

STATE OF MICHIGAN
COURT OF APPEALS

JASON TERRY,

Petitioner-Appellee,

v

OFFICE OF FINANCIAL & INSURANCE
REGULATION and COMMISSIONER OF
FINANCIAL & INSURANCE REGULATION,

Respondents-Appellants.

UNPUBLISHED

April 28, 2011

No. 295470

Ingham Circuit Court

LC No. 08-000459-AA

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

In this insurance licensing dispute, respondents, the Office of Financial and Insurance Regulation (OFIR) and the Commissioner of Financial and Insurance Regulation, appeal by leave granted a circuit court order reversing a commissioner decision to revoke petitioner Jason Terry's resident insurance producer license. We affirm.

The parties do not dispute the pertinent facts that led to this appeal. In March 2007, Terry applied to the OFIR seeking licensure as a resident producer of property and casualty insurance. Terry revealed on his application that he had a 2005 felony conviction for driving while impaired or intoxicated, third offense. See current MCL 257.625(9)(c). In June 2007, the OFIR's insurance licensing director issued Terry a license subject to a three-year term of probation, "[p]ursuant to MCL 500.1239." Shortly thereafter, though, the OFIR commenced proceedings to revoke Terry's license. In March 2008, the commissioner issued a decision revoking Terry's license, reasoning that Terry did not possess a valid license given that MCL 500.1205 and MCL 500.1239 mandated a denial of the license due to his felony conviction.

Terry sought review in the circuit court, which reversed the commissioner's license revocation according to the following logic:

MCL 500.1205 specifically states it does not allow a license to be awarded to anyone who has committed an act that is grounds for denial, suspension, or revocation under MCL 500.1239. MCL 500.1239 gave the Commissioner discretion to determine what type of offense would lead to suspension or revocation of a license. The specific language used in MCL 500.1239 states the

Commissioner may revoke a license when an applicant has been convicted of a felony.

On January 6, 2009, MCL 500.1239 was edited to say the Commissioner shall refuse to issue a license under MCL 500.1205 if an applicant had been convicted of a felony. However, the new law did not contain any language making it retroactive. At the time Plaintiff's license was granted under the law, it was a valid license. Once a valid license had been issued, OFI[R] did not have the legal authority to revoke Plaintiff's license due to his previous felony conviction. The Commissioner was not acting lawfully when he stripped Plaintiff of his license.

When a circuit court reviews an agency decision, it must circumscribe its consideration to an ascertainment "whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 223; 771 NW2d 423 (2009) (internal quotation omitted). "This Court reviews a lower court's review of an agency decision to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Id.* at 222. If appellate review involves statutory interpretation, we consider this issue de novo. *Id.* at 223.

The OFIR and the commissioner raise multiple challenges to the circuit court's interpretation of the relevant licensing statutes. The legal positions the OFIR and the commissioner raise in this appeal mirror those made by the Department of Economic Growth (DEG) and the commissioner in *King v Michigan*, 488 Mich 208; 793 NW2d 673 (2010), a case in which our Supreme Court recently decided several issues of statutory construction relating to resident insurance producer licensing.¹ The facts of *King* closely resemble the circumstances presented here. "In 2004, [Steven King] applied to the Michigan Office of Financial and Insurance Services (OFIS) [now the OFIR] for a resident insurance producer license," fully disclosing a 2000 felony conviction of operating a vehicle under the influence of liquor. *Id.* at 211 (opinion by Davis, J.).² "The commissioner granted [King's] license." *Id.* at 212.

[King] then pursued a career as an insurance agent for a number of years. In the meantime, he has not been convicted of any other felonies or provided any new grounds for revocation of his license In 2008, [the DEG and the commissioner] began proceedings to revoke [King's] license, and [King] initiated

¹ The Supreme Court more recently denied a motion for reconsideration in *King*. ___ Mich ___ (Docket No. 140684, entered April 8, 2011).

² Although only Justice Hathaway joined Justice Davis's lead opinion, Justice Cavanagh and Chief Justice Kelly concurred in the lead opinion's statutory construction. *Id.* at 217.

the instant suit. The gravamen of [the DEG’s and the commissioner’s] argument is that a change to the Insurance Code in 2002 had *required* the commissioner to deny [King’s] application, that failing to do so was a mistake, and that the current provisions of the Insurance Code [MCL 500.100 *et seq.*] require the commissioner to correct that mistake. . . . [*Id.* (emphasis in original).]

Because the Michigan Supreme Court’s subsequent statutory interpretation disposes of the OFIR’s and the commissioner’s instant contentions regarding the meaning of the Insurance Code, we republish much of the Supreme Court’s analysis in *King*, 488 Mich 208. With respect to the first question presented in *King*, “whether in 2004 the [c]ommissioner . . . was *required* by statute to deny [King’s] application for a resident insurance producer license on the basis of [King’s] fully disclosed prior felony conviction,” *id.* at 210-211 (emphasis in original), the Supreme Court explained as follows:

Before 2002, the Insurance Code’s licensure provisions had required applicants to have “good moral character.” . . . It remains the law today that no licensing agency may make a finding as to an applicant’s moral character on the sole basis of a criminal conviction. MCL 338.42. It also remains the law that “(o)rders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in (the Insurance Code) shall be made or reached in the reasonable exercise of discretion.” MCL 500.205.

The “good moral character” requirement in the Insurance Code’s licensure provisions was replaced by 2001 PA 228. When [King] applied for his license, MCL 500.1205(1)(b) provided that an application “shall not be approved” if the applicant had “committed any act that is a ground for denial, suspension, or revocation under (MCL 500.1239).” While this seems mandatory when read in isolation, MCL 500.1239(1) provided that “the commissioner *may* place on probation, suspend, revoke, or refuse to issue” a license for a list of possible reasons, including an applicant’s “having been convicted of a felony.” MCL 500.1239(1)(f) [emphasis in original]. Consistent with MCL 500.205, the licensure requirement mandates that the commissioner make a discretionary judgment call when reviewing an application and deny the application if he or she concludes—in the exercise of that discretion—that denial, suspension, or revocation would be appropriate.

. . . When the applicable versions of MCL 500.1205, MCL 500.1239, and MCL 500.205 are read *together*, they set forth a licensure procedure that requires the commissioner to exercise judgment within a framework We reject [the the DEG’s and the commissioner’s] contention that the Insurance Code in effect in 2004 *required* the commissioner to deny [King’s] application. The Insurance Code did not, and the commissioner’s exercise of discretion in granting [King] a license was therefore permissible. [*Id.* at 213-214 (emphasis in original).]

The Supreme Court further rejected as “incorrect” a prior commissioner decision that the DEG and the commissioner offered in support of its preferred statutory construction. *Id.* at 214-215.

Concerning the second issue decided in *King*, “whether the commissioner is now *required* by statute to affirmatively revoke [King’s] license on the basis of the same prior felony,” *id.* at 211 (emphasis in original), our Supreme Court elaborated:

Subsequently, 2008 PA 422 and 2008 PA 423 amended MCL 500.1205 and MCL 500.1239. MCL 500.1205 now provides in relevant part that “(a)n application for a resident insurer (sic) producer license shall not be approved unless the commissioner finds that the individual (h)as not committed any act listed in (MCL 500.1239(1)).” And MCL 500.1239(1)(f) provides that “the commissioner *shall* refuse to issue a license” for “(h)aving been convicted of a felony.”

These two statutes are now consistent, and were a convicted felon to apply for an insurance producer license *today*, the commissioner *would* be required to deny it. . . . But no language in these statutes rebuts the general rule of construction that changes to a statute should only apply prospectively. Even if we were to engage in a speculation that the amendment was intended to clarify the Legislature’s prior intent, amendments may not be applied retrospectively if doing so would impair a vested right. The fact that an applicant like [King] would necessarily be denied a license today does not automatically invalidate [the commissioner’s] decision to exercise its discretion to grant him a license in 2004.

Although the current statutes require denial of a license, they do not require an existing license to be revoked. The first clause of MCL 500.1239(1) states in full: “In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer’s license or may levy a civil fine under (MCL 500.1244) or any combination of actions, and the commissioner shall refuse to issue a license under (MCL 500.1205 or 500.1206a), for any 1 or more of the following causes(.)” Denial is mandatory if any number of enumerated conditions is satisfied; however, *revocation* is still as discretionary as it was in 2004.

Therefore, we answer the second question, whether [the commissioner] is currently required by statute to revoke [King’s] license, in the negative. [*Id.* at 215-216 (emphasis in original).]

The Supreme Court then proceeded to address the third issue presented in *King*, “whether the commissioner is now *permitted* to revoke [King’s] license on the basis of the same prior felony,” 488 Mich at 211 (emphasis in original):

We observe initially that the plain language of the present Insurance Code gives the commissioner the discretion to pursue revocation of [King’s] resident insurance producer license for a variety of possible reasons, including [King’s] having been convicted of a felony. However, we emphasize that doing so must be a “reasonable exercise of discretion.” MCL 500.1205. Here, the gravamen of [the DEG’s and the commissioner’s] argument is that the commissioner is required to revoke [King’s] license. This erroneous abdication of discretion is, in

itself, an abuse of discretion. Therefore, in this case, the commissioner cannot be said to be engaging in a “reasonable exercise of discretion.”

With regard to this issue, we hold only that the commissioner may not revoke a license on the basis of the erroneous belief that he must do so when, in fact, he has discretion. Because this result is mandated by the plain terms of the Insurance Code, we make no pronouncement about whether equity applies here or what effect it might have. . . .

* * *

[King’s] license was properly granted by the commissioner in 2004. The Insurance Code does not require [King’s] license to be revoked now. The commissioner could have exercised reasonable discretion and decided to pursue revocation of [King’s] license; however, in this case, the commissioner necessarily abused that discretion by proceeding on the basis of an erroneous belief that he was *required* to revoke [King’s] license. [*Id.* at 216-217 (emphasis in original).]

Keeping in mind the Supreme Court’s statutory interpretation in *King*, 488 Mich 208, in this case the commissioner properly exercised discretion in granting on a probationary basis Terry’s 2007 license application. The OFIR and the commissioner do not now suggest that Terry has subsequent convictions or has engaged in any conduct that would place his resident producer license in jeopardy. As in *King*, *id.* at 216, the OFIS and the commissioner have pursued revocation of Terry’s license in a fashion that amounts to an “erroneous abdication of discretion,” under the mistaken belief “that the commissioner is required to revoke [Terry’s] license.” We conclude that the circuit court correctly found that the commissioner’s decision to revoke Terry’s license rested on incorrect readings of the applicable law. *Dykstra*, 283 Mich at 222-223.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro