0A369 - C91

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Tri County Beverage,	:	
Appellant,	:	CASE NO. 11CVF02-2129
-vs-	:	**JUDGE DAVID W. FAIS**
Ohio Department of Health,	:	
Appellee.	:	

DECISION AND ENTRY ON MERITS OF APPEAL

FAIS, JUDGE

I. INTRODUCTION

The above-styled case is before the Court on an appeal pursuant to R.C. 3794.01 et seq. and R.C. 119.12, filed by Appellant Tri County Beverage (hereinafter "Appellant") of a January 31, 2011 decision by the Ohio Department of Health (hereinafter "Appellee" or "Department").

Based on this history, the instant appeal is fully briefed, the record of administrative proceedings has been submitted and the matter is ripe for consideration. 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. An inspector for the Smoke-Free Workplace Program, as well as being Sanitarian for the Seneca County General Health District, visited the premises for an on-site inspection on January 29, 2010. This was in response to an anonymous complaint received via the Department's website.

After entering the bar through the back door, the inspector smelled smoke and then observed a gentleman patron seated with a burning cigar. At the time of the inspection, the owner of the bar was sitting at the very next table, approximately six to seven feet away from the smoker.

Subsequently, the inspector spoke to the owner of the permit premises regarding the incident and resulting notice of report.

A proposed violation of R.C. 3794.02(A) was sent to Appellant based upon this inspection. Pursuant to O.A.C. 3701-52-08, Appellant requested dismissal of the violation or an administrative review. An administrative hearing was conducted before a Hearing Examiner on the charge on October 5, 2010.

The inspector Sanitarian for the Department, Matthew Beckman, along with Appellant's proprietor Richard Miller and bartender Ashley Drake testified at the hearing. A Report and Recommendation was issued by the Hearing Examiner on October 13, 2010. Therein, it was determined that Appellant had permitted smoking in a prohibited area in violation of R.C. 3794.02(A), along with O.A.C. 3701-52-02(A). A corresponding finding of a violation was also made by the Hearing Examiner, and as a result, a $2,500.00 fine was imposed.[1] Subsequently, the Director of the Department adopted the Report and Recommendation, and an Order was issued that 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 Board if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111; *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621; *Insight Enterprises, Inc. v. Liquor Control Comm.* (1993), 87 Ohio App.3d 692. This standard of review set forth in R.C. 119.12 governs administrative appeals brought pursuant to the Smoke-Free Workplace Act.

[1] The Hearing Officer reduced the previously-assessed fine of $5,000.00 after finding the evidence supported careless, rather than intentional, conduct by Appellant.

This quality of the required evidence was defined by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570 as follows:

> (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.* (Apr. 22, 2003), Franklin App. No. 02AP-943, unreported, citing *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207. 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* (2004), 155 Ohio App. 3d 689.

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* (1959), 170 Ohio St. 233, 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* (1988), 47 Ohio App. 3d 167; *Evans v.*

Board of Liquor Control (1960), 112 Ohio App. 264; *Ganson v. Board of Liquor Control* (1953), 70 Ohio L. Abs. 242.

IV. ANALYSIS AND FINDINGS OF THE COURT

As its first assignment of error, Appellant asserts that Chapter 3794 of the Ohio Revised Code is void for vagueness in that the term "permit" is too simplistic and vague to properly regulate a complex issue.

Numerous decisions by the trial courts in this county have expressly rejected the definition of the phrase "permit smoking" presently offered by Appellant. The lone exception to enforcement of the Smoke-Free Act was a decision by Judge Cain in *Jackson v. Bartec, Inc.* (February 19, 2010), 09CVH08-12197. Judge Cain determined that "in an establishment whose policy is to not permit smoking; when an individual is asked to stop smoking but refuses, liability is transferred from the property owner to the individual. Asking a person to put out a cigarette or leave discharges the property owner's duty under the Smoke-Free Act." *Id.* at page 8, citing to *Pour House v. Ohio Dep't of Health* (2009), Franklin App. No. 09AP-157. Judge Cain concluded that such enforcement of the Smoke-Free Act was stricter than authorized under R.C. 3794. However, this decision was ultimately reversed by the Tenth District in *Jackson v. Bartec, Inc.* (2010), Franklin App. No. 10AP-173, 2010-Ohio-5558, which was issued November 16, 2010.

The Tenth District Court of Appeals held in *Jackson v. Bartec* that R.C. 3794.02(A) places on proprietors, under the provisions of the Smoke-Free Act, at least some responsibility to enforce its terms, stating that "[n]o proprietor of a public place or place of employment [***] shall permit smoking in the public place or place of employment." *Id.* at ¶18 The Court relied upon the case of *Deer Park Inn v. Ohio Dep't of Health* (Deer Park I), 185 Ohio App. 3d 524,

2009 Ohio 6836 (Ohio Ct. App., Franklin County 2009), and its holding that the underlying statute, along with O.A.C. 3701-52-08(B), requires that a proprietor to take "reasonable steps" to prevent smoke from entering smoke-free areas. Accordingly, the plain language of the Smoke-Free Workplace Act and corresponding administrative code provisions expressly mandate proprietors to assume a certain level of responsibility for the conduct occurring at their premises. *Id.* at ¶22. In addressing the very same unconstitutionally vague argument, the Tenth District has repeatedly found that the Smoke-Free Act is not unconstitutionally vague because it clearly gives notice of the conduct it prohibits and does so in comprehensible, ordinary language not subject to misinterpretation. See *The Boulevard v. Ohio Dept. of Health*, 2010 Ohio 1328, ¶17 (Ohio Ct. App., Franklin County 2010); *Traditions Tavern v. Columbus*, 171 Ohio App.3d 383, 2006 Ohio 6655, ¶24 (Ohio Ct. App., Franklin County 2006); *Trish's Café & Catering, Inc. v. Ohio Dep't of Health*, 195 Ohio App. 3d 612, 620 (Ohio Ct. App., Franklin County 2011). Consequently, Appellant's assertions to the contrary have been consistently rejected by the Court of Appeals and are without merit.

In its second assignment of error, Appellant asserts that the Order by the Department is not supported by reliable, probative and substantial evidence because Appellant did not permit smoking at the premises in violation of Chapter 3794.

Upon review, sufficient evident exists in the record for the Department to determine that Appellant's owner permitted smoking in an area where smoking is statutorily prohibited. During the hearing, inspector Beckman testified as part of his January 29, 2010 investigation of the subject premises, he observed a gentlemen with a burning cigar, that was billowing smoke. *Hearing Transcript*, at 12. Although an ashtray was not visible, the investigator indicated it

looked as the patron smoker was ashing into a beer can. *Id.* at 26. When asked if he was certain the cigar was actually lit and burning, Mr. Beckman verified that he walked within two feet and witnessed "a smaller cigar a couple of inches in length." *Id.* at 26-27. Moreover, it was his testimony that he readily observed the owner of the bar sitting at the table next to the smoker, which was about six to seven feet away. *Id.* at 13-14. It was this close proximity between the owner and the smoker that caused the investigator to issue a fine for an intentional violation of the Smoke-Free Act. Mr. Beckman added that in his approximately five minutes in the premises, he did not witness any representative or employee of Appellant ask the patron to stop smoking or to leave. *Id.*

While no court has found that the owner of a bar needs to physically eject a patron, the consensus is that simply stating that smoking is illegal or placing no-smoking signs, while at the same time allowing smoking to go unfettered, is an insufficient attempt to comply with the Smoke-Free Act. *Deer Park Inn v. Ohio Dept. of Health* (Deer Park Inn II), Franklin App. No. 09AP974, 2010 Ohio 1392 (Ohio Ct. App., Franklin County 2010). Similarly, willful blindness on the part of the proprietor and his agents will give rise to liability to the proprieter. *Id.* at ¶11. After reviewing the testimony in the matter *sub judice*, if the testimony of the investigator was believed, then the facts in this instance closely parallel those present in Deer Park Inn II, *supra*.

In an effort to be exhaustive, this Court is aware of at least two other decisions that have refused to find comparable violations when the quantum of evidence was insufficient. See *McFrye dba Corky's Thomastown Café v. Ohio Dept. of Health* Case, 09CVF09-14430, issued on March 16, 2010; and *General Motors Corporation v. Ohio Dept. of Health,* 08CVF06-8589,

issued on December 22, 2008. Nevertheless, these cases must be distinguished from the matter at bar, as neither involved observed smoking by patrons and are therefore, inapposite.

Appellant maintains that both owner Mr. Miller and bartender Ms. Drake attested under oath that they did not observe the described cigar smoker, and did not notice any odor of tobacco in the establishment. However, the hearing examiner reconciled such conflicting witness testimony by determining that the inspector's testimony was more credible. Resulting inferences can reasonably drawn once this factual predicate is established. This Court in its hybrid review will not disturb such factual findings, as it must be deferential to determination of witness credibility at the administrative level, which includes: the manner in which they testified; their reactions on cross-examination, as well as direct examination; the reasonableness of the testimony; the opportunity each witness had to see, hear and know the things about which they testified; the accuracy of memory of each witness; frankness or lack of it; and the interest, if any, that any witness had in the outcome of the case.

Finally, Appellant claims that the so-called mandatory interview requirement was ignored or not sufficiently satisfied. The Tenth District Court of Appeals recently articulated the parameters of this requirement, as set forth by O.A.C. 3701-52-08-(D). *Parker's Tavern v. Ohio Dep't of Health*, 2011 Ohio 5767 (Ohio Ct. App., Franklin County Nov. 8, 2011). As suggested in *Parker's Tavern*, the interview mandate lacks the formality suggested by Appellant.

The record supports that investigator Beckman did meet with the bar owner face-to-face to discuss the proposed violation and exchange information. Although Mr. Beckman did not meet with any other bar employees, and did not ask certain questions of the owner, such as whether he asked the cigar smoker to stop or if he enforced the smoking ban, this does not defeat

the interview requirement or render it unsatisfied under the circumstances. As was the case in Deer Park Inn II, direct evidence in the form of observing patrons smoking in close proximity to the bar's owners or employees may eliminate the need to develop such questions or adhere to a specific checklist. While the lack of a more thorough interview by the inspector is not dispositive, the Court reasons that it did in this instance preclude the hearing examiner from making a finding of intentional conduct, rather than a careless violation of R.C. 3747.02(A).

Based on the foregoing, it is concluded that the assigned error by Appellant is not well-taken, and the Order of the Department is supported by reliable, probative and substantial evidence, and is in accordance with applicable law. Therefore, the Department's January 31, 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.

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Franklin County Court of Common Pleas

Date: 04-19-2012

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

Case Number: 11CV002129

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge David W. Fais

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Court Disposition

Case Number: 11CV002129

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

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes