STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-3742

ELIZABETH DURANLEAU,
Appellant,

v.

VERMONT AGENCY of TRANSPORTATION,
Appellee.

DECISION ON APPEAL

Following a hearing, an Agency of Transportation hearing examiner, with the approval of the Commissioner of the Department of Motor Vehicles, indefinitely suspended Appellant Elizabeth Duranleau's driver's license due to "incompetence" to safely operate a motor vehicle related to her cognitive or health status. 23 V.S.A. § 671(a). Ms. Duranleau has sought Rule 74 review of that decision pursuant to 23 V.S.A. § 105(b). See 23 V.S.A. § 671(f) (expressly making the procedures at 23 V.S.A. §§ 105–107 applicable in this context). She argues: (a) the applicable standard of review is de novo; (b) the AOT decision violates her due process rights insofar as § 671 is void for vagueness and delegates standardless discretion to the Commissioner; (c) two findings of fact are not supported by the record; (d) the various testing which she undertook does not show incompetence, and all other evidence demonstrates competence; (e) thus, on balance, a preponderance of the evidence does not show incompetence; and (f) to the extent that the State argues that Ms. Duranleau's appeal arguments required expert support that was never offered, that argument is in error because expert testimony is irrelevant to AOT hearings. For the following reasons, the decision below is affirmed.

Background

Ms. Duranleau, now in her mid-80s, has been driving since the age of 21 without incident. In early 2021, one of her treatment providers, Kate Wagerman, a family nurse practitioner, referred her to the Driver Rehabilitation Program at the University of Vermont Medical Center "due to concerns regarding her cognition." Hearing Examiner's Decision at 6. There, she undertook a battery of tests administered by Sarah Benis, an occupational therapist who is a certified driver rehabilitation specialist and Vermont driving school instructor. Ms. Benis concluded overall as follows:

> Results from the evaluation indicate that [Ms. Duranleau] is at a high risk for being in a crash due to critical errors related to decreased processing speed and divided attention. I am recommending that she stop driving. I am recommending that the following restriction be placed on her license:

MEDICAL SUSPENSION, EFFECTIVE IMMEDIATELY. . . .

Ms. Benis's report back to Ms. Duranleau's treatment provider includes this: "If you agree with this recommendation, please sign [this] letter below and we will help process this through VT DMV." Another of Ms. Duranleau's treatment providers at the same practice, Ms. Pascale Stephani, a nurse practitioner, signed to indicate her agreement with the recommendation.

As a result of this recommendation, the DMV suspended Ms. Duranleau's license under 23 V.S.A. § 671(a), which permits suspension upon "reason to believe that the [licensed person] is an individual who is incompetent to operate a motor vehicle or is operating improperly so as to endanger the public." Ms. Duranleau sought a hearing, staying the suspension until a determination was made on the evidence. See *id*. Prior to the hearing, Ms. Duranleau privately arranged for additional testing by Adaptive Driving Associates (ADA).

ADA administered several cognitive tests and accompanied Ms. Duranleau on an actual drive. After the evaluation, on a specific form, it left blank a section in which it could have concluded, "You have a basic ability to drive." It also left blank a section in which it could have concluded, "It is not safe for you to drive at this time." Instead, it indicated in a different section ("We recommend the following intervention:") that she should undergo "Neuropsych testing" and a "Road test by DMV." In its narrative report, however, ADA indicated many substantial concerns, including the following:

> Right foot brake reaction time measure .75 second, yielding a "D" rating and placing her in the 12th percentile for female drivers over 66 years old. Of concern was [her] difficulty in understanding the directions and holding on to the instructions. . . . Of note was her inability to explain what was expected of her. . . .
>
> . . . . Again, she required repeated directions and repetition of instruction to participate in tasks presented. . . .
>
> . . . . Often, part way through a subtest, she would forget the directions and was unsure of what was expected of her. . . .
>
> . . . . When presented with the more visually complex test, Elizabeth was unable to successfully alternate and shift her attention to complete this test. Elizabeth's inability to retain directions, and divide, shift and alternate her attention are of concern.
>
> In addition, a traffic sign recognition test was presented, Elizabeth correctly identified 12/18 signs. Visual search appeared poorly organized and confusion was evident between the meanings of several signs.
>
> . . . . When looking at a complex picture of a driving scenario, she appeared overwhelmed, identifying a vehicle in the wrong place but unable to explain why without coaching and leading by the examiner. With leading she identified a potential crash but could not determine where each vehicle had

