

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

TRI COUNTY BEVERAGE,

Case No: 12CVF-04-5207

Appellant,

JUDGE SHEWARD

-vs-

**OHIO STATE DEPARTMENT OF
ENVIRONMENTAL HEALTH,**

Appellee.

DECISION AND ENTRY
AFFIRMING THE FINAL DECISION OF THE DIRECTOR OF HEALTH
MAILED APRIL 13, 2012

SHEWARD, JUDGE

On April 23, 2012 Tri County Beverage (hereinafter referred to as the Appellant) filed this administrative appeal naming the Ohio State Department of Environmental Health (hereinafter referred to as the Appellee). Appellant appealed the Appellee's decision of April 13, 2012. After granting additional time, the parties have now fully briefed the issues.

For the reasons that follow this Court **AFFIRMS** the Final Decision of the Appellee as mailed on April 13, 2012.

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:

The record reflects that the Appellant had/has a history of violating the Smoke Free Act. The Appellee's designee, the Seneca County General Health District, (hereinafter referred to as Seneca) received a complaint on or about February 14, 2011. The complaint indicated that the Appellant was keeping ashtrays in a back room for use by customers. (Cert. R., Doc 8) A

Notice of Report was hand-delivered to the Appellant in regard to the complaint on February 17, 2011. That document informed the Appellant of the allegations. (Cert. R. Doc 7).

On February 17, 2011 Seneca also sent Matthew Beckman, a sanitarian, to conduct an on-site investigation. He smelled smoke in the building when he conducted his investigation. The sanitarian found two coffee cans in a back room. He inspected one of the cans and found that it was partially filled cigarette butts and ashes. The Appellant did not dispute the fact that the two coffee cans were found nor did Appellant contest that one of the cans contained cigarette butts and ashes.

The Appellant offered an alternative theory for the use of the coffee cans. Appellant's witnesses testified that the coffee cans were actually ashtrays provided to customers who smoked outside. The ashtrays were brought in after the bar closed and were to be returned to the outside area when the bar re-opened.

Seneca issued a 'Proposed Civil Fine Letter #34778'. A proposed fine was assessed at \$2,500.00 and then doubled because Seneca felt that the violation was in fact intentional. If upheld it will be the Appellant's 6th violation of the Act. (Cert. R. Doc 10) The violation was noted to be R.C. §3794.06(B). Appellant requested an administrative review.

After a number of continuances the review was finally conducted on December 5, 2011. Appellant appeared with counsel and called witnesses in its defense. Seneca's sanitarian testified about his investigation. The sanitarian testified that he entered the bar and immediately smelled cigarette smoke. (Cert. R. Hr. T. page 14 and 16.) The sanitarian noted that there was an open door to the back room that he was able to see while he was talking with a bartender. (Cert. R. Hr. T. page 14) The sanitarian then noticed another bartender closing the door. (Cert. R. Hr. T. page

14) The sanitarian questioned the bartender concerning what was in the back room. After some stonewalling he was allowed into the room.

The sanitarian testified that shortly after entering the room he observed the two coffee cans that later were found to contain cigarette butts and ashes. (Cert. R. Hr. T. pages 15 & 26) At the time of the discovery of the coffee cans, the bartender for the Appellant did not offer any explanation for the cans. (Cert. R. Hr. T. page 15) The sanitarian testified that the same type of cans had been used by the Appellant in the bar before. (Cert. R. Hr. T. page 26)

At the hearing Appellant offered the testimony of one of its bartenders. Ms. Myers testified that the cans were used outdoors because the Appellant did not allow smoking indoors. (Cert. R. Hr. T. page 42) She further testified that the cans were placed outside each morning. (Cert. R. Hr. T. pages 43 & 48) However, the evidence showed that the bar opened as early as 6:30 a.m. and the investigation on the night in question was conducted 11 hours after the bar opened and there were no cans outside the building. (Cert. R. Hr. T. pages 47 - 49) Ms. Myers confirmed that on the night of the investigation, no cans were outside. (Cert. R. Hr. T. page 39)

