

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION**

Triton Services, Inc., :  
Appellant, : CASE NO. 14CV-4111  
-vs- : **JUDGE SERROTT**  
Ohio Facilities Construction Commission :  
Appellee. :

**OPINION AND JUDGMENT ENTRY**

Rendered this 21<sup>st</sup> day of August, 2014.

**SERROTT, JUDGE.**

**I. PROCEDURAL HISTORY AND FACTS**

This matter is before the Court upon the Appellant’s R.C. 119.12 appeal of the Ohio Facilities Construction Commission’s order “debaring” the Appellant from being considered for public works contracts by State agencies. The administrative action against Appellant was originally filed in 2012. However, the initial Hearing Examiner’s report recommending debaring the Appellant was not timely sent to Appellant after the report had been sent to the Commission. (See R.C. 119.09 provision requiring that the report be sent to the [Appellant] within five (5) days of the filing of the report with the Commission.) As a result of this procedural flaw, the Commission correctly rescinded its debarment of the Appellant and reinitiated the notice and hearing process anew.

Thus, in 2013, the Appellant received a new notice of the Commission’s intent to debar the Appellant. The sole allegation was that Appellant had been debarred by the Federal Government and as a result R.C. 153.02(A)(9) authorized the Commission to debar Appellant based upon the

Federal order. R.C. 153.02(A)(9) authorizes the executive director of the Commission to debar a contractor who has “been debarred from bidding or participating in a contract with any Federal or State Agency.”

Hearing Examiner Rosan was assigned the 2013 case and issued a report finding that the Appellant had been barred Federally and thus pursuant to R.C. 153.02 (A)(9) should be barred in Ohio. During the hearing, the representative and owner of Appellant admitted that the Appellant was on the Federal list and barred from contracting with Federal agencies. (R 527-528). At the 2013 hearing, the Appellant essentially argued that Appellant was not given notice or an opportunity to appear and defend the Federal proceedings and as a result, the Federal order was invalid. Appellant also argued during the hearing that the executive director was biased and pre-disposed to debar Appellant. (R. 193-211).

The Hearing Examiner overruled a motion to dismiss alleging bias and recommended that Appellant be barred in Ohio because of the Federal order. The Commission adopted the recommendation and Appellant then timely perfected this appeal.

## **II. LEGAL STANDARD OF REVIEW**

In a R.C. 119.12 appeal, the Court must affirm the order of the Commission if it is supported by substantial, reliable, and probative evidence. Our Place, Inc. v. Ohio Liquor Control Comm’n, 63 Ohio St.3d 570 (1992). “The Ohio Supreme Court has defined reliable, probative, and substantial evidence s follow: (1) ‘Reliable’ evidence is dependable; that is, it can be confidently trust. 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 is evidence with some weight; it must

have importance and value.” Keydon Mgmt. Co. v. Liquor Control Comm’n, 10<sup>th</sup> Dist. No. 08AP-965, 2009-Ohio-1809, at ¶5 (quoting Our Place, supra, at 571).

If the trial court finds that the order is supported by reliable, probative and substantial evidence and is in accordance with law, then the trial court must affirm the order. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St3d 619, 621.

### **III. LEGAL ANALYSIS**

The Appellant essentially argues in its brief that the Federal order was procedurally flawed and therefore the Federal order was invalid. Because the Federal order was invalid, Appellant argues that the Commission’s order was not supported by substantial, reliable, and probative evidence and is not in accordance with law. (Appellant’s Brief pp 2-7). The Appellant also argues that the Commission through its executive director was pre-disposed and biased against Appellant and therefore Appellant did not have a fair hearing. (Appellant’s Brief pp 9-11).

#### **A. The Federal order was, and currently still is, a valid order barring Appellant from contracting with Federal Agencies.**

While this Court is sympathetic to Appellant’s arguments that the Federal order is procedurally flawed and invalid, the fact remains that the Federal order did bar Appellant. R.C. §153.02 (A)(9) only requires proof that Appellant was barred from contracting with a Federal agency in order to be “debarred” by the Commission in Ohio. Appellant’s argument in essence is that the Commission and Hearing Examiner should look behind the order and conduct a hearing as to the validity of the Federal order. This argument ignores R.C. 153.02(A)(9) simple requirement that such an order exist. The Commission could not, nor could the Hearing Examiner, rule that the

Federal order was invalid. Such a ruling would violate constitutional principles of comity and the constitutional and statutory rights of Federal agencies to regulate Federal construction contracts.

The only remedy is for the Appellant to obtain a Federal court, or Federal agency order, invalidating the current Federal order. Appellant is currently attempting to do so. The Ohio statute's plain and express terms merely require proof that the contractor is barred Federally. Appellant's owner admitted and the uncontroverted evidences establish Appellant was barred Federally. Thus, the Commission's order is supported by substantial, reliable and probative evidence and is in accordance with the law.

Again, if all that Appellant claims is true, then the Federal order may indeed be invalid. But, the only remedy is to attack the validity of that order through the Federal system.

Therefore, Appellant's first claim of error is overruled in its entirety.

**B. The Commission Order was in accordance with law and no evidence of bias or an unfair hearing exists.**

The Appellant next claims the order is not in accordance with law. The essence of the argument is that the executive director was pre-disposed and biased against Appellant. (Appellant's Brief pp 16-22). Appellant also argues that the director had improper ex-parte emails and/or conversations with the Hearing Examiner.

Appellant spends considerable time in its Brief (pp. 5-8) arguing the initial notice and hearing was procedurally flawed. However, the Appellant ignores the fact the first decision was rescinded and a new Hearing Examiner was assigned to the case. Absolutely, no evidence exists that the Hearing Examiner herself was biased against the Appellant. The executive director did not make the decision and recommendation. A neutral detached Hearing Examiner heard all the

evidence and issued a report and recommendation. Had the case been assigned to the same Hearing Examiner that made the original decision, the Appellant's bias argument might have some merit. But such was not the case.

Moreover, Appellant cannot and does not dispute that it received proper notice of the second (2013) hearing and was given an opportunity to appear. Indeed, Appellant appeared and vigorously defended the allegations. The record is devoid of any evidence of unfairness or bias on the part of the Hearing Examiner. The Hearing Examiner was not obligated to investigate and make a determination as to the underlying procedural validity of the Federal order. She could not constitutionally invalidate a Federal order in a state agency proceeding.

Finally, the alleged ex-parte communications with the Hearing Examiner were procedural in nature and not substantive. Therefore, the one email and other allegations not in the record were not improper and did not violate any due process rights of the Appellant.

Therefore, the Commission's order was in accordance with law and this claim of error is overruled in its entirety.

#### **IV. CONCLUSION**

For all the reasons stated herein, the Appellant's claimed errors are all overruled and the decision of the Commission is **AFFIRMED** in its entirety. The previous **STAY** is hereby **VACATED** and the Commission's order shall have immediate effect hereinafter. Again, the Court has grave concerns concerning the procedural fairness and due process of the Federal order, however; neither this Court nor the Hearing Examiner can collaterally invalidate the order in a state proceeding. This Court cannot ignore the Federal order even if flawed. The order of Commission is **AFFIRMED**; the **STAY** is lifted and vacated.

COPIES TO:

Jessica A. Hill, Esq.  
William G. Geisen, Esq.  
100 East Rivercenter Blvd., Suite 450  
Covington, KY 41011  
Counsel for Appellant

David A. Beals, Esq.  
William C. Becker, Esq.  
150 East Gay Street, 18<sup>th</sup> Floor  
Columbus, Ohio 43215  
Counsel for Appellee

Franklin County Court of Common Pleas

**Date:** 08-21-2014

**Case Title:** TRITON SERVICES INC -VS- OHIO STATE FACILITIES  
CONSTRUCTION COMMI

**Case Number:** 14CV004111

**Type:** DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in cursive that reads "Mark Serrott". The signature is written over a circular official seal. The seal contains the text "COMMON PLEAS COURT" at the top, "FRANKLIN COUNTY, OHIO" in the middle, and "ALL THINGS BE" at the bottom.

/s/ Judge Mark Serrott

Court Disposition

Case Number: 14CV004111

Case Style: TRITON SERVICES INC -VS- OHIO STATE FACILITIES  
CONSTRUCTION COMMI

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes