IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

HARD ROCK ROCKSINO

Appellant,

-vs-

SUMMIT COUNTY PUBLIC HEALTH DEPARTMENT, ET AL.,

Appellees.

Case No: 15CVF-01-416

JUDGE REECE II

DECISION AND ENTRY
GRANTING APPELLANT'S MOTION FOR LEAVE TO FILE ITS REPLY BRIEF INSTANTER AS FILED ON APRIL 27, 2015

AND

DECISION AND ENTRY
AFFIRMING THE LETTER OF WARNING MAILED JANUARY 5, 2015

REECE, JUDGE

The Hard Rock Rocksino (Appellant) appeals the Letter of Warning issued by the Summit County Public Health Department (Summit) as the designee of the Ohio Department of Health (Department). The Letter was dated January 5, 2015. Appellant named Summit and the Department in its Notice of Appeal filed on January 15, 2015. The Department has entered an appearance in this matter. The Appellant filed its Brief on March 26, 2015. The Department filed its Brief on April 9, 2015. A Reply was filed by the Appellant on April 27, 2015.

On April 27, 2015 the Appellant also filed an unopposed Motion to allow the Appellant to file its Reply Brief *instanter*. For the reasons that follow this Court **GRANTS** the Motion to file a Reply Brief *instanter*; and **AFFIRMS** the Later of Warning as dated January 5, 2015.

I. Statement of the Case:

This case deals with an appeal of the Appellant's claimed violation of the Smoke-Free Workplace Act and the validity of the Appellee's Letter of Warning dated January 5, 2015.

II. Facts:

The Appellant operates a casino. The location of the alleged violation was two outdoor patios attached to the casino. On October 23, 2014 Summit issued a notice letter to the Appellant. Said letter informed the Appellant that a complaint had been filed with the Department. The letter indicated a problem with Appellant's outdoor patios claiming that the patios were in violation the Smoke Free Workplace Act and the administrative code.

During the relevant timeframe the Appellant's patios were under temporary construction. The Appellant was in the process of expanding the already existing patios to increase the area and provide more outdoor space for gamblers who smoked. The Appellant had submitted the drawings for the patios expansions to other governmental agencies as part of the construction project.

An investigation was conducted by Summit on or about November 6, 2014. At that time the patios in question were still under construction and some temporary construction barriers were in place. The Sanitarian noted the existence of "big section of plywood effectively enclosing the rooms." The Sanitarian also checked the box on the Investigation Worksheet as follows:

1. Are signs adequately and appropriately posted?
   ☑ Yes ☐ No
2. Is there a visible smoke or haze or the smell of smoke?
   ☑ Yes ☐ No
3. Is there smoking in a prohibited area?
   ☑ Yes ☐ No Approx Number enclosed smoking areas
4. Are there ashtrays present?
   ☑ Yes ☐ No Type black
5. Are there employees smoking in a prohibited area?
   ☐ Yes ☑ No
6. Approximate number of people in the facility. 30

After the inspection, Summit issued its second letter to the Appellant dated November 25, 2014 confirming the findings from the inspection which found smoking and ashtrays in an enclosed area. The Appellant appealed the findings to Summit by a

letter dated December 24, 2014. Summit then issued its Warning Letter denying the appeal on January 5, 2015.

There is not much really in dispute. It is clear from the Briefs that on November 6, 2014 the investigation conducted by Summit found evidence of smoking and ashtrays at the location of the Appellant's place of business. Appellant did not contest that. The smoking and ashtrays are not an issue. The Appellant has asserted that the evidence was found in its patio areas and a patio area is exempted from the Act. The Department claimed that the patios had been altered during the construction/expansion of the patios. The Department asserted that the temporary alterations effectively enclosed the patios on November 6, 2014 to a point where the patios became covered by the Act. Apparently the case boils down to whether or not the Appellant's patios had been temporarily altered to an extent that changed the characteristics of the patios from an exempt location, to a location covered by the Smoke Free Workplace Act.

This matter is now ready for review.

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 Order from the Department 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. 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. Analyses:

A) Appellant's Motion of April 27, 2015:

As noted, the Appellant filed an unopposed motion requesting the right to file its Reply Brief after the Court ordered deadline. Appellant's filing was 11 days late. The Court finds no reason why it should not accept the unopposed motion and therefore, **GRANTS** Appellant's request to file its late Reply Brief.

B) Merits of the Appellant's Appeal:

The Appellant appeared to be concerned with the future consequences of the Department's January 2015 warning letter. The Appellant was worried that the letter was in fact a statement that the new expanded patios were not going to be exempted from the Act. That has been resolved by the acknowledgement of the Department that the January 2015 letter dealt only with the findings on the day of the November 6, 2014 inspection.

The main thrust of the Appellant's argument is that their patios were exempt from the Act. Please note the following from R.C. §3794.03(F) that exempt outdoor patios:

> (F) Outdoor patios as defined in Section 3794.01(I) of this chapter. All outdoor patios shall be physically separated from an enclosed area. If windows or doors form any part of the partition between an enclosed area and the outdoor patio, the openings shall be closed to prevent the migration of smoke into the enclosed area. If windows or doors do not prevent the migration of smoke into the enclosed area, the outdoor patio shall be considered an extension of the enclosed area and subject to the prohibitions of this chapter.

The legislature has defined an outdoor patio as follows:

> (I) "Outdoor patio" means an area that is either: enclosed by a roof or other overhead covering and walls or side coverings on not more than two sides; or has no roof or other overhead covering regardless of the number of walls or other side coverings.

The Appellant's patios did have a 'roof'. Hence, the first part of the definition must be applied to this case.

The Department asserted that as of November 6, 2014 the Appellant had changed the nature of its outdoor patios to the point that they no longer qualified for the exception noted in R.C. §3794.03(F). As such, the Summit's investigator found evidence of smoking and ashtrays where employees were asked to work and customers were allowed to gamble. The Department felt that the findings contained within the Investigation Worksheet, was reliable, probative and substantial evidence of a violation of the Act.

The Department also asserted that the condition of the patios on November 6, 2014 was not really contested by the Appellant. The Department asserted that there had been what amounted to an admission within Appellant' counsel's Letter of Contestment dated December 24, 2014. The following statement was contained in that letter:

> At the outset, it is our understanding that the complaint that prompted the site visit and allege violations of both the Ohio Administrative Code and the Revised Code was based on temporary construction barriers that **temporarily enclosed** the area of concern for purposes of protecting patrons from construction debris. Indeed, during the site evaluation, these temporary construction barriers were still in use. However, these temporary construction barriers will be permanently removed within the next ten (10) days. As such, the area of concern will no longer have temporary **barriers that enclose the area** for protection purposes. (Emphasis added)

There is not a great deal of merit in that assertion. Counsel's letter did not state that the area was enclosed completely. A pasture is 'enclosed' by a fence but the pasture would be a safe outdoor smoking area. The use of the word enclosed is not the same as admitting that the patios were not open to the air. The Appellant's letter to the agency did not concede anything. The Department's reliance on that alleged 'admission' was misguided.

The Department went on to explain that the reason for the outdoor patio exception is the fact that the area is supposed to have been 'open to the air'. In furtherance of the Act, the Department drafted administrative code language found in O.A.C. §3701-52-04 that reads, in relevant part as follows.

> (F) Outdoor patios may be located immediately adjacent to locations of ingress or egress to the public place or place of employment, but shall be **physically separated from any enclosed area**. Notwithstanding this rule, a proprietor shall comply with divisions (A) and (B) of section 3794.02 of the Revised Code and paragraphs (A) and (B) of rule 3701-52-02 of the Administrative Code.
>
> (1) When smoking is permitted, the outdoor patio shall be **open to the air**. "Open to the air" shall mean the patio has thorough, **unobstructed circulation** of outside air to all parts of the outdoor patio.
>
> (2) Any outdoor patio that has a structure capable of being enclosed, regardless of the materials **or removable nature** of the walls or side coverings, **shall be regarded as an enclosed area when the walls or coverings are in place**. An outdoor patio shall be **presumed to be open to the air** when not more than fifty percent of the combined surface area of an outdoor patio's sides is covered by walls or side coverings.
>
> (3) For purposes of division (F) of section 3794.03 of the Revised Code and this paragraph, a "roof or other overhead covering" shall include any structure or arrangement above the outdoor patio, including substantial coverage by umbrellas or awnings, that may impede the flow of air into the patio, regardless of the type or nature of roof or other overhead covering. For the purposes of division (F) of section 3794.03 and this rule, roof or other overhead covering does not include materials provided by a proprietor to ensure security in a confined residential setting when the outdoor patio is otherwise open to the air. (Emphasis added)

The Code created a presumption that a patio is in fact open to the air when “not more than fifty percent of the combined surface area of an outdoor patio’s sides is covered by walls or side coverings.”

It is the position of the Department that the area investigated on November 6, 2014 did have walls – albeit temporary ones – to an extent that they exceeded the presumption. It was therefore, incumbent upon the Appellant to establish that its patios were still in compliance with the exception. The Appellant failed to produce any reliable, probative and/or substantial evidence on that point. Appellant’s letter showed drawings for how the patios were going to look after they were finished. Unfortunately the Appellant did not provide any evidence to support its belief that the patios on November 6, 2014 were in fact ‘open to the air’ and therefore still covered by the exemption.

Not surprisingly the Appellant took issue with the findings of the Sanitarian. The Appellant asserted that 'effectively enclosing the rooms' is not the same as actually enclosing the patios. The Appellant asserted that the ply-wood structures were not even 'walls'. Appellant claimed that the Appellee's administrative code failed to define what a 'wall' or 'side covering' was/is. As such, the Appellant's temporary ply-wood structures were not walls that enclosed the area. The Appellant argued that if the temporary ply-wood structures were not walls or covering, then the patios in question fell under the exception noted in R.C. §3794.03(F)

The Appellant continued with its semantic based arguments by opining that a plywood wall was not the same as a 'true wall'. The Appellant claimed that the plywood wall did not cover more than 50% of the combined surface area of the outdoor patios. Again, the Sanitarian noted that there was only "3 feet around 3 outside walls" as the only open space.

This Court cannot accept the Appellant's use of the term wall. After a review of the statute and the code, it is clear that an area need not be completely enclosed to still be covered by the Act. And a temporary wall can create such an obstruction to the free flow of air that it defeats the 'open to the air' exception to the application of the Act. That is true even if the wall is not a complete wall or load barring.

In the end, there was more than sufficient evidence to support the finding of the Appellee and the need to issue the Letter of Warning.

V. Decision:

Appellant's Motion to File Reply Instanter as filed on April 27, 2015 is **GRANTED**.

The Court **AFFIRMS** the Decision of the Appellee to issue the Letter of Warning as mailed on January 5, 2015 because it was supported by reliable, probative and substantial evidence and was in accordance with law.

Cost to the Appellee.

THIS IS A FINAL APPEALABLE ORDER:

Judge Guy L. Reece, II

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Franklin County Court of Common Pleas

Date:	09-23-2015
Case Title:	HARD ROCK ROCKSINO -VS- SUMMIT COUNTY PUBLIC HEALTH DEPARTMENT ET AL
Case Number:	15CV000416
Type:	DECISION/ENTRY

It Is So Ordered.

/s/ Judge Guy L. Reece, II

Court Disposition

Case Number: 15CV000416

Case Style: HARD ROCK ROCKSINO -VS- SUMMIT COUNTY PUBLIC HEALTH DEPARTMENT ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 15CV0004162015-04-2799980000
   Document Title: 04-27-2015-MOTION FOR LEAVE TO FILE - PLAINTIFF: HARD ROCK ROCKSINO
   Disposition: MOTION GRANTED