ADMINISTRATIVE APPEALS

SUPERIOR COURT JUDGE PAUL RIDGEWAY

NC CONFERENCE OF SUPERIOR COURT JUDGES - OCTOBER 2011

I. APPELLATE AND ORIGINAL JURISDICTION OF THE SUPERIOR COURT

The jurisdiction of the Superior Court to hear appeals from administrative agencies is derived from GS § 7A-250(a), which designates the superior court as:

> . . . the proper division, without regard to the amount in controversy, for review by original action or proceeding, or by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, proceeding, or appeal.

Note that the jurisdiction conferred by GS 7A-250(a) can be either appellate jurisdiction or original jurisdiction. The distinction is critical, and is the threshold consideration for any appeal to superior court of an agency action.

In the context of an administrative appeal, the exercise of appellate jurisdiction by the superior court requires the court to exercise the "traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure while generally deferring to the latter's 'unchallenged superiority to act as finders of fact' and if those facts are supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 662 (N.C. 2004) (citations omitted).

The exercise of original jurisdiction by the superior court requires the court to "disregard the facts found in an earlier hearing or trial and engage in independent fact-finding. . . . It is a 'new trial on the entire case -- that is, on both questions of fact and issues of law -- conducted as if there had been no trial in the first instance.'" *Id*. at fn. 3. (citations omitted).

Our appellate courts have instructed that unless specifically stated otherwise by statute, appeals to the superior court from administrative decision-making bodies invoke the appellate jurisdiction of the superior court and not its original jurisdiction. *In re Dunn*, 73 N.C. App. 243 (1985). Most, but not all, agency appeals to superior court fall within this general rule, and hence, most administrative appeals invoke only the court's appellate jurisdiction. However, some agency appeals are designated by statute to be within the superior court's original jurisdiction. Thus, the first task of the superior court in reviewing an appeal from an administrative agency is to determine, by reference to statute, the scope of its jurisdiction.

A. GENERAL RULE OF APPELLATE JURISDICTION FOR ADMINISTRATIVE APPEALS

Because the determination of jurisdiction requires examination of the statutory authority for the taking of an appeal, the first task of the reviewing court is to locate that authority. In many instances, the court will find that authority in the North Carolina Administrative Procedure Act (GS 150B-1 et seq., hereinafter "APA"). The APA is intended to provide a uniform system of administrative rule making and adjudicatory procedures for North Carolina agencies and should be a starting point for the determination of jurisdiction. Article 4 of the APA sets out the procedures and standard of review for judicial review of final agency decisions of contested

cases in superior court, including the scope of the superior court's jurisdiction. Within Article 4, GS 150B-43 says, in part:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

In a moment we will consider three categories of exceptions, but this statute makes Article 4 of the APA the default authority for the superior court's jurisdiction. In other words, unless (1) an agency is exempt from the APA altogether, or (2) the agency has agency-specific language stating otherwise, or (3) the singular exception allowed within Article 4 itself applies, the jurisdiction of the superior court over agency appeals will be appellate jurisdiction. *N.C. Dep't of Env't & Natural Res. v. Carroll,* 358 N.C. 649, 663 (2004). With this in mind, we next consider the three exceptions to the applicability of this default rule.

B. THREE EXCEPTIONS TO GENERAL RULE

1. AGENCIES EXEMPT FROM THE APA.

Although the APA is intended to provide a uniform system for the adjudicatory procedures of administrative agencies, some agencies are entirely exempt from the APA. These agencies are listed in GS 150-1(c). Because these agencies are exempt, GS 150B-43 and the other judicial review provisions of Article 4 of the APA do not apply to the appeals arising from such agencies. Some of the more notable agencies exempted from the APA are the Utility Commission, the Industrial Commission and the Employment Security Commission.[1] For agencies so exempted, reference must be made to the agency-specific jurisdictional statutes governing appeals of contested cases within each agency.

Note, however, that with respect to the Utility Commission and the Industrial Commission, appeals from these agencies are outside the subject matter jurisdiction of the superior court and appeals from these agencies' decisions are made directly to the Court of Appeals. GS 7A-250(b). Moreover, with respect to the Employment Security Commission, appeals to superior court of ESC decisions are governed by GS 96-15. The relevant language of GS 96-15 provides that in judicial appeals to the superior court, the "finding of facts by the Commission, if there is any competent evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." This is, of course, simply another way of stating that the superior court has only appellate jurisdiction in the review of ESC decisions. In sum, therefore, the fact that some agencies are entirely exempt from the scope of the APA does little to alter the general rule that agency appeals fall within the appellate jurisdiction of the superior court.

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[1] Other agencies or functions entirely exempted from the APA are: The North Carolina National Guard in exercising its court-martial jurisdiction; The Department of Health and Human Services in exercising its authority over the Camp Butner reservation granted in Article 6 of Chapter 122C of the General Statutes; The State Board of Elections in administering the HAVA Administrative Complaint Procedure of Article 8A of Chapter 163 of the General Statutes; The North Carolina State Lottery and (Expires June 30, 2012), except as provided in G.S. 150B-21.1B, any agency with respect to contracts, disputes, protests, and/or claims arising out of or relating to the implementation of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5).

2. AGENCIES WITH AGENCY-SPECIFIC JUDICIAL PROCEDURE STATUTES

Recalling that the language of GS 150B-43 says that Article 4 of the APA applies to all agency appeals "unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute," we now look at the exception created by other agency-specific statutes that provide for judicial review. There are a number of such statutes, covering a myriad of administrative tasks and functions. When an appeal arises under one of these agency-specific statutes, the statute must be examined carefully to discern whether the General Assembly requires the superior court's judicial review to be original review or appellate. The chart attached at **Appendix A** provides a reference for many of these agency-specific statutes.

Recall that case law has directed that if an agency's statutes are silent as to the jurisdiction of the superior court in appellate review, then the review falls only within the appellate jurisdiction of the superior court. To invoke the superior court's original jurisdiction, the statute must state so specifically. *In re Dunn*, 73 N.C. App. 243 (1985). The statute must contain words that have the effect of directing the superior court to examine evidence anew, which is the hallmark of original jurisdiction. Some agency-specific statutes invoke original jurisdiction on appeal in just that manner – by instructing that on appeal the superior court is to "take evidence and examine facts." Other agency-specific statutes conferring original jurisdiction require that "the matter shall be heard *de novo* in the superior court." [2]

A number of these agency-specific statutes do not confer original jurisdiction at all, but rather instruct, either explicitly or implicitly by silence, that the review by superior court shall be only within the appellate jurisdiction of the court. Several simply provide that appeals to superior court shall be governed by the judicial review provisions (Article 4) of the APA, which, as discussed above, implies that only the appellate jurisdiction of the court is invoked. Other statutes itemize the issues that may be considered on appeal, and exclude any issues that would be outside of the appellate jurisdiction of the superior court. Hence, these statutes also do not invoke the superior court's original jurisdiction.

3. APPEALS FROM FINAL AGENCY DECISIONS WHERE AGENCY HAS NOT ADOPTED AN ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION.

The third and final exception to the default rule that administrative appeals in superior court are subject to appellate jurisdiction is found within Article 4 of the APA. This exception, by legislative action in the 2011 session, will soon be eliminated. However, appeals of matters commenced prior to the effective date of the amendment, January 1, 2012, may continue to find their way to superior court for several years to come. Understanding this exception requires a bit of background into the procedure in contested cases prior to an agency's final decision or order.

Some, but not all, of the agencies subject to the APA are required by GS 150B-23 to conduct contested case hearings before the Office of Administrative Hearings ("OAH"), as set out in Article 3 of the APA. At the conclusion of a hearing before an administrative law judge ("ALJ") of the OAH, the ALJ issues a recommended decision containing findings of fact and conclusions of law. Under current law, the agency then reviews the ALJ's recommended

[2] Herein lies a source of potential confusion because, as described in more detail below, the term "*de novo*" also describes a *standard of review* within the superior court's *appellate* jurisdiction of agency appeals (discussed below). It is important to recognize that the use of the term *de novo* in these jurisdiction statutes is not relevant to the appellate standard of review, but rather is only relevant to the fundamental question of the nature of the court's jurisdiction.

decision and issues a "final decision." In issuing the final decision, the agency may adopt all, none, or any part of the ALJ's decision. *See* GS 150B-34 and -36.

If an agency that is required to use the OAH under Article 3 does not adopt the ALJ's decision, and the matter is appealed to superior court, the scope of the superior court's judicial review of this singular circumstance is specified in GS 150B-51(c). This statute requires that when reviewing a final decision in a contested case in which an ALJ made a decision and the agency does not adopt the ALJ's decision, the court "shall review the official record, *de novo*, and shall make findings of fact and conclusions of law." "In reviewing the case," the statute goes on to say, "the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision. The court shall determine whether the petitioner is entitled to the relief sought in the petition, based upon its review of the official record." In other words, in this unique circumstance, the APA, through GS 150B-51(c), confers original jurisdiction on the superior court to consider the matter anew, albeit limited to the official record established in the prior proceedings and without taking new evidence.

In 2011, the General Assembly substantially amended the APA. One significant amendment makes the decision of the ALJ a "final decision" rather than a "recommended decision." *See*, S.L. 2011-398 at Sec. 18 (amending GS 150B-34 – Decision of ALJ). The agency will longer have the ability, after the decision of the ALJ is rendered, to adopt all, none or part of the ALJ's decision. Rather, if the agency disagrees with the ALJ, the agency is permitted to itself petition for judicial review to the superior court. *See*, S.L. 2011-398 at Sec. 22 (amending GS 150B-43 – right to judicial review); Sec. 15 (amending GS 150B-2(5) – definition of "party"). In conjunction with this amendment, the General Assembly also has deleted 150B-51(c), and has replaced it with language clarifying that all appeals of decisions to superior court from agencies subject to the APA invoke appellate, not original, jurisdiction unless agency-specific statutes expressly provide otherwise.

These amendments become effective January 1, 2012, and apply to contested cases commenced on or after that date. A "contested case" is defined to be the point at which either the agency or the person commences an administrative proceeding to determine the person's rights, duties, or privileges. GS 150B-22. In cases proceeding through the OAH, a case is commenced at the time the petition is filed with the OAH and the fee paid. GS 150B-23

II. THE SCOPE AND STANDARD OF REVIEW UNDER THE SUPERIOR COURT'S APPELLATE JURISDICTION

The scope of the superior court's appellate review of an agency decision is whether the agency's findings of fact are supported by the evidence, whether the findings support the agency's conclusions of law, and whether the conclusions of law are a proper statement and application of the law. The standards of review are the tests by which these determinations are made, namely, the "any competent evidence" test, the "substantial evidence based on the whole record" test, and the "clear, cogent and convincing evidence" test with respect to findings of fact and the *de novo* standard of review with respect to questions or issues of law. *Meza v. Div. of Soc. Servs. & Div. of Med. Assistance of the N.C. HHS*, 364 N.C. 61 at fn. 1 (N.C. 2010)

The standard of review to be applied by the superior court is dictated by the substantive nature of each assignment of error. *ACT-UP Triangle v. Comm'n for Health Servs*., 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). The standard of review, as a general rule, will be the "whole record review" if the issue on appeal is a "fact-intensive issue" and a "*de novo*" review if the issue on appeal is an "issue of law." *NC Dept of Env't & Nat Res v. Carroll*, 358 NC 649, 660 (2004).

A. THE WHOLE RECORD STANDARD OF REVIEW

The APA identifies two fact-intensive issues that can be the basis of a party's assignments of error. For administrative appeals subject to Article 4 of the APA, these are the only fact-intensive issues that can be asserted. GS 150B-51. They are:

- Whether the agency decision was supported by substantial evidence
- Whether the agency decision was arbitrary, capricious or an abuse of discretion

Id. If these errors are asserted by the appealing party, the superior court must conduct a "whole record review," and examine all competent evidence to determine if the agency's decision is supported by substantial evidence, and if not, whether substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions were affected by the agency's failure to so do. *Id*.

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Walker v. NC Dep't of Human Resources*, 100 NC App 498, 503 (1990). *See also, N.C. Dep't of Crime Control & Pub. Safety v. Greene*, 172 NC App 530, 534 (2005); GS 150B-2(8b) and -51(b)(5). Credibility of witnesses and resolution of conflicts in their testimony is for the agency, not the reviewing court. *In re Dailey v. Board of Dental Examiners*, 60 N.C. App. 441, 444, 299 S.E.2d 473, 476, *rev'd on other grounds*, 309 N.C. 710, 309 S.E.2d 219 (1983). The superior court may not take new evidence but, in appeals arising under the APA, if a petitioner wishes to present additional evidence, and the court is satisfied that the evidence is material to the issues, is not merely cumulative, and could not reasonably have been presented at the administrative hearing, the court may remand the case so that additional evidence can be taken. *See* GS 150B-49.

The whole record test "does not allow the reviewing court to replace the [fact finder's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Wake Cty. Bd of Educ.,* 292 NC 406, 410 (1977). On the other hand, the standard is greater than "any competent evidence" – "the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the [agency's] decision, to take into account whatever in the record fairly detracts from the weight of the [agency's] evidence." *Id.*

B. THE *DE NOVO* STANDARD OF REVIEW

The APA also identifies four issues of law that can be asserted as assignments of error. In judicial appeals subject to Article 4 of the APA, these are the only issues of law that can be asserted. In other words, under the APA, these four issues of law along with the two fact-intensive issues identified above are the only six assignments of error that can be made by an appellant.[3] GS 150B-51. The four legal issues are:

- Whether the agency's decision was in violation of the constitution
- Whether the decision was in excess of statutory authority or jurisdiction

[3] As a caveat to the assertion that there are only six permitted bases for appeal, note that GS 150B-43 states that "nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article." *See, Carillon Assisted Living, L.L.C. v. N.C. Dep't of Health & Human Serv.*,175 NC App 265, 278 (2006, Jackson, dissenting) ("Petitioner's proper procedural course regarding its constitutional claims would have been to file a separate complaint alleging its constitutional claims in superior court. N.C. Gen. Stat. 150B-43").

- Whether the decision was made upon unlawful procedure
- Whether the decision was affected by other error of law

Id. In reviewing these assignments of error, the superior court must apply a *de novo* standard of review. In so doing, the Court examines the matter anew to determine whether substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions were affected by errors of law and procedure. *Id.*

When employing the "*de novo*" standard of review, the trial court acts in the capacity of an appellate court and reviews the official record of an agency decision for errors of law and procedure. *NC Dept. of Env't & Nat Res v. Carroll, supra*, at fn 3. The superior court "considers the matter anew and freely substitutes its own judgment for the agency's judgment." *Mann Media, Inc. v. Randolph County Planning Bd*, 356 NC 1, 13 (2002). The Court should treat the matter "as though the issue had not yet been determined." *Whiteco Outdoor Adver. v. Johnson County Bd. Of Adjustment,* 132 N.C. App. 465 (1999). Although courts " traditionally accord some deference" to an agency's interpretations of its enabling statutes, under a *de novo* review, "those interpretations are not binding." *Total Renal Care of N.C., LLC v. N.C. HHS*, 698 S.E.2d 446 (2010)

As mentioned above, the *de novo* standard of appellate review should not be confused with jurisdictional statutes that confer original jurisdiction on the superior court to "hear the matter *de novo*." These jurisdictional statutes empower the court to consider anew the entire matter – both law and facts – as if there had been no proceeding below.

III. PROCEDURAL ERRORS BY THE PETITIONER WHICH DEPRIVE THE SUPERIOR COURT OF JURISDICTION

A common issue on appeal of agency decisions is whether the petitioner followed proper procedure in prosecuting the grievance or contested case prior to the petition for judicial review. Failure to follow statutory procedures by a petitioner is a jurisdictional bar to proceeding before the superior court. This was emphatically explained by our Court of Appeals in its 2010 opinion in *Dare County v. N.C. Dep't of Ins*:

> There is no inherent or inalienable right of appeal from an inferior court to a superior court or from a superior court to the Supreme Court. *A fortiori*, no appeal lies from an order or decision of an administrative agency of the State unless the right is granted by statute. The appeal must conform to the statute granting the right and regulating the procedure. The statutory requirements are mandatory and not discretionary. They are conditions precedent to obtaining a review by the courts and must be observed. Non-compliance therewith requires dismissal.

701 S.E.2d 368 (2010). This same principle has been extended to the internal grievance procedures of an agency – the failure of a petitioner to follow internal grievance procedures deprives the court of jurisdiction. *Lee v. N.C. DOT*, 175 N.C. App. 698 (2006); *Lewis v. N.C. Dep't. of Human Resources*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989)

In a broader sense, procedural errors of the petitioner can be viewed as a failure of a petitioner to satisfy one or more of the conditions precedent to judicial review found in the APA. In order to seek and obtain judicial review of an adverse administrative action, a party must satisfy five requirements: (1) the person must be aggrieved; (2) there must be a contested case;

(3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute. GS 150B-43. Where a petitioner has failed to conform to any of these conditions, by procedural error or otherwise, the superior court has no jurisdiction to hear the appeal. *Dare County v. N.C. Dep't of Ins.*, 701 S.E.2d 368 (2010). *See further, Department of Transp. v. Blue*, 147 N.C. App. at 605, 556 S.E.2d at 618 (2001) for a thorough discussion of each of these five conditions precedent.

Note that the untimely filing of a notice of appeal to superior court may not be a procedural error that deprives the superior court of jurisdiction. Although GS 150B-45 says that the failure to file a petition for judicial review within 30 days after a person is served with a written copy of the agency's final decision constitutes a waiver of the right to judicial review, the superior court, for good cause shown, may accept an untimely petition.

IV. DRAFTING THE ORDER AND REMEDIES

Upon completion of the superior court's review of an administrative appeal, care should be taken to prepare an order that appropriately reflects whether the court exercised its original or appellate jurisdiction and the standard of review employed by the court. Should the superior court order be appealed:

> . . . the appellate court examines the trial court's order for error of law. 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.

Trotter v. NC Dep't of Heath & Human Serv., 189 NC App 655, 658 (2008) *citing Carillon Assisted Living, LLC, supra,* 175 NC App at 270. Generally, "the trial court, when sitting as an appellate court to review an administrative agency's decision, must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review. It is not necessary, however, that it '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.'" *Sutton v. NC Dep't of Labor,* 132 NC App 387, 389 (1999), *citing Shepherd v. Consolidated Judicial Retirement System*, 89 NC App 560, 562 (1988).

When only the appellate jurisdiction of the superior court is invoked, it would be inappropriate for the superior court to include findings of fact in its order. When a court is considering assertions of fact-based errors under the whole record review, the sole inquiry is whether the agency's decision was supported by substantial evidence. Inclusion of findings of fact by the superior court would suggest that the court is seeking to replace the fact finder's judgment with its own, which would be beyond the scope of the whole record review and outside the court's appellate jurisdiction. *Markham v. Swails*, 29 NC App 205, 208 (1976). Likewise, when the superior court is considering law-based assertions of error, even though the review is *de novo*, the reviewing court is required to adopt the agency's findings of fact that are supported by substantial evidence and not make alternate findings. In such cases, inclusion of findings of fact in the court's order would again suggest that the court exceeded the scope of the appropriate standard of review and strayed beyond its appellate jurisdiction. *NC Dep't of Env't and Natural Res v. Carroll*, 358 N.C. 649, 662 (2004).

Under the superior court's appellate jurisdiction, the only instance where findings of fact are appropriate is if, under the whole record review, the reviewing court finds that the agency's findings of fact are not supported by substantial evidence. If so, the reviewing court should enter findings of fact on those findings that are at variance with those of the agency. *NC Dep't*

of Crime Control & Pub Safety v. Greene, 172 NC App 530, 534 (2005), *citing Scroggs v. NC Justice Standards Com,* 101 NC App 699, 702-03 (1991). However, this is not to be used as a "tool for judicial intrusion; the court is not permitted to replace the agency's judgment with its own even though a different conclusion might be rational", *NC Dep't of Crime Control, supra*, 172 NC App at 534, *citing Floyd v. NC Dep't of Commerce*, 99 NC App 125, 129 (1990), unless the court's new findings compel the superior court to reverse or modify the agency's decision. *Id.*

Findings of fact should be included when the court has exercised its original jurisdiction either under an agency-specific statute that requires the same, or under the exception found in GS 150B-51(c) (soon to be eliminated by 2011 amendment), where an agency has not adopted in full an ALJ's recommended decision. In these instances, because the superior court's original jurisdiction requires the court, as the finder of fact, to take evidence and consider it anew, findings of fact should be included in the superior court's order

The final consideration in drafting an order relating to an administrative appeal is the relief to be granted. When the superior court is reviewing the matter under its original jurisdiction, the court may determine if the petitioner is entitled to the relief sought in its petition and grant relief accordingly. When the court is conducting the review under its appellate jurisdiction, the APA provides the superior court with a range of options which generally include adopting the agency decision, adopting the ALJ's decision, reversing or modifying the agency decision, or remanding the matter back to either the agency or the ALJ. *See* GS 150B-51(b).