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

TIMOTHY BALES,

Appellant,

v.

OHIO STATE DEPARTMENT OF AGRICULTURE,

Appellee.

CASE NO.: 17CVF-05-4743

JUDGE: WOODS

DECISION AND ENTRY
AFFIRMING THE ORDER NO. 2017-092
ISSUED ON MAY 8, 2017

WOODS, J.

This action comes before the Court upon Timothy Bales' (Appellant) appeal of Order No. 2017-092 issued by the Ohio State Department of Agriculture (Appellee). Said order affirmed the administrative determination to destroy Appellant's captive whitetail deer herd due to the possible consequences of Chronic Wasting Disease (CWD).

For the reasons that follow the Order issued by the Appellee is **AFFIRMED**.

I. FACTS:

On May 24, 2017 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.

Appellant was served with an Order on May 17, 2016 issued by the Appellee. The Order required the destruction of all captive whitetail deer 'currently' on the Honey Run Farm in Millersburg Ohio. Appellee believed that the deer had been exposed to CWD. Appellant

contested the Order and requested a hearing. The following facts are not in dispute: 1) When Appellant purchased the deer Appellant knew that the herd was under quarantine because of CWD; 2) When Appellant purchased the deer he did not have a license to own captive deer in the State of Ohio; 3) After he purchased the deer and prior to obtaining his license the Appellant was told that the herd would need to be inventoried; 4) no deer tested positive for CWD; and 5) the deer were destroyed prior to the administrative hearing.

After a number of continuances a hearing was finally conducted before a Hearing Officer. After a multi-day hearing, the Hearing Officer issued his Report and Recommendation (R&R) on April 3, 2017. The R&R contained the following findings:

1. On May 17, 2016, ODA issued to Mr. Bales a Notice of Order of Destruction of Animals, ordering that all the captive whitetail deer at the Honey Run Farm be destroyed.
2. Mr. Bales timely requested a hearing which eventually took place on January 12, 2017, and February 9th and 10th, 2017.
3. Pursuant to Chapter 941 of the Ohio Revised Code, the Director of ODA may order the destruction of any domestic or nondomestic animal found to be adulterated witch residues, infected with or exposed to a dangerously contagious or infectious disease, or determined to endanger the health or well-being of animal populations or public health in the state.
4. Chronic Wasting Disease is an untreatable, dangerously contagious or infections disease which can be transmitted from deer to deer through environmental contamination or direct contact, and ultimately will lead to the animal's death.
5. The only scientifically recognized method to determine if a deer is infected with CWD is a post mortem exam and only then when the disease has progressed to a certain level.
6. Mr. Dan Yoder owned the herd on Honey Run Farm prior to Mr. Bales' ownership.
7. Mr. Bales, through the terms of the contract of sale, appeared to have purchased the Honey Run Farm herd knowing full well the risks involved with the herd.
8. Mr. Yoder owned other captive deer operations, two of which were destroyed due to exposure and contamination of CWD.
9. Mr. Yoder pled guilty to four counts of violation of agriculture laws, one count of obstructing official business, and one count of Dangerously Contagious of an Infection Disease, associated with his whitetail deer operations.

10. That there was sufficient and reliable evidence that the deer on Honey Ron Farm were a high risk for exposure to CWD. Specifically, but not limited to:
    a. Mr. Yoder's violation of the quarantine order;
    b. Mr. Yoder's multiple convictions of poor record keeping;
    c. A significant discrepancy 'between the physical inventory in April of 2014 when compared to the visual count of June of 2015;
    d. Intentional misidentification of a harvested buck in order to avoid CWD testing;
    e. The lack of a licensed owner responsible for compliance with captive white tail deer regulations
11. The Director relied upon these factors, all of which were reasonable, in ordering the destruction of the Honey Run Farm herd.
12. That based upon the evidence that the herd on Honey Run Farm herd was exposed to a dangerously contagious or infectious disease and endangered the health and well-being of the deer populations of the state, it is recommended that the captive whitetail deer at Honey Run Farm be destroyed.

The Appellant filed objections to the R&R.

Appellant asserted that there were other actions that the Appellee could have taken, short of destroying the herd. Furthermore, the Appellant renewed his argument that there had been no need for the quarantine Order in the first place. Appellant asserted that Mr. Yoder's alleged conduct, that served as one of the factors in the Hearing Officer's findings - was not supported by the evidence, and therefore should not have been relied upon by the Hearing Officer. Additionally, the Appellant claimed it was improper to have relied upon a visual inventory to base Appellee's actions. The Appellant also claimed that there was a lack of evidence to establish that the deer were in fact exposed to CWD. Finally the Appellant claimed that a post-deprivation hearing is a violation of the takings clause of the United States Constitution.

On January 12, 2017 at the first day of the hearing, the Appellant's counsel requested a continuance to deal with a set of new documents produced by the Appellee. The request was overruled by the Hearing Officer. The Hearing Officer decided to press on with the evidence stating that he would withhold a final decision on the admissibility of the documents until the

facts were better developed. The evidence was presented on January 12, February 9 and 10, of 2017.

The Hearing Officer issued his R&R on April 3, 2017. The following facts were contained in the R&R:

1. On May 17, 2016, ODA issued to Mr. Bales a Notice of Order of Destruction of Animals, ordering that all the captive whitetail deer at the Honey Run Farm be destroyed.
2. Mr. Bales timely requested a hearing which eventually took place on January 12, 2017, and February 9th and 10th, 2017.
3. Pursuant to Chapter 941 of the Ohio Revised Code, the Director of ODA may order the destruction of any domestic or nondomestic animal found to be adulterated with residues, infected with or exposed to a dangerously contagious or infectious disease, or determined to endanger the health or well-being of animal populations or public health in the state,
4. Chronic Wasting Disease is an untreatable, dangerously contagious or infections disease which can be transmitted from deer to deer through environmental contamination or direct contact, and ultimately will lead to the animal's death,
5. The only scientifically recognized method to determine if a deer is infected with CWD is a post mortem exam and only then when the disease has progressed to a certain level.
6. Mr. Dan Yoder owned the herd on Honey Run Farm prior to Mr. Bales' ownership.
7. Mr. Bales, through the terms of the contract of sale, appeared to have purchased the Honey Run Farm herd knowing full well the risks involved with the herd.
8. Mr. Yoder owned other captive deer operations, two of which were destroyed due to exposure and contamination of CMD.
9. Mr. Yoder pled guilty to four counts of violation of agriculture laws, one count of obstructing official business, and one count of Dangerously Contagious of an Infection Disease, associated with his whitetail deer operations.
10. That there was sufficient and reliable evidence that the deer on Honey Ron Farm were a high risk for exposure to CWD. Specifically, but not limited to:
    a. Mr. Yoder's violation of the quarantine order;
    b. Mr. Yoder's multiple convictions of poor record keeping;
    c. A significant discrepancy between the physical inventory in April of 2014 when compared to the visual count of June of 2015;
    d. Intentional misidentification of a harvested buck in order to avoid CWD testing;
    e. The lack of a licensed owner responsible for compliance with captive white tail deer regulations

> 11. The Director relied upon these factors, all of which were reasonable, in ordering the destruction of the Honey Run Farm herd.
> 12. That based upon the evidence that the herd on Honey Run Farm was exposed to a dangerously contagious or infectious disease and endangered the health and well-being of the deer populations of .the state, it is recommended that the captive whitetail deer at Honey Run Farm be destroyed.

Appellant objected to the R&R and asserted a number of issues as the Appellant perceived the law and the facts. The Director of the Appellee reviewed the matter and he issued his Order No. 2017-092 on or about May 8, 2017.

The Appellant filed this appeal. The Appellant filed his merit Brief on September 1, 2017. The Appellee responded with its merit Brief on September 14, 2017. The Appellant filed his Reply Brief on September 22, 2017. The administrative appeal has been fully briefed and is ready for review.

II. 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. See *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. 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.

III. ANALYSIS:

The majority of the Appellant's argument stems from his belief that there is not sufficient reliable, probative and substantial evidence to can support the Order. The Appellant has also advanced a due process claim. First the Court will address the issue of the evidence.

The Appellee claims that the Order is supported by the requisite level of evidence. The Appellee asserted that the question concerning the Order should be framed as follows: was the deer herd 'exposed to a dangerously contagious or infections disease' or did the herd 'otherwise endanger the health or well-being of animal populations or public health in Ohio.' Building upon that the Appellee pointed out that CWD is a highly contagious threat that cannot be contained easily. CWD cannot be detected in living deer and postmortem tests still may not find it. Hence, the Appellee has a right to be very concerned about the spread of the disease.

The Appellee then established that the hearing officer was presented with testimony that it was important to have accurate records of the movement, death and escape of deer from herds to track CWD and thereby protect the deer population in general. Both parties understood that an inventory and veterinary inspection is required of deer herds as part of the licensing application process. When the Appellant purchased the herd in question, the Honey Run Farm was quarantined due to its possible exposure to CWD from the other herds owed by Mr. Yoder.

At the administrative hearing Appellant's counsel acknowledged that in November of 2014 Yoder violated the Honey Run Farm quarantine by brining two deer into the herd without the Appellee's knowledge or consent. Counsel however, claimed that it was two deer that had not been exposed to CWD so it was not relevant.

The evidence established that one of Mr. Yoder's herds (Hunting Preserve) did have a post-mortem finding of CWD and that herd was destroyed in late April of 2015. That was also true concerning another herd of Mr. Yoder's (Dan Weaver Farm) leading to that herd's destruction on June 16, 2015. At the hearing it was established that Mr. Yoder did not keep the required records necessary to account for the movement of deer between the herds.

The Hearing Officer also heard testimony from Dr. Tony Foshey. Dr. Foshey's testimony started on the second day of the hearing. Dr. Foshey testified that there exists a list of 37 diseases for animals that the Appellee would like to eradicate. CWD is one of the types of diseases to be eradicated. Specifically, Dr. Foshey testified that once CWD gets into the wild population: "it's impossible to eradicate it." (Hr.Tr. Vol 2., p. 231, l. 16 - 17) Dr. Foshey testified to the significance of recordkeeping and inventory requirements so that the Appellee can handle CWD outbreaks. (Hr.Tr. Vol 2., p. 242)

The Appellee felt that the evidence advanced at the hearing clearly supported its belief that the deer at Honey Run Farm had in fact been exposed to CWD and therefore the herd posed a risk to the deer population of Ohio. The Appellant did not agree with that and asserted that the Hearing Officer based his findings on improper inferences that should have not been drawn from the evidence.

The Appellant claimed that the actions of the Appellee seemed to contradict the Appellee's statements that there was a great chance for harm to the state's deer population. The Appellant claimed that the Appellee seemed to take its time in destroying the deer and that fact conflicts with Appellee's current assertion that the herd needed to be destroyed. Appellant claimed there was no evidence that the Appellee tried to do anything to restrict the movement of Mr. Yoder's deer. Arguing again that if CWD was such a concern, why wasn't the Appellee

taking more significant efforts to keep the deer contained. One simple reason could have been because the Appellee expected the Appellant and Mr. Yoder to obey the law. In any event this argument does not change the established evidence relied upon by the Hearing Officer.

The Appellant also complaint about the amount of information the Appellee was giving to him during the relevant timeframe; i.e., when he was purchasing the deer from Mr. Yoder. That is not evidence of a witness' testimony that is internally inconsistent. That is just a complaint about the process. It is not an impeachment of the evidence.

The Appellant felt that it was improper for the Hearing Officer to assume issues with the deer at Honey Run Farm just because there was evidence of poor record keeping. But there was evidence that Mr. Yoder did not keep proper records; there was evidence that Mr. Yoder pled guilty to four counts of failing to maintain required records and one count of falsifying the identity of a deer to be tested for CWD. That coupled with evidence that CWD was found at Mr. Yoder's other properties gave the Hearing Officer the reliable, probative and substantial evidence to find as he did. Hence, the Director's Order is supported by reliable, probative and substantial evidence.

Finally the Appellant claimed that he was denied due process because the Appellee destroyed his property before he had the opportunity to be heard in a meaningful way. Here again the Appellant feels that the Appellee has created some issue by not moving fast enough to justify the Appellee's position that the destruction of the herd was immediately necessary. In support the Appellant relied upon *Marathon Oil Co. v. Board of Zoning Adjustment*, 44 Ohio App.2d 402 (10th Dist). That case dealt with a city ordinance that declared an abandoned service station a public nuisance. It was important to the decision in *Marathon* that the ordinance was in fact a zoning code and not an ordinance based on the health, safety, or building regulations.

Plus, in *Marathon*, the court noted that under the building code there was an opportunity to be heard prior to the destruction of the building. That meant that the owner of a service station was handled differently than any other type of property owner in the City. *Marathon* does not have any real application to the case now before this Court.

The Appellant also relied on *Jackson v. City of Columbus*, 41 Ohio App.2d 90 (10th Dist.) is another building code/nuisance case dealing with a municipal ordinance. The *Jackson* case is not relevant.

The Appellee responded by asserting the following:

> This use of the state's police power has been the foundation of ODA's regulatory programs involving animals in other settings - see, for example, *Wilkins v. Daniels*, 744 F.3d 409 (6th Cir. 2014); *Hetrick v. Ohio State Department of Agriculture*, Franklin Cty. Case No. 15CVF-06-5006, affirmed *Hetrick v. Ohio Dept. of Agriculture*, 2017-Ohio-303 [involving the regulation of dangerous wild animals in R.C. Chapter 935]. It has also been the basis for the regulation of animals, such as dogs, by other governmental authorities in Ohio. *Downing* and *Zageris*, *supra*. Similarly, the destruction of plants found to be hosting plant pests or plant diseases has been routinely upheld under the state's police power. *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) [upholding the destruction of cedar trees to prevent the spread of cedar rust to neighboring apple orchards]; *Solly v. City of Toledo*, 7 Ohio St.2d 16 (1966); *State ex rel. Miller v. Anthony*, 72 Ohio St.3d 132 (1995); *Van Gunten v. Worthley*, 25 Ohio App. 496, 159 N.E. 326 (Lucas Cty. C.P. 1927) [upholding destruction of wheat crop to combat corn borers].

This Court holds that the actions of the Appellee in destroying the deer herd was an appropriate exercise of the police powers of this state.

Therefore the Order is in fact supported by reliable, probative and substantial evidence and in accordance with law.

IV. DECISION

Appellee's Order No. 2017-092 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 William Woods

Copies To:

CHAD YODER
225 N MARKET ST, PO BX 599
WOOSTER, OH 44691
Counsel for the Appellant

Mike DeWine, Esq.
Attorney General
James R. Patterson, Esq.
26TH FLOOR
30 E BROAD ST
COLUMBUS, OH 43215
Attorney for Appellee

Franklin County Court of Common Pleas

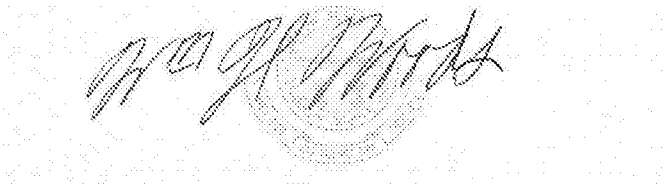
Date: 09-29-2017

Case Title: TIMOTHY BALES -VS- OHIO STATE DEPARTMENT AGRICULTURE

Case Number: 17CV004743

Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge William H. Woods

Court Disposition

Case Number: 17CV004743

Case Style: TIMOTHY BALES -VS- OHIO STATE DEPARTMENT AGRICULTURE

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes