

0A332 - K43

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

JOEZ TABERNACLE LOUNGE		CASE NUMBER 11CVF08-10788
APPELLANT,		JUDGE CAIN
vs.		MAGISTRATE MCCARTHY
OHIO DEPARTMENT OF HEALTH		
APPELLEE.		

DECISION AND JUDGMENT ENTRY

CAIN, J.

This matter is now before the court on appellant's administrative appeal of the adjudication order of the Ohio Department of Health dated August 17, 2011. That order approved and adopted the findings of an independent decision maker who found and imposed sanctions on appellant for two occurrences of violations of the state Smoke Free Act. This appeal is governed by R.C. 119.12 which in pertinent part provides:

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. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

In considering this matter on appeal, this court is limited to determining whether the department of health's decision is supported by sufficient evidence in

0A332 – K44

the record (a preponderance of the evidence standard must be employed) and is lawful. This court may not substitute its judgment for that of the director; it may not reverse simply because it interprets the evidence differently than did the director. *Angelkovski v. Buckeye Potato Chips Co.* (1983), 11 Ohio App. 3d 159, 161-162. Appellee's construction and application of its regulations must be accomplished on a case-by-case basis. Due deference must be accorded to the decisions of an administrative agency. *VFW Post 8586 v. Ohio Liquor Control Comm.* (1998), 83 Ohio St. 3d 79. It has been noted that "an administrative agency's construction of a statute that the agency is empowered to enforce must be accorded due deference." *Ciriello v. Bd. of Embalmers and Funeral Directors of Ohio*, 105 Ohio App. 3d 213, 218, citing *Leon v. Bd. of Psychology* (1992), 63 Ohio St. 3d 683 and *Chaney v. Clark Cty. Agr. Soc., Inc.* (1993), 90 Ohio App. 3d 421. However, the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-111.

Here, the facts of the case are not in significant dispute. On two separate occasions, June 30, 2009 and January 11, 2011, two health department sanitarians went to appellant's business premises and observed patrons smoking cigarettes in the bar. Although appellant attempts to challenge the accuracy of the observations of the two sanitarians, it must be noted that the owner of the establishment and the bartender each testified that they saw the occurrence of the patrons smoking cigarettes on both occasions. Controlling is Ohio Revised Code Chapter 3794 and its derivative administrative regulations.

0A332 – K45

In a straightforward fashion, R.C. 3794.02(A) provides “No proprietor of a public place or place of employment, except as permitted in section 3794.03 of this chapter, *shall permit* smoking in the public place or place of employment. . .” (Emphasis added.) Here, appellant places focus on the legal requirement that in order to be found in violation of the law, it must first be found that appellant **permitted** smoking to occur on its premises.

Appellant denies that it permitted smoking on the premises. It maintains that it has all requisite no smoking signs posted in the premises. Appellant further contends that it has instructed all staff to immediately request that all smokers extinguish their smoking materials. If a patron refuses to cease smoking after being requested to do so, he is obligated to sign a form provided by appellant indicating that the patron may be in violation of the law and subject to a monetary fine. On each visit by the sanitarians, the described forms were displayed to them. On one occasion the form was signed by 20 smokers and on the other occasion, at least 12 smokers signed.

Appellant observes that it is not a peace officer and has demonstrated its obligation to not permit smoking by posting signs, speaking with patrons in violation of the ban and asking them to cease smoking and to sign a form if they continue to smoke. Appellant’s generalized approach would allow proprietors to avoid the prohibitions of the non-smoking law by allowing them to give smokers a “wink and a nod” when asking them to stop smoking. O.A.C. 3701-52-02(B), however, requires proprietors to take reasonable steps to enforce the

0A332 – K46

smoking ban which includes, but is not limited to, requesting individuals to stop smoking.

O.A.C. 3701-52-02 indicates that more reasonable steps should be taken beyond merely asking an individual to stop smoking. For example, the proprietor could contact the local health department that enforces the ban to let them know that they have a person in their establishment who is smoking despite warnings to stop. Further, the proprietor could refuse to serve the smoker with any more food or beverages.

Significantly, the proprietor could respond in the same manner he would if a customer were violating any other law. For example, appellant's establishment is located in Mansfield, Ohio. The Codified Ordinances of the City of Mansfield, Sec. 541.05 provides, in relevant part:

No person, without privilege to do so, shall do any of the following.
... (4) Being on the land or premises of another, negligently fail or refuse to leave upon being notified by signage posted in a conspicuous place or otherwise being notified to do so by the owner or occupant, or the agent or servant of either.

Appellant merely had to inform violating patrons, by oral communication or by a posted warning that they will be trespassing if they engage in smoking. The trespassers could then be dealt with accordingly. This measure could be undertaken for no cost or very minimal expense.

In *Deer Park Inn v. Ohio Dept. of Health* (10th Dist), 185 Ohio App. 3d 524, the court held that the testimony of the investigators can establish a violation when there is "nothing less than **willful blindness** on the part of the proprietor and his agents, and some measure of contempt for, let alone non-

0A332 – K47

compliance with, the Ohio Smoke Free Act." (Emphasis added.) In *Parker's Tavern Parker's Tavern v. Ohio Dep't of Health*, 195 Ohio App. 3d 22, 2011 Ohio 3598, the court held that "[a] proprietor permits smoking when the proprietor affirmatively allows smoking or **implicitly allows smoking by failing to take reasonable measures** to prevent patrons from smoking. . ." (Emphasis added.) The Court cited to *Pour House, Inc. v. Ohio Dept. of Health* (10th Dist. 2009), 185 Ohio App.3d 680, in which the Court had provided some examples of reasonable measures that could be taken. In *Parker's Tavern*, the Court held:

While the [proprietor] did take the measures mentioned in *Pour House*, compliance with those measures is not, by itself, sufficient to prove that an owner did not permit smoking in every case. The preventative measures mentioned in *Pour House* were only examples of measures an owner could take to demonstrate a reasonable attempt to prevent smoking in the establishment. **We did not indicate that implementation of those specific measures created a "safe harbor."** Whether the owner took reasonable measures to prevent its patrons from smoking depends on the particular circumstances and must be assessed on a case-by-case basis. (Emphasis added.)

In a similar federal case, the Fifth Circuit Court held that an establishment cannot use "reasonable steps" as a loophole to the avoid enforcement of the law. In *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 2008 U.S. App. LEXIS 6484 (5th Cir. Tex. 2008) the Court stated:

Although no smoking signs were posted there, the operators either failed to remove ashtrays or instead provided candle holders to be used as substitutes. In addition, the establishment had customers **sign forms acknowledging that they had been instructed to go outside to smoke, but once the form was signed, the operators permitted the customers to continue to smoke inside the establishment.** Inspectors observed operators who neither requested smokers to extinguish their cigarettes nor refused

0A332 – K48

service to those smoking. From this evidence, we find it apparent that, most of the time, the only "steps" taken were in trying to find a loop-hole to avoid enforcing the ordinance. Such behavior is a clear violation of the "necessary steps" provision. (Emphasis added.)

In the action at hand, it is clear appellant permitted its patrons to smoke in the bar -- all they had to do was to "sign up to smoke." Therefore and upon a consideration of the involved issues, the court finds appellee's August 17, 2011 adjudication order is supported by reliable, probative and substantial evidence and is in accordance with law. It is therefore **affirmed with modification** to reflect fines of \$2,000 in violation number 26025¹ and \$5,000 in violation number 28770. Judgment is entered in favor of appellee. Costs to be paid by appellant.

David E. Cain, Judge

Copies to:

Joshua A. Dunkle, Esq.
Counsel for Appellant

Stacy Hannan, Esq.,
Counsel for Appellee

¹ This reflects a lowering of the fine in recognition of a mathematical error as suggested by appellee.

0A332 - K49

0A332 - K50

Franklin County Court of Common Pleas

Date: 04-02-2012
Case Title: JOEZ TABERNACLE LOUNGE -VS- OHIO STATE DEPARTMENT
HEALTH DIRECTOR
Case Number: 11CV010788
Type: MAGISTRATE DECISION

It Is So Ordered.

The image shows a handwritten signature in cursive that reads "David E. Cain". To the left of the signature is a circular official seal, which is partially obscured by the signature. The seal appears to be the official seal of the Franklin County Court of Common Pleas.

/s/ Judge David E. Cain