

# Ohio Attorney General's Administrative Law Newsletter

Highlighting Recent Cases in Administrative and Sunshine Law



## WINTER 2015

The Administrative Law newsletter highlights recent developments in Ohio administrative and sunshine law. All issues are published in [printable PDFs](#). Clients of the Ohio Attorney General's Office with questions on specific cases should contact their designated assistant attorney general. The Attorney General's Office also maintains a [database of administrative appeals from Ohio common pleas courts](#). For more information, visit [OhioAttorneyGeneral.gov](http://OhioAttorneyGeneral.gov) or call 800-282-0515.

### United States Supreme Court Review: Regulatory Authority v. Antitrust Violation

*North Carolina State Bd. of Dental Examiners v Federal Trade Comm.*, U.S. Supreme Court Case No. 13-534.

The United States Supreme Court recently heard arguments on appeal of a decision of the United States Court of Appeals for the Fourth Circuit. The appeal arises from an antitrust action by the Federal Trade Commission (FTC) against the North Carolina Board of Dental Examiners. The FTC asserted that the North Carolina board engaged in anticompetitive activity by sending, without statutory authority, "cease and desist" letters to unlicensed individuals providing teeth-whitening services. The Fourth Circuit held that the North Carolina board is a private entity that is not subject to "active supervision" by the state, and therefore is not entitled to immunity from an antitrust action. Only one member of the North Carolina board is appointed by the Governor, while the remaining members are elected by private dental associations. The North Carolina Board appealed and arguments were held before the Supreme Court in October. On appeal, the FTC argued that because the individual members were dentists in competition with the unlicensed individuals who they attempted to regulate, the board was not entitled to immunity. The attorney for the North Carolina board argued that the board members were state actors, and that states have a long tradition of regulation of professions by peer member boards. The North Carolina board further asserted that it is reasonable and desirable for experts in the profession to regulate that profession. Justices on the court questioned the board regarding the conflict issue, lack of state supervision, and the board's lack of statutory authority to issue cease-and-desist letters. Note that in Ohio, professional regulatory boards and commissions are not composed of members of those professions, elected by their peers, but rather are appointed by a governmental official.

### **Administrative Procedure: Res Judicata to Bar Second Action**

[Elhanise, Inc. v. Ohio Liquor Control Comm.](#)

10th Dist. Franklin No. 13AP-937, 2014-Ohio-2243.

Res judicata does not bar agency's proposed denial of application for license renewal after having already brought an action to revoke the license based on the same charges.

## Administrative Procedure: Hearing Evidence—past acts

[Suburban Inn, Inc. v. Ohio Liquor Control Comm.](#),  
10th Dist. Franklin No. 13AP-811, 2014-Ohio-4355.

Acts committed prior to the license year that is the subject of the administrative disciplinary action may be considered in combination with more recent acts to show a course or pattern of conduct which was of a continuing nature.

## Administrative Procedure: Judicial Review—standard of review

[Adams Quality Heating & Cooling v. Erie Cty. Health Dept.](#)  
6th Dist. Erie No. E-13-040, 2014-Ohio-2318.

In an appeal taken pursuant to R.C. 2506.01, an agency's final order was unreasonable when it required the respondent to perform an impossible task in order for the agency to approve the respondent's registration application.

## Administrative Procedure: Judicial Review—presumption of regularity

[Cowans v. Ohio State Racing Comm.](#)  
10th Dist. Franklin No. 13AP-828, 2014-Ohio-1811.

Absent a showing to the contrary, the reviewing court must presume the regularity of the administrative proceedings. When the record is silent as to consideration of the objections, the reviewing court must presume the commission reviewed the objections.

## Administrative Procedure: Attorney Fees

[Mr. T's Heart of Gold and Diamonds, LLC v. Ohio Dept. of Commerce, Div. of Financial Institutions](#)  
Franklin CP No. 13CVF-2280 (Oct. 24, 2014).

R.C. 119.092 requires that an adjudication hearing have been held for a party to be eligible for attorney fees. Compensation may be awarded for fees incurred in connection with that adjudication hearing. When an agency terminates without prejudice a notice of proposed action, there is no prevailing party for purposes of R.C. 119.092.

## Public Records: Personal Email Addresses

[2014 Ohio Atty.Gen.Ops. No. 2014-029.](#)

*Syllabus:*

1. Whether personal email addresses that are contained in a public record are themselves public records is a fact-specific inquiry that must be determined on a case-by-case basis.
2. Personal email addresses that are contained in an email sent by a township fiscal officer that do not document the organization, functions, policies, decisions, procedures, operations, or other activities of the township do not constitute "records," as defined in R.C. 149.011(G), and are not required to be disclosed by R.C. 149.43.
3. To determine whether personal email addresses document the organization, functions, policies, decisions, procedures, operations, or other activities of the township, the township must determine whether disclosure of the email addresses would facilitate the public's ability to monitor the functions of the township in performing its

statutory duties, and whether the township actually used the email addresses in making decisions or in performing its functions.

## **Open Meetings: Minutes**

[\*State ex rel. Patrick Bros. v. Putnam Cty. Bd. of Commrs.\*](#)

**3rd Dist. Putnam No. 12-13-05, 2014-Ohio-2717.**

A single paragraph indicating that a meeting occurred is insufficient to let the public understand and appreciate what happened at the meeting and thus violates the minutes requirement of the Open Meetings Act. Minutes do not include other documents that have not been approved by the public body.

## **Open Meetings: Notice of Meetings**

[\*State ex rel. Patrick Bros. v. Putnam Cty. Bd. of Commrs.\*](#)

**3rd Dist. Putnam No. 12-13-05, 2014-Ohio-2717.**

County Board of Commissioners' failure to have a rule establishing a procedure for providing notice of meetings to the public violated the Open Meetings Act. Providing notice of meetings on a whiteboard in Commissioners' office that was not readable to the public, constantly updated, and failed to always provide complete information did not provide sufficient advance notice. The failure to have a procedure for members to request notice of meetings and for providing requested notices also violated the Act. Commissioners' failure to have required rules and procedures required the trial court to issue an order compelling them to comply with the Act. Resolutions adopted without reasonable notice to the public and without specific notice to those who requested the notice are invalid.

## **Open Meetings: Executive Session**

[\*Maddox v. Greene Cty. Children Servs. Bd. of Dirs.\*](#)

**2d Dist. Greene No. 2013-CA-38, 2014-Ohio-2312.**

Preparing for bargaining sessions with employees is a valid reason to enter into executive session, but referencing "upcoming negotiations" is not a proper statutory purpose for executive session. Similarly, "evaluation of an employee" is not a proper reason pursuant to which a public body may enter into executive session. An employee's job performance may be discussed in executive session; prior to entering into executive session, the public body must specify the context in which "job performance will be considered by identifying one of the statutory purposes set forth in R.C. 121.22(G).

## **Open Meetings: Invalidation of Action**

[\*Maddox v. Greene Cty. Children Servs. Bd. of Dirs.\*](#)

**2d Dist. Greene No. 2013-CA-38, 2014-Ohio-2312.**

A public body's action taken properly, but resulting from prior deliberations held improperly in executive session, is invalid. It is not enough that some "new" or "additional" deliberations took place in public.