Board in 2002. At that time N. C. Gen. Stat. §90 – 210.25 was the statute most applicable to the facts and circumstances at issue herein. Pursuant to that statute anyone applying to be licensed to practice funeral directing, embalming or funeral service must "be of good moral character." Further, G.S. §90 – 210.25(e)(1)states:

> Whenever the Board finds that an applicant for a license or a person to whom a license has been issued by the Board is guilty of any of the followings acts or omissions and the Board also finds that the person has thereby become unfit to practice, the Board may suspend or revoke the license or refuse to issue or renew the license . . : a. Conviction of a felony or a crime involving fraud or moral turpitude. a1. Denial, suspension, or revocation of an occupational or business license by another jurisdiction. g. Gross immorality, . . . (Emphasis added)
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> In any case in which the Board is entitled to suspend, revoke or refuse to renew a license, the Board may accept from the licensee an offer to pay a penalty of not more than five thousand dollars ($5,000). The Board may either accept a penalty or revoke or refuse to renew a license, but not both.
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> N. C. Gen. Stat. §90 – 210.25(e)(1)

N. C. Gen. Stat. §90 – 210.25(e)(1) applied each year that Bevell applied for re-licensure from 2002 until 2012. There is no question that Bevell had committed felonies involving moral turpitude which is the crux of his reapplication now being denied.

At the time Petitioner sought to be relicensed by the Petitioner Board in 2002, the Petitioner had statutory authority to deny his application for any number of reasons associated with his prior convictions in the state of Virginia, but consciously chose not to. The Board likewise had an option to assess a penalty instead of denying the license renewal, but consciously chose not to. These were conscious, knowing acts of a properly promulgated Board of the Petitioner. For ten years each successive Board had this same statute upon which to rely, but consciously chose to continue to relicense Bevell.

By continuing to relicense Bevell each year the Board was either deciding that the statute was only to be interpreted as having prospective application or that the Board had weighed all the applicable conditions each year and found in Bevell's favor. In either event, the Board was making an affirmative decision that Bevell had NOT "become unfit to practice." The reasonable interpretation is that the Board interpreted the statute to have only prospective application, and,

therefore, once Bevell was relicensed the Board did not have to consider those matters yearly as applicable to his prior convictions.

III. "NEW" LAW—N.C.G.S. 90-210.25B

The only thing that has changed which lead to Bevell's denial is the enactment of N.C. Gen. Stat. § 90-210.25B which became effective July 12, 2012. The effects of the statutory changes are what are at issue herein. N.C. Gen. Stat. § 90-210.25B states: "(a) The board shall not issue or renew any licensure, permit, or registration to any person or entity who has been convicted of a sexual offense against a minor." (Emphasis added) There is no question that Bevell was convicted of a sexual offense against a minor as defined in the statute. In its denial letter, the Respondent Board articulates that N.C. Gen. Stat. § 90-210.25B is the basis upon which Bevell was denied reapplication in "Bevell I."

N.C. Gen. Stat. § 90-210.25B is mandatory; however, N. C. Gen. Stat. §90-210.25(e)(1) is discretionary. Both use the same language in that each refers to the issuance or renewal of a license. There is no articulation and thus no distinction between the two as to whether or not the statute is to be applied prospectively as opposed to retroactively. They should be interpreted consistently. Clearly the Board applied N. C. Gen. Stat. §90-210.25(e)(1) prospectively, but applied N.C. Gen. Stat. § 90-210.25B retroactively.

The operative language of both the "old" and the "new" statutes is the same in that both applied to issuance and renewal. The fact that the "old" was discretionary and the "new" was mandatory has absolutely no effect on whether or not the statute is to be applied retroactively as opposed to prospectively. There is no logic in applying the two statutes differently.

A. Prospective Application versus Retroactive Application

A question to be resolved is whether or not N.C. Gen. Stat. § 90-210.25B has retroactive effect so as to be applicable to Bevell whose convictions were approximately eighteen years before the effective date of this statute. A statute is presumed to have prospective effect only and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from the terms of the legislation. *In re Will of Mitchell, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974); In re Estate of Proctor*, 79 N.C. App. 646, 649, 340 S.E.2d 138,141 (1986). Any reasonable doubt should be resolved against retroactive application of the law. *Hicks v. Kearney*, 189 N.C. 316, 127 S.E.2d 205, 207 (1925).

When a statute is silent or ambiguous with respect to a specific issue, the courts must consider other indicia in order to try to determine the intent of the General Assembly in enacting the particular statute. N.C.G.S. § 90-210.25B is silent as to the effective date of the statute. N.C.G.S. § 90-210.25B was an amendment to Senate Bill 847, which included a number of other amendments which were specifically enacted to be applied retroactively. Had the General Assembly intended for this statute to have retroactive application, then it very easily could have done so but did not. The logical inference and conclusion to be drawn is that the intent was not for this statute to have retroactive application.

The traditional legislative history of this particular statute is not especially helpful in understanding the reason for enacting this statute; however, the dialogue between the statute's primary proponent and the Board is instructive of the true intention behind its enactment which will be discussed further below.

B. Board's Course of Conduct.

The fact that Petitioner Board contends that the current Board is much more strict and such acts as Bevell's would not have been abided is in essence an acknowledgment that the current Board felt it had no authority to overrule the prior decisions of the Board granting Bevell his licenses; i.e., any enforcement of more punitive punishments could only be prospective. The Board's course of conduct prior to enactment of N.C. Gen. Stat. § 90-210.25B shows that it intended only prospective application and continued to license Bevell in the intervening ten years.

That the Board's intention was to continue that course of conduct is also demonstrated in its published application for renewal which Bevell completed and returned to the Board. In the application it shows that Bevell's license is to expire December 31, 2012, meaning this is the application for 2013. In the body of the application it asks: "have you been convicted of any crime, either felony or misdemeanor (other than traffic convictions) since your last renewal?" (Emphasis added) Bevell received a letter from the Board dated December 21, 2012 citing Senate Bill 847 as the reason for denying his application even though Senate Bill 847 does not address retroactivity and is contrary to the Board's interpretation and instruction on the application.

III. EFFECT OF N.C.G.S. 93B-8.1

The General Assembly enacted N.C. Gen. Stat. Ann. § 93B-8.1 which became effective July 1, 2013. It states in pertinent part:

> (b) Unless the law governing a particular occupational licensing board provides otherwise, a board shall not automatically deny licensure on the basis of an applicant's criminal history. If the board is authorized to deny a license to an applicant on the basis of conviction of any crime or for commission of a crime involving fraud or moral turpitude, and the applicant's verified criminal history record reveals one or more convictions of any crime, the board may deny the license if it finds that denial is warranted after consideration of the following factors:
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> (1) The level and seriousness of the crime.
> (2) The date of the crime.
> (3) The age of the person at the time of the crime.
> (4) The circumstances surrounding the commission of the crime, if known.
> (5) The nexus between the criminal conduct and the prospective duties of the applicant as a licensee.
> (6) The prison, jail, probation, parole, rehabilitation, and employment records of the applicant since the date the crime was committed.
> (7) The subsequent commission of a crime by the applicant.
> (8) Any affidavits or other written documents, including character references.

N.C. Gen. Stat. Ann. § 93B-8.1 (effective July 1, 2013)

Respondent Bevell filed his second application for renewal of his license with Petitioner Board on July 2, 2013(Bevell 2). An initial question is whether or not G.S. § 93B-8.1applies to Bevell's second application. The first sentence states "[u]nless the law governing a particular occupational licensing board provides otherwise. . . ." If N.C.G.S. § 90-210.25B(a) is to be applied retroactively, one could argued that the statute does "provide otherwise" by stating that the board "shall" not renew a licensee who has been convicted of the enumerated crimes. Conversely, if G. S. § 90-210.25B(a) is to be read prospectively, then G.S. § 93B-8.1 would not apply to Bevell 2.

It is important to note that in its September 6, 2013 letter to Bevell, Petitioner Board refers to § 90-210.25B(a) as the basis for denying his first application. The letter then goes on to state that it did in deed consider the mandates of § 93B-8.1. This acknowledgement infers that the Board is looking at § 90-210.25B(a) as applying retroactively.

The letter very specifically lists three of the enumerated factors for consideration in § 3B-8.1. It is important to note that in listing those three enumerated factors the Petitioner Board omitted a very important word from the statute: "(5) The nexus between the criminal conduct and the prospective duties of the applicant." (Emphasis added). Obviously, the intent as stated is prospective application. There is no nexus at all between the criminal conduct and the particular duties of Bevell and certainly no nexus prospectively and especially in light of the fact that he has been licensed for ten years without any problems. Lastly, the September 6 letter acknowledges "consideration of the applicable statutes," in the plural and there are only two statutes referenced in the letter.

Even if § 93B-8.1 is applicable, this Tribunal takes exception to the Board's position that it weighed the considerations of § 93B-8.1 and found the three listed factors to outweigh all other factors. It must be remembered that the "level and seriousness" and the "circumstances surrounding the commission of the crimes" has been known from the very outset. While those factors are significant, the fact that the crimes had been committed approximately eighteen years before is significant as well. The fact that Bevell went through the criminal justice system and did everything that was asked of him is also significant. He was incarcerated, complied with post release supervision and probation and complied with every requirement. The Board was aware of his employment history in the intervening years because it had sanctioned his employment. The Board was aware that he had had no further involvement with the criminal justice system. The Board was keenly aware of the tremendous support Bevell had within the community and the industry. And, finally, the Board misapplied factor number 5 as stated above. An honest weighing of these factors enumerated in the statute would weigh in favor of Bevell.

IV. CORRESPONDENCE BETWEEN BOARD AND REP. JUSTICE

Perhaps the most telling and compelling piece of this puzzle is the dialogue between former Representative Carolyn Justice and Petitioner Board. In her letter dated January 4, 2012, Representative Justice expresses great concern on having learned that someone with a prior

felony conviction for child molestation and other offenses could be licensed to transport human bodies in North Carolina. Her concern is directed solely at Mr. Bevell who had been the center of a report in the *Wilmington Star News* to which Rep. Justice refers, as well as the various entities who may play a role in his licensing.

Rep. Justice's letter seeks information about how Mr. Bevell was able to become licensed with those convictions on his record. Her questions are very pointed and appropriately ask probing questions which should be answered in order for someone to be license by any board in North Carolina. The Board answered each of Rep. Justice's questions by, in essence, stating that those matters had in fact been considered by the Board in reviewing Bevell's application and that he had satisfactorily answered those questions. It is of import to note that on the last page of her letter, in addressing possible legislation to address her concerns, Rep. Justice proposes that for anyone who's license has previously been revoked that they "may not" be license in North Carolina; that is, discretionary language and not mandatory. (Emphasis added)

Petitioner Board responded to Rep. Justice by letter dated February 8, 2012. Bevell was first license by the Board as it was then constituted in 1981, and he was convicted of his crimes thirteen years later in 1994. Rep. Justice's first question is whether or not Bevell revealed that he was a convicted felon. The written answer to that question only addresses his 1999 application which was the first after his conviction; however in answering questions throughout, it is shown that Bevell always answered questions concerning his conviction in an honest and straight-forward manner, admitting his convictions. Bevell was denied in 1999. He reapplied two years later in 2001 for a transport license which was granted.

Rep. Justice asks how anyone with such a record could have been licensed. Petitioner Board used two and a half pages to explain Bevell's licensure history, which reflects, among other things, tremendous support within the profession and among his peers.

