

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

HUBER HIGHTS CITY OHIO,

Appellant,

vs.

OHIO STATE LIQUOR CONTROL
COMMISSION, ET AL.,

Appellees.

CASE NO: 12CVF-12-15622

JUDGE: SHEWARD

DECISION AND ENTRY
AFFIRMING THE ORDER OF THE COMMISSION
DATED DECEMBER 5, 2012

SHEWARD, J.

This action comes before the Court upon an appeal of an Order of the Liquor Control Commission (hereinafter referred to as Commission) dated December 5, 2012. Said Order reversed the Division of Liquor Control's (hereinafter referred to as Division) determination that rejected YAK Entertainment, LLC's (hereinafter referred to as Appellee) application for a change of LCC Membership Interest. Appellant asserted that said Order was not supported by the evidence and was not in accordance with law.

For the reasons that follow, this Court **AFFIRMS** the Commission's Order of December 5, 2012.

STATEMENT OF THE CASE

The Appellee moved to change the membership interest of its LLC. The Division denied the request and the Appellee appealed to the Commission. The Commission reversed the Division in its Order dated December 5, 2012.

FACTS RELEVANT TO THE APPEAL

The Appellee holds a D-5 liquor permit. That Appellee is an LLC. At the time of the requested transfer, April 4, 2012, Deborah A. Young was the sole member of the

LLC. The Appellee proposed that Jessica Kennedy become the sole member of the LLC. The record reflects that Ms. Kennedy was the daughter of Ms. Young. Ms. Kennedy had been involved in the day-to-day management of the business known as the Heat Nightclub. The Heat Nightclub is located on 6115 Brandt Pike in Huber Heights, Ohio.

The Division had a hearing on July 31, 2012. The hearing went to both the Appellee's request to renew its D-5 permit and the Appellee's request to transfer the membership interest to Ms. Kennedy. By an Order dated October 24, 2012 the Division held as follows:¹

- 1) **Jessica Kennedy, the proposed sole member in YAK Entertainment, LLC, has operated a liquor permit business in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state. R.C. §4303.29(A)(1)(b).**

The Order also denied the application for the following reasons:

- 2) **The Division also denies and rejects the application for change of membership interest as authorized or required by law. R.C. §4301.10(A)(2) and O.A.C. §4301:1-1-12(B).**

The first part of the Division's order was appealed by the Appellee to the Commission and is currently pending in this Court before Judge Travis under case number 12CVF-12-15620. It is not relevant to this appeal.

It was the position of the Appellee that there had been no showing/evidence that served as evidence to deny the transfer the membership interest of the permit holder. Hence, the Appellee appealed the Division's determination to the Commission.

The Commission held a hearing on December 5, 2012. The hearing was consolidated with the Appellee's appeal of the Division's determination not to renew the D-5 liquor permit. Evidence was taken by the Commission. The parties have filed their respective briefs.

This matter is ready for review.

¹ The darker text is a 'copy image' of the Order found at page 135 of the scanned certified record filed with this Court.

STANDARD OF REVIEW

Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of the Commission 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.

ARGUMENTS OF COUNSEL

To reject an application to transfer ownership and location of a liquor permit under R.C. 4303.292(A)(1)(b), it must be shown that the applicant's actions demonstrated a disregard for the laws, regulations or local ordinances. *Kamm's Korner Tavern, Inc. v. Liquor Control Comm.*, 10th Dist. No. 00AP-1423 (May 24, 2001), citing *Leo G. Keffalas, Inc. v. Ohio Liquor Control Comm.*, 74 Ohio App.3d 650, 653 (10th Dist.1991). Appellee contends the record contained no evidence that Appellee or Kennedy had

operated a liquor permit business in a manner proscribed by this section and, therefore, said provision cannot serve as a basis for denying the application to transfer ownership.

Please note the following language from the Revised Code:

§ 4303.292. Grounds for refusal to issue, transfer ownership or location or renew permit

(A) The division of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of, any retail permit issued under this chapter if it finds either of the following:

(1) That the applicant, or any partner, member, officer, director, or manager of the applicant, or, if the applicant is a corporation or limited liability company, any shareholder owning five per cent or more of the applicant's capital stock in the corporation or any member owning five per cent or more of either the voting interests or membership interests in the limited liability company:

(b) Has operated liquor permit businesses in a manner that demonstrates a disregard for the laws, regulations, or local ordinances of this state or any other state. . . .

The Appellant argued that the evidence adduced at the hearing of December 5, 2012 that was relevant to its request to deny the renewal of the D-5 liquor permit was the same evidence that the Commission should have used to deny the transfer. Appellant argued that the existence of the claimed external disturbances near or outside of the permit location all should prove that the Appellee and/or Ms. Kennedy operated the business in a manner that demonstrated a disregard for the laws, regulations and the local ordinances of this state.

The evidence at the hearing did not support Appellant's contention. The issues discussed at the hearing concerned noise complaints and various issues outside of the Heat Nightclub. There was no evidence of any violation of any law, regulation, or local ordinance by the Appellee or Ms. Kennedy. Furthermore, there was no evidence of any administrative citations ever having been issued against the Appellee and/or Ms. Kennedy. Nor was there any evidence of any criminal conduct by the employees of the Appellee.

Appellant did assert that certain promotional material showed that the Appellee was violating the law concerning free alcohol. The Appellee claimed it objected to the admission of said evidence during the hearing and the objection was sustained. The Appellant did not brief to this Court why it thought that the objection should have been overruled, nor did the Appellant claim that it had been denied a fair hearing based on that ruling. Hence, Appellant's reliance on evidence not admitted at the hearing is misplaced. Furthermore, Ms. Kennedy testified later in the hearing that the advertisements were not the Appellee's but had been apparently produced by various promoters. The evidence failed to establish that the alleged conduct that was shown in the promotional material ever led to a violation by the Appellee or Ms. Kennedy.

The testimony of Judy Blankenship, a member of city council, addressed almost exclusively noise complaints. Ronald Fisher, the Mayor of Huber Heