

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

THOMAS J. ASHMORE,

Appellant,

VS.

LIQUOR CONTROL COMMISSION,

Appellee.

CASE NO.: 12CVF-08-9973

JUDGE: SHEWARD

DECISION AND ENTRY
AFFIRMING THE JULY 20, 2012 ORDER OF
THE LIQUOR CONTROL COMMISSION

SHEWARD, J.

This action comes before the Court upon an appeal filed by Thomas J. Ashmore (hereinafter referred to as Appellant) of an Order of the Liquor Control Commission (hereinafter referred to as the Appellee) affirming the Division of Liquor Control's (hereinafter referred to as Division) decision rejecting Appellant's Renewal Application. The Appellee's decision was mailed on July 20, 2012. This appeal was filed on August 8, 2012.

The record from the administrative proceeding has been filed. The parties sought and received extensions of time to file their briefs. For the reasons that are set forth below, the Order mailed July 20, 2012 is **AFFIRMED**.

STATEMENT OF THE CASE

Appellant placed his permit into safekeeping pursuant to R.C. §4303.272. Appellant renewed the safekeeping for one year and then, attempted to renew for another. The subsequent renewal was rejected by the Appellee. Appellant appeals that Order to this Court.

STATEMENT OF THE FACTS

The Appellant was a liquor permit holder. He held a class D1 and D2 liquor permit. Appellant lost his rights to continue his business operation at the location he leased and therefore, he placed his permits into safekeeping pursuant to R.C. §4303.272 effective March 2, 2010. Thereafter the Appellant renewed the permits while in safekeeping on June 1, 2010.

Appellant applied to renew his permits for the 2011-2012 renewal period on or about June 30, 2011. That was his second renewal while his permits where in safekeeping. That renewal was rejected by the Division due to a lack of any evidence that the Appellant was taking efforts to build or reconstruct a location where he would be able to use the permits. Appellant appealed the Division's decision to the Appellee.

The Appellee held a hearing on July 13, 2012. At the hearing the Appellant testified that he did not have any location in which he could operate using his liquor permits. (Hr. Tr. p. 6, lines 18 – 23)¹

18 MR. SHAHEEN: But you don't even
19 have a contract for this property yet?

20 MR. ASHMORE: No, I do not. I would
21 say, I'm not going to sit here and promise
22 you, but I'm about 90 percent sure I will
23 within a month, so.

Appellant also admitted that he did not fully understand the parameters of the safekeeping statute. (Hr. Tr. p. 7, lines 6 – 12)

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

The Appellee issued its Order on July 20, 2012 and it affirmed the Division's rejection of Appellant's renewal request. Appellant appealed the Order to this Court. The standard case schedule was modified at the request of the litigants. Appellant filed his 'Memorandum in Support of Appeal' on November 2, 2012. Appellee filed its merit Brief on November 16, 2012. Appellant's Reply Brief was overdue as of the time of the drafting of this Decision

This matter is ready for review.

STANDARD OF REVIEW

Review by this Court of an administrative agency, such as the Appellee, is governed by R.C. §119.12 and the multitude of cases addressing that section. An often cited case is that of *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 407 N.E.2d 1265. The *Conrad* decision states 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.

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:

“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.

This Court must examine the record to determine whether the Appellee's ‘Order’ is supported by reliable, probative and substantial evidence and is in accordance with the law. *Red Hotz, Inc. v. Liquor Control Commission* (1993), Tenth App. Dist. Case No. 93AP-87, 1993 Ohio App. LEXIS 4032 relying on *Grecian Gardens v. Bd. Of Liquor Control* (1964), 2 Ohio App.2d 112.

REVIEW ON THE MERITS

R.C. §4303.272 requires permit holders to place permits into “safekeeping” with the Division when the premise is destroyed or unused until such time as the premise is usable. Please note the following relevant language from the statute:

§ 4303.272. Safekeeping of permits

* * * * *

Any permit holder whose permit premises are destroyed or made unusable for any cause, **or whose tenancy is terminated for any cause**, shall

deliver the permit holder's permit to the division of liquor control for safekeeping until such time as the original permit premises are made available for occupancy or new premises are secured by the permit holder or until new premises are secured by the permit holder outside the precinct affected by a local option election.

* * * * *

If the expiration date of a permit occurs during the time it is held in safekeeping, the permit **shall** be renewed by the division if the permit holder complies with the other provisions of Chapters 4301. and 4303. of the Revised Code, pertaining to the renewal of a permit. The division shall issue and then retain the renewed permit until the original permit premises become available for occupancy by the permit holder or until the permit holder secures other premises. The division shall return to the permit holder a permit renewed while in safekeeping when the original permit premises are made available for occupancy or new permit premises are secured by the permit holder, if the premises meet the requirements of Chapters 4301. and 4303. of the Revised Code.

* * * * *

A permit held in safekeeping **shall not be renewed more than once while so held**, unless the building from which the permit was taken for safekeeping or the building to which the permit is to be transferred is under construction or reconstruction, in which event the permit shall be held in safekeeping and shall, upon the application of the permit holder, be renewed at each expiration date until the construction or reconstruction of the building is completed. (Emphasis added)

Clearly, there was no evidence at the July 13, 2012 hearing that indicated that there existed ongoing construction or reconstruction of a building where the permits were to be used.

While in safekeeping a permit holder must continue to submit applications and pay the applicable renewal fees to renew the permit. Unlike the presumption in favor of a permit renewal under R.C. §4303.271, a permit in safekeeping is entitled to one renewal and additional renewals only if there is progress on the construction, reconstruction or other impediment to the re-opening of the permit premise.

In *Banc of Am. Strategic Solutions, Inc. v. Cooker Rest. Corp.*, 2006-Ohio-4567, ¶9 (10th Dist. Sept. 5, 2006), the court noted that Liquor permits are subject to strict

regulation by the Ohio Division of Liquor Control. (See also *Delfratte v. Ohio State Liquor Control Comm'n*, 2004-Ohio-1143, ¶14 (10th Dist. Mar. 11, 2004). Appellant's inability to understand the requirements of R.C. §4303.272 is not an excuse.

Appellant asserted that the acceptance of his permit renewal payments by the Appellee should estop the Appellee from denying Appellant's renewal. However, as pointed out by the Appellee, estoppel does not apply to the State. Generally, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function. See *State, ex rel. Upper Scioto Drainage & Conservancy Dist., v. Tracy* (1932), 125 Ohio St. 399, 181 N.E. 811; *State, ex rel. Kildow, v. Indus. Comm.* (1934), 128 Ohio St. 573, 192 N.E. 873; *Interstate Motor Freight System v. Donahue* (1966), 8 Ohio St.2d 19, 221 N.E.2d 711; *Van Gilder v. Denver* (1939), 104 Colo. 76, 89 P.2d 529; *Alexander Co. v. Owatonna* (1946), 222 Minn. 312, 24 N.W.2d 244; *Main v. Dept. of Highways* (1965), 206 Va. 143, 142 S.E.2d 524. Furthermore, the Appellant had a duty to make the permit applications because if he did not, by statute, he would have lost the permits for non-compliance with that requirement. Appellant's request for the return of the permit applications fees is therefore, not only misguided, but not appropriate in an administrative appeal.

This Court has reviewed the transcript of the hearing. There is sufficient reliable, probative and substantial evidence to support the Order of the Appellee. Pursuant to the language of R.C. §4303.272 the Order was lawful.

DECISION

The Order of the Appellee dated July 20, 2012 is supported by reliable, probative and substantial evidence and is in accordance with law. It is **AFFIRMED**.

THIS IS A FINAL APPEALABLE ORDER

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Franklin County Court of Common Pleas

Date: 11-29-2012
Case Title: THOMAS JAMES ASHMORE -VS- OHIO STATE LIQUOR
CONTROL COMMISSION
Case Number: 12CV009973
Type: DECISION/ENTRY

It Is So Ordered.

The image shows a handwritten signature in black ink that reads "Richard S. Sheward". The signature is written over a circular blue ink seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE" around the bottom. In the center of the seal is a smaller emblem.

Judge Richard S. Sheward

Court Disposition

Case Number: 12CV009973

Case Style: THOMAS JAMES ASHMORE -VS- OHIO STATE
LIQUOR CONTROL COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes