

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1851

IN THE MATTER OF EARL TURNER CARR

Judgment Rendered: NOV - 9 2011

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On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 585,550

The Honorable Todd Hernandez, Judge Presiding

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* * * * *

BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

CARTER, C. J.

The Louisiana Department of Insurance (“LDOI”) appeals a judgment of the district court that overturned the decision of the Division of Administrative Law (“DAL”) and ordered that Earl Turner Carr should be allowed to work as a public adjuster.

FACTS AND PROCEDURAL HISTORY

Carr began working as a public adjuster in Louisiana in 2000. At that time, adjusters were not regulated or required to be licensed. In 2006, the Louisiana Legislature enacted provisions that required adjusters to be licensed by the LDOI. In compliance with the new regulations, Carr submitted his application for licensure.

The licensure application sets forth seven background questions, including whether the applicant has a prior felony conviction. Carr responded affirmatively, disclosing that in 1996, he pleaded guilty to one count of pension fund fraud in violation of title 18 U.S.C. § 664. The application further questions whether the applicant has applied for a waiver under title 18 U.S.C. § 1033 (“1033 waiver”), which provides that a person who has committed certain enumerated offenses may engage or participate in the business of insurance only if he has obtained the written consent of the appropriate insurance regulatory official. Carr indicated that he had requested such a waiver and attached his request to his licensure application.

Within the LDOI, 1033 waiver requests are handled by the fraud division. The division investigates the request then presents the request to a “1033 committee” and the Insurance Commissioner. The committee makes a recommendation, and the Insurance Commissioner decides whether to grant or deny the request. Pending action on his waiver request, Carr’s licensure

application was held in abeyance. After reviewing Carr's 1033 waiver request and receiving the committee's recommendation, Insurance Commissioner James J. Donelon denied Carr a 1033 waiver.¹

Carr requested a review hearing before the DAL pursuant to Louisiana Revised Statutes Annotated section 22:1700. The DAL affirmed the Commissioner's decision to deny the waiver. Carr then petitioned the district court for review pursuant to Louisiana Revised Statutes Annotated section 49:964, arguing that title 18 U.S.C. § 1033 does not apply to public adjusters because they are not "engaged in the business of insurance" and, alternatively, that the decision of the Insurance Commissioner was arbitrary and capricious. The district court found that public adjusters are not engaged in the business of insurance as defined by title 18 U.S.C. § 1033 and overturned the decision of the DAL. The district court further ordered that Carr should be allowed to work as a public adjuster.

The LDOI now appeals the decision of the district court. Carr has answered the appeal, seeking an award of attorney fees and costs and further contending that the LDOI's appeal is frivolous, thereby warranting damages, costs, and attorney fees.

STANDARD OF REVIEW

The Louisiana Administrative Procedure Act (APA) governs judicial review of a final decision in an agency adjudication, providing that:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;

¹ The letter that Carr received informing him of the denial was signed by the LDOI's executive counsel; however, the testimony at the hearing established that the ultimate decision in every 1033 waiver case is made by the Insurance Commissioner.

- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (6) Not supported and sustainable by a preponderance of the evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. Where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

La. Rev. Stat. Ann. § 49:964G.

Any one of the six bases listed in the statute is sufficient to modify or reverse an agency determination. *Wild v. State, Dept. of Health and Hospitals*, 08-1056 (La. App. 1 Cir. 12/23/08), 7 So. 3d 1, 4. The APA further specifies that judicial review shall be conducted by the court without a jury and shall be confined to the record. La. Rev. Stat. Ann. § 49:964F.

When reviewing a final administrative decision, the district court functions as an appellate court. *Maraist v. Alton Ochsner Medical Foundation*, 02-2677 (La. App. 1 Cir. 5/26/04), 879 So. 2d 815, 817. Once a final judgment is rendered by the district court, an aggrieved party may seek review by appeal to the appropriate appellate court. La. Rev. Stat. Ann. § 49:965. On review of the district court's judgment, no deference is owed by the court of appeal to the factual findings or legal conclusions of the district court, just as no deference is owed by the Louisiana Supreme Court to factual findings or legal conclusions of the courts of appeal. *Maraist*, 879 So. 2d at 817. Consequently, this court will conduct its own independent review of the record in accordance with the standards provided in Section 49:964G.

DISCUSSION

Louisiana's Public Adjuster Act is set forth in Louisiana Revised Statutes Annotated §§ 22:1691, *et seq.*, and governs the qualifications and procedures for the licensing of public adjusters. The Act defines a public adjuster as one who engages in public adjusting, which means either:

(a) Investigating, appraising, or evaluating and reporting to an insured in relation to a first-party claim for which coverage is provided by an insurance contract that insures the property of the insured. Public adjusting does not include acting in any manner in relation to claims for damages to or arising out of the operation of a motor vehicle. Public adjusting does not include any activities which may constitute the unauthorized practice of law. Nothing in this Part shall be considered as permitting the unauthorized practice of law.

(b) Advertising for employment as a public adjuster of insurance claims or soliciting business or representing himself to the public as a public adjuster of first-party insurance claims for losses or damages arising out of policies of insurance that insure real or personal property.

La. Rev. Stat. Ann. § 22:1692 (7), (8).

A person wishing to hold himself out as a public adjuster must apply to the Insurance Commissioner for a license, using the application prescribed by the Insurance Commissioner. La. Rev. Stat. Ann. §§ 22:1693-1694. Before issuing a public adjuster license, the Insurance Commissioner must find, among other things, that the applicant:

When applicable, has the written consent of the commissioner of insurance pursuant to [title 18 U.S.C. § 1033], or any successor statute regulating crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce.

La. Rev. Stat. Ann. § 22:1695A(5). As explained in *Donelon v. Louisiana Div. of Admin. Law ex rel. Wise*, 522 F.3d 564, 565 (5th Cir. 2008):

Congress enacted 18 U.S.C. § 1033 as part of the "Violent Crime Control and Law Enforcement Act of 1994" ("the Act") which included criminal and civil enforcement provisions aimed at white-collar and insurance fraud. Engaging in the insurance business with a prior felony conviction, making false material statements, and

embezzlement are among insurance-related crimes defined by the statute. Section 1033(e)(2) allows a person who has been convicted of any offense enumerated in the statute, as well as “any criminal felony involving dishonesty or a breach of trust,” to engage in the insurance business only if the person has the written consent of “any insurance regulatory official authorized to regulate the insurer.”

(Citations and footnote omitted.)

The interpretation of a statute begins with the language of the statute itself. *Denham Springs Economic Development Dist. v. All Taxpayers, Property Owners*, 04-1674 (La. 2/4/05), 894 So. 2d 325, 330. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written, and no further interpretation may be made in search of the intent of the legislature. *Denham Springs Economic Development Dist.*, 894 So. 2d at 330-331.

Pursuant to the standard rules for statutory construction developed in the jurisprudence: 1) it is presumed that every provision of law was intended to serve some useful purpose; 2) it is not presumed that the lawmaker intended for any part of a law to be meaningless; 3) the lawmaker is presumed to have enacted the law with full knowledge of all other laws pertaining to the same subject matter; 4) it is the duty of the courts to interpret a provision of law so as to harmonize and reconcile it with other provisions pertaining to the same subject matter; and 5) when a law is susceptible to two or more interpretations, that which affords a reasonable and practical effect to the entire act is preferred to one that renders part of the act nugatory. *SEMO, Inc. v. Board of Com'rs for Atchafalaya Basin Levee Dist.*, 07-2571 (La. App. 1 Cir. 6/6/08), 993 So. 2d 222, 225. Additionally, rendering the whole or a part of a law meaningless is the last option available to a court when it interprets a law. *SEMO*, 993 So. 2d at 225-226. Where a statute is ambiguous and susceptible of two constructions, the courts will provide the construction that best comports with the principles of reason, justice, and

convenience, for it is presumed that the legislature intended such construction of its language as would avoid injustice, oppression, or absurd consequences. *SEMO*, 993 So. 2d at 226.

The specific language placed at issue here is Louisiana Revised Statute Annotated section 22:1695A's requirement that an applicant have a 1033 waiver "[w]hen applicable." Carr takes the position that the waiver is applicable only in accordance with the terms of 18 U.S.C. § 1033, which limits itself to those in the business of insurance. Carr further argues that since public adjusters are not engaged in the business of insurance, the 1033 waiver is not "applicable" to him through Section 1695A. Carr contends that the legislature could only require public adjusters to obtain 1033 waivers if it defined "engaged in the business of insurance" for purposes of the Public Adjuster Act and, since the legislature did not, Section 1695A was unnecessarily or mistakenly included in the Act.

Based on the plain language of Section 1695A, the waiver under title 18 U.S.C. § 1033, regulating crimes by or affecting those engaged in the business of insurance, is applicable to public adjusters. If the applicant has not committed such a crime, the waiver is not applicable. We decline to interpret Section 1695A as Carr suggests so as to render the provision meaningless. Through Section 1695A, the 1033 waiver is a statutory prerequisite for those who have committed certain crimes, such as Carr, to obtain a public adjusters license. The district court erred as a matter of law in finding otherwise.

Carr contends that even if a waiver is required, denial of his waiver request was arbitrary and capricious and should be overturned. *See* La. Rev. Stat. Ann. § 49:964G(5). A decision is "arbitrary and capricious" if there is no rational basis for the action taken. *Bowers v. Firefighters' Retirement System*, 08-1268 (La. 3/17/09), 6 So. 3d 173, 176.

The testimony presented at the administrative hearing establishes that the LDOI followed its normal procedure in reviewing Carr's waiver request. Once received, Carr's request was referred to the LDOI's fraud division where it was reviewed to determine that it was complete and that the information contained therein was true and correct. A background check was run through the National Crime Information Center maintained by the FBI, which revealed nothing further than the information set forth in Carr's application and waiver request. The Director of the Fraud Section then scheduled a meeting with the 1033 committee and the Insurance Commissioner.

At the meeting, the director presented the information surrounding Carr's request. One of the committee members who reviewed Carr's request testified at the administrative hearing that Carr's conviction was reviewed in detail, paying particular attention to how the offense related to what the LDOI considers dishonesty and breach of trust and also considering Carr's narrative explaining the circumstances of the offense. A second committee member indicated that the committee fully considered all of the exculpatory information contained in Carr's file, including the numerous letters of recommendation. The committee then collectively recommended to the Insurance Commissioner, who was present and privy to the discussions, that Carr's request be denied. The Insurance Commissioner accepted the committee's recommendation and denied Carr's request.

After reviewing this matter pursuant to the standards of Louisiana Revised Statutes Annotated section 49:964G, we cannot conclude that the Insurance Commissioner's decision to deny Carr's waiver request was arbitrary and capricious. Carr admittedly committed pension fund fraud in violation of title 18 U.S.C. § 664, which subjects him to the Insurance Commissioner's discretionary

authority as to whether a 1033 waiver should be granted. The decision was reached after thorough review in accordance with LDOI's standard internal procedures and after considering all of the character evidence submitted. Although Carr points out that two others with criminal pasts have received 1033 waivers, the Insurance Commissioner was within his authority to distinguish the nature of those crimes (obstruction of justice and possession of cocaine) from Carr's crime of pension fund fraud. We find that a rational basis exists for the Insurance Commissioner's discretionary action in denying the 1033 waiver.

CONCLUSION

For the foregoing reasons, the district court erred in reversing the decision of the DAL. Accordingly, the judgment of the district court is reversed, and the decision of the DAL is reinstated. For the same reasons, the relief requested in Carr's answer to the appeal is denied. Costs of this appeal are assessed to Earl Turner Carr, Jr.

DISTRICT COURT JUDGMENT REVERSED; DIVISION OF ADMINISTRATIVE LAW JUDGMENT REINSTATED; ANSWER TO APPEAL DENIED.