

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

MICHAEL HORN,	:	
	:	
Appellant,	:	
	:	CASE NO. 13CVF-01-1051
vs.	:	
	:	JUDGE TIMOTHY S. HORTON
OHIO STATE LIQUOR CONTROL	:	
COMMISSION,	:	
	:	
Appellee.	:	

DECISION AND ENTRY

**AFFIRMING THE ORDER OF THE LIQUOR CONTROL COMMISSION
DATED JANUARY 9, 2013**

This action comes before the Court upon an appeal of an Order of the Liquor Control Commission (hereinafter referred to as the “Commission”) dated January 9, 2013. Said Order denied the renewal application of Appellant Michael Horn (“Appellant”). Appellant asserts that the Order was not supported by the evidence and not in accordance with law.

For the reasons that follow, this Court **AFFIRMS** the Commission’s Order of January 9, 2013.

I. FACTS RELEVANT TO THE APPEAL

Appellant has operated a successful business/restaurant known as the Chateau Club (hereinafter referred to as “Club”), which was established in 1997. Appellant filed for renewal of the Club’s permits for 2012-2013. During the renewal period, two events outside the control of Appellant occurred which led to issues at the Club. First, Appellant had suffered from a health issues. Secondly, two nearby permit premises were shut down, causing the clientele of those locations to frequent Appellant’s business. Those two events led to a dramatic increase problems for the Club. The evidence at the hearing established that once the Appellant was able to get back into the day-to-day operation of the Club, things did get better.

Prior to 2012, the Appellant only had a history of two citations stemming from the fact that he had installed a gambling machine at the Club. Otherwise, the pre-2012 record of Appellant was clean. Appellant applied for the renewal of his Class D-1, D-2, D-3, D-3A, and D-6 permit for the year 2012-2013. The Harrison Township Trustees (hereinafter referred to as the "Township") objected to the renewal of the permit.

The Division of Liquor Control ("Division") reviewed the matter and rejected the renewal application on the following grounds:¹

- 1) **The place for which the permit is sought is so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the renewal of the permit and operation thereunder by the applicant. R.C. §4303.292(A)(2)(c).**
 - 2) **The applicant has operated the liquor permit business in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state. R.C. §4303.292(A)(1)(b).**
- * * * * *
- 3) **The Division also denies and rejects the 2012-2013 renewal application for good cause. R.C. §§4303.271(A), 4301.10(A)(2), and O.A.C. §4301:1-1-12(B).**

The Division issued its Order on September 28, 2012. Appellant was informed of his right to appeal to the Commission; Appellant appealed to the Commission and also requested a stay of the Division's decision. The Township objected to the stay request. On October 26, 2012 the Commission denied the request for stay. Due to the denial, Appellant moved to expedite the scheduling of a hearing for its appeal. A hearing was set for December 5, 2012.

At the December 5, 2012 hearing, the Commission heard evidence establishing there were a number of serious incidents that occurred at the liquor permit premises. Captain Jeff Papanek from the Montgomery County Sheriff's Office testified that there had been twenty-four (24) separate incidents that were of a high priority associated with the permit premises. Out of the twenty-four established, incidents, eleven were for fights, assaults, shots fired, or shootings. (Shooting is different from shots fired because a shooting indicates someone was shot.) It was also established that individuals had been shot both inside and outside of the permit premises.

¹The darker text is a 'copy image' from the certified record at page 111.

It has also been reported that patrons had also been physically assaulted and robbed. Captain Papanek testified that he was aware of some changes to the permit premises to make it more safe, however, these changes occurred *after* the Township contested the permits. The Captain did note that there had been no similar problems at the Club in the past. The testimony of Sergeant Darryl Saylor, also of the Sheriff's office, also testified to the current reduction in runs to the permit premises. He also noted that the location seemed deserted and/or closed.

Nevertheless, Commission heard that during the time relevant to the renewal of the license, serious incidents had been occurring for as many as fifteen months. Additional testimony by other members of the Sheriff's office supported, in more detail, the earlier testimony of Captain Papanek.

Appellant testified during the December 5, 2012 hearing. However, Appellant did not contest the allegations against him. He acknowledged the issues and offered his apology for what happened. He also formally admitted to having lost control of the bar.

3 Q. Okay. Would you admit that for the
4 period in question here, that you lost control

5 of the bar?

6 A. Yes.

7 Q. Would you admit that for the year in
8 question, that this bar was probably scary for
9 people that -- was scary for the police to
10 have to deal with?

11 A. Yes.

During the administrative process, Appellant filed a document titled "Appellant's Memorandum in Support of Mitigating Factors Surrounding the Appeal," which described Appellant's health issues and the change in circumstances due to the closing of the other clubs. Appellant offered to cancel his D-3A permit (attaching his cancellation request) and indicated

that he would change his hours of operation (to close at 1:00 a.m. instead of 2:30 a.m.). In effect, Appellant threw himself on the mercy of the Commission. He indicated that his livelihood would be ruined if the Commission was not going to overturn the Division's ruling.

The Appellant filed its Brief with this Court on April 8, 2013 within which he asserted for the first time that the evidence presented against him was not reliable, probative and substantial.

II. STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the SPBR 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, 111 407 N.E.2d 1265 (1980), 111; *Henry's Cafe, Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233. That quality of proof was articulated by the Ohio Supreme Court in *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 589 N.E.2d 1303 (1992) 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.

A Court of Common Pleas performs a hybrid review of the administrative record, in which the court must appraise the credibility of the witnesses, the probative character of the evidence, and the weight of the evidence presented. *Conrad*, 63 Ohio St. 2d 108. When undertaking this hybrid review, a trial court "must give due deference to the administrative resolution of evidentiary conflicts" as the administrative body, as fact-finder, had "the opportunity to observe the demeanor of the witnesses and weigh their credibility." *Conrad* at 111-12. However, findings by administrative agencies are not conclusive. *Id.*

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, the court may reverse, vacate or modify the administrative

order. Where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

Id. The *Conrad* case has been cited with approval numerous times. See *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591.

Although a review of applicable law is *de novo*, the reviewing court should defer to the agency's factual findings. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 614 N.E.2d 748 (1993) (rehearing denied by: *Pons v. State Medical Bd.* (1993), 67 Ohio St. 3d 1439, 617 N.E.2d 688); See also *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St.3d 79, 82, 697 N.E.2d 655(1998). The basis for such due deference is the expertise in interpretation of the technical and ethical requirements of a profession provided by its administrative body. *Joudah v. Ohio Dept. of Human Serv.*, 94 Ohio App. 3d 614, 617, fn.2, 641 N.E.2d 288 (1994). Yet, this Court understands that deference to the agency's findings does not equate to willful blindness. Please note the following from *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471, 613 N.E.2d 591 (1993):

We take this precedent to mean that an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.

Hence, this Court must review the record to see if any material internal inconsistency exists.

This Court is also aware of the Tenth Appellate District's Opinion in *Harr v. Jackson Township*, 10th Dist. No. 10AP-1060, 2012-Ohio-2030, 970 N.E.2d 1128. This Court has considered and weighed *all* of the evidence in the record in order to make the Court's determination. The fact that this Court has not specifically addressed *all* facts and exhibits within this decision does not indicate that the Court failed to take any such fact into consideration.

The Court has reviewed the merits of this appeal within the framework of the above noted standards.

III. LAW AND ANALYSIS

At the administrative level, Appellant acknowledged the issues and attempted to seek leniency from the Commission. Having lost his permits, Appellant now claims that the Commission's decision is not supported by the evidence.

Under the applicable standard, even if this Court may draw different inferences from the evidence than those of the Commission, it is not for this Court to substitute its judgment for that of the Commission. *T. Marzetti Co. v. Doyle*, 37 Ohio App. 3d 25, 29, 523 N.E.2d 347 (10th Dist. 1987). This Court is limited to the determination of whether the evidence is sufficient to support the decision of the Commission. Here, Appellant admitted to the issues and his inability to control the permit premises. This fact alone distinguishes *2216 SA, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 07AP-600, 2007-Ohio-7014, 2007 Ohio App. LEXIS 6135 from the case *sub judice*.) In *2216 SA*, the Tenth District Court of Appeals determined that there was insufficient evidence to deny the permit request because all testimony of illegal activity or improper conduct pertained to a previous manager no longer associated with the premises. Here, Appellant was alerted to the issues by Captain Papanek in January but did not take any corrective steps until approximately five months later, after a serious shooting inside the premises occurred and after the Township objected to renewal. In addition, there is evidence on the record of five or six incidents occurring even after Appellant began security measures in May 2012. (Hr. Tr., 78:24-79:23). And, unlike *2216 SA*, Appellant remained in charge of managerial duties throughout the period, admits that he was not available as much as he needed to be, and admits that he did not control the Club. (Hr. Tr., 71:7-11; 73:6-9).

After a full review of the record, the Court finds that there is some reliable, probative and substantial evidence to support the order of the Commission and that the Order is in accordance with law. This Court has no authority to change a lawful sanction of the Commission. *See, Henry's Café, Inc., v. Bd. Of Liquor Control*, 170 Ohio St. 233, 163 N.E.2d 678 (1959). Accordingly, the Order of the Commission is affirmed.

IV. DECISION

The Order of January 9, 2013 is supported by reliable, probative and substantive evidence and is in accordance with law. It is **AFFIRMED**.

The foregoing decision renders **MOOT** Appellant's Motion for Stay, as filed on January 28, 2013.

Costs to Appellant.

THIS IS A FINAL APPEALABLE ORDER.

IT IS SO ORDERED.

JUDGE TIMOTHY S. HORTON

Copies To (via electronic delivery):

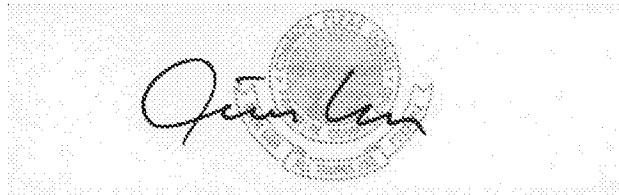
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Franklin County Court of Common Pleas

Date: 05-09-2014
Case Title: MICHAEL L HORN -VS- OHIO STATE LIQUOR CONTROL COMMISSION
Case Number: 13CV001051
Type: DECISION/ENTRY

It Is So Ordered.

A rectangular area containing a handwritten signature in cursive script, which appears to read "Timothy S. Horton". The signature is written over a circular, textured seal or stamp that is partially obscured by the ink.

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 13CV001051

Case Style: MICHAEL L HORN -VS- OHIO STATE LIQUOR
CONTROL COMMISSION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 13CV0010512013-01-2899920000
Document Title: 01-28-2013-MOTION TO STAY
Disposition: MOTION IS MOOT