# STATE OF MICHIGAN

# COURT OF APPEALS

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| VITTORIO GINO ABBRUZZINO,<br><br>Petitioner-Appellee,<br><br>v<br><br>DEPARTMENT OF LABOR & ECONOMIC GROWTH and RESIDENTIAL BUILDERS & MAINTENANCE & ALTERATION,<br><br>Respondents-Appellants. | UNPUBLISHED<br>September 18, 2007<br><br>No. 269132<br>Wayne Circuit Court<br>LC No. 05-509243-CZ |

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Respondents appeal by leave granted from a circuit court order that reversed respondent's denial of petitioner's application for re-licensure as a residential builder. Respondents contend that the court applied an incorrect standard of review and thereby failed to afford the appropriate level of discretion to its decision. We agree and reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The issue presented on appeal is whether judicial review of the denial of a residential builder's license may include analysis of whether the ruling was supported by "competent, material and substantial evidence on the whole record" or whether the court is limited to determining whether the decision was "authorized by law." Const 1963, art 6, § 28. This Court explained in *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 487-489; 586 NW2d 563 (1998), the scope of review Const 1963, art 6, § 28 affords depends on whether a hearing is required. If a hearing is not required, then judicial review is limited to a determination whether the action of the agency was authorized by law. If a hearing is required, then the review also includes whether the decision is supported by competent, material and substantial evidence on the whole record. Likewise, the review authorized under the Administrative Procedures Act (APA) applies to "contested cases," which is defined in part by whether a hearing is necessary. MCL 24.301; MCR 7.105(A). Therefore, the appropriate level of judicial review turns on whether a hearing was required before the denial of the license.

The statute governing the particular agency decision at issue determines whether a hearing is required. *Northwestern Nat'l Cas Co, supra* at 488. This presents a question of law, which this Court reviews de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Petitioner contends that his application for a license and respondent's denial is a "contested case" under the APA and relies on the following administrative rule in support of his contention that respondents must provide notice and an opportunity to be heard:

> The department may deny an application for a license for good and sufficient case. Prior to entering an order of denial, the department shall notify the applicant by certified mail of its decision by a notice of intent to deny. The notice shall advise the applicant of reasons for denial and of *his right to make a written request for a hearing*. [Emphasis added.]

The cited administrative rule is a former version of 1999 AC, R 338.1524(3). It was amended in 2006 and currently states:

> (3) The department may deny an application for a license for good and sufficient cause. The notice of denial shall advise the applicant of reasons for denial and of his or her right to submit a petition for review of the denial.

The former version was in effect at the time that petitioner's license was denied.

Although the rule in effect at the time petitioner's license was denied referred to a right to request a hearing, the referenced right was statutory and was eliminated in 1980; the right referenced in the rule is a vestige of the former statute. Former MCL 338.1504 governed the application for a residential builder's license, and subsection 4 stated, "No applicant shall be refused a license without an opportunity for a hearing before the commission." This provision and many others were repealed by 1980 PA 299, § 2601, when the Legislature adopted a new occupational code, MCL 339.101 *et seq.*

The occupational code adopted in 1980 does not require a hearing before the denial of a license. MCL 339.515 provides that a person who does not receive a license "may petition the department and the appropriate board for a review . . . ." Similarly, MCL 339.520 provides that a person who has been denied licensure "may petition the department in writing for a review of that decision." MCL 339.521 addresses consideration of a petition under § 520 and states:

> In considering a petition submitted under section 520, the department and an appropriate board may reinvestigate the school, institution, or person and the curriculum of the school, institution, or program offered by the person before replying to the petition. The reply to the petition shall set forth the reasons licensure, approval, or recognition had not been granted. The reply shall be sent to the petitioning school, institution, or person.

The occupational code requires hearings with respect to certain proceedings, e.g., summary suspension of a license, § 505, orders to cease and desist, § 506, and formal complaints, § 508, §§ 511-514. It does not require a hearing before the denial of a license.

Petitioner's reliance on the former version of 1999 AC, R 338.1524(3) is misguided because that rule did not confer a right to a hearing; it merely referred to a statutory right that no longer existed. Because there was no right to a hearing in conjunction with the denial of the license, the court was not permitted to review respondent's decision to determine whether it was

supported by competent, material and substantial evidence on the whole record. The court should have been limited its review to analyzing whether the decision was "authorized by law."

An agency's decision is not "authorized by law" if it is in violation of a statute or constitution, in excess of the agency's authority or jurisdiction, is made upon unlawful procedures that result in material prejudice, or is arbitrary and capricious. *Northwestern Nat'l Cas Co, supra* at 488. In applying that standard, it is not proper for the circuit court or this Court to review the evidentiary support for the agency's determination. *Id*.

In the present case, although the court's ruling referred to the agency's decision as being "arbitrary," the parties do not contend that the court applied the "authorized by law" standard. Rather, they treat the court's ruling as one applying the "competent, material, and substantial evidence" standard and limit the discussion to whether that standard was applicable. Because we agree with respondents that the standard did not apply, we reverse the trial court's order. We express no opinion on whether the denial was "authorized by law" inasmuch as that point has not been briefed by the parties.

We reverse and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder