0A265 - Q17

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

ENTERMAN ENTERPRISES, LLC.

Case No: 11CVF-10-13192

Appellant,

JUDGE HOGAN

-vs-

OHIO STATE DEPARTMENT OF ENVIRONMENTAL HEALTH,

Appellee.

DECISION AND ENTRY
AFFIRMING THE FINAL DECISION OF THE DIRECTOR OF HEALTH
MAILED OCTOBER 4, 2011

HOGAN, JUDGE

Appellant appeals the Final Decision of the Appellee as mailed on October 4, 2011. Appellant requested and received additional time to file its Brief. Appellant filed its Brief on January 30, 2012. After securing the right to change the briefing schedule, the Appellee filed its Brief on January 30, 2012 and the Appellee filed its brief on February 13, 2012. No Reply brief was filed.

For the reasons that follow this Court **AFFIRMS** the Final Decision of the Appellee as mailed on October 6, 2011.

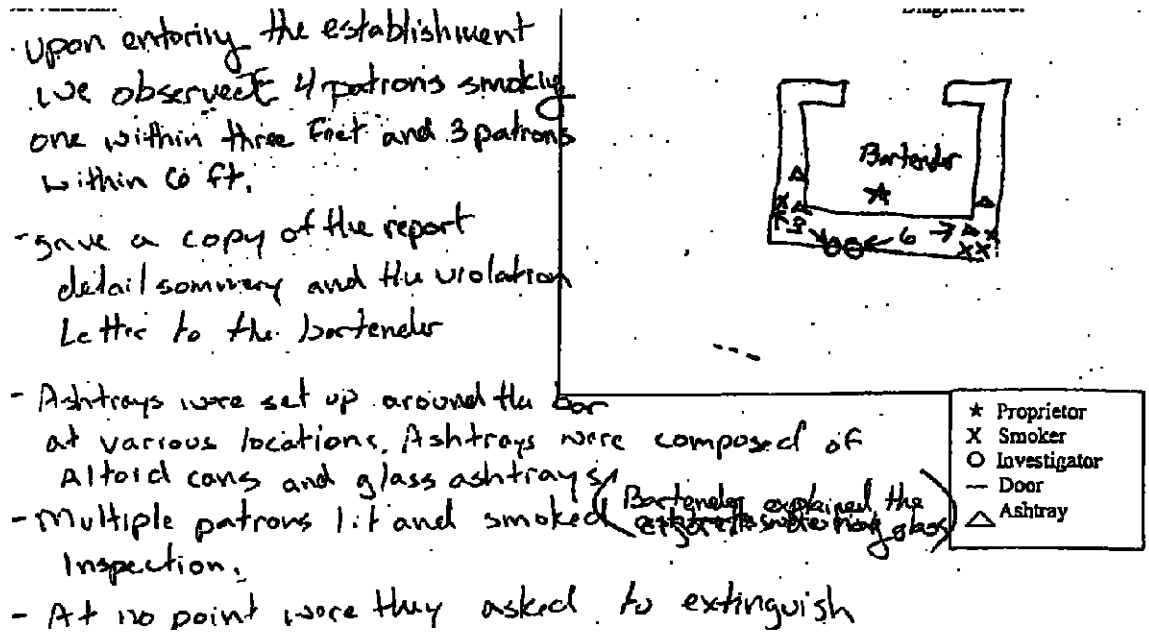
I. Statement of the Case:

This case deals with an appeal of the Appellant's claimed violation of the Smoke-Free Workplace Act.

II. Facts:

Appellant had a history of violating the Smoke Free Act. Appellant had received, and failed to question, 5 prior violations. (Hr. Tr. page 5, Lines 8 – 15, Exhibits A – F, and H.) In response to an anonymous call the Appellant was investigated by two agents

of the Appellee on December 28, 2009. When those two individuals arrived at the Appellant's bar they noted several smoking patrons and a number of Altoid tins and glass and/or plastic ashtrays on the bar. Please see the following diagram created on the night of the investigation: (Diagram is at page 14 of the scanned certified record.)



At the Hearing, the Appellee's witnesses provided testimony that not only identified the above noted document, but was consistent with the noted information on that document. Ms. Evens, Appellee's witness, clearly established that there were a number of people smoking in clear view of the bartenders working that night. (Hr. Tr. page 11, Lines 2 – 13)

After the hearing the Independent Decision Maker (hereinafter referred to as IDM) held that not only had the Appellant violated the Smoke Free Act concerning smoking and ashtrays, but the IDM found that the actions of the Appellant were willful and therefore he recommended a doubling of the fine from $2,500.00 to $5,000.00. The Appellant objected to the holdings contained in the Report and Recommendation. The Appellee's Director rejected the objections of the Appellant. However, the Director

agreed that there was no reason to double the fine and therefore reduced same from the recommended $5,000.00 to the standard $2,500.00. The Director then issued an Adjudication Order on September 22, 2011 and mailed same on October 4, 2011.

Appellant filed its appeal to this Court on October 21, 2011. The parties have briefed the issues and this matter is now ready for review.

III. Standard of Review:

The standard of review set forth in R.C. §119.12 governs administrative appeals brought pursuant to the Smoke Free Workplace Act. Revised Code §119.12 provides, in pertinent part:

> The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law.

If the Order from the Appellee or its designee is supported by reliable, probative and substantial evidence and is in accordance with law, a common pleas court may not substitute its judgment for that of the agency, even if the court may come to a different conclusion. See *Our Place, Inc., v. Ohio Liquor Commission.* (1992), 63 Ohio St.3d 570, 589.

Thus, the scope of review for an order of an administrative agency is limited. The common pleas court may not modify the penalty imposed once the court has concluded that there is reliable, probative and substantial evidence and that the sanction imposed was in accordance with law. See *Henry's Café, Inc. v. Bd. of Liquor Control*, 1959 Ohio App LEXIS 1003.

This Court will address the claims of Appellant from within this framework.

IV. Analyses:

Appellant's first assertion for a reversal of the Appellee's Final Decision comes in the form of an attack on the validity of the statute. Appellant asserted that said act was void for vagueness. This Court is well aware of the great number of cases that have rejected said claim as

made by others similarly situated Appellants. *Trish's Café & Catering, Inc. v. Ohio Department of Health*, 2011-Ohio-3304 stands for the proposition that Appellant's void for vagueness challenge fails. In *Trish's Café*, the Appellate Court at paragraphs 10 through 16 completely laid to rest this claimed error. This Court agrees. The statute is not void for vagueness. For the same reasons, this Court rejects Appellant's argument that it did not know what 'permit' or 'remove' meant in regard to smoking and ashtrays.

The Appellant argued that it did take steps to stop the smoking but it cannot be responsible for the actions of the individual patrons. A similar argument was advanced in *Deer Park Inn v. Ohio Department of Health*, 2010-Ohio-1392 (Tenth District). This Court concurs with the *Deer Park* court. Please note the following from *Deer Park* at ¶ 11:

> Our reasoning and decision in Pour House does implicitly acknowledge that, because the proprietor is essentially tributary to the conduct of his or her patrons, not every instance of surreptitious, unobserved smoking on the premises will give rise to liability for the proprietor. The definition of what may constitute "reasonable measures to prevent smoking" may be debated in some close cases in which a proprietor has diligently taken measures to train staff and personally intervene to suppress smoking in unauthorized areas, and yet some isolated instances of smoking occur despite these efforts. The appeal before us, however, does not present that close case. The testimony of the investigators, if believed, was sufficient to establish nothing less than willful blindness on the part of the proprietor and his agents, and some measure of contempt for, let alone non-compliance with, the Ohio Smoke Free Act. We accordingly find no error by the Franklin County Court of Common Pleas in upholding the finding of violation by ODH, and Deer Park's first assignment of error is overruled.

The Appellant's argument that it did attempt to control smoking to a degree sufficient to avoid responsibility is without merit.

The Appellant also asserted that the process was flawed. Appellant argued that O.A.C. §3701-52-08(D) was violated by the Appellee. Appellant claimed that there had not been compliance with Ohio Admn. Code §3701-52-08(D)(3) because the Appellee did not conduct **all**

of the activities as listed in Ohio Admn. Code §3701-52-08(D)(2), (a) – (d). Appellant did make that argument at the hearing. (See., Hr. Tr. page 61)

Please note the following language from the code section:

> (2) The Ohio department of health may, in its discretion, investigate a complete report of violation or promptly transmit the report of violation to a designee in the jurisdiction where the reported violation allegedly occurred for investigation and enforcement. If the report of violation is transmitted to a designee, the designee shall investigate all complete reports of violation. For the purposes of this chapter, an investigation **may include but is not limited to**:
>
> (a) A review of report of violation;
>
> (b) A review of any written statement or evidence contesting the report of violation;
>
> (c) Telephone or on-site interviews; and,
>
> (d) On-site investigations.
>
> (3) Prior to issuing a proposed civil fine for a violation of Chapter 3794. of the Revised Code and this chapter, the department's investigation **shall** include all investigation activities set forth in paragraphs (D)(2)(a) to (D)(2)(d) of this rule. (Emphasis added)

Appellant claimed that it was incumbent on the Appellee to do everything contained in (a) through (d). Appellant claimed that the Appellee did not produce all of those investigatory items listed in the code. Appellant asserted that Ohio Admn. Code §3701-52-08(D)(2)(c) had never been performed or produced. The Appellee responded that the sanitarian did in fact conduct an interview with the Appellant's bartender who claimed to have been in charge during the inspection.

Appellant's reading of the code is wrong. Ohio Admn. Code §3701-52-08(D)(2) clearly shows that (a) through (b) are **optional**. Any investigation 'may' include one or more of the listed methods. Furthermore, the language allows the Appellee to conduct other unlisted techniques not enumerated by the code. The Appellee need not do them all.

Please note the following language concerning issue of statutory construction:

> "When construing a statute, the paramount concern is the legislature's intent in enacting the statute." Wilmington City School Dist. Bd. of Edn. v. Clinton Cty.

> Bd. of Commrs. (2000), 141 Ohio App.3d 232, 239, citing State ex rel. Purdy v. Clermont Cty. Bd. of Elections, 77 Ohio St.3d 338, 340, 1997-Ohio-278. In order to determine the legislature's intent, the court must look to the statute itself and, "if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged[.]" State ex rel. McGraw v. Gorman (1985), 17 Ohio St.3d 147, 149, quoting Wachendorf v. Shaver (1948), 149 Ohio St. 231, paragraph five of the syllabus. In turn, a court must "read words and phrases in context and construe them in accordance with rules of grammar and common usage." Winkle v. Zettler Funeral Homes, Inc., 182 Ohio App.3d 195, 2009-Ohio-1724, ¶53, quoting State ex rel. Russell v. Thornton, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶11. A court, however, "must keep in mind that a strong presumption exists against any construction which produces unreasonable or absurd consequences." Burdge v. Kerasotes Showplace Theatres, LLC, Butler App. No. CA2006-02-023, 2006-Ohio-4560, ¶34, citing State ex rel. Belknap v. Lavelle (1985), 18 Ohio St.3d 180, 181-182. *Roberts v. RMB Enterprises Inc.*, 2011-Ohio-6223 (Twelfth District) at ¶12.

Appellant's reading of the 'shall' in O.A.C. §3701-52-08(D)(3), if accepted, would defeat the 'may' in the prior section of the code. Frankly, it is apparent to this Court that the 'shall' as contained in Ohio Admn. Code §3701-52-08(D)(3) does not speak to the **type** of investigatory material. It merely establishes that the investigatory material utilized by the Appellee shall be included in its notice of a proposed civil fine. Hence, if there has been a decision to issue a fine, the Appellee must disclose the full factual grounds for its decision. Both good and bad. Appellant's assertion that no fine can be issued until all four subparts of Ohio Admn. Code §3701-52-08(D)(2) are conducted is rejected by this Court.

In any event, even if this Court's reading of the statute is incorrect, the certified record shows that the Appellee's investigators did speak with the bartender in charge at the time of the investigation. Said contact is sufficient to serve the intent of an 'interview' as noted in the administrative code. See, *Parker's Tavern v. Ohio Department of Health*, 2011-Ohio-5767 at ¶¶ 8 & 9. The *Parker's Tavern* court was aware of the 'shall' in Ohio Admn. Code §3701-52-08(D)(3) but instead concentrated on the facts of the case choosing not to interpret the code.

There existed in the certified record reliable, probative and substantive evidence to support the fact that the Appellant was in violation of the Smoke Free law. As noted in the facts section of this Decision, the Appellee's investigators saw patrons smoking when they arrived. They saw a number of ashtrays on the bar. That evidence was not refuted by any competent testimony. The evidence relied upon by the Independent Decision Maker was reliable, probative and substantial evidence and was in accordance with law. The Appellee was correct to reject Appellant's objections and to render its Final Decision adverse to the Appellant.

For its last argument the Appellant claimed that there could be no finding that the Appellant failed to 'remove' ashtrays when the IDM's Report and Recommendation only noted that the evidence supported the presence of ashtrays. Appellant claimed that the evidence showed that no one asked the Appellant to remove the ashtrays nor was there any evidence that the Appellant had placed the ashtrays on the bar. Also, the Appellant claimed that there was no evidence offered that the alleged ashtrays were used as ashtrays; i.e., no testimony that there were extinguished cigarettes or ashes.

The Appellee responded that the code and statutes do not require a showing of who placed the ashtrays. It only requires a showing that the ashtrays existed in the smoke free area. Appellee relied upon the following from *Trish's Café & Catering, Inc. v. Ohio Department of Health*, 2011-Ohio-3304 (Tenth District) at ¶24:

> With respect to Trish's Café, Fister observed ashtrays on the bar, at a table, and behind the bar. The ashtrays held ashes, cigarette butts, and lit cigarettes, and were being used, not only by customers, but also by the bartender, while the owner was on the premises. Just as a violation of R.C. 3794.02(A) can be established with evidence that a proprietor implicitly permitted smoking, so may a violation of R.C. 3794.06(B) be established with evidence that a **proprietor acquiesced to the presence of ashtrays** in areas where smoking is prohibited. At the very least, the testimony established that the bartender, an agent of the proprietor, acquiesced to the presence of ashtrays and failed to remove them. Moreover, Fister's

> testimony that the owner did nothing, upon entering the public area of the bar, to stop customers from smoking or to remove the ashtrays **constitutes evidence that the owner also acquiesced to the presence of ashtrays.** Despite appellants' contention that Fister did not ask any questions regarding the ashtrays he observed, Fister's testimony constitutes reliable, probative, and substantial evidence supporting a violation of R.C. 3974.06(B). (Emphasis added)

At paragraph 3 of the same decision, the Tenth District made it clear that the act required the removal of ashtrays from areas where smoking is prohibited.

Here the evidence established that a number of ashtrays where present when the investigation started. Also, the IDM also heard testimony that during the 15 minute investigation, there was no effort made by anyone to remove the Altoid tins and ashtrays from the bar. Based on the testimony offered and the reasoning of *Trish's Café* this Court rejects Appellants last argument.

V. Decision:

The Court **AFFIRMS** the Final Decision of the Director mailed October 4, 2011 because it was supported by reliable, probative and substantial evidence and was in accordance with law.

Cost to the Appellant.

THIS IS A FINAL APPEALABLE ORDER:

Copies To:

Lori Cicero
500 East Fifth Street
Dayton Ohio 45402
Counsel for the Appellant

Mike DeWine, Esq.
Ohio Attorney General
Angela Sullivan, Esq.
Assistant Attorney General

30 East Broad Street, 16th Floor
Columbus, Ohio 43215-3428
Counsel for the Appellees.

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Franklin County Court of Common Pleas

Date: 03-02-2012

Case Title: ENTERMAN ENTERPRISES LLC -VS- OHIO STATE DEPT BUREAU ENVIRONMENTAL HEALTH

Case Number: 11CV013192

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Daniel T. Hogan

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Court Disposition

Case Number: 11CV013192

Case Style: ENTERMAN ENTERPRISES LLC -VS- OHIO STATE DEPT BUREAU ENVIRONMENTAL HEALTH

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes