NO. COA11-1361
NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2012

PAULA SPENCER, LPN,
Petitioner,

v. Wake County
No. 11 CVS 5364

NORTH CAROLINA BOARD OF NURSING,
Respondent.

Appeal by petitioner from judgment entered 13 September 2011 by Judge Gary E. Trawick in Wake County Superior Court. Heard in the Court of Appeals 8 March 2012.

*Patrice Walker for the petitioner-appellant.*

*J.W. Bryant, Law Firm, P.L.L.C. by John Walter Bryant & Amber Ivie Hayles for the respondent-appellee.*

STEELMAN, Judge.

The superior court did not err in affirming Board's Final Decision and Order imposing probationary conditions upon Petitioner's license as a nurse.

## I. Factual and Procedural History

Paula Spencer (petitioner) is a Licensed Practical Nurse. The North Carolina Board of Nursing (Board) was established by

statute to oversee the practice of nursing. N.C. Gen. Stat. § 90-171.21 (2011).

On 2 June 2010, Board sent a Letter of Charges to petitioner stating that she had been convicted of two driving while impaired (DWI) charges in a year and that this indicated that petitioner "may not be safe and competent to practice nursing or that you may have violated the Nursing Practice Act." On 25 February 2011, a hearing was held before Board. The parties stipulated to petitioner's two DWI convictions within a one year period. On 25 February 2011, Board entered a Final Decision and Order. This order made the following findings of fact:

> 5. Ms. Spencer was convicted of the first DWI on March 3, 2009, in Randolph County. She was convicted of the second DWI on February 8, 2010, in Guilford County. Ms. Spencer received two (2) DWI's within one (1) year. As part of the court sanction, Ms. Spencer was placed on supervised probation for two (2) years.
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> 6. Ms. Spencer was an in-patient and received treatment for substance abuse from the Watershed Treatment Facility in Delray Beach, Florida from October 8, 2009 through November 24, 2009. Following discharge, she continued her treatment with Recovery and Renewal Intensive Outpatient Program in High Point, North Carolina from November 27, 2009 through January 18, 2010. Ms. Spencer was diagnosed with chemical dependency.

Board ordered that petitioner be issued a license with probationary conditions requiring her to comply with Board's probation program for a minimum of one year.

On 4 April 2011, petitioner filed a Petition for Judicial Review in the Superior Court of Wake County. On 13 September 2011, Judge Trawick entered an order affirming the Final Decision and Order of Board.

Petitioner appeals.

## II. Standard of Review

> In reviewing an appeal from a trial court's order affirming an agency's final decision, this Court must "(1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard." *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993). The proper standard of review for the trial court to apply "in reviewing an agency decision depends upon the nature of the alleged error." *Id.* Where an appellant alleges the agency's decision was affected by errors of law, "*de novo*" review is required; however, where an appellant questions whether the agency's decision was supported by substantial evidence or was arbitrary and capricious, the trial court must employ the "whole record" test. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991); *see also* N.C. Gen. Stat. §§ 150B-51(b)(4)-(6) (1999).

*Dixie Lumber Co. of Cherryville v. N.C. Dep't of Env't, Health & Nat. Res.*, 150 N.C. App. 144, 146-47, 563 S.E.2d 212, 214 (2002).

In the instant case, the petition for judicial review attacked Board's jurisdiction, attacked the sufficiency of the evidence presented to Board, attacked finding of fact 8 and conclusions of law 1, 5, 6, 7, and 8.

Board's finding of fact 8 reads as follows:

> The Board takes official notice that with it's [sic] mandate to protect the public, the Board cannot fulfill the mandate if a known substance abuser is not appropriately monitored. Ms. Spencer declined participation in the Alternative Program; and therefore, the Board cannot assure she is safe and competent to practice nursing without monitoring her nursing practice.

The petition for judicial review attacked the legal validity of Board's conclusions in the first sentence of finding 8 and the second portion of the second sentence. It did not challenge the finding contained in the first part of the second sentence. We hold that the portions of finding of fact 8 challenged in the petition are in reality conclusions of law and treat them as such. *See, e.g.*, *Sheffer v. Rardin*, ___ N.C. App. ___, ___, 704 S.E.2d 32, 35 (2010).

Based upon this holding, we conclude that the proper standard of review for the superior court for all issues in this matter was *de novo*. This was the standard of review that was applied by the superior court in this case.

To the extent that petitioner seeks direct review of alleged errors contained in Board's Final Decision, these are not properly before this Court. Our review is limited to the final judgment of the superior court. N.C. Gen. Stat. § 150B-52 (2011). *See also Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Human Servs.*, 176 N.C. App. 46, 59, 625 S.E.2d 837, 845 (2006). Petitioner's arguments seeking direct review of Board's Final Decision and Order are dismissed. This disposes of Arguments I, II, VI, VII, and VIII contained in petitioner's brief.

III. Petitioner's Substance Abuse

In her third argument, petitioner contends that the superior court erred in its findings 17 and 18[1] because they were not supported by competent evidence and were not relevant.

[1] Certain portions of the superior court's order are designated as "findings of fact." These "findings" consist of legal conclusions and repetition of findings contained in Board's Final Decision and Order. As noted above, the proper standard of review for the superior court was *de novo*. We treat these "findings" as either conclusions of law or recitations explaining the reasoning of the court, but not as true "findings of fact."

Petitioner argues that "the Legislature has given the Board jurisdiction over nurses only when they allow substance abuse to impact their nursing practice." We disagree.

Findings 17 and 18 of the superior court's order read as follows:

> 17. The NCBN cannot fulfill its mandate to protect the public if a known, and as in this case, an admitted substance abuser is not appropriately monitored.
>
> 18. As the Petitioner declined to participate in the Alternative Program where she would have been monitored, the NCBN cannot best assure the Petitioner has not relapsed and that she is safe and competent to practice nursing.

These findings are clearly based upon finding of fact 8 contained in Board's Final Decision and Order, as set forth above. As previously noted, petitioner failed to contest the factual portions of finding of fact 8 of Board's order in her petition for judicial review. We are thus left with her challenge to Board's authority to discipline nurses who have a substance abuse problem. We note that petitioner failed to challenge findings of fact 5 and 6 of Board's order. The superior court considered those to be established facts, as does this Court for purposes of our analysis.

Petitioner's argument is that even though she has a substance abuse problem, there was no evidence or findings that this problem affected her performance of her work duties, and that Board was without authority to discipline her by placing her on probation.

The superior court held that

> N.C.G.S. § 90-171.37 authorizes the NCBN to discipline a nurse who has been convicted of or pleaded guilty to any crime which indicates that the nurse is unfit or incompetent to practice nursing, engages in conduct that endangers the public health, and/or has violated an [sic] rules enacted by the Board. See N.C.G.S. § 90-171.37(2), (4), (7), and (8).

N.C. Gen. Stat. § 90-171.23(b)(3) authorizes Board to "[a]dopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article." N.C. Gen. Stat. § 90-171.23(b)(3) (2011). Board has adopted regulations found in Article 21 of the North Carolina Administrative Code. "Behaviors and activities which may result in disciplinary action by the Board" include drug or alcohol abuse or "commission of any crime which bears on a licensee's fitness to practice nursing as set out in G.S. 90-171.48(a)(2)." 21 N.C.A.C. 36.0217(c) (2010).

N.C. Gen. Stat. § 90-171.48(a)(2) contains a long list of criminal offenses, including "driving while impaired in

violation of G.S. 20-138.1 through G.S. 20-138.5." N.C. Gen. Stat. § 90-171.48(a)(2) (2011).

Under 21 N.C.A.C. 36.0217(c), the drug or alcohol abuse is not restricted to abuse that occurs in the actual course of performing nursing duties. Similarly, the convictions for impaired driving, under the regulations, are deemed to bear on petitioner's fitness to practice nursing.

Petitioner's argument is without merit.

IV. Clear and Convincing Evidence

In her fourth argument, petitioner contends that the evidence presented to Board did not show her violations by "clear and convincing" evidence, the applicable standard. We disagree.

We first note that the critical factual findings of Board in findings of fact 5 and 6 were unchallenged in the petition for judicial review, and are binding on appeal. The superior court concluded as follows:

> Facts in an Administrative Proceeding shall be proved by credible and substantial evidence. The substantial evidence should be both clear and convincing and should be such that would lead a reasonable mind to a conclusion that a violation of the Nursing Practice Act or pertinent administrative regulations have occurred.

The superior court went on to hold that the Board correctly determined that petitioner had violated a number of statutory and regulatory provisions and was properly disciplined by Board.

Petitioner's argument is based upon a parsing of the words contained in the superior court's conclusion number 4, set forth above. She contends that "clear and convincing" evidence is a higher standard than evidence that "would lead a reasonable mind to a conclusion." These clauses are joined by the conjunction "and." We hold that the second clause in the sentence did not constitute an improper dilution of the standard of proof required in this case.

This argument is without merit.

V. Sufficiency of Superior Court's Conclusions

In her fifth argument, petitioner contends that conclusions of law 5, 6, and 7 of the superior court do not support its affirmation of the decision of Board. We disagree.

These three conclusions held that petitioner violated N.C. Gen. Stat. § 90-171.37(7) and (8) and 21 N.C.A.C. 36.0217(c)(1). In addition to revoking and suspending licenses, Board has the authority to "invoke other such disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper; in any instance or instances in which the Board is

satisfied that the applicant or licensee: . . . [h]as willfully violated any rules enacted by the Board." N.C. Gen. Stat. § 90-171.37 (2011). The conclusions of law holding that petitioner violated provisions of N.C. Gen. Stat. § 90-171.37 support its affirmation of Board's decision.

This argument is without merit.

AFFIRMED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).