IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

COURTYARD LOUNGE

Appellant,

-vs-

OHIO STATE DEPARTMENT OF ENVIRONMENTAL HEALTH,

Appellee.

Case No: 11CVF-08-10955

JUDGE HOGAN

DECISION AND ENTRY
AFFIRMING THE FINAL DECISION OF THE DIRECTOR OF HEALTH
MAILED AUGUST 19, 2011

HOGAN, JUDGE

Appellant appeals the Final Decision of the Appellee as mailed on August 19, 2011. Appellant requested and received additional time to file its Brief. Appellant filed its Brief on December 6, 2011. The Appellee filed its Brief on December 19, 2011. Appellant requested and received additional time to file its Reply. Appellant filed its Reply on January 18, 2012. For the reasons that follow this Court **AFFIRMS** the Final Decision of the Appellee as mailed on August 19, 2011.

I. Statement of the Case:

This case deals with an appeal of the Appellants claimed violation of the Smoke-Free Workplace Law.

II. Facts:

The Appellant has a history with the Appellee and that history is relevant to the administrative appeal. The following sets forth the established prior violations. The existences of the prior violations are not in issue. However, the Appellant did file appeals on some of those charges and those appeals have run their course.

History of Violations:

On August 20, 2007 Jennifer Wentzel, a registered sanitarian, notified the Appellant that it was in violation of the Smoke-Free law. The notification indicated that there was smoking in prohibited areas. (See, State's Exhibit A admitted at the May 26, 2010 hearing) Due to that violation, the Appellant was given a letter of warning. Appellant did not contest that finding nor did it appeal.

On September 12, 2007, Sara Carine, a registered sanitarian, notified the Appellant that it was again in violation of the Smoke-Free law. (See, State's Exhibit B admitted at the May 26, 2010 hearing) The violation dealt with smoking in a prohibited place and having ashtrays. A fine of $100.00 was issued.

On December 17, 2008, the Appellant was again notified that it had violated the law for a third time. The violations were the same as noted in the September 12, 2007 matter. (See, State's Exhibit C admitted at the May 26, 2010 hearing) The Appellant was found to have violated the act and fined $1,000.00.

Current Appeal:

On November 24, 2009 Wentzel notified the Appellant that on November 23, 2009 a complaint had been reported. The complaint claimed that on November 21, 2009 at approximately 10:00 p.m. Appellant had violated the law by allowing smoking in a prohibited area. (See, State's Exhibit D admitted at the May 26, 2010 hearing) Stemming from said complaint, an on-site investigation of the alleged violation was conducted on December 3, 2009.

During the December 3, 2009 on-sight visit, conduct was witnessed that showed a violation of the act. A patron was smoking as the inspectors entered Appellant's

establishment. At that point the inspectors observed that the bartender asked the patron to put out the cigarette and the patron complied by using one of the black plastic bowels on the bar. The inspectors saw other black plastic bowels on the bar that contained discarded ashes and cigarette butts. The Appellant's owner attempted to fill the 'ashtrays' with snack food so as to assert that the black plastic bowels were dishes and not ashtrays. (See, State's Exhibit E & F, admitted at the May 26, 2010 hearing)

The outcome of the investigation lead to the Appellant being notified on January 7, 2010 that it was again in violation of the law. (See, State's Exhibit G admitted at the May 26, 2010 hearing) Because of the prior fines, the Appellee assessed a $1,000.00 fine and made the determination that the violations were intentional. Hence, the fine was doubled to $2,000.00. The Appellant contested this violation and a hearing was conducted on May 27, 2010. At that hearing the Appellee called Sara Garine and Jennifer Wentzel to testify. Appellant was present and represented by counsel. Appellant called Jerome Badders and Lee Ward to testify. The Impartial Decision Maker made the following findings of fact:[1]

6. During the December 03, 2009 inspection, Carine observed an individual smoking at the northwest corner of the bar. Courtyard's bartender spoke to the individual who was smoking and the individual extinguished his cigarette in an ashtray located on the bar.

7. Carine did not approach the individual who was observed smoking, nor did she cite the individual for smoking.

8. During the December 03, 2009 inspection, Carine observed seven small, black plastic ashtrays on the bar located in front of and accessible to customers. A number of the ashtrays contained discarded ashes and cigarette butts.

9. During the December 03, 2009 inspection, the owner began to fill the ashtrays with snack food without emptying the ashtrays or washing his hands prior to handling the snack food.

[1] The darker text is a 'copy image' of the Report and Recommendation as contained in the Certified Record.

10. During the December 03, 2009 inspection, Carine did not ask the owner if he enforced the smoking ban, did not ask the owner what policies and procedures were in place, nor did she conduct an interview of the owner regarding the individual who was smoking. Carine did conduct an interview of Badders regarding the complaint that was filed that initiated the investigation.

The Report and Recommendation also contained the following 'Conclusion of Law' based upon the above noted facts:

There is credible evidence that Courtyard violated the Smoke-Free Workplace Law by failing to take reasonable measures to prohibit smoking. One individual was observed smoking. The ODH inspector observed seven ashtrays present, with cigarette ashes and cigarette butts in some of the ashtrays. In addition, the ODH investigator directly observed the customer who was smoking extinguish his cigarette in the ashtray that was placed in front of him. In addition, the ODH investigator determined that there were no "no smoking" signs present.

There is credible evidence that Courtyard violated the Smoke-Free Workplace Law by having ashtrays present, in violation of OAC §3701-52-02(F). First, the investigator directly observed the presence of seven small, black plastic ashtrays, some of which contained ashes. The customer who was observed to be smoking discarded his cigarette in the ashtray.

The Independent Decision Maker held that Mr. Badders' statement, that he had the ashtrays but only used them for snacks, lacked any credibility. Hence, there was a finding that the Appellant violated Ohio Admn. Code §3701-52-02(A) and R.C. §3794.02(A) by permitting smoking in prohibited areas. And a finding that the Appellant violated Ohio Admn. Code. §3701-52-02(F) and R.C. §3794.06(B) by having ashtrays present. There was also a finding that the Appellant had acted intentionally.

The Appellant objected to the holdings contained in the Report and Recommendation by a letter dated June 24, 2010. The Appellee's Director rejected the objections of the Appellant and issued its Adjudication Order on August 12, 2011. Appellant filed its appeal to this Court on August 31, 2011. 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.

This Court will address the claims of Appellant from within this framework.

IV. Analyses:

Appellant's first assertion for a reversal of the Appellee's Final Decision comes in the form of an attack on the validity of the statute. Appellant asserted that said act was void for vagueness. Appellee advanced the great number of cases that have rejected said claim as made

by others, and as made in the past by the Appellant. *Trish's Café & Catering, Inc. v. Ohio Department of Health*, 2011-Ohio-3304 stands for the proposition that Appellant's void for vagueness challenge fails. In *Trish's Café*, the Appellate Court at paragraphs 10 through 16 completely lay to rest this claimed error. This Court agrees. The statute is not void for vagueness

The Appellant has asserted that the process was flawed. Appellant argued that O.A.C. §3701-52-08(D) was violated. Appellant claimed that there had not been compliance with Ohio Admn. Code §3701-52-08(D)(3) because the Appellee did not conduct **all** of the activities as listed in Ohio Admn. Code §3701-52-08(D)(2), (a) – (d). Please note the following language from the code section:

> (2) The Ohio department of health may, in its discretion, investigate a complete report of violation or promptly transmit the report of violation to a designee in the jurisdiction where the reported violation allegedly occurred for investigation and enforcement. If the report of violation is transmitted to a designee, the designee shall investigate all complete reports of violation. For the purposes of this chapter, an investigation **may include but is not limited to**:
>
> (a) A review of report of violation;
>
> (b) A review of any written statement or evidence contesting the report of violation;
>
> (c) Telephone or on-site interviews; and,
>
> (d) On-site investigations.
>
> (3) Prior to issuing a proposed civil fine for a violation of Chapter 3794. of the Revised Code and this chapter, the department's investigation **shall** include all investigation activities set forth in paragraphs (D)(2)(a) to (D)(2)(d) of this rule. (Emphasis added)

Appellant claimed that it was incumbent on the Appellee to do everything contained in (a) through (d). Appellant then pointed out that the Appellee did not produce all of those investigatory items listed in the code. Appellant asserted that Ohio Admn. Code §3701-52-08(D)(2)(c) had never been performed or produced. The Appellee responded that it in fact did conduct an interview with the Appellant's owner during the inspection.

Appellant's reading of the code is wrong. Ohio Admn. Code §3701-52-08(D)(2) clearly shows that (a) through (b) are **optional**. Any investigation 'may' include one or more of the listed methods. Furthermore, the language allows the Appellee to conduct other unlisted techniques not enumerated by the code. The Appellee need not do them all.

Please note the following language concerning issue of statutory construction:

> "When construing a statute, the paramount concern is the legislature's intent in enacting the statute." Wilmington City School Dist. Bd. of Edn. v. Clinton Cty. Bd. of Commrs. (2000), 141 Ohio App.3d 232, 239, citing State ex rel. Purdy v. Clermont Cty. Bd. of Elections, 77 Ohio St.3d 338, 340, 1997-Ohio-278. In order to determine the legislature's intent, the court must look to the statute itself and, "if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged[.]" State ex rel. McGraw v. Gorman (1985), 17 Ohio St.3d 147, 149, quoting Wachendorf v. Shaver (1948), 149 Ohio St. 231, paragraph five of the syllabus. In turn, a court must "read words and phrases in context and construe them in accordance with rules of grammar and common usage." Winkle v. Zettler Funeral Homes, Inc., 182 Ohio App.3d 195, 2009-Ohio-1724, ¶53, quoting State ex rel. Russell v. Thornton, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶11. A court, however, "must keep in mind that a strong presumption exists against any construction which produces unreasonable or absurd consequences." Burdge v. Kerasotes Showplace Theatres, LLC, Butler App. No. CA2006-02-023, 2006-Ohio-4560, ¶34, citing State ex rel. Belknap v. Lavelle (1985), 18 Ohio St.3d 180, 181-182. *Roberts v. RMB Enterprises Inc*., 2011-Ohio-6223 (Twelfth District) at ¶12.

Appellant's reading of the 'shall' in O.A.C. §3701-52-08(D)(3), if accepted, would defeat the 'may' in the prior section of the code. Frankly, it is apparent to this Court that the 'shall' as contained in Ohio Admn. Code §3701-52-08(D)(3) does not speak to the **type** of investigatory material. It merely establishes that **all** investigatory material utilized by the Appellee shall be included in its report. Hence, if there has been a decision to issue a fine, the Appellee must disclose the full factual bases for its decision. Both good and bad. Appellant's assertion that no fine can be issued until all four subparts of Ohio Admn. Code §3701-52-08(D)(2) are conducted is rejected by this Court.

In any event, even if this Court's reading of the code is incorrect, the certified record shows that the Appellee's investigators did speak with the owner at the time of the investigation. Said contact is sufficient to serve the intent of an 'interview' as noted in the administrative code. See, *Parker's Tavern v. Ohio Department of Health*, 2011-Ohio-5767 at ¶¶ 8 & 9. The *Parker's Tavern* court was aware of the 'shall' in Ohio Admn. Code §3701-52-08(D)(3) but instead concentrated on the facts of the case choosing not to interpret the code.

There clearly existed reliable, probative and substantive evidence to support the fact that the Appellant was in violation of the Smoke Free law. As noted in the facts section of this Decision, the Appellee's investigators saw a patron smoking when they arrived. They saw 6 to 7 ashtrays on the bar with cigarette butts and ashes present. That evidence was not refuted by any competent evidence. The evidence relied upon by the Independent Decision Maker was reliable, probative and substantial evidence and was in accordance with law. The Appellee was correct to reject Appellant's objections and to render its Final Decision adverse to the Appellant.

Finally, the Appellant argued that the determination that the violations were intentional was wrong. Hence, the fine should not have been doubled. Yet, here there was evidence of knowledge of the law and efforts taken by the Appellant to willingly disobey it. Several ashtrays were out on the bar and clearly visible to all. The Appellant's action of placing snacks in ashtrays to change the character of the item, was evidence of a knowing disregard for the law. The decision to double the fine was supported by reliable, probative and substantial evidence and was in accordance with law.

V. Decision:

The Court **AFFIRMS** the Final Decision of the Director mailed August 19, 2011 because it was supported by reliable, probative and substantial evidence and was in accordance with law.

Cost to the Appellant.

THIS IS A FINAL APPEALABLE ORDER:

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Franklin County Court of Common Pleas

Date:	01-20-2012
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Case Number:	11CV010955
Type:	DECISION/ENTRY

It Is So Ordered.

/s/ Judge Daniel T. Hogan