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

MCFAUL & BITTERMAN ENTERPRISES,	:	CASE NO. 12 CVF-008614
	:	
	:	(JUDGE FRYE)
Appellant,	:	
	:	
vs.	:	
	:	
OHIO LIQUOR CONTROL COMMISSION,	:	
	:	
	:	
Appellee.	:	

DECISION AND FINAL JUDGMENT
AFFIRMING THE ORDER OF THE OHIO LIQUOR COMMISSION ISSUED IN CASE NO. 145A-11

The Court has the instant appeal for consideration pursuant to R.C. 119.12. Appellant filed this appeal on July 5, 2012 from an Order of the Commission mailed on June 15, 2012. That Order denied Appellant's appeal before the Commission for the Division of Liquor Control's Non-Renewal of Appellant's liquor license. The Commission determined that Appellant had failed to establish compliance with the requirements of Section 4303.271 and Section 4303.272 of the Ohio Revised Code.

STANDARD OF REVIEW

Decisions of administrative agencies are subject to a "hybrid form of review" in which a common pleas court must give deference to the findings of an agency, but those findings are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111, 407 N.E.2d 1265. In *Strausbaugh v. Dept. of Commerce, Div. of Real Estate & Professional Licensing* (10th Dist.), Case No. 07AP-870, 2008-Ohio-2456, ¶ 6, the Court of Appeals set forth more fully the standard of review under Ohio's administrative procedure act as follows: "In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with the law. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, [487 N.E.2d 1248]; *Belcher v. Ohio State Racing Comm.*,

10th District No. 02AP-998, 2003-Ohio-2187, at ¶10." The meaning of reliable, probative and substantial evidence was defined in *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

The common pleas court conducts a de novo review of questions of law, exercising its independent judgment to determine whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591.

FACTS AND LEGAL ANALYSIS

Appellant McFaul & Bitterman Enterprises ("Appellant") operated a restaurant and bar in Cleveland, Ohio from 1982 until March 2001. (3/14/12 Tr. 8 & 22). After March 2001, the restaurant and bar were effectively closed, holding only occasional small parties. (3/14/12 Tr. 23). Appellant did not place its permit in safekeeping upon closing in March 2001 and continued to complete permit renewal applications for each subsequent year until 2011. (3/14/12 Tr. 22-23). On each renewal, Appellant indicated that it was open and operational. (3/14/12 Tr. 23; R. 66-74). Had Appellant indicated on any renewal application that the business had closed in March 2001, a letter would have been sent to Appellant requesting that a safekeeping application be submitted to the Division of Liquor Control. (6/12/12 Tr. P. 11). Mr. Panzera, an attorney for the Ohio Department of Commerce, Division of Liquor Control, testified as to the effect of Appellant's continuing representation that the business was open: "If you indicate that it's open, there's no reason for us to believe otherwise because you are declaring that everything within – that you're stating within that document is truthful." (6/12/12 Tr. 11, L. 7-11).

Appellant explained that as to the years when the premises were functionally closed that he "did make attempts to open and be open basically when I had to fill out the forms." (6/12/12 Tr. P. 17, L. 1-3). At the March 14, 2012 hearing, Appellant, explained why he indicated the business was open when it was not: "I had some small parties and stuff like that years ago. I don't know the exact – if it's exactly 10 years –" (3/14/12 Tr. P. 23, L.22-24). The Commission could infer that attempting to be open at times when Appellant was filling out the forms does not equate to truly being open for business. Furthermore, a fair inference from Appellant's testimony is that he had not

even had small parties at the premises for years prior to the administrative hearing. Had Appellant timely disclosed the business was closed in March 2001, he would have learned that the permit could have been placed in safekeeping.

Furthermore, Appellant's Application to place the permit in safekeeping signed by him before a Notary Public on January 27, 2011 stated, in response to question 4, "Give the last date of operation: SEPT 31, 2001." (Record at 50/98). This is materially at variance with Appellant's statement to the Department's investigator Kristin Linsenmeyer that, as of their conversation on January 11, 2011, "the premises had been closed for about 3 years..." (Record at 57/98).

The Commission had ample reliable, probative and substantial evidence supporting the conclusion that Appellant had not timely applied to place the permit in safekeeping as required by Ohio law.

Appellant conceded a misunderstanding of the law. "Again, I was unaware of the actual technical language of the law, the codes. I was informed several years ago that as long as you keep your permit paid on your annual renewal fee, you're good to go." (3/14/12 Tr. 10, L 12 -16.) Additionally, Mr. McFaul, an attorney and Appellant's former business partner, testified "Again, not knowing himself and not consulting with anybody or anybody with any legal advice knowing that you can't keep this in safekeeping or keep it as long as it has, I think he can probably explain better as to why he's in the position he is today." (March 14, 2012 Tr. 8, L.22 – Tr. 9 L. 3)

Appellant acted at his own peril. In *Banc of Am. Strategic Solutions, Inc. v. Cooker Rest. Corp.*, 2006 Ohio 4567, ¶9 (Ct. App., Franklin County), 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, (Ct. App., Franklin County).

Appellant did apply to move the permit to safekeeping in January 2011, but only after the Division of Liquor Control requested Appellant move the permit upon discovering the bar was closed for business. (R. 49-51; 3/14/12 Tr. 22). The Division only became aware of the lengthy closure after Appellant submitted its application for safekeeping, indicating it had been closed since September 21, 2001. Appellant then submitted a 2011-2012 renewal application in safekeeping that was rejected by the Division based upon the lack of construction, reconstruction or progress to the permit

premises. (R. 47-48). Appellant appealed the Division's Order to the Ohio Liquor Control Commission ("Commission").

The Commission held an initial administrative hearing on March 14, 2012. At the time of that administrative hearing, Appellant indicated that the permit premises could be open within 90 days. (Tr. 16-17). The Commission held another administrative hearing approximately 90 days later on June 12, 2012. Then, Appellant indicated that the location was not yet open and still needed a gas valve, fire suppression room and additional inspections. (Tr. 22-24). After the June 12th hearing, the Commission issued an Order affirming the decision of the Division to reject the renewal in safekeeping. (R. 25).

Appellant argues that the Division did not establish "good cause" for rejection of Appellant's permit as mandated by R.C. 4303.271[1] as a basis for a reversal of the Commission's June 14, 2012 Order. While the Appellant's recitation of the requirements of R.C. 4303.271 is correct, the Division's rejection, and the Commission's Order, is not predicated on a renewal of a permit pursuant to R.C. 4303.271. Rather, the statutory authority for non-renewal in this instance is found in R.C. 4303.272.

R.C. 4303.272 requires permit holders to place permits into "safekeeping" with the Division when premises are destroyed or unused until such time as the location is again usable. While in safekeeping, a permit holder must continue to submit applications and pay the renewal fees. R.C. 4303.272. Unlike the presumption in favor of a permit renewal under R.C. 4303.271, a permit in safekeeping is entitled to one automatic renewal, and thereafter two additional renewals only if there is progress on the construction, reconstruction or other impediment to the re-opening of the permit premises. (*Id.*) This suggests the legislature does not want liquor permits placed "on ice" indefinitely, as appears to have occurred here.

Appellant did not comply with the requirements of R.C. 4303.272 until nearly ten years after closing its doors while having made little progress on the reconstruction of the premises during all that time. The Division rejected the renewal, while in safekeeping, for failure to make construction or reconstruction progress at the permit premise. It was only after the Division's action that significant progress began to be

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[1] Appellant cites R.C. 4303.292 as the basis for showing "good cause;" however, R.C. 4303.271 is the statutory provision requiring the Division to show good cause to reject a renewal of a permit.

made on the reconstruction of the premises. Even at the June 12, 2012, administrative hearing, after receiving an additional three months to re-open, Appellant was still not ready for business. Based upon all of the evidence presented during the two administrative hearings, the Commission understandably affirmed the Division's Order to not renew Appellant's permit in safekeeping.

Appellant argues that it acted in "good faith" and was not trying to "game the system" in neither placing the permit in safekeeping nor operating for ten years while holding an active permit. Unfortunately, what is abundantly clear is that Appellant made no attempt to conform to the law. Appellant concededly did not know the liquor law. Despite not knowing the law in this heavily regulated industry, Appellant did not seek the advice of a lawyer. Thus, even if Appellant acted in good faith, such a long-term failure to understand and conform to the legal requirement to maintain this liquor permit cannot be excused. The facts are established by a preponderance of the reliable, probative and substantial evidence in the record, and the decision is in accordance with law.

Appellant also argues that the Commission's Order should be reversed because it did not contain the particular reasons for affirming the Division's Order. However, there is no requirement that the Commission's Order identify reasons or rationale. The record relied upon by the Commission contains reliable, substantial and probative evidence supporting the Order. Courts are required to interpret a decision of the Commission in a manner consistent with its Order. *Gina, Inc. v. Ohio Liquor Control Comm'n*, 10th Dist. Case No. 11AP-107, 2011 Ohio 4927, ¶ 21.

Appellant cites no law or previous case in which the Commission permitted conduct similar to Appellant's conduct here. R.C. 4303.272 places the duty upon every permit holder, "whose premises are made unsuitable for any cause" to "deliver the permit holder's permit to the division of liquor for safekeeping until such time as the original permit premises are made available for occupancy..." Appellant failed to deliver the permit for 10 years.

The Order is **AFFIRMED**. Costs taxed against Appellant.

***** This is a Final Appealable Order. *****

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 02-25-2013

Case Title: MCFAUL & BITTERMAN ENTERPRISES -VS- OHIO STATE LIQUOR CONTROL COMMISSION

Case Number: 12CV008614

Type: DECISION/ENTRY

It Is So Ordered.

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 12CV008614

Case Style: MCFAUL & BITTERMAN ENTERPRISES -VS- OHIO STATE LIQUOR CONTROL COMMISSION

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes