

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

SAOOD INC.,

Appellant,

VS.

LIQUOR CONTROL COMMISSION,

Appellee.

CASE NO.: 12CVF-06-7103

JUDGE: RICHARD SHEWARD

DECISION AND ENTRY
AFFIRMING THE MAY 24, 2012 ORDER OF THE LIQUOR CONTROL
COMMISSION
AND
DECISION AND ENTRY
HOLDING MOOT
THE MOTION TO DISMISS FILED BY THE LIQUOR CONTROL
COMMISSION ON SEPTEMBER 6, 2012
AND
DECISION AND ENTRY
VACATING THE STAY FILED JUNE 4, 2012

SHEWARD, J.

This case is a R.C. §119.12 administrative appeal, by SAOOD Inc. (Appellant), from and Order from the Ohio Liquor Control Commission (Appellee), mailed to Appellant on May 24, 2012, that sanctioned the Appellant for selling beer to an individual under the age of twenty-one years in violation of R.C. §4301.69(A). Appellant timely appealed the Order, obtained a Stay, and then did nothing to present the appeal further.

Appellee moved to have the matter dismissed on September 6, 2012. For the reasons that follow, this Court **AFFIRMS** the Order of May 24, 2012 and holds as **MOOT** the Appellee's motion to dismiss.

FACTS RELEVANT TO THE APPEAL

On or about December 28, 2011 the certified record established that the Appellant and or its agent sold beer to a person under the age of twenty-one in violation of state law. A hearing was held on May 8, 2012 where the Appellant was present and was represented by counsel. The following starts at the bottom of page 4 of the hearing transcript:¹

24 **MR. GORDON: Very briefly, my**
 1 client is here with me in case you have any
 2 questions on this case. His employee sold a
 3 beer to an 18-and-a-half-year-old. He did not
 4 request an ID and was convicted.

There was no argument advanced by the Appellant concerning the conviction or any defense raised to the validity of the Appellee's ability to find that the Appellant had violated its duty as a license holder.

Counsel indicated that his client had been hit hard by the prior penalties imposed by the Appellee. Counsel admitted that this was the third violation for his client. Counsel attempted to seek some break on the potential penalty but truly offered no meaningful evidence that the Appellant had learned its lesson.

The Appellee took the matter under advisement and issued the following sanction:

4. It is the order of this Commission that the Permit Holder has the option to either pay a forfeiture in the amount of \$5,000.00, or the permit will be REVOKED. If the Permit Holder shall elect to pay the forfeiture, the Permit Holder has twenty-one (21) days after the date on which this order is sent to pay the full amount of the forfeiture. It is the law that the forfeiture **MUST BE PAID IN FULL BY CERTIFIED CHECK, MONEY ORDER OR CASHIERS CHECK. THE COMMISSION DOES NOT ACCEPT BUSINESS OR PERSONAL CHECKS.** The full amount of the forfeiture shall be **RECEIVED BY THE COMMISSION IN COLUMBUS** on or before June 14, 2012 or the permit(s) is/are REVOKED as ordered below .

Appellant appealed that Order to this Court.

¹ The darker text is a 'copy image' from the certified record as filed with this Court.

As indicated there have been on further filings from the Appellant after the Appellant received its Stay. However, the Appellee did file its September 6, 2012 motion to dismiss. These issues are now ready for review.

STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the Appellee if it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111; *Henry's Cafe, Inc. v. Board of Liquor Control* (1959), 170 Ohio St. 233.

That quality of proof was articulated by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570 as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.* at 571.

In *Conrad, supra* the decision stated 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 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. *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.

Yet this Court understands that deference to the agency's findings does not equal blindness. Please note the following from *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466 at 471:

We take this precedent to mean that an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable.

Hence, this Court must review the record to see if any material internal inconsistency exists.

This Court is also aware of the recent Tenth District Opinion of *Harr v. Jackson Township*, 2012-Ohio-2030. This Court has considered and weighed **all** of the evidence in the record in order to make the Court's determination. The fact that this Court has not specifically addressed **all** facts and exhibits within this decision does not indicate that the Court failed to take any such fact into consideration.

The Court has reviewed the merits of this appeal within in the framework of the

above noted standards.

ADMINISTRATIVE APPEAL

Here the evidence against the Appellant is unassailable. Appellant's employee violated R.C. §4301.69(A). The Appellant offered no evidence to contest the violation. Hence, the certified record contained the acknowledgement of the Appellant to the charge and a sanction was warranted. The Order is therefore supported by reliable, probative and substantial evidence and is in accordance with law.

Next is the question of the sanction. The Appellant only assertion at the administrative hearing was a hope that the Appellee would be lenient. But there is no indication in the record or in the statute that the sanction given was unlawful. The Appellee's sanction is authorized by law. This Court lacks the ability to modify a lawful sanction. See, *Henry's Café, Inc., v. Bd. Of Liquor Control*, 170 Ohio St. 233. Therefore the lack of 'leniency' is not a meritorious argument. Appellee's order is lawful and **AFFIRMED.**

MOTION TO DISMISS

The Appellee filed a motion to dismiss on September 6, 2012. However, a motion to dismiss is not truly available to the Appellee due to the holding of *Red Hotz, Inc. v. Liquor Control Commission*, Appellee No. 93AP-87 (10th Dist.) decided on August 17, 1993. Even without a brief, the *Red Hotz* case indicates that this Court has an obligation to review the matter.

Following the authority of *Red Hotz*, this Court has reviewed the merits of the appeal and has found it not to be meritorious. Appellee's motion to dismiss is therefore **MOOT.**

DECISION

The Order of May 24, 2012 is supported by reliable, probative and substantive evidence and is in accordance with law. It is **AFFIRMED**.

Appellee's motion to dismiss as filed on September 6, 2012 is **MOOT**.

The Stay as filed on June 4, 2012 is **VACATED**

Costs to Appellant.

THIS IS A FINAL APPEALABLE ORDER

Copies mailed to:

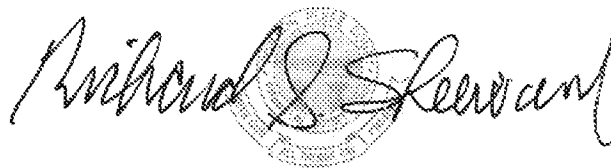
NATHAN GORDON
2485 EAST BROAD STREET
COLUMBUS, OH 43209-1757
Attorney for Appellant

Mike DeWine
Attorney General
Paul Kulwinski
Assistant Attorney General
State Office Tower, 23rd Floor
150 East Gay Street
Columbus, Ohio 43215-3428
Counsel for Appellee

Franklin County Court of Common Pleas

Date: 09-10-2012
Case Title: SAOOD INC -VS- OHIO STATE LIQUOR CONTROL
COMMISSION
Case Number: 12CV007103
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, "Richard S. Sheward", is written over a circular official seal. The seal is partially obscured by the signature but appears to contain text around its perimeter.

Judge Richard S. Sheward

Court Disposition

Case Number: 12CV007103

Case Style: SAOOD INC -VS- OHIO STATE LIQUOR CONTROL COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0071032012-09-0699980000

Document Title: 09-06-2012-MOTION TO DISMISS

Disposition: MOTION IS MOOT