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NO. COA05-306

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

GEORGE (GERRY) W. SHELL,
Petitioner,

v.

Wake County
No. 04 CVS 4683

NORTH CAROLINA STATE
BANKING COMMISSION,
Respondent.

Appeal by Petitioner from an order entered 4 October 2004 by Judge Donald W. Stephens, in Superior Court, Wake County. Heard in the Court of Appeals 15 November 2005.

Robinson Law Office, by Charles Everett Robinson, for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General L. McNeil Chestnut and Assistant Attorney General Anne J. Brown, for respondent-appellee.

WYNN, Judge.

Petitioner appeals from the trial court's affirmance of the North Carolina State Banking Commission's decision to revoke Petitioner's loan officer's license. Petitioner contends the Banking Commission's decision is not supported by substantial evidence and is arbitrary and capricious. After a careful review of the record as a whole, we affirm the trial court's order affirming the decision of the Banking Commission.

On 13 August 2002, Petitioner applied for a loan officer's license with the North Carolina Commissioner of Banks under the grandfather provision of the Mortgage Lending Act. Thereafter, Petitioner requested and was granted a hearing which was held before the Commissioner. In a decision issued on 15 May 2003, the Commissioner denied Petitioner's application for a loan officer's license based upon Petitioner's failure to disclose outstanding tax liens and judgments and based upon Petitioner's filing for bankruptcy five times within the past ten years of his application. Petitioner did not appeal the Commissioner's 15 May 2003 Decision and Final Order.

On 28 July 2003, Petitioner re-applied for a loan officer's license and filed a *de novo* application with supplemental materials for licensure, including evidence of release of a tax lien, certification that he completed the Overview of Lending and Application Process course, certification that he took and passed the exam for North Carolina Loan Officers, and a statement of explanation. At the time of his re-application, Petitioner had also improved his credit score and was employed by a mortgage lending company.

On 22 September 2003, the Commissioner issued a Final Order and Decision (1) vacating for cause the prior 15 May 2003 denial of Petitioner's application for a loan officer's license; and (2) granting a loan officer's license to Petitioner upon stated terms and conditions, including that he not have any meritorious complaints filed against him for five years, that he comply with

any Office of the Commissioner of Bank's request for assistance in resolving a complaint, and that he only act in the capacity of a loan officer, and that he may not be designated or act in the capacity of a branch manner without prior approval from the Commissioner for five years. Petitioner appealed the terms and conditions of his licensure to the North Carolina State Banking Commission on 10 October 2003. Petitioner stated in his request for review to the Banking Commission that he was only appealing the terms and conditions of his licensure, and that he was not challenging the Commissioner's order and decision to the extent it granted him a loan officer's license.

On 17 March 2004, the Banking Commission vacated and reversed the Commissioner's Final Order and Decision of 22 September 2003, and revoked Petitioner's loan officer's license based upon the recommendation and proposed resolution of the appellate panel. The appellate panel, which was appointed to review Petitioner's appeal to the Banking Commission, concluded that "the Commissioner erred as a matter of law in concluding on these facts that character and financial responsibility on the part of the applicant had been proven[,] and therefore Petitioner "[did] not meet the financial responsibility, character, or general fitness requirements under N.C. Gen Stat. § 53-243.05."

Petitioner filed his Written Notice of Appeal, Or, Alternatively, Petition for Judicial Review from the Banking Commission's final agency decision in Superior Court on 6 April 2004. On 4 October 2004, the trial court entered an order (1)

dismissing Petitioner's Petition for Judicial Review as to the Commissioner's 15 May 2003 Decision and Order; and (2) affirming the Banking Commission's Final Agency Decision to revoke Petitioner's loan officer's license. Petitioner appeals to this Court.

Before addressing the merits of Petitioner's appeal, we first note the applicable standard of review. The proper manner of review of a final agency decision "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dept. of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Our statutes provide that a reviewing trial court

may also reverse or modify the agency's decision, or adopt the administrative law judge's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2004).

De novo review is proper when the issue raised is whether an agency decision was based on an error of law. *Beneficial North Carolina, Inc. v. State ex rel. N.C. State Banking Comm'n*, 126 N.C. App. 117, 122, 484 S.E.2d 808, 811 (1997). Under *de novo* review, the court considers the question "anew, as if the agency has not addressed it." *Blalock v. N. C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 476, 546 S.E.2d 177, 182 (2001).

However, when the appellant challenges "(1) whether the agency's decision was supported by the evidence or (2) whether the decision was arbitrary or capricious, then the reviewing court must apply the 'whole record' test." *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). "The 'whole record' test requires the reviewing court to examine all competent evidence . . . in order to determine whether the agency decision is supported by 'substantial evidence.'" *Beneficial*, 126 N.C. App. at 122, 484 S.E.2d at 811 (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. N.C. Dep't of Human Res.*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citation omitted).

In applying the whole record test, our Supreme Court has held:

[I]t is for the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. It is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. . . . As Justice Exum stated in *In re Rodgers*: 'The 'whole record' test is

not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.'

State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 300 N.C. 381, 430, 269 S.E.2d 547, 578 (1980) (citations omitted).

"The standard of review for an appellate court when reviewing a superior court order affirming or reversing a decision of an administrative agency requires the appellate court to examine 'the trial court's order for error of law' just as in any other civil case." *Beneficial*, 126 N.C. App. at 123, 484 S.E.2d at 811 (citation omitted). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19.

In this case, Petitioner contends that the Banking Commission's decision to revoke his loan officer's license is not supported by substantial evidence in the record and is arbitrary and capricious. Thus, the appropriate standard of review is the "whole record" test. The record on appeal indicates that the trial court employed the correct standard of review since the trial court's order affirming the Banking Commission's final agency decision states that the final agency decision was "fully supported by the record as a whole, [and] has a rational basis in the evidence[.]" Thus, we now determine whether the trial court applied the "whole record" standard of review properly.

North Carolina General Statute Section 53-92(d) vests "full power and authority" in the Banking Commission to "supervise, direct and review" the powers exercised by the Commissioner. See N.C. Gen. Stat. § 53-92(d) (2004). Further,

Upon an appeal to the Banking Commission by any party from an order entered by the Commissioner of Banks following an administrative hearing . . . the chairman of the Commission may appoint an appellate review panel of not less than five members to review the record on appeal, hear oral arguments, and make a recommended decision to the Commission.

N.C. Gen. Stat. § 53-92(d).

Here, Petitioner appealed the specific terms and conditions of the Commissioner's Decision and Final Order granting him a loan officer's license to the North Carolina State Banking Commission. The Banking Commission appointed an appellate panel to review Petitioner's appeal under North Carolina General Statute Section 53-92(d). Upon its review of the record on appeal and the briefs submitted by both parties, the appellate panel concluded that "the Commissioner erred as a matter of law in concluding on these facts that character and financial responsibility on the part of the applicant had been proven[,] and that Petitioner "[did] not meet the financial responsibility, character, or general fitness requirements under N.C. Gen Stat. § 53-243.05." See N.C. Gen. Stat. § 53-243.05(i) (2004) (stating that an applicant for a loan officer's license is required to possess character, fitness and financial responsibility.).

The record undisputably shows that Petitioner filed for bankruptcy five times within the past ten years of filing for his

loan officer's license. Although the appellate panel acknowledged in its report that a mere filing for bankruptcy would be insufficient evidence to justify the denial of a loan officer's license, the appellate panel distinguished this case stating:

However, in a case like this one where a pattern or practice of frequent filings suggests a misuse of the bankruptcy laws, with the likely prejudice and harm to creditors that that involves, denial would be appropriate because the requisite character and financial responsibility is not established by the applicant. We so conclude.

The Banking Commission accepted the appellate panel's recommendation and proposed resolution to reverse the Commissioner's 22 September 2003 Decision and Final Order granting Petitioner a loan officer's license. Because there was sufficient evidence in the record to support the appellate panel's findings, and the Banking Commission is authorized to review and reverse an order of the Commissioner, we affirm the trial court's holding on this issue.

In his final assignment of error, Petitioner contends that the Banking Commission's Decision and Order revoking his loan officer's license was arbitrary and capricious. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith, or "whimsical" in the sense that "they indicate a lack of fair and careful consideration[.]" *State ex rel. Comm'r of Ins.*, 300 N.C. at 420, 269 S.E.2d at 573. After reviewing the whole record and finding substantial evidence to support the Banking Commission's order, we hold the Banking Commission did not act in an arbitrary and capricious manner in

revoking Petitioner's loan officer's license. Accordingly, this assignment of error is also overruled.

Affirmed.

Judges STEELMAN and JOHN concur.

Report per Rule 30(e).