Petitioner Board was asked to define "good moral character." Petitioner responded by explaining its process if there is a question about an applicant's moral character. The Board referred to the State's appellate courts' decisions which have held that a criminal conviction is not necessarily conclusive that the person lacks good moral character, although it is some evidence that can be considered. The Board also stated that there had been some personnel changes at the Board in 2003 and 2004 which made things much tighter for applicants. The answer states that all applicants with felony convictions are sent straight to the Disciplinary Committee and are then sent to the full Board for a hearing. (Emphasis in the original) Since 2004 the Board also has taken affirmative steps to insure that all applicants are "fit to practice" by conducting background checks on all individual applicants. (Emphasis in the original) It is not clear but current licensees may only be subjected to background checks on their initial application. The letter is clear, however, that such is the case on transport permittees.

Again, one of two possible scenarios exists. Either the newly constituted and more vigilant Board subjected Bevell to that same scrutiny since it was applied to "all," or this new

Board applied its stricter scrutiny prospectively. Since Bevell was subjected to the Board's heightened scrutiny and was licensed each year since 2004, it necessarily flows that he was found "fit to practice." The only logical explanation is that the statute was interpreted as being prospective. It is crystal clear that the Board has had ten years within which to review Bevell's applications, but the Board has treated the then existing statute as prospective and without effect on Bevell.

Rep. Justice asked for copies of the letters of recommendation submitted on Bevell's behalf. The Board complied by providing letters for three years including 1999 in which he was denied. Rep. Justice asked if Bevell's probation status had been checked or to see if his license had been suspended. The Board answered basically that Bevell had supplied all that information.

Rep. Justice asks the very poignant question of how the public should have any confidence in the State statute. The Board answers by citing the composition of the Board at that time and the quality and quantity of the numerous letters to the Board on Bevell's behalf. The Board also answers that the current Board is very different from the one in existence when Bevell was given back his license. In conjunction with the prior answer the inference is that this current Board would not be inclined to return a license to one similarly situated as Bevell—prospectively. There is no inference that it would undertake any different action on Bevell himself. In fact, the Board's course of conduct demonstrates that it would not, since the newly constituted and more critical Board also re-licensed Bevell for eighth years.

Finally, in addressing Rep. Justice's concerns, the Board notes that Bevell had been a successful and compliant licensee. In other words, Bevell has done what has been asked of him by the Board and he has abided by all rules and regulations, with very minor exceptions.

Counsel for Petitioner Board wrote to Rep. Justice as well, noting that the Board in 2002 decided that Bevell was of good moral character even though he had been convicted of those certain crimes. She goes on to say that the current process of vetting applications is much improved and that the current process "provides a safeguard against <u>future</u> applicants who are convicted sexual predators from being licensed without a full evidentiary hearing." (Emphasis added) The tenor of all discussions is that everything is prospective and there is no hint from anyone that there should be any retroactive application that would deprive Bevell or anyone else of his or her license.

V. APPLICABILITY OF N.C.G.S. 90-210.25B—BILL OF ATTAINDER

Looking at the statute's applicability to the facts and circumstances of this case, only one of two interpretations exits: either the statute is for prospective application and is of no consequence to Bevell; or it has retroactive application and is applicable ONLY to Mr. Bevell. Respondent Bevell has represented that at the time § 90-210.25B became effective, Mr. Bevell was the only person who held a license to whom the statute would apply. That fact has not been challenged.

Retroactive application of § 90-210.25B would be an unconstitutional bill of attainder. A bill of attainder is a legislative act which inflicts punishment on a particular individual or designated group of persons without a judicial trial. *United States v. Lovett*, 328 U.S. 303, 315,106 Ct.Cl. 856, 66 S.Ct. 1073, 1079, 90 L.Ed. 1252, 1259 (1946).

> Bills of attainder are prohibited by the United States Constitution: "No State shall ... pass any bill of attainder." U.S. Const. art. I § 10, cl. 1. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (citations omitted). "In forbidding bills of attainder, the draftsmen of the Constitution sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.' " *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) (quoting *United States v. Brown*, 381 U.S. 437, 447, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965)).
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> *State v. Whitaker*, 364 N.C. 404, 411-12, 700 S.E.2d 215, 220 (2010)

In its original and purest form, bills of attainder referred only to punishment by death and anything less than death is termed a bill of pains and penalties. The terms are used within the meaning of the Constitution interchangeably today and are generally referred to as bills of attainder without any distinction. *Lovett*, 328 U.S. at 315.

The North Carolina Constitution does not specifically prohibit bills of attainder. N.C. Const. art. I, § 16 is a prohibition against ex post facto laws which are specifically reserved for criminal laws. U.S. Const. art. I § 10, cl. 1 makes the prohibition applicable to the states.

The prohibition embodied in U.S. Const. art. I § 10, cl. 1 is not to be strictly and narrowly construed in the context of traditional forms but is to be interpreted in accordance with the designs of the framers so as to preclude trial by legislature, a violation of the separation of powers concept. J. Story, *Commentaries on the Constitution of the United States* (Boston: 1833) § 1338. The clause thus prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *Lovett*, 315 U.S. at 315

As it relates to an individual, a legislative act which singles out an individual for legislatively prescribed punishment because of past conduct is evidence that such act is unconstitutional. *Selective Serv. Sys. v Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984). In the case of *Cummings v. Missouri*, 4 Wall. 277, 18 L. Ed 356 (1867), the United States Supreme Court struck down a provision of the Missouri post-Civil War Reconstruction Constitution that barred persons from various professions unless they stated under oath that they had not given aid or comfort to any person engaged in armed hostility to the United States. The Court recognized that the oath as required was not a means of ascertaining whether the individual was qualified for his profession, but rather to effect a punishment for having associated with a particular group.

This present case at issue with Mr. Bevell is analogous. If applied retroactively, N.C.G.S § 90-210.25B is a legislative act that punishes Bevell for prior acts which have no effect on his ability to perform his professional services as a funeral service director.

VI. THREE-PRONG TEST

The United States Supreme Court established the test for determining whether a legislative act or statute amounts to a bill of pains and penalties by inflicting punishment prohibited by the Constitution:

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."
> *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852, 104 S.Ct. 3348, 3355, 82 L.Ed.2d 632, 643 (1984) (citations omitted).

A. Historical Meaning of Legislative Punishment.

The first inquiry under the *Selective Service* test is whether § 90-210.25B falls within the historical meaning of legislative punishment. In recent years, courts in the United States have noted the lists of punishments forbidden by the Bill of Attainder Clause to be more commonly seen to bar participation by individuals or groups in specific employments or professions. *Id*. at p. 852

In the case at bar, § 90-210.25B, as applied to Bevell, is exactly the type of punishment that courts across the United States, including those in North Carolina, have deemed to be forbidden. Applied retroactively as the Board is attempting to do, this statute is barring an individual, Bevell, from participation in the funeral service industry as the result of a 20-year-old criminal conviction.

B. Furtherance of Non-punitive Legislative Purposes.

The second inquiry under the *Selective Service* test is whether the statute or legislative act can be said to further non-punitive legislative purposes. As previously noted, there is little to no legislative history regarding § 90-210.25B. However, correspondence between Representative Justice and the Board reveals that the introduction and passage of § 90-210.25B was not for the betterment of the funeral service industry in North Carolina, but rather was to punish Bevell.

With the backdrop of the dialogue with Rep. Justice, § 90-210.25B was enacted, effective July 12, 2012. Determining anyone's "intent" is often difficult and is generally only discernible from extrinsic evidence. In this instance, it is abundantly clear that the only inquiry from Representative Justice was concerning Bevell and no other. Her entire focus was on Bevell and no other. Her entire focus was on the crimes he had committed and no other types of crimes.

Representative Justice's interest was piqued after reading the article in the *Wilmington Star News* about Bevell. In her correspondence there is no mention of how to better the funeral

service industry. The tenor of that correspondence is that Representative Justice was not seeking guidance on how to better the funeral service industry as it related to Bevell's felony criminal convictions. The entirety of the inquiry is about Bevell and how the Board could possibly fathom licensing HIM. There was no inquiry about sanctioning someone similarly situated or someone who might have any other felony convictions. The inquiry was solely and completely about Bevell. The only logical inference to be drawn was that her purpose—i.e., her "intent"—was to remove Bevell from the funeral service industry based upon a 20-year-old criminal conviction.

There is no legislative discussion or history relating to § 90-210.25B other than the correspondence between Representative Justice and the Board which is nevertheless telling. Correspondence refers to legislative changes relating to licensees of the funeral service industry who had been convicted of sexual acts with a minor, but does not address how any legislative changes discussed would benefit either the funeral service industry or the people of North Carolina. Rather, a March 30, 2012 letter defends the Board's decision in licensing Bevell in 2002 and each year since.

At no point in any of the correspondence is there a reference or even inference to any benefit to the State of North Carolina. From the legislative history and intent, the goal of N.C. Gen. Stat. § 90-210.25 was to punish if applied retroactively.

While the crimes listed in § 90-210.25B may be perceived to be reprehensible, the same is true for a myriad of felony crimes within North Carolina's criminal laws which are not included in the list intended as a prohibition from entering the funeral service industry. There is no explanation anywhere as to how the crimes listed in § 90-210.25B affects one's ability to perform the responsibilities of a funeral service professional. While the legislative history in this matter comes from unconventional means, it is clear that no one considered the good of the funeral service profession in this matter or the general welfare of the public of North Carolina.

In "viewing the severity of the burdens imposed," this statute does not "further non-punitive legislative purposes." It is abundantly clear that in this contested case retroactive application of this statute as the Board has done in denying Bevell's application to be relicensed can have no other purpose than the punishment of Bevell.

C. Intent to Punish Bevell.

The final inquiry under the *Selective Service* test is whether the legislative record evinces a congressional intent to punish. As noted above, the legislative history relating to § 90-210.25B is limited to correspondence between the Board and Representative Justice. This correspondence clearly evinces an intent to punish Bevell.

It is again interesting to note that the only crimes which would automatically prohibit one from being licensed by this Board are sex offenses against minors. With the host of heinous felonies enumerated in North Carolina criminal law, it is interesting indeed that this group of crimes is the only ones identified. The only logical inference in light of the totality of circumstances is that this legislation was aimed specifically at Bevell.

It is both incongruous and inconceivable that the Board has licensed Bevell for ten years, defended him in correspondence and then refused to relicense him. The only inference that can be drawn is that the Board was determined to get rid of Bevell although he has had no further criminal law involvement and his record with the Board is only blemished by very minor violations.

As the *Selective Service* analysis reveals, § 90-210.25B is an unconstitutional bill of attainder as applied in this contested case.

VII. CONCLUSION

Retroactive application of § 90-210.25B and/or § 93B-8.1is in the very least an erroneous interpretation and application of the statutes. The statutes are to be interpreted and applied prospectively, just as the Board had been doing with §90 – 210.25(e)(1) in relicensing Bevell for ten years. The critical factor, however, is that retroactive application in this particular contested case is an unconstitutional bill of attainders.

"When a statute or ordinance is susceptible to two interpretations—one constitutional and one unconstitutional—the Court should adopt the interpretation resulting in a finding of constitutionality." *Smith v. Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974). The only constitutional application of those statutes is a prospective application to Mr. Bevell.

Respondent Bevell's Motion for Summary Judgment is **ALLOWED**. The Board should only apply the applicable statutes prospectively from the effective date of each such statute; and, therefore, the Board should issue Mr. Bevell his funeral service license.

Petitioner Board's Motion for Summary Judgment is **DENIED.**

NOTICE AND ORDER

The North Carolina Board of Funeral Services will make the Final Decision in this case. That agency is required to give each party an opportunity to file Exceptions to the Proposal for Decision, to submit Proposed Findings of Fact and to present oral and written arguments to the Agency. N.C. Gen. Stat. §150B-40(e)

This the 22nd day of December, 2013.

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Donald W. Overby
Administrative Law Judge