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NO. COA11-858
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

STEPHEN SIMPSON,
Petitioner,

v.

Mecklenburg County
No. 10 CVS 13429

MICHAEL ROBERTSON, NORTH CAROLINA
DIVISION OF MOTOR VEHICLES,
DEPARTMENT OF TRANSPORTATION,
Respondent.

Appeal by respondent from order entered 20 April 2011 by
Judge Robert T. Sumner in Mecklenburg County Superior Court.
Heard in the Court of Appeals 10 January 2012.

*Arnold & Smith, PLLC, by J. Bradley Smith, and by David C.
Driscoll, for petitioner-appellee.*

*Roy Cooper, Attorney General, by Kathryne E. Hathcock,
Assistant Attorney General, for respondent-appellant.*

MARTIN, Chief Judge.

Petitioner Stephen Simpson petitioned the Superior Court of
Mecklenburg County for a writ of certiorari to review the denial
of his request for conditional reinstatement of driving
privilege by an order of Hearing Officer Robert Gray Southern,

on behalf of Commissioner Michael Robertson and the Department of Motor Vehicles, (together, "respondent"). After a hearing, the superior court found that the decision of respondent was arbitrary and capricious and ordered that respondent restore petitioner's privilege to drive in North Carolina. Respondent appeals, and for the reasons herein, we affirm.

Petitioner's driver license was permanently revoked on 21 January 1995 pursuant to N.C.G.S. §§ 20-17(a)(2) and 20-19(e) after he was convicted of driving while impaired ("DWI") three times between 1987 and 1994. In 2010, petitioner applied to the North Carolina Department of Motor Vehicles ("the DMV") for conditional restoration of his license. A restoration hearing was held on 26 May 2010 after which respondent denied petitioner's application.

The record presented at the restoration hearing tended to show that petitioner proffered three witnesses on his behalf: Sharon I. Simpson, his wife of twenty-six years; Thomas M. Gansma, a golfing partner; and Otis D. Speight, a neighbor. According to Sharon Simpson, petitioner occasionally consumes a glass of wine with a meal or during a social gathering. Thomas Gansma stated that he sees petitioner "almost daily" and that while he has seen petitioner have "a beer," he has never seen

him intoxicated and feels that he has everything "under control." He also noted that petitioner is a "good neighbor," "devoted husband and father," and "the kind of person that will just do anything for you." Otis Speight testified that he sees petitioner at least three to four times per week and that he has only seen petitioner consume "an occasional beer." Each witness stated they were not aware of petitioner using street drugs of any kind.

Petitioner also testified on his own behalf at the restoration hearing. He admitted to having approximately three drinks a month during social gatherings or dinner, but clarified that he does not consider himself "a drinker." Petitioner acknowledged that he "maybe" had a problem with alcohol when he was younger, that he never attended AA or a 30-day inpatient treatment center, and that, although his alcohol use has decreased, he has never completely abstained from drinking for an extended period of time.

Additionally, petitioner submitted documentary evidence to respondent, including a letter written on his behalf by the Chief of Police of the Tega Cay Police Department in South Carolina, who has known petitioner for fifteen years. He stated petitioner is "well[-]respected and very appreciated in the

community," and that he has given "countless hours of his time for community volunteer projects." Petitioner also submitted a Substance Abuse Evaluation written by a state-certified substance abuse evaluator, Ella Fuller. In the evaluation, Ms. Fuller noted that petitioner drank to medicate his feelings in the past. She also wrote that he drove to their interview, although this fact was disputed by petitioner and his wife at the hearing. Despite these two findings, Ms. Fuller identified petitioner's "prognosis as good," and stated that she "would not impose traditional treatment upon client at this time," because "[petitioner] seems to have overcome that part of his life and is now very responsible. Client's occasional and sometimes week-end [sic] glasses of wine do not appear problematic."

After hearing all the testimony, respondent denied petitioner's request for reinstatement, citing petitioner's failure to have "sobriety time" or "quit" drinking. Hearing Officer Southern stated that he "think[s] that anyone that consumes an alcohol[ic] beverage and operates a motor vehicle to any degree endangers everybody's lives on the road" and that petitioner is an "excessive user of alcohol." He told petitioner that, in order to grant him reinstatement, he would need to see "sobriety time. With no drinking at all. . . . I

need to see support in place where you go to AA, get counseling, do whatever you need to do, to deter from alcohol use." Respondent also made findings of facts relying on the Substance Abuse Evaluation that petitioner "is drinking" to medicate his feelings and that he drove to his interview to meet with his substance abuse evaluator.

At issue on appeal is whether the superior court erred in: finding that respondent's ruling was arbitrary and capricious; failing to consider alternative grounds upon which respondent could have relied in its decision, in addition to its determination that petitioner was an "excessive user" of alcohol; and in ordering "specific performance" rather than simply reversing and remanding respondent's decision.

"The proper standard of review [of an agency decision] depends on the particular nature of the issues presented on appeal." *Tucker v. Mecklenburg Cty. Zoning Bd. of Adjust.*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *aff'd in part and disc. review improvidently allowed in part*, 356 N.C. 658, 576 S.E.2d 324 (2003). Because the petitioner contends the agency's decision was arbitrary and capricious, the superior court in the instant case correctly used the whole record test. *Id.* In

applying the whole record test, the "trial court reviews the record de novo for any errors of law to determine if competent, material, and substantial evidence exists, based on the whole record, to support the decision, and determines whether the decision was arbitrary and capricious." *Cole v. Faulkner*, 155 N.C. App. 592, 596-97, 573 S.E.2d 614, 617 (2002). The court must consider both evidence justifying the agency's decision and contrary evidence that could lead to a different result. *Lackey v. N.C. Dep't of Human Res., Div. of Med. Assistance*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). On appeal from the trial court, this Court's scope of review is two-fold: (1) examine whether the superior court applied the appropriate standard of review; and if so, (2) determine whether the superior court correctly applied the standard. *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). We have already determined that the superior court correctly applied the whole record test, therefore, we need only consider if it was applied correctly.

Respondent contends the superior court erred in determining, based on the whole record test, that its decision to deny petitioner's application for a conditional restoration of his license was arbitrary and capricious. We disagree.

Under N.C.G.S. § 20-19(e1)(2), the DMV can conditionally restore the driving privilege of a person previously convicted of DWI if the person provides satisfactory proof that (1) in the previous three years, the person has not been convicted in North Carolina or in any other state or federal court of an offense related to motor vehicles, alcoholic beverages or drugs and (2) the person is not currently an excessive user of alcohol, drugs, or unlawfully using any controlled substance. N.C. Gen. Stat. § 20-19(e1)(1)-(2) (2011). Decisions of administrative agencies may be reversed as arbitrary and capricious if they are found to be "patently in bad faith or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment." *Everhart & Assoc. v. Dept. of Env't, Health & Natural Res.*, 127 N.C. App. 693, 697, 493 S.E.2d 66, 69 (1997) (citations omitted) (internal quotation marks omitted), *disc. review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998).

In the instant case, respondent primarily based its decision to deny petitioner's conditional restoration on a determination that petitioner is an "excessive user of alcohol." There is no definition of this term in the statute; therefore, we must "accord the words in [the] statute their 'natural,

ordinary meaning, unless the context requires a different construction.'" *N.C. Div. of Sons of Confederate Veterans v. Faulkner*, 131 N.C. App. 775, 779, 509 S.E.2d 207, 210 (1998) (citing *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 615 (1977)). According to Merriam Webster's Dictionary, "excessive" means "exceeding what is usual, proper, necessary, or normal." *Merriam Webster's Collegiate Dictionary* 435 (11th ed. 2003).

Respondent relied on testimony from petitioner and his witnesses that he occasionally consumes an alcoholic beverage as well as isolated portions of the Substance Abuse Evaluation to determine that petitioner is an excessive user of alcohol. Respondent failed to consider abundant evidence supporting that petitioner is no longer an excessive user of alcohol; for example, the opinions of each of his witnesses and the conclusions of the substance abuse evaluator, who stated that petitioner's occasional weekend consumption of a glass of wine or beer is "not problematic" and rather, that petitioner "is very responsible" and does not need any traditional treatment at this time. In direct contravention to this conclusion, respondent told petitioner that in order to conditionally reinstate his license, it would need to see "support in place where you go to AA, get counseling" and "no drinking at all."

Essentially, respondent misconstrued the meaning of "excessive user" to include "anyone [who] consumes an alcohol[ic] beverage and operates a motor vehicle to any degree" and anyone who does not totally abstain from drinking rather than exceeding what is usual, proper, necessary, or normal. In our view, such a construction does not indicate fair and careful consideration of the particular facts of this case or a reasonable exercise of judgment. Respondent incorrectly imposed a higher standard on petitioner than required by the law of North Carolina, and thus, its decision was arbitrary and capricious.

Respondent next argues that the superior court erred by only considering respondent's conclusion that petitioner was an excessive user of alcohol as the basis for his determination; thereby failing to consider alternative grounds which also supported denying petitioner's application for conditional restoration of driving privilege. We disagree.

As discussed above, the superior court applied the whole record test to determine if the record lacks substantial evidence to support respondent's conclusions of law. The superior court, in its order, listed alternative grounds that respondent recited in its findings, including whether the petitioner had driven during his current suspension, and found

that such conclusion was not supported by the evidence. The superior court also concluded that respondent did not follow North Carolina law in arriving at its decision because it substituted its own standard for that of the law. Therefore, the trial court considered more than simply respondent's determination that petitioner was an excessive user of alcohol and found that reversal was required on those grounds as well, and thus, respondent's argument is without merit.

Respondent finally contends that the superior court erred in "ordering specific performance" rather than reversing and remanding respondent's decision. Again, we disagree.

The superior court ordered the DMV to restore petitioner's privilege to drive in North Carolina and remove petitioner from the registry showing that his privilege was revoked. The order did not issue a license to petitioner, thereby usurping the DMV's sole authority to issue licenses; rather, the superior court merely sought to order the DMV to conditionally restore petitioner's license to drive in North Carolina. We find no error in this disposition.

Affirmed.

Judges MCGEE and CALABRIA concur.

Report per Rule 30(e).