IN THE COURT OF COMMON PLEAS FRANKLIN COUNTY, OHIO
CIVIL DIVISION

KENNETH HETRICK,

Appellant,

v.

OHIO STATE DEPARTMENT OF AGRICULTURE,

Appellee.

CASE NO.: 15CVF-06-5006

JUDGE: YOUNG

DECISION AND ENTRY
DENYING THE MOTION OF THE APPELLANT TO STRIKE AS FILED ON SEPTEMBER 9, 2015
AND
DECISION AND ENTRY
DENYING THE MOTION TO RECONSIDER
AS FILED ON SEPTEMBER 10, 2015
AND
DECISION AND ENTRY
AFFIRMING THE ADMINISTRATE ORDER NO. 2015-087
ISSUED ON MAY 29, 2015

YOUNG, J.

This action comes before the Court upon Kenneth Hetrick's (Appellant) appeal of an Order No. 2015-087 issued by the Ohio State Department of Agriculture. (Appellee) The Appellant also has filed a Motion to Strike and a Motion to Reconsider. For the reasons that follow, the Motions to Strike and to Reconsider are **DENIED**.

The Order issued by the Appellee is **AFFIRMED**.

I. STATEMENT OF THE CASE:

The Appellant appeals from the Order, issued by the Appellee on May 29, 2015, that rejected Appellant's arguments and held that the transfer order enforced on January 28, 2015 was proper.

II. FACTS:

On June 12, 2015, the Appellant commenced this appeal. In his Notice, the Appellant relied upon R.C. §119.12 for his authority to appeal the actions of the Appellee. The Appellee, pursuant to Chapter 935 of the revised code, has the duty to control the management of wild animals and snakes within the State of Ohio. Pursuant to R.C. §935.20, the Director or the Director's designee can order a quarantine or a transfer of a dangerous wild animal (DWA). On January of 2015, just such an Order was issued taking Appellant's animals away from him.

The Order removing the DWA noted the following:

The Director has reason to believe that the following facts are true:

As of today's date, Kenneth Hetrick is in possession of approximately 12 dangerous wild animals (DWA), does not possess any type of valid permit for possession of the DWA, and is in violation of the care and housing standards under Ohio Revised Code (OEC) Chapter 935.

Mr. Hetrick registered his DWA with the Ohio Department of Agriculture (ODA) in November of 2012, but failed to timely seek a permit or otherwise comply with ORC Chapter 935. An investigation initiated in May 2014 confirmed that Mr. Hetrick was still in possession of the DWA and failed to seek a permit with ODA.

On October 17, 2014 ODA received an application for a wildlife shelter permit from Mr. Hetrick. The deadline to submit an application for such permit under law was December 31, 2013. Mr. Hetrick missed the deadline to apply under ORC Chapter 935 by nearly 298 days.

On or about November 7, 2014, ODA visited Mr. Hetrick's property and noted serious violations of the care and housing standards required under Ohio Administrative Code Chapter 901.1-4, including over 21 deficiencies of safe housing, proper nutrition, and health of the DWA. The poor housing conditions pose a direct threat to public safety and a direct threat to the health of DWA due to the poor conditions of the animals.

Based on the dilapidated conditions of the cages in which these animals are housed and other numerous care and health violations, these animals must be

> transferred to a secure location to protect public safety and health of the animals until the conclusion of this investigation.

In response to this Order and the sizing of his DWAs, the Appellant filed a prior appeal that dealt with the Appellee's interlocutory order to remove the animals. This Court issued a decision in Case No: 15CVF-01-1171 that held that the removal order was not subject to an appeal because it was not the final adjudication of the agency as required by R.C. §119.12.

The prior case was dismissed and the parties returned to the administrative process. A hearing was conducted on February 19, 20 and March 3, of 2015. The Appellant appeared and he was represented by counsel. It appears from the record of the February 19, 2015 hearing that the parties agreed that the hearing was to be limited to the issue of whether the transfer order was properly issued pursuant to R.C. §935.20. At the beginning of the hearing, the Hearing Examiner allowed the parties to address any procedural issues. Appellant wanted the matter dismissed based upon the fact that the Appellant believed that the transfer order was the final order. At the time of the hearing that issue was still the subject of the appeal in Case No: 15CVF-01-1171. Appellant's motion to stay was denied by the Hearing Examiner. The Hearing Examiner's denial was shown to be correct when this Court dismissed the appeal in Case No: 15CVF-01-1171.

Next, the Appellant asserted an issue with his subpoenas. Apparently, the requested subpoenas had only been served the day prior to the hearing. Appellant also asserted that there had been an untimely response to the public records request made by the Appellant. Appellant argued that the documents had only recently been received. Therefore, it appeared that the Appellant was seeking a continuance of the hearing. Eventually, it was decided that the parties would proceed with the Appellee's case and the matter would be held open for a later date. The

Appellant could then make sure that the witnesses subpoenaed would appear and that he would have time to review the documents he recently had received.

As to any missing document the Hearing Examiner asked that the parties work it out. The agreement to keep the record open gave the Appellant time to address those issues. During opening statements, the Appellee asserted it was an easy case. The Appellant had not timely filed for a permit and did not hold a permit at the time that the animals were transferred. That fact alone – the lack of a permit – justified the actions of the Appellee. However, the Appellee also stated that other witnesses would be called to testify in order to establish that the Appellant was not giving proper care to his animals and that he was not safely housing them.

The Appellant asserted during his opening that he was licensed by the Federal government to own wild animals and he was on the Wood County's DWA team to help the county deal with any potential DWA escape. The Appellant indicated that he failed to file for a permit because he was acting upon advice of counsel. The Appellant was involved in a court case contesting the constitutionality of the new statute and he was told that his act of requesting a permit would not look right. Once the Appellant requested the permit, he attempted to comply with all of the requests of the Appellee.

At the hearing the Appellee's first witness was Randall Junge. Mr. Junge was employed by the Columbus Zoo. (Hr. Tr. P. 50) Mr. Junge is Vice President of Animal Health for the Zoo. (Hr. Tr. P. 51) Mr. Junge is a licensed veterinarian. (Hr. Tr. P. 53) Mr. Junge was clearly competent to testify on behalf of the Appellee.

Mr. Junge was present on January 28, 2015 when the Appellant's animals were seized. (Hr. Tr. P. 70) Mr. Junge testified to what he saw and noted a number of deficiencies in the caging of the animals. (Hr. Tr. P. 73 - 74) He also noted that the cages had swinging gates that

made a safe transfer from the cage to a transport carrier unsafe without some form of anesthesia. (Hr. Tr. P. 84) Mr. Junge also testified that he again viewed the animals the following day after they were transported to the facility in Reynoldsburg. (Hr. Tr. P. 82) He noted that the animals were settling in well at the new location and they were in good condition.

The next witness at the hearing was David Hunt. Mr. Hunt is an enforcement agent working for the Appellee. (Hr. Tr. P. 104) Mr. Hunt testified that he appeared at Appellant's property on January 28, 2015 two times. The first time he went there Mr. Hunt had paperwork that would have allowed the Appellant to voluntarily surrender his animals. (Hr. Tr. P. 107) The first interaction between Mr. Hunt and the Appellant was recorded by video phone. The recording was then viewed and became part of the record. (Hr. Tr. P. 129 - 138) When the voluntary request was denied, Mr. Hunt testified that he left and awaited the arrival of a warrant. (Hr. Tr. P. 107) Mr. Hunt was the individual who actually served the warrant. (Hr. Tr. P. 111) Mr. Hunt also remembers serving the Appellant with the transfer order at that same time. (Hr. Tr. P. 112)

The Appellee then called Melissa Simmerman to testify. Ms. Simmerman works for the Appellee as the Assistant Chief of the Division of Animal Health and the Assistant State Veterinarian. (Hr. Tr. P. 143) Ms. Simmerman is licensed as a veterinarian in Ohio. (Hr. Tr. P. 144) Ms. Simmerman was asked to explain the process of how someone who owned a DWA would secure a permit. Ms. Simmerman testified that after the law was passed anyone who already owned a DWA was required to register the animal. The registration of a DWA was the first step in permitting. (Hr. Tr. P. 148) Registration was possible as early as 2012.

Next, Ms. Simmerman testified that in the fall of 2013 someone with a registered DWA could start the permitting application process. Everyone was informed that the permit request

was to be made prior to December 31, 2013. (Hr. Tr. P. 148) Ms. Simmerman also established that the law allowed for a number of different types of permits. (Hr. Tr. P. 149)

Ms. Simmerman testified that the Appellee had sent a compliance package to the Appellant after he registered his DWAs. (Hr. Tr. P. 153) She testified that the Appellant did not apply for a permit in 2013. (Hr. Tr. P. 161) Ms. Simmerman established that even after the deadline had been missed by the Appellant the Appellee did reach out to him and the Appellee gave him more opportunities to apply. (Hr. Tr. P. 163 - 167) Ms. Simmerman testified that it was not until October 17, 2014 that the Appellant finally submitted a request for a permit. (Hr. Tr. P. 169) At that point in time, the Appellant requested that he be given a rescue facility permit. Ms. Simmerman also was at the Appellant's property on November 7, 2014, and she testified to what she saw on that date and what she saw on January 28, 2015. (Hr. Tr. P. 174) She testified concerning what she saw relative to the housing of the DWAs. (Hr. Tr. P. 177 to 190) A list of her concerns is as follows:

1. No water;
2. Water with green residue;
3. Water buckets with frozen water even though they had heating elements;
4. Fencing not secured to the poles in the right way;
5. Fencing not at the right height;
6. Some enclosures lacked secondary enclosures or had secondary enclosures that did not completely surround the enclosure;
7. Lack of shift cages within the enclosures (allows one to easily secure the animal so that you can then work on inside of enclosure);
8. Wrong type/size of enclosure for the leopard;
9. No roof on leopard enclosure;
10. Fence for lion not correct and lacking electrification at the top;
11. Den boxes in the enclosures allowed the animals to get on top of the boxes and that allowed the animals to be too close to the tops of the fences; and,
12. Spoiled meat in with animals' food.

Her testimony established both animal health and public safety issues. The above list was not all of the defects noted during the hearing.

Ms. Simmerman also established that a number of cages were unsecured. They either had a lock that was not engaged or, if engaged, the gate was hung in such a way that any individual could lift it off its hinge to gain access to the animals. (Hr. Tr. P. 191 - 192)

Ms. Simmerman testified that it was decided that the DWAs would not be quarantined at the Appellant's property because of the number of deficiencies in the caging and welfare of the animals. Clearly that was a public safety concern. (Hr. Tr. P. 214 - 215)

Ms. Simmerman testified that she was aware in November of 2014 that the Appellant had a USDA license for his animals. (Hr. Tr. P. 253) Apparently, the Appellant had been able to renew his USDA license after an August 2014 federal inspection. (Hr. Tr. P. 254) She also confirmed that except for the condition of Leo the lion, the animals were noted to be in apparent good condition. (Hr. Tr. P. 265)

On the second day of the hearing, the Appellee called Mr. Tony Forshey to testify. Mr. Forshey is the Chief of the Division of Animal Health. That position is more commonly known as the State Veterinarian. (Hr. Tr2. P. 6) Mr. Forshey set forth the issues he saw on January 28, 2015. (Hr. Tr2. P. 15) The list supported the prior testimony of the witnesses concerning the public safety issues.

When Mr. Forshey was asked on cross examination why the transport order had been issued he answered as follows:

> Oh, the concerns were there were dangerous wild animals present on the premises and there was no permit to – license to have those animals. (Hr. Tr2. P. 34)

He confirmed that was the major reason but not the only reason for the transfer order. The Appellee rested after the testimony of Mr. Forshey.

The Appellant called Keefe Snyder as his first witness. Mr. Snyder is a Detective Sergeant for the Toledo police department working in the Crime Scene Unit. (Hr. Tr2. P. 60)

Mr. Snyder was a friend and frequent guest of the Appellant. (Hr. Tr2. P. 63) Mr. Snyder testified that the Appellant was the man he would call if he came across an exotic animal situation in Toledo. (Hr. Tr2. P. 79) The majority of Mr. Snyder's testimony was not relevant to the issue.

The next witness for the Appellant was Joshua Large. Mr. Large is a neighbor of the Appellant. (Hr. Tr2. P. 92) Mr. Large testified that he was over nearly daily to give the Appellant a hand. (Hr. Tr2. P. 92) Mr. Large confirmed that at least one water heater was not working. (Hr. Tr2. P. 98) But again, the majority of Mr. Large's testimony was not relevant to the issue.

Mr. Edward Rocco II was the next witness called by the Appellant. Mr. Rocco is the owner of a fencing company. (Hr. Tr2. P. 111) Mr. Rocco was called by the Appellant to counter any claim that the fencing was dilapidated. (Hr. Tr2. P. 114) When asked to give his opinion as to the fencing as it complied with the regulations, Mr. Rocco testified as follows:

> I would say he complied with most of the regulations. There were some things that were being done there, such as the top wire, which I believe are done now. (Hr. Tr2. P. 117)

When asked if the Appellant was in compliance, Mr. Rocco testified that Appellant was except "everything but the cover." (Hr. Tr2. P. 119, Line 9) Furthermore, Mr. Rocco confirmed that the secondary barriers were only four feet away from the main fences as of January 28, 2015. (Hr. Tr2. P. 120) That distance was not up to Appellee's standards.

The Appellant then testified. At the time of the hearing the Appellant was employed by the Walbridge Police Department. (Hr. Tr2. P. 137) The Appellant testified that he held a United States Department of Agriculture animal exhibitor license for 2015. (Hr. Tr2. P. 139) He testified that he has held the Federal license since 1988. (Hr. Tr2. P. 153) The Appellant had also completed a Chemical Immobilization of Animals class in 1996. (Hr. Tr2. P. 142)

When asked why he did not timely request his permit, the Appellant testified to the lawsuit he was involved in. (Hr. Tr2. P. 157) After losing two times – District Court and Circuit Court - the attorney handling the matter quit. At that point the Appellant finally tried to secure a permit. (Hr. Tr2. P. 158) Appellant testified concerning the amount of money he has expended in an attempt to make his facility compliant with the Appellee's requirements.

The Appellant claimed that on January 28, 2015, when the authorities came the second time to serve the search warrant, he stayed in his home. He testified that the transfer order was never given to him. (Hr. Tr2. P. 178) After the Appellant testified that he had certain drugs in his possession for use in tranquilizing his animals, he pled the Fifth Amendment. (Hr. Tr2. P. 189)

The Appellee testified that he knew that in March of 2014 the Federal case that had been filed contesting the validity of the statute had be decided by the Sixth Circuit. The decision held that the law is constitutional. (Hr. Tr2. P. 201) There then was a second break in the hearing and the hearing was renewed on March 3, 2015.

The third hearing date did not start with the continuation of Appellant's testimony. On March 3, 2015, the Appellant first called Mr. Eric Reynolds to testify. Mr. Reynolds was the Chief Deputy to the Wood County Sheriff. (Hr. Tr3. P. 8) Mr. Reynolds knew the Appellant for a long time. (Hr. Tr3. P. 9) Mr. Reynolds' testimony conflicted with the Appellant's as to the Appellant's conduct when he received the warrant and transfer order. Mr. Reynolds stated that the Appellant stepped out of his home while the Appellant claimed that he never left his home the second time.

> Kenny answered the door. Again he came out; we did not go in. He was served papers by the ODA. And the ODA official left at that point. (Hr. Tr3. P. 13, lines 2 - 5)

Mr. Reynolds' testimony established that paper work was served on the Appellant.

With the conclusion of Mr. Reynolds testimony, the Appellant was again called to testify. The Appellant claimed that the only documents he received on January 28, 2015 were associated with the warrant. (Hr. Tr3. P. 24) The Appellant then called Ms. Simmerman back to the witness stand.

Ms. Simmerman confirmed that the main reason for the transfer order was the lack of a permit. (Hr. Tr3. P. 28) During Ms. Simmerman's cross examination, counsel for the Appellant seemed to have forgotten that the focus of the hearing was not on the granting or denial of the permit. (Hr. Tr3. P. 39 - 43)

The Appellant then called Mr. Dominic D'urso to testify on his behalf. Mr. D'urso was a former employee of the Appellee who was terminated on February 9, 2015. He had been a Dangerous Wild Animal Inspector. (Hr. Tr3. P. 58) Mr. D'urso was at the Appellant's property on November 7, 2014. (Hr. Tr3. P. 68) Mr. D'urso testified that the inspection was different than the prior inspection, because the Appellant did not hold a permit. (Hr. Tr3. P. 69) As already established, Mr. D'urso testified that the Appellant was in compliance with some laws and out of compliance with others. (Hr. Tr3. P. 72)

Mr. D'urso was also at the Appellant's property on January 28, 2015. (Hr. Tr3. P. 75) Mr. D'urso was not on the property at the time when Mr. Hunt served the transfer order. (Hr. Tr3. P. 76) During cross examination by the Appellee, Mr. D'urso explained the difference between a formal inspection of a property that has a permit and an outreach visit to a prospective permit holder. (Hr. Tr3. P. 94 – 95) The November 7, 2014 review of the Appellant's property was an outreach visit.

The Appellant's next witness was Mr. Richard Carstensen. Mr. Carstensen is a veterinarian. (Hr. Tr3. P. 106) Mr. Carstensen's testimony was apparently offered to show that

the Appellant took good care of his animals. However, his testimony had nothing to do with the relevant topic of the hearing; i.e., the procedure used to remove the animals. The Appellant's case ended with the testimony of Mr. Carstensen.

The Appellee decided to call Mr. Hunt again in a rebuttal case. Mr. Hunt testified that he got the transfer order from Ms. Simmerman the night before the January 28, 2015 events. (Hr. Tr3. P. 125) Mr. Hunt again testified that he gave both the transfer order and the search warrant to the Appellant. (Hr. Tr3. P. 126) He then was asked to confirm that he was not in possession of the transfer order at the end of the day and he stated that he was not. (Hr. Tr3. P. 127)

The Appellee then called Ms. Simmerman back to the witness stand. She confirmed handing the transfer order to Mr. Hunt the night before the animals were transferred. (Hr. Tr3. P. 129) She also confirmed it was the document with the Seal. (Hr. Tr3. P. 141) Ms. Simmerman testified that the Appellant was the only DWA owner she was aware of who had waited so long to file for a permit. (Hr. Tr3. P. 135) At the conclusion of Ms. Simmerman's testimony, the Appellee's rebuttal case came to an end.

Contained within the exhibits offered at the hearing was a transcript from a proceeding in Case No: 2015CV48 Wood County Common Pleas Court. Counsel for the Appellant was informing Judge Kelsey that the Appellant had been locked into his home during the events of January 28, 2015. (State's Exhibit B) The document showed the effort(s) that had been taken by the Appellant to stop the transfer. That hearing was conducted on January 28, 2015. In that hearing, the record does not reflect any claim that the Appellant had not been served with the transfer order.

The Hearing Examiner issued his Recommendations on or about May 5, 2015. The Recommendation indicated that a great deal of the testimony at the hearing was not relevant.

This Court concurs. As to the relevant issues - the Hearing Examiner held that the transfer order was served on the Appellant personally on January 28, 2015.

The Hearing Examiner concluded that States Exhibit 2 contained a valid copy of the order and that the order met the requirement of the statute. Being valid, the Hearing Examiner concluded that the Appellee had the right to rely upon the order – once served. The Hearing Examiner determined the following:

> From January 1, 2014 through their transfer January 28, 2015, Responded knowingly disregarded the requirements of R.C. 935.04(E) and R.C. 935.101(A) by possessing DWA's without a permit. (Recommendation at page 11)

Furthermore, the Hearing Examiner held that there was evidence – prior to the transfer order – that the Appellant's facilities were not compliant with the act. The Hearing Examiner made the following recommendation:

> The Director's Order to transfer Mr. Hetrick's animals and initiate and investigation was valid, authorized by law and appropriate under the circumstances. It is recommended that the Order No. 2015-010 be maintained. (Recommendation at page 14)

The Recommendation was served on the parties.

As was his right, the Appellant filed objections to the Recommendation. Appellant pointed to portions of the record to advance evidence he thought outweighed the evidence relied upon by the Hearing Examiner. The Appellee rejected the objections and in Order No. 2015-087, the Appellee adopted the recommendation of the Hearing Examiner.

The Appellant filed this appeal. The administrative appeal has been fully briefed and is ready for review.

III. STANDARD OF REVIEW:

Review by this Court of an administrative agency is governed by R.C. §119.12 and the multitude of cases addressing that section. An often cited case is that of Univ. of Cincinnati v.

Conrad (1980), 63 Ohio St. 2d 108, 407 N.E.2d 1265. The Conrad decision states that in an administrative appeal filed pursuant to R.C. §119.12, the trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. The Conrad court stated at pages 111 and 112 that:

> In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.
>
> 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, and necessary to its determination, the court may reverse, vacate or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

The Conrad case has been cited with approval numerous times. Ohio Historical Soc. v. State Emp. Relations Bd. (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591 noted Conrad and stated that although a review of applicable law is de novo, the reviewing court should defer to the agency's factual findings. See VFW Post 8586 v. Ohio Liquor Control Comm. (1998), 83 Ohio St.3d 79, 82, 697 N.E.2d 655.

Issues of law and statutory interpretation are viewed with a different standard. This case also deals with issues of statutory and administrative code construction. Please note the following relevant case law:

> Moreover, in Lorain City Bd. of Edn. v. State Emp. Relations Bd. (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, we held that courts must accord due deference to the State Employment Relations Board's interpretation of R.C. Chapter 4117, since the General Assembly designated it to be the proper forum to resolve public

> employment labor disputes. Similarly, we hold in the cause sub judice that courts must accord due deference to the State Board of Psychology in its interpretation of R.C. Chapter 4732 and the relevant provisions of the Ohio Administrative Code, given that the General Assembly has deemed it to be the proper forum to determine licensure matters concerning psychologists. Leon v. Ohio Bd. of Psychology, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (Ohio 1992)

Said line of authority was followed in *Salem v. Koncelik*, 2005-Ohio-5537, 164 Ohio App.3d 597, 843 N.E.2d 799 (Ohio App. 10 Dist. 2005). Please note the following langue from Salem:

> We are cognizant that courts must give due deference to an administrative agency's interpretation of its own administrative rules. See Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio (1989), 46 Ohio St.3d 147, 545 N.E.2d 1260. The General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. See Pons v. Ohio State Med. Bd. (1993), 66 Ohio St.3d 619, 614 N.E.2d 748, paragraph one of the syllabus. Thus, the Ohio Supreme Court has held that unless the construction is **unreasonable or repugnant** to that statute or rule, this court should follow the construction given to it by the agency. Leon v. Ohio Bd. of Psychology (1992), 63 Ohio St.3d 683, 590 N.E.2d 1223. (Emphasis added)

From within this framework, this Court will render its decision.

IV. ANALYSIS:

The Court will address the recent Motions as filed by the Appellant. Then the Court will address the merits of the appeal.

A. Motion to Strike as filed on September 9, 2015:

On September 9, 2015, the Appellant filed a Motion to Strike. The Motion requested that Appellee's merit Brief be stricken because it exceeded – by one page – the page limit set by the local rules of this Court. Appellee responded by pointing out that the first page of its Brief – page 'i' – was no more than the caption of the case and therefore should not be counted.

Appellant's motion – at best – is technically correct. However, the sanction requested by Appellant is excessive for such a small transgression. The Court will exercise its discretion and not strike the Appellee's Brief. Appellant's motion is **DENIED**.

B. Motion to Reconsider filed on September 10, 2015:

Appellant has requested that this Court reverse its prior August 25, 2015 Decision. In that Decision, this Court was unwilling to allow an evidentiary hearing. Appellant's initial request for an evidentiary hearing was filed on July 23, 2015. Now the Appellant – within his Motion to Reconsider –narrows his former request for an evidentiary hearing just to the issues of his constitutional claims.

A review of the prior Motion – with its attached affidavit – and a review of the current Motion to Reconsider again shows that the Appellant has failed to allege any 'factual' constitutional issues. In the prior Motion, the Appellant only stated "Plaintiff wishes to submit evidence on the violation of his due process and equal protection rights." That is an as applied challenge not necessitating a hearing at this level. The Appellant made those arguments during the administrative process. In fact, had the Appellant not raised those issues during the agency process, those issues would have been waived.

Appellant's Motion to Reconsider is void of any new issue. Though it references case law, the Motion fails to establish what law or portion of the statute he feels is unconstitutional. Appellant – at best – has asserted a facial constitutional challenge to the entire statute and that does not require a hearing. Though Appellant relied upon language found within a dissent filed in the case of *Lomaz v. Ohio Dept. Of Commerce, Div. Of State Fire Marshall*, 2005-Ohio-7052 (11th Dist.) the facts of this appeal are more relevant to the majority holding in *Lomaz* that indicated that there was no need for a hearing.

Hence, Appellant's Motion to Reconsider is **DENIED**.

C. Administrative Appeal:

The issue before this Court is the validity of the transfer order served on the Appellant on January 28, 2015. The Appellee has asserted that statute authorized the transfer order and that the Appellee complied with the law. The Appellant has claimed that the transfer order was not properly served; if properly served, it was defective; if properly served and not defective, the use of the transfer order somehow violated the Appellant's constitutional rights; and if the transfer order was served, not defective and constitutional, then the Appellant was subject to disparate treatment and/or singled out for enforcement.

The Court will address Appellant's arguments in that order.

1. The Transfer Order was not Served:

There was testimony at the hearing that the transfer order was served on the Appellant. Mr. Hunt testified that he personally served the document on the Appellant. Ms. Simmerman testified that she gave the transfer order – the one signed and sealed – to Mr. Hunt the night before he served it on the Appellant.

The Hearing Examiner noted at page 7 and 8 of his Report that the Appellant at first acknowledged receipt of the transfer order. Later, on another day of the hearing, Appellant testified the he had not received the transfer order. The Hearing Examiner was within his rights to determine that the Appellant's testimony was not credible.

Appellant argued that he scanned the documents he received and the number of documents he scanned did not add up to the total number of documents that should have been handed to him; i.e., 5 for the Warrant and 4 for the Transfer order. Again, having viewed the Appellant and having heard his testimony, the Hearing Examiner determined that the Appellant

did receive the transfer order. Clearly, the Hearing Examiner found the Appellant to lack credibility in regard to this evidentiary issue.

The Hearing Examiner had the right to believe the testimony of Mr. Hunt. Nothing advanced by the Appellant created a situation where this Court could ignore the Hearing Examiner's findings. No internally inconsistent statement was presented nor was there any evidence that showed that Mr. Hunt's testimony was legally not credible. Therefore, this Court could not hold that his testimony should be given no weight. Frankly, having reviewed the complete hearing transcript, this Court concurs with the holding of the Hearing Examiner.

Therefore there was reliable, probative and substantial evidence that established that the Transfer Order was served personally on the Appellant on January 28, 2015.

2. The Transfer Order was Legally Defective:

Next the Appellant claimed that the actual transfer order was legally defective and therefore, should not have been relied upon when the Appellant's DWAs were removed on January 28, 2015. Appellant tried to muddy the water by pointing out that there were other copies of the transfer order that were in the record in the Woods County Common Pleas Court case. However, the Hearing Examiner made the determination that the transfer order served on the Appellant was the one noted as Exhibit 2 at the hearing. The Appellee argued that its order complied with the law. The Hearing Examiner agreed.

The law setting out the right of the Appellee to issue a transfer order is in R.C. §935.20. Please note the following relevant language from that statute:

> § 935.20. Investigations
> (A) On and after January 1, 2014, the director of agriculture immediately shall cause an investigation to be conducted if the director has reason to believe that one of the following may be occurring:

> (1) A dangerous wild animal is possessed by a person who has not been issued a wildlife shelter permit, wildlife propagation permit, or rescue facility permit under this chapter. . . .
> (3) A dangerous wild animal or restricted snake is being treated or kept in a manner that is in violation of this chapter or rules.
> For purposes of the investigation, the director or the director's designee **may order the animal** or snake that is the subject of the notification to be quarantined or may order the transfer of the animal or snake to a facility that is on the list maintained by the director under this section. If the director's designee orders the animal or snake to be quarantined or transferred, the designee shall provide a copy of the order to the director.
> (B) The director shall attempt to notify the person owning or possessing an animal or snake that has been ordered to be quarantined or transferred under division (A) of this section. The notice **shall be delivered in person** or by certified mail. . . The director shall maintain a copy of an order issued under this section and evidence that the director attempted to notify the person owning or possessing the animal or snake.
> (C) A quarantine or transfer order issued under this section shall contain all of the following:
> (1) The name and address of the person owning or possessing the animal or snake, if known;
> (2) A description of the quarantined or transferred animal or snake;
> (3) A description of the premises affected by the quarantine or transfer;
> (4) The reason for the quarantine or transfer;
> (5) Any terms and conditions of the quarantine or transfer;
> (6) A notice that a person adversely affected by the order may request a hearing to review the order. . . . (emphasis added)

The Appellant has claimed that the transfer order was defective because it did not adequately describe the animals to be transferred under R.C.§395.20(C)(2) and (4).

The actual transfer order clearly complied with R.C. §395.20(C)(1). That is not at issue.

The transfer order has the following language:

> As of today's date, Kenneth Hetrick is in possession of approximately 12 dangerous wild animals (DWA), **does not possess any type of valid permit** for possession of the DWA, and is in **violation** or the care and housing standards under Ohio Revised Code (ORC) Chapter 935. (State's Exhibit 2 page 1. Emphasis added)

Even though there were more grounds noted in the transfer order, the above language alone was sufficient to meet the requirement to state reasons for the transfer order. Hence, it complied with R.C. 395.20(C)(4).

Appellant claimed that the listing of the animals noted in the transfer order violated R.C. §395.20(C)(2). Please note the following language as contained in the transfer order:

> 1. In accordance with R.C. 935.20(A), and in furtherance of the ongoing investigation of Kenneth Hetrick for alleged unpermitted possession of dangerous wild animals, that six (6) tigers, one (1) lion, one (1) Kodiak brown bear, one (1) bobcat, one (1) black leopard, one (1) liger, one (1) cougar and any other dangerous wild animals located on the property whose the address is 5359 Fremont Pike, Perrysburg, Ohio 43551, be transferred to the Ohio Department of Agriculture's Dangerous Wild Animal Holding Facility.

Appellant asserted that the use of the word 'tiger' was insufficient to place the Appellant on notice as to what animal was to be transferred. The Appellant offered no valid suggestion as to what 'description' met his understanding of the law. Clearly, name, weight, coloring, height, etc., would be more descriptive but that is not required by the clear wording of the statute.

The use a word indicating a type of animal is sufficient. There was clearly no confusion on the day that the transfer order was executed. Appellant's argument on this point lacks merit. The Appellant also asserted that there was no evidence that the Appellee maintained a copy of the transfer order as required by R.C. §935.20(B). The statute merely required that the Appellee "shall maintain a copy of an order issued under this section and evidence that the director attempted to notify the person owning or possessing the animal." Clearly, the order was maintained because it was produced at the hearing. It was properly journalized. The evidence at the hearing supported that finding. Hence, there is no merit in Appellant's assertion that the transfer order was not appropriately kept by the Appellee.

3. Other Arguments Contained Within Appellant's Merit Brief:

Appellant argued in his Brief that it was somehow the duty of the Appellee to give specific prior notice to the Appellant that he had to finally get a permit or face the loss of his DWAs. Appellant asserted that prior contacts between the Appellant and the Appellee led the Appellant to believe that no action would be taken by the Appellee while the Appellant was working to get his facility up to the requirements of the statute. Appellant went as far as to utilize a news article from April of 2014 wherein the Appellee's Director was reported to have indicated that the Appellee was still willing to work with owners in their pursuit of a permit. Though Appellant never testified that he relied on any of these statements, the Appellant nevertheless asserted that those statements made it mandatory for the Appellee to revoke that position prior to enforcing the statute. That is not the law.

What the Appellant is asserting – at best – is that the Appellee should be estopped from arguing that his lack of a permit allowed the Appellee to transfer the DWAs based upon the prior statements. The Supreme Court has held, "It is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function." *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-146, 555 N.E.2d 630. Please note the following:

> The Supreme Court of Ohio has refused to apply principles of estoppel against the state, its agencies or its agents. Griffith v. JC Penny Co. (1986), 20 Ohio St.3d 112. There is no reason to depart from precedent and apply the doctrine of equitable estoppel under the circumstances of this case. If a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule is undermined. Ohio State Board of Pharmacy v. Frantz (1990), 51 Ohio St.3d 143, 145-146. State v. White Landing Fisheries, 2011-Ohio-3497 (6th Dist.) at ¶ 29.

Hence, Appellant's estoppel (notice) argument has no merit.

In any event, if in fact estoppel would somehow apply, the Appellant would not prevail. Please note the following:

> To prove promissory estoppel, a plaintiff must show: "1) a clear and unambiguous promise; 2) reliance on the promise; 3) the reliance is reasonable and foreseeable; and 4) the party relying on the promise was injured by his or her reliance." Dunn v. Bruzzese, 7th Dist. No. 06 JE 2, 2007-Ohio-3500, at ¶ 21 citing Patrick v. Painesville Commercial Properties, Inc. (1997), 123 Ohio App.3d 575, 583, 704 N.E.2d 1249. See also Hortman v. Miamisburg, 110 Ohio St.3d 194, 2006-Ohio4-251, 852 N.E.2d 716, at ¶ 23-24.

The evidence produced at the hearing established that the Appellant was on notice of the law and he understood the requirement of the law.

The Appellant's decision not to request a permit had nothing to do with the statements contained in any letter or any article. The evidence showed that the Appellant was adverse to the statute from its inception and he took no action to secure a permit believing that he was right. Only after losing the issue in the Federal Court, did the Appellant request a permit. Therefore any estoppel claim would fail.

The Appellant next asserted that the Appellee failed to provide him with due process because the Appellee exercised its discretion in a fashion Appellant claimed to be arbitrary. The Appellant argued that when the Appellee allowed for the late filing of permit requests, and waived other deadlines in the statute, the Appellee was acting in a purely subjective nature that failed to advise the Appellant as to when his permit was required. In support of his argument the Appellant relied upon *Huber Hts. v. Liakos*, 2001-Ohio-1532, 145 Ohio App.3d 35 (2nd Dist.) The case dealt with a municipal code dealing with sexually oriented business licensing. Appellant's argument is not on point. The issue before this Court is quite different. This Court is tasked with deciding if the transfer order was appropriate. The *Huber Hts.* court held that the ordnance was unconstitutional on its face. The ordnance placed an undue burden on a party's constitutional rights by its mere existence. Here, R.C. 395 *et seq.* has been found to be constitutional. (See, *Wilkins v. Daniels*, 744 F.3d 409 (6th Cir. 2014)) Basically, Appellant's

argument raised the issue of estoppel in a different light. This Court has already indicated that estoppel is not a valid argument.

Contained within the same 'due process' argument the Appellant asserted that individuals who 'worked with' the Appellee were treated different than individuals who did not. The Appellant produced no viable evidence to support that disparate treatment argument at the hearing.

Appellant also claimed that R.C. §935 was vague as to the requirements for a rescue facility permit. That argument goes to the granting or denial of the permit. As already noted, the issue of granting or denying the permit is not before this Court. This Court declines to review the matter and holds that the alleged vagueness - or lack thereof – in R.C. §395.101 is not a valid argument in this appeal.

The Appellant asserted that his right to equal protection under the law was violated. He claimed that other individuals – similarly situated – received different positive outcomes as it relates to their requests to secure a permit. It must be noted that the evidence before the Hearing Examiner in no way established that assertion. There was no valid evidence that an individual – similarly situated – received preferential treatment.

There was some testimony concerning other owners, but the evidence never raised to the level required to make such a claim. In fact, the evidence produced at the hearing showed that the Appellant was quite unique in his delay in requesting a permit.

In any event, this argument has no merit in this appeal because this appeal deals with the legality of the Appellee's act in executing the transfer order in January of 2015. The denial of Appellant's permit(s) appears to be the subject of another administrative appeal.

4. Discovery/Evidentiary Issues:

Appellant has continued to maintained that documents were not provided to the Appellant concerning the November 7, 2014 property review conducted by the Appellee. The Appellee has asserted any documents not secured by way of a public records request is not the subject of the administrative appeal. The Appellee has also asserted that discovery is not normally allowed in an administrative process so the Appellant could not claim a right to those documents.

What is clear from the facts of this case is that there was no harm to the Appellant stemming from his claimed denial of the documents. Whether or not the documents existed, or whether or not the documents showed that the DWAs were housed in compliant or noncompliant cages, is really not relevant to the right of the Appellee to issue the transfer order. That is because the statute in question allowed for the transfer order to issue due to the lack of a permit. Furthermore, the evidentiary issues raised by the Appellant are now either moot or not relevant to the issues on appeal.

Having found no merit in any of Appellant's arguments, this Court AFFIRMS the Order of May 29, 2015.

5. Reliable, Probative and Substantial Evidence and is in Accordance with law:

This Court has reviewed the merits of the appeal. The Court has reviewed the evidence contained within the certified record as well as the arguments of counsel. The Court holds that there is reliable, probative and substantial evidence within the record to support the Hearing Examiner's Recommendation that the transfer order was properly issued. The Court holds that said recommendation, adopted by the Appellee in its Order of May29, 2015 is in accordance with law.

V. DECISION

Appellant's Motion to Strike as filed on September 9, 2015 is **DENIED**.

Appellant's Motion to Reconsider its request for an Evidentiary hearing as filed on September 10, 2015 is **DENIED**.

Appellee's Order No. 2015-087 is supported by reliable, probative and substantial evidence and is in accordance with law. As such it is **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER

Judge David C. Young

Copies To:

KAREN A NOVAK
316 N MICHIGAN ST
SUITE 800
TOLEDO, OH 43604
Counsel for the Appellant

Mike DeWine, Esq.
Attorney General
LYDIA M ARKO
150 EAST GAY STREET
22ND FLOOR
COLUMBUS, OH 43215
Attorney for Appellee

Court Disposition

Case Number: 15CV005006

Case Style: KENNETH HETRICK -VS- OHIO STATE DEPARTMENT AGRICULTURE

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 15CV0050062015-09-1099970000
   Document Title: 09-10-2015-MOTION TO RECONSIDER - PLAINTIFF: KENNETH HETRICK
   Disposition: MOTION DENIED

2. Motion CMS Document Id: 15CV0050062015-09-0999980000
   Document Title: 09-09-2015-MOTION TO STRIKE - PLAINTIFF: KENNETH HETRICK
   Disposition: MOTION DENIED