> come from or its intended path of travel. . . . When further questioned about what she would do if she noticed cars in front of her (both in her lane and the oncoming lane) pulling to the side of the road, after repeated explanation, she responded she would pull over too, but was unable to predict that vehicles pulled over to let an emergency [vehicle] pass.

The narrative continues in this fashion at length, expressing substantial concerns both with her clinical test results and her actual driving.

At the hearing, the written reports and related materials from the Driver Rehabilitation Program and Adaptive Driving Associates evaluations were admitted into evidence. No expert was called to testify by either party. However, three witnesses—two family members and one friend—all testified to the effect that Ms. Duranleau's driving is competent.

In a written decision following the hearing, the hearing examiner reviewed the two evaluations, plainly found the Driver Rehabilitation Program report and resulting recommendation persuasive and found the Adaptive Driving Test evaluation generally supportive of that recommendation even though it did not include a formal recommendation in favor of (or against) suspension. With the Commissioner's approval, the DMV's decision to impose an indefinite suspension was affirmed, and the suspension went back into effect. Ms. Duranleau's subsequent request to stay the suspension pending appeal was denied.

Standard of Review

"Courts presume that the actions of administrative agencies are correct, valid and reasonable, absent a clear and convincing showing to the contrary. . . . [J]udicial review of agency findings is ordinarily limited to whether, on the record developed before the agency, there is any reasonable basis for the finding." *State Dep't of Taxes v. Tri-State Ind. Laundries*, 138 Vt. 292, 294 (1980).

Ms. Duranleau argues generally that this court's review instead should be de novo because it involves a mixed question of law and fact. Although she does not specifically identify the mixed question, she presumably refers to the ultimate determination of incompetence. In support of this argument, she cites *MacDonough-Webster Lodge No. 26 v. Wells*, 2003 VT 70, ¶ 17, 175 Vt. 382. The de novo standard described there, however, applies when a higher court reviews a lower court's determination of a mixed question. Review of an *administrative* decision, on the other hand, involves separation-of-powers concerns. *In re Williston Inn Group*, 2008 VT 47, ¶ 11, 183 Vt. 621. The rule in this situation is one of deference: "Absent a compelling indication that an agency has misinterpreted the statute it has been charged to execute, we will defer to the agency's judgment." *Lemieux v. Tri-State Lotto Commn.*, 164 Vt. 110, 112–13 (1995). Review in this case is not de novo.

Due process

Ms. Duranleau argues, quite summarily, that the AOT decision violates her due process rights insofar as § 671 is void for vagueness and delegates standardless discretion to the Commissioner. She merely asserts that there is no way to tell from its language

what it means and the AOT has failed to adopt rules more specifically defining the details.

Statutes "are unconstitutionally vague when they either (1) fail to provide sufficient notice of what conduct is prohibited, or (2) authorize or encourage arbitrary and discriminatory enforcement by failing to provide explicit standards." *In re Rusty Nail Acq., Inc.,* 2009 VT 68, ¶ 12, 186 Vt. 195. Similarly, the delegation of discretion unbounded by any standards fails to provide notice and is inherently arbitrary. See *In re Pierce Subdivision Application*, 2008 VT 100, ¶ 19, 184 Vt. 365.

Section 671 is neither impermissibly vague nor standardless. A suspension under § 671(a) must be predicated on a determination that a licensed person is "incompetent to operate a motor vehicle or is operating improperly so as to endanger the public." Thus, the statute does not apply to any incompetence or improper operation but only incompetence or improper operation of a sufficient character that the public would be endangered by it. The AOT may not have adopted rules specifically defining the terms used in § 671 in detail (and no statute required it to do so), but motor vehicle operation as a general matter is highly regulated by detailed rules of the road with which all fit drivers are aware. A person may be incompetent to comply with those rules, or otherwise may operate in violation of them regardless of fitness, in myriad ways. The statute thus imposes a minimum but meaningful standard—endangerment to the public—for § 671 suspensions. The standard is necessarily generally stated, but a reasonable person would know what it means without a specific articulation of the myriad ways in which one might be unable or unwilling to comply with it. See *Rogers v. Watson*, 156 Vt. 483, 491 (1991) ("In evaluating this argument, we must first recognize that we are dealing with an area where some imprecision and generality is necessary and inevitable."). Section 671 is not so standardless or vague that it amounts to a due process violation.

Whether the findings are supported by the record

Ms. Duranleau argues that two "findings" lack evidentiary support. In the *conclusions* section of the decision, the hearing examiner—in response to Ms. Duranleau's argument that she performed well on the majority of the clinical tests administered—summarily stated that instead she appeared to have experienced "significant difficulties" with half of the tests administered by the Driver Rehabilitation Program and more than half administered by Adaptive Driving Associates. Ms. Duranleau, relying on her own interpretation of the test results, argues here that she instead performed well or acceptably on most of the tests. The court agrees that some of the individual test results are reported in such a vague manner that their proper interpretation, in isolation, is uncertain absent a more detailed explanation by an expert. To that extent, Ms. Duranleau's argument has some merit. However, this issue is immaterial because the hearing examiner's decision is predicated largely on the expert conclusions of testing *overall* and its implications on Ms. Duranleau's competence to drive, not on the specific results of any specific clinical test.

Whether the testing shows incompetence

The major thrust of Ms. Duranleau's appellate argument is that her layperson assessment of specific results from the tests administered by the Driver Rehabilitation Program and Adaptive Driving Associates demonstrates that they fail to show that she is incompetent or, at best, they are inconclusive. All the other evidence in the record, her

driving history and the testimony of her friend and family members, she argues, demonstrates that she is competent. In other words, she disagrees with the conclusions of the experts who administered the tests, and whose opinions were admitted into the record, without having provided any countervailing expert testimony at the hearing to support her view. In response to the State's argument that her failure to provide expert testimony is terminal to her case, she argues that experts are unnecessary in AOT review hearings, which rely on "common sense" and the perspectives of laypersons. This is so, she argues, because the formal Rules of Evidence do not apply in these proceedings.

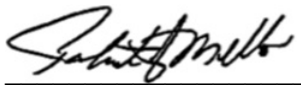
Ms. Duranleau's preference to rely on her or her counsel's "common sense" to contest the conclusions of experts is ineffective in this case. The decision to suspend Ms. Duranleau's driver's license is clearly predicated on an expert health provider's decision that it is warranted and the expert analyses and conclusions of those who administered the clinical and driving tests. Expert testimony typically is necessary where a "lay person of average intelligence, from his knowledge and experience" would not be fit to "reach the necessary conclusions." *Houghton v. Leinwohl*, 135 Vt. 380, 384 (1977). At the administrative hearing, Ms. Duranleau contested the expert opinions almost exclusively with the arguments of counsel alone. Neither she nor her counsel, however, purport to have any expertise that would permit either to credibly testify as to the correct interpretation of the clinical and driving tests, the details of which are not generally within the scope of an ordinary layperson's knowledge and intelligence. Moreover, neither attempted to so *testify* at the hearing, and no other expert was called to do so. Counsel repeats those arguments here, but they continue to lack any expert support and provide little basis to question the experts' conclusions or the hearing examiner's reliance on them.

The hearing examiner's decision does not lack a reasonable basis in the record.

Order

For the foregoing reasons, the hearing examiner's decision is affirmed. Counsel for the State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 14th day of April, 2022.



Robert A. Mello
Superior Judge