

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF MECKLENBURG

19-CVS-14937

William Kennedy and  
Delevan Financial, LLC,  
Petitioners

v.

North Carolina Department of Insurance,  
Respondent

**ORDER**  
**AFFIRMING DECISION OF THE**  
**DEPARTMENT OF INSURANCE**

This matter came before the undersigned superior court judge at the January 9, 2020 term of Court on Petitioner Williams Kennedy's and Petitioner Delevan Financial, LLC's petition for Judicial Review of the North Carolina Department of Insurance's Order and Final Decision dated June 28, 2019 revoking Petitioner William Kennedy's resident insurance producers and broker's license and revoking Petitioner Delevan Financial, LLC's business entity license, pursuant to NCGS §58-33-46. The judicial review is being brought pursuant to NCGS §150B-43, NCGS §150B-40, and NCGS §7A-250. Petitioners were represented in superior court by Attorney John T. Crook. The North Carolina Department of Insurance ("Department") was represented by Attorney Denise Stanford.

Issues and Standards of Review

Pursuant to N.C. Gen. Stat. § 150B-51(b), a final agency decision may be reversed or modified by a reviewing court if the substantial rights of the petitioner 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 or administrative law judge;

(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).

The proper standard for the superior court's judicial review depends upon the particular issues presented on appeal. When the petitioner questions (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. . . . However, if a petitioner contends the board's decision was based on an error of law, de novo review is proper. . . . Moreover, the trial court, when sitting as an appellate court to review a decision of a quasi-judicial body, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review. Mann Media, Inc. v. Randolph Cty. Planning Bd., 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)

Where "the gravamen of an assigned error is that the agency violated" N.C.G.S. § 150B-51(b)(4), the superior court "engages in de novo review." N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004). Under the de novo standard of review, the superior court "consider[s] the matter anew and freely substitutes its own judgment for the agency's." Id. at 660, 599 S.E.2d at 895. An error of law, as that term is used in subdivision (b)(4), exists if a conclusion of law entered by the administrative agency is not supported by the findings of fact entered by the agency or if the conclusion of law does not support the decision of the

agency. Brooks v. Ansco & Assocs., 114 N.C. App. 711, 443 S.E.2d 89, 1994 N.C. App. LEXIS 508 (1994).

The superior court reviews errors of law de novo and uses the whole record test "to review allegations that the agency decision was not supported by the evidence or was arbitrary and capricious." Kea v. HHS, 153 N.C. App. 595, 602, 570 S.E.2d 919, 924 (2002) (citation omitted). To apply the whole record review standard, "the reviewing court [must] examine all competent evidence (the whole record) in order to determine whether the agency decision is supported by substantial evidence." Kea, 153 N.C. App. at 602, 570 S.E.2d at 924 (citation and internal quotation marks omitted). Further, a reviewing court applying the whole record test "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter de novo." N. Carolina Dep't of Env't & Nat. Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (citation and internal quotation marks omitted). "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C. Gen. Stat. § 150B-2(8c) (2017).

In the case at bar, there are three categories of issues presented for the judicial review:

1. Whether the Department of Insurance had authority and jurisdiction to enforce claims arising under the Affordable Care Act or under Title 45 of the Code of Federal Regulations.
2. Whether the agency overstepped its authority or abused its authority by revoking Petitioner's license due to the following conduct attributed to Petitioner:
  - a. Field workers/outreach workers engaging in activities that required licenses from the Department while acting on behalf of Petitioner in 2015 and 2016.
  - b. Petitioner selling Aetna policies without agency appointment with Aetna.
  - c. Petitioner failing to maintain documents as required by the Department.

3. Whether the revocation of Petitioner's license arbitrary and capricious. Or whether a remedy less drastic than revocation was available.

There are three standards of review related to the issues above that have been utilized by the undersigned:

1. Jurisdiction and statutory claims warrant a de novo review.
2. Findings related to the Petitioner conducting unlicensed activity warrant a whole record review.
3. Alleged arbitrary and capricious sanctioning for record keeping procedures and having unlicensed workers warrants a whole record review.

The undersigned carefully reviewed the case as follows: listened to the entire six-day hearing before the Department's Hearing Officer Sherri Hubbard (which included the examination of several witnesses including Mr. Kennedy, review of documents and other exhibits, and various arguments of counsel (closing arguments were waived)), reviewed portions of the hearing transcript, read the memos submitted by counsel, reviewed the exhibits submitted by counsel, read and researched the relevant case law and statutes, and considered arguments of counsel from the 2020 superior court hearing.

#### Facts Adopted

It is not necessary, that a court reviewing an administrative agency's decision "make findings of fact and enter a judgment thereon in the same manner as the court would be when acting in its role as trial court." Shepherd v. Consolidated Judicial Retirement System, 89 N.C. App. 560, 562, 366 S.E.2d 604, 605 (1988). [W]here the findings of fact of an administrative agency are supported by substantial competent evidence in view of the entire record, they are binding on a reviewing court, and the reviewing court lacks authority on de novo review to make alternative

findings at variance with the agency's decision. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004). Further, administrative findings of fact made by the Commission, if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope of its reviewing powers.

This court has carefully considered the arguments of counsel, the brief of the parties, the hearing before the Department's Hearing Officer, the exhibits, the decision of the Department's Hearing Officer below, the Final Agency Decision, and the whole official record submitted. And this Court has given no deference to any prior decision in this case but has reviewed and considered the official record de novo.

The undersigned adopts the findings of the N.C. Department of Insurance Hearing Officer Sherri Hubbard, entered June 28, 2019, as they are supported by competent, material and substantial evidence. The undersigned will not make alternate findings.

#### Conclusions

1. The evidence received by the Department's Hearing Officer was sufficient as a matter of law.
2. In applying a de novo review of the issues of law, the Department's decision to review Petitioners' conduct and impose sanctions was not in excess of its statutory authority or jurisdiction.
3. The Department's decision was not made upon unlawful procedures, or in violation of constitutional provisions, statutory authority, or jurisdiction of the agency.
4. The Department did not make an error of law.

5. In applying the de novo standard, the Department had jurisdiction and authority to both conduct a review of Petitioners and impose sanctions.
6. In applying the whole record standard of review, the Department's findings of fact were supported by substantial evidence.
7. In applying the whole record standard of review, the Department's findings and conclusions were neither arbitrary, capricious nor an abuse of process.
8. The Department's findings of fact and conclusions of law were supported by competent, material, and substantial evidence, and were not arbitrary, capricious, or an abuse of discretion.
9. The Department's decision was supported by competent, material and substantial evidence in the record.


Order

Based upon the foregoing and in viewing the record de novo and as a whole,

1. The Court finds no error, and the agency's final decision revoking the Petitioner William Kennedy's resident insurance producers and broker's license is AFFIRMED.
2. The Court finds no error, and the agency's final decision revoking the Petitioner Delevan Financial, LLC's business entity license is AFFIRMED.
3. The Petitioners' request for attorney's fees is DENIED.

IT IS SO ORDERED.

THIS the 14<sup>th</sup> day of April, 2022.

  
Karen Lady-Williams  
Superior Court Judge Presiding