Furthermore, Ms. Myers' testimony was inherently unreliable. She testified that her employer enforced the smoking law. Yet the evidence established a number of prior violations of the law that clearly conflicted with the veracity of that statement. She also made the statement that the use of the coffee cans for outside smoking kept the establishment from looking "trashy". (Cert. R. Hr. T. page 43) However, placing a used receptacle on the ground by the front door to a bar does nothing to elevate the curb appeal of the establishment. Finally, Ms. Myers testified that the dumping of the ashes was an act normally conducted in the morning after the used receptacles had been stored in the bar overnight. (Cert. R. Hr. T. page 44) An illogical

statement. It also conflicted with the established evidence. If her statement was correct, the sanitarian should have found empty coffees can, not a full one.

The Appellant also called the owner, Mr. Miller, to testify. He confirmed the use of the coffee cans as outdoor ashtrays. (Cert. R. Hr. T. page 50) Mr. Miller testified that he did in fact place one of the cans outside on the morning of the investigation. (Cert. R. Hr. T. page 51) Mr. Miller also provided conflicting testimony concerning the use of the coffee cans. Mr. Miller claimed that the cans were used until full and then tossed out. (Cert. R. Hr. T. page 51) Yet, Ms. Myers testified that they are emptied out in the morning.

After hearing the testimony and reviewing the documents, the Impartial Decision Maker, on January 21, 2012 issued her Report and Recommendation. (R & R) In the R & R the fine was found to be \$2,500 due to the violation being the 6th offense. The Decision Maker also found that the evidence warranted a doubling of the fine because the actions of the Appellant were in fact intentional.

The Decision Maker felt that the Appellant had failed in its burden to establish that the coffee cans fell into the exemptions as set forth in O.A.C. §3701-52-02(F)(1)-(3). The Decision Maker found the sanitarian to be credible and found that the inconsistencies in the Appellant's witnesses made them less than credible.

Appellant filed written objections to the R & R. The Appellee affirmed the proposed violation for the presence of ashtrays pursuant to R.C. §3794.06(B) and agreed with the \$5,000.00 sanction. The Appellee did that in a Decision issued on February 25, 2012. However, on March 13, 2012 and email was sent to the counsel for the Appellant. The email indicated that the Appellee *sue sponte* withdrew its prior final finding because it was issued without consideration of the objections filed by the Appellant.

The Appellee reviewed the matter further and issued its Final Decision on April 13, 2012. The Appellee found that that there was no adequate evidence to support the intentional claim but found that the violation was still present regarding R.C. §3794.06(B) as evidenced by the assessment of the \$2,500.00 fine. Appellant then timely appealed the final ruling to this Court. The parties have filed their briefs and the matter is ready for determination.

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 Decision 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 raised the following as its one assignment of error:

The Proprietor of Tri County Beverage was erroneously found in violation of the Smoke Free Workplace Law, Specifically R.C. §3794.06(B) and was improperly fined.

Based on said assignment, one must look to R.C. §3794.06(B) for guidance. Please note the relevant part of the statute:

§ 3794.06. Posting of signs; prohibition of ashtrays; responsibilities of proprietors:

In addition to the prohibitions contained in section 3794.02 of this chapter, the proprietor of a public place or place of employment shall comply with the following requirements:

(B) All ashtrays and other receptacles used for disposing of smoking materials shall be removed from any area where smoking is prohibited by this chapter.

Appellant asserted that the room where the coffee cans were found was not a location where 'smoking was prohibited by the chapter'.

Appellant claimed that the room where the ashtrays were found was for the lawful storage of the ashtrays pursuant to O.A.C. §3701-52-02(F)(3). Please note the following language from that code section:

3701-52-02. Responsibilities of proprietor

(F) A proprietor shall remove ashtrays and other receptacles used for disposing of smoking materials pursuant to Chapter 3794. of the Revised Code and this chapter. If ashtrays and other receptacles used for disposing of smoking materials are of historic or architectural value and were affixed to real property prior to December 7, 2006, such ashtrays and other receptacles may remain if they are not used for disposal of smoking materials. Division (B) of section 3794.06 of the Revised Code and this rule shall not apply to ashtrays and other receptacles within vehicles if they are not used for the disposal of smoking materials.

(1) A proprietor may provide ashtrays and other receptacles used for disposing of smoking materials in areas where smoking is not prohibited under Chapter 3794. of the Revised Code and this chapter.

(2) A proprietor may provide ashtrays and other receptacles used for disposing of smoking materials solely for the purpose of disposing smoking materials prior to entering a place of employment or public place.

(3) A proprietor may store ashtrays and other receptacles used for disposing of smoking materials in a location within an area where smoking is prohibited if the location has no public access, the location is used primarily for storage purposes, and the ashtrays or other receptacles are used solely in accordance with paragraph (F) (1) of this rule.

It was the contention of the Appellant that the Decision Maker should have accepted its position that the coffee cans were only used outside. It believed that the evidence supported its claim to that effect. Had the Decision Maker believed the Appellant's evidence, then O.A.C. §3701-52-02(F)(3) excused the storage of the coffee cans in Appellant's storeroom.

That was the thrust of the Appellant's argument. Appellee **should** have believed its witnesses. Appellant's evidence should have been accepted over the testimony of the sanitarian.

But the conflicting evidence was that the sanitarian smelled smoke within the establishment. That one bartender closed the storage room door when the sanitarian noticed that it was open. That one can was found partially full of cigarette butts and ashes, inconsistent with a logical desire to empty them before you would bring them back through the establishment. The evidence also established that the coffee cans found had been used by the Appellant as ashtrays inside the bar on prior occasions. Finally, no 'outdoor' excuse was offered on the night of the inspection.

It is a reasonable inference, drawn by the Decision Maker, when she felt that the storage of the coffee cans containing cigarette butts and ashes, in an enclosed location behind the bar, far from the outside door, was illogical and failed to support the testimony advanced by the Appellant's witnesses. Furthermore, the testimony of the sanitarian concerning the lack of any explanation on the night in question is also telling. The defense raised by the Appellant at the hearing could be viewed by the Decision Maker as a fabricated story to avoid the violation. Judgments as to credibility of the witnesses are left to the Decision Maker as long as they are not inherently inconsistent with the facts. This Court does not find that the Decision Maker or the Appellee's conclusions were materially inconsistent with the facts presented.

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 during the investigation so there had been no violation of the code.

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 sanitarian did speak with the Appellant and/or its agents 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. In this case the interview was primarily one sided, yet it still constituted an interview. 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 Act. As noted in the facts section of this Decision, the Seneca's sanitarian found the ashtrays in the building where smoking is prohibited. 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 free to reject Appellant's claim that the ashtrays were kept solely for the use of patrons outside of the building.

The Appellee was also free to hold that the evidence and arguments advanced by the sanitarian failed to show that the Appellant acted intentionally. Therefore, there could be no doubling of the fine. The eventual fine and holding was supported by the reliable, probative and substantial evidence and was in accordance with law.

V. Decision:

The Court **AFFIRMS** the Final Decision of the Director mailed April 13, 2012 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:

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Franklin County Court of Common Pleas

Date: 09-14-2012
Case Title: TRI COUNTY BEVERAGE -VS- OHIO STATE DEPT BUREAU ENVIRONMENTAL HEA
Case Number: 12CV005207
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink, "Richard S. Sheward", is written over a blue circular seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE" around the bottom.

Judge Richard S. Sheward

Court Disposition

Case Number: 12CV005207

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

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes