COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

TRI COUNTY BEVERAGE,	:	
Appellant,	:	CASE NO. 11CVF06-8391
v.	:	**JUDGE HOLBROOK**
OHIO DEPARTMENT OF HEALTH, et al.,	:	
Appellee.	:	

DECISION AND ENTRY ON MERITS OF APPEAL

HOLBROOK, JUDGE

I. INTRODUCTION

This case comes before the Court on an appeal pursuant to R.C. 119.12, which derives from a May 21, 2011 Director's Journal Entry (Adjudication Order) by the Director of the Ohio Department of Health (hereinafter "Department") levying a proposed $500 Civil Fine against Appellant Tri County Beverage (hereinafter "Appellant") based upon a violation of the Ohio Smoke-Free Workplace Act, codified in Chapter 3794 of the Ohio Revised Code. The instant appeal has been fully briefed and the record of administrative proceedings has been submitted. For the reasons identified below, the decision of the Department must be affirmed.

II. FACTUAL AND PROCEDURAL HISTORY

Appellant operates a bar in Fostoria, Ohio. The bar is both a bar and a drive-thru. The drive-thru runs through the middle of the building. The bar is on the west side of the building and the bathrooms are on the east side. The bar has two entrances, including one from the drive-thru.

On August 11, 2009, the Ohio Department of Health received an anonymous complaint against Appellant of a violation of the Smoke Free Act. A Notice of Report was hand-delivered to

Appellant on August 27, 2009, informing the proprietor of the allegations. That same day, the Seneca County General Health District conducted an on-site investigation at Appellant Tri County Beverage, in which the sanitarian smelled a very strong sent of smoke upon entering the establishment through the drive-thru entrance. The sanitarian also found an empty beer can in the trash inside the business, which was inside the prohibited smoking area, with cigarette ashes on top and the smell of cigarette butts inside the can. Additionally, the sanitarian spoke with the owner of Tri County Beverage, Mr. Miller, who claimed a person who came through his drive-thru gave him the beer can to throw away. The sanitarian did not believe Mr. Miller's claim.

A Proposed Civil Fine Letter #26753 for proposed violations of R.C. 2794.02(A) (Smoking in a Prohibited Area) and R.C. 3794.06(B) (Ashtray Present) was sent to Appellant based upon the inspection. Pursuant to O.A.C. 3701-52-08, Appellant requested an administrative review. An administrative hearing was conducted before Independent Hearing Examiner Richard Mellott on February 4, 2010.

The inspector/sanitarian for the Department, Matthew Beckman, along with the proprietor Richard Miller testified at the hearing. David Angles and Gary Dillon, who are regular patrons of Appellant, and Michael Scott and Ashley Miller, employees of Appellant, also testified at the hearing on behalf of the proprietor. All four testified that smoking is not permitted inside Appellant's bar. Notably, Mr. Angles testified that patrons can ask for a "can cooler" to smoke outside and that when the smoker finishes their cigarette, they bring the can back inside and give it to the bartender. Mr. Dillon similarly testified that when he lights a cigarette in the bar, he is handed a pop or beer can with a huggy and told to go outside. When he finishes his cigarette, he brings the can back inside the bar. Michael Scott, as an employee of Appellant, confirmed that

Appellant's employees give smokers cans to smoke outside when they want to smoke. In addition to presenting testimony that Appellant provides patrons with an empty can set inside of a can cooler to take outside to use as a portable, temporary ashtray, Appellant's witnesses testified that patrons are asked to return the used can to the bartender inside, where it is discarded. An exemplary "can" was submitted into evidence as Defendant's Exhibit 1.

A Report and Recommendation was issued by the Hearing Examiner on February 17, 2010. Therein, it was determined that the preponderance of the evidence did not support a violation of R.C. 3794.02(A) (Smoking in a Prohibited Area). A determination was made, however, based upon Appellant's own admission that an empty beverage can was used by Appellant for disposing smoking materials including, but not limited to, ash and filters (i.e. the legal definition of an ashtray) inside the prohibited smoking area, of a violation of R.C. 3794.06(B) (Ashtray Present). The Hearing Examiner concluded that Appellant's violation of R.C. 3794.06(B) was not intentional. As a result, a $500 was imposed.

Appellant filed written objections to the Report and Recommendation. After reviewing the record and the written objections, the Director of the Department of Health issued a Director's Journal Entry (Adjudication Order), in which he adopted the Report and Recommendation, and affirmed the violation and fine of $500. The Director's Adjudication Order is the subject of the current appeal.

III. STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the Department of Health if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980); *Pons v. Ohio State Med. Bd.*,

66 Ohio St.3d 619, 621 (1993); *Insight Enterprises, Inc. v. Liquor Control Comm*., 87 Ohio App.3d 692 (1993). This standard of review set forth in R.C. 119.12 governs administrative appeals brought pursuant to the Smoke Free Workplace Act.

In *Our Place v. Liquor Control Comm*., 63 Ohio St.3d 570 (1992), the Ohio Supreme Court defined "reliable, probative and substantial evidence" to mean:

> (1) `Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) `Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) `Substantial' evidence is evidence with some weight; it must have importance and value. *Id*. at 571.

The common pleas court's review of the administrative record is neither a trial de novo, nor an appeal on questions of law only, but consists of "a hybrid review in which the court must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence and the weight thereof." *Marciano v. Liquor Control Comm.*, Franklin App. No. 02AP-943, unreported (CP Apr. 22, 2003), citing *Lies v. Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (10th Dist.1981). In undertaking such a review, the court must give due deference to the administrative agency's resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Id*. However, the court is obligated to accord due deference to the agency's interpretation of the technical and ethical requirements of its profession. *Pons v. Ohio State Med. Bd.*, *supra* at 621; *Rossiter v. State Med. Bd*, 155 Ohio App.3d 689 (2004).

Once a violation is established, the penalty, if legal, is entirely within the province of the agency. Even if the reviewing trial court were inclined to be more lenient, it is powerless to do so given the long-settled rule of *Henry's Cafe v. Board of Liquor Control*, 170 Ohio St. 233 (1959),

found at paragraph three of the syllabus:

> On such appeal, the Court of Common Pleas has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion.

See also *Hale v. Ohio State Veterinary Medical Board*, 47 Ohio App.3d 167 (1988); *Evans v. Board of Liquor Control*, 112 Ohio App. 264 (1960); *Ganson v. Board of Liquor Control*, 70 Ohio L. Abs. 242 (1953).

IV. ANALYSIS AND FINDINGS OF THE COURT

A. R.C. Chapter 3794 Is Not Unconstitutionally Vague

In its first assignment of error, Appellant asserts that R.C. Chapter 3794 is void for vagueness in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 1 of the Ohio Constitution.

As to the assigned constitutional error that the R.C. 3794 is void for vagueness, or in violation of procedural due process and substantive due process, the Court observes that the Tenth District Court of Appeals has already ruled that R.C. Chapter 3794 is not unconstitutionally vague and does not violate the right to due process. *See The Boulevard v. Ohio Dept. of Heath,* 2010 Ohio 1328, ¶15 (noting that the Tenth District considered and rejected constitutional challenges to Ohio's Smoke Free Workplace Act in *Deer Park v. Ohio Dept. of Health,* 2009 Ohio 6836, ¶15-22). The Tenth District has also recently ruled that R.C. 3794.06(B) – the statutory provision at issue in this case – is not unconstitutionally void for vagueness. *See Trish's Café and Catering v. Ohio Dept. of Health*, 2011 Ohio 3304 (10th Dist.). In *Trish's Café*, the Tenth District concluded that R.C. 3794.06(B) "gives clear notice of the conduct required for compliance with the statute in comprehensive, ordinary language, not subject to misinterpretation. *Id.* at ¶14. The Court also held

that just because the Smoke Free Act places some responsibility on proprietors to not permit smoking or remove ashtrays, does not render the statute unconstitutionally vague. *Id.* at ¶15.

Additionally, Appellant's constitutional arguments have been addressed by and rejected by several other Franklin County judges.[1] The rejection of those claimed constitutional infirmities is based upon sound reasoning and mandated by applicable law. A review of the legal theories and cases cited by Appellant offer no new bases to support invalidation of the statute, either as applied or on a substantive basis.

Further, this Court notes that Appellant failed to raise his constitutional arguments regarding the alleged vagueness of R.C. 3794.06(B)'s mandate to "remove" ashtrays at the administrative hearing. A party to an administrative proceeding who challenges "the constitutional application of legislation to particular facts is required to raise that challenge at the first available opportunity during the proceedings before the administrative agency." *Board of Edn. of South-Western City Schools v. Kinney*, 24 Ohio St.3d 184, 185-86 (1986), citing *Sun Finance & Loan Co. v. Kosydar*, 45 Ohio St.3d 283, 284 (1976). This is true even though an administrative agency lacks jurisdiction to determine a statute's constitutionality, because if a party does not raise an as applied constitutional challenge during the proceedings before the administrative agency, it is "impossible to develop the factual record necessary for the resolution of the case." *Kinney* at 185-86, citing *Petrocon v. Kosydar*, 38 Ohio St.2d 264 (1974). Since Appellant failed to raise its vagueness challenge at the administrative review, it has waived the argument.

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[1] *The Brass Pole, v. Ohio Department of Health*, Judge McIntosh, 08CVF-03-4142, issued October 7, 2008; *Adis' Place v. Ohio Department of Health*, Judge Hogan, 08CVF- 10675, issued November 24, 2008; *Deer Park Inn v. Ohio Department of Health,* Judge Brown, 08CVF-10275, issued December 29, 2008; *Woody's Café, II, LLC v. Ohio Department of Health,* 08CVF-4523, Judge Fais, issued September 16, 2008; *Fraternal Order of Eagles, 1161 v. Ohio Department of Health*, 08CVF-7752, Judge Fais,, issued February 11, 2009; *Adis' Place v. Ohio Department of Health*, 08CVF10-15569, Judge Fais, issued April 29, 2009; *Stan's Bar & Grill, Inc. v. Ohio Department of Health*, 10CVF06-9351, Judge Fais, issued January 12, 2011.

Based on the foregoing, it is concluded that the assigned error by Appellant is not well-taken.

B. Appellee's Order Is Supported By Reliable, Probate And Substantial Evidence

Appellant's second assignment of error asserts that Appellant was "erroneously found in violation" of R.C. 3794.06(B) and was improperly fined. Specifically, Appellant maintains that R.C. 3794.06(B) violation was not supported by a preponderance of evidence, and Appellee erred in finding that Appellant "failed to remove an ashtray from its establishment where it only found that an ashtray was merely *present* in [Appellant's bar] on August 27, 2009." Appellant's Brief p. 8.

Appellant's claim of insufficient evidence is not supported in the record. The owner, on premises during the inspection, did not dispute that a receptacle for disposing of smoking materials was found in a trash can inside the bar, which was an area where smoking was prohibited by R.C. Chapter 3794. This Court has previously found that a beer can with ashes meets the definition of an ashtray. *See Orwich Associates Inc. dba Walnut Saloon v. Ohio Dept. of Health*, Franklin Cty. C.P.No. 08CVF04-5312, unreported, (Dec. 19, 2008) (J. Pfieffer) (beer cans and bottles). Additionally, it is undisputed that Appellant is a public place of employment for purposes of the Smoke Free Workplace Act. *See* R.C. 3794.01(C).

While Appellee relies on Mr. Miller's testimony that a person came through Appellant's drive-thru and gave him the ashtray to throw away, this claim was not deemed credible by Mr. Beckman. The testimony was also contradicted, in part, by the testimony of Appellant's witnesses with regard to the common practice employed by Appellant with beer can ashtrays. Moreover, the Hearing Examiner ruled that Appellant should have known better than to dispose of unsealed, extinguished smoking materials inside of a prohibited area, and, as a result, determined that

Appellant violated R.C. 3794.06(B).

This court's review of an administrative order in an R.C. 119.12 appeal involves some deference to the trier of fact's determinations where the record contains conflicting evidence. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). Although the court must necessarily weigh the evidence presented to the administrative agency and, to a limited extent, may re-evaluate the credibility of the evidence, it must give due deference to the administrative determination of conflicting testimony, including the resolution of credibility conflicts. *Westlake v. Ohio Dept. of Agriculture*, 2008-Ohio-4422, ¶13 (10th Dist.). *See also Myers v. Columbus Development Ctr.*, Franklin App. No. 88AP-497 (10th Dist.Sept. 13, 1988), citing *Conrad* at 111 ("[i]t is elementary that in reviewing an order pursuant to R.C. 119.12, the common pleas court should normally defer to the determination of the administrative agency as to the weight to be given the evidence and the credibility of the witnesses.").

Here, the Independent Hearing Examiner had the opportunity to observe the demeanor of the witnesses and weight their credibility. The Hearing Examiner found the testimony and evidence advanced by the Department to be credible. While the testimony before the Hearing Examiner included some conflicting evidence of the events underlying this action and also of facts going to the witnesses' credibility, the Hearing Examiner relied upon the admission of Mr. Miller, proprietor of Appellant, that an empty beverage can was being used by Appellant to dispose of smoking materials. As a result, the Hearing Examiner determined that the used beverage can retrieved by Mr. Beekman inside the premises of Appellant clearly fits the definition of ashtray. This Court will give the fact finder the deference that is required.

The law specifically states that ashtrays must be removed from areas where smoking is prohibited, and this includes trash cans located where smoking is prohibited. *See Fraternal Order of Eagles 3998 v. Ohio Dept. of Health*, Franklin Cty. C.P. No. 07CVF11-151317, unreported (April 25, 2008) (J. Pfieffer) (court held a trash can with cigarette butts found behind the bar was an ashtray and rejected claim that trash can was used to sweep up outside and then brought back inside the bar). There existed reliable, probative and substantial evidence to support the Independent Hearing Examiner's February 17, 2010 Report and Recommendations, which was approved by the Department's Order.

Based on the foregoing, it is concluded that the assigned error by Appellant is not well-taken and the May 21, 2011 Journal Entry/Adjudication Order of the Department is supported by reliable, probative and substantial evidence, and is in accordance with applicable law. Therefore, the Department's May 21, 2011 Order is hereby **AFFIRMED**.

Rule 58(B) of the Ohio Rules of Civil Procedure provides the following:

> **(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment on the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A).

The Court finds that there is no just reason for delay. This is a final appealable order.

The Clerk is instructed to serve the parties in accordance with Civ. R. 58(B) as set forth above.

Franklin County Ohio Clerk of Courts of the Common Pleas- 2012 Mar 28 8:48 AM-11CV008391

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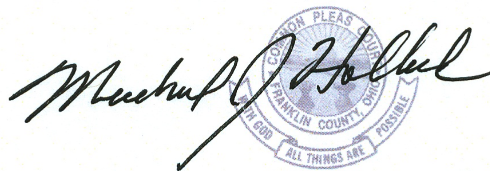
Franklin County Court of Common Pleas

Date:	03-28-2012
Case Title:	TRI COUNTY BEVERAGE -VS- OHIO DEPT HEALTH BUREAU ENVIRONMENTAL HEALTH
Case Number:	11CV008391
Type:	DECISION/ENTRY

It Is So Ordered.



/s/ Judge Michael J. Holbrook

Court Disposition

Case Number: 11CV008391

Case Style: TRI COUNTY BEVERAGE -VS- OHIO DEPT HEALTH BUREAU ENVIRONMENTAL HEALTH

Final Appealable Order: Yes