Ohio Attorney General's

Administrative Law Newsletter

Highlighting Recent Cases in Administrative and Sunshine Law

Spring 2016

This newsletter highlights recent developments in Ohio administrative and sunshine law. Clients of the Ohio Attorney General's Office with questions on specific cases should contact their designated assistant attorney general.

Administrative Procedure: Hearing Evidence—subpoena, discretion to quash
Clayton v. Ohio Bd. of Nursing, ___ Ohio St.3d ___, Slip Opinion No. 2016-Ohio-643.
An administrative agency, or hearing examiner, has the discretion to limit or quash subpoenas requested during adjudication hearings, subject to a duty to maintain fairness and impartiality.

Administrative Procedure: Judicial Review—notice of appeal, filing by non-attorney
Laster v. Ohio State Bd. of Cosmetology, Franklin C.P. No. 15CVF-11333 (Feb. 25, 2016).
Notice of appeal filed by a non-attorney on behalf of a corporation did not properly commence the judicial appeal of an administrative decision. Later appearance of an attorney did not cure the defect.

Administrative Procedure: Judicial Review—notice of appeal, governing law and contents
Laster v. Ohio State Bd. of Cosmetology, Franklin C.P. No. 15CVF-11333 (Feb. 25, 2016).
R.C. Chapters 2505 and 2506 are inapplicable to administrative appeals that are governed by R.C. Chapter 119, therefore notices of appeal must conform to R.C. 119.12 by including "magic language" required by R. C. 119.12 to establish jurisdiction.

Administrative Procedure: Judicial Review—notice of appeal, timing
Cline v. New Lexington 5th Dist. Perry No. 15 CA 00003, 2015-Ohio-3727.
Pursuant to R.C. 2505.07, the notice of appeal must be filed within 30 days following the agency's entry of its final order. A village's final order is entered upon the entry of the resolution, order, or directive in the official minute book.

Administrative Procedure: Judicial Review—notice of appeal, where to file
ePro Services, LLC v. Ohio Dept. of Commerce, Div. of State Fire Marshal, Franklin C.P. No. 15CV-10060 (Mar. 7, 2016).
Place of business is location where person engages in business. Receiving of mail is a function of engaging in business. Despite licensee's contention that it operates through the internet and cellular phones, and that most of its work is done in one county, the county where the business receives its mail is the county with jurisdiction to hear the appeal.

Slusser v. Celina, 3rd Dist. Mercer No. 10-15-09, 2015-Ohio-3721.
To invoke the court of common pleas' jurisdiction, R.C. 2505.04 requires only that a notice of appeal be filed with the commission within 30 days. The appellant need not file a notice with the court.

Administrative Procedure: Judicial Review—stay of agency's order

Prince-Paul v. Ohio Bd. of Nursing, 10th Dist. Franklin No. 15AP-62, 2015-Ohio-3984.

Court applied factors from *Rob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App.3d 777 (10th Dist.2001), and held that (1) because the board's restrictions on employment do not prohibit respondent from working as a licensed nurse, (2) because the cause of respondent's embarrassment, humiliation and emotional distress is her own acts, and not the board's order, and (3) because the board offered respondent all process due her, she did not suffer unusual hardship, and affirmed the trial court's denial of the motion to stay execution of the board's order.

Administrative Procedure: Judicial Review—failure to exhaust administrative remedies

Bermann v. Ohio Dept. of Job & Family Servs., 7th Dist. Mahoning No. 14 MA 151, 2015-Ohio-3963.

If an administrative appeal would be "wholly futile," an appellant is not required to exhaust administrative remedies. A belief that an administrative agency is "likely" to find against an appellant does not make that appeal wholly futile. As long as the agency has the authority to grant relief, then administrative remedies must be exhausted.

Administrative Procedure: Collateral Attack

Pennell v. Brown Twp., 5th Dist. Delaware No. 15 CAH 09 0074, 2016-Ohio-2652.

A board of zoning appeals' final decision is a quasi-judicial act involving notice and an evidentiary hearing. A challenge to the final decision therefore must be made by appeal pursuant to R.C. 2506.01, not by an original action.

Smith v. Ohio Edison Co., 11th Dist. Trumbull No. 2014-T-0093, 2015-Ohio-4540.

An issue not raised in an administrative hearing and appeals is precluded from being raised in a collateral action pursuant to the aspect of res judicata known as issue preclusion.

State ex rel. Dir., Ohio Dept. of Agriculture v. Forchione, Slip Opinion No. 2016-Ohio-3049.

When the General Assembly grants exclusive administrative authority to an agency, a court of common pleas has no jurisdiction to consider a complaint for a temporary restraining order and an injunction to block the agency's action. Here, the Director of the Department of Agriculture has the exclusive authority to remove dangerous wild animals from an owner's property. A court of common pleas patently and unambiguously lacks jurisdiction to issue an injunction to block the Director's removal order, and therefore a writ of prohibition will lie to prevent the court from exercising jurisdiction.

Public Records: Private Entity Holding Records

State ex rel. Am. Ctr. for Economic Equality v. Jackson, 8th Dist. Cuyahoga No. 102298, 2015-Ohio-4981.

- When a private entity is performing a function that is traditionally performed by private entities (disparity study), it is not performing a "historically governmental function," even when contracted by a governmental agency.
- In private entity's disparity study, the records were prepared to carry out the city's public responsibilities, the city monitored the entity's progress, and had access to its records. Accordingly, the private entity is an agent or quasi-agent of the city, and the records are subject to disclosure insofar as R.C. 149.43 is applicable.

Open Meetings: Meeting by Email

White v. King, Slip Opinion No. 2016-Ohio-2770.

Ohio's Open Meetings Act, R.C. 121.22, prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by email, text, tweet, or other form of communication.

Open Meetings: Executive Session

Stewart v. Lockland School Dist. Bd. of Edn., 144 Ohio St.3d 292, 2015-Ohio-3839.

A public employee who is the subject of the board's executive session may insist that the meeting be conducted in an open meeting pursuant to R.C. 121.22(G) only if the employee otherwise has a right to a public hearing in connection with the termination of his or her employment. A typical at-will employee generally cannot use R.C. 121.22(G) to prevent the executive session from going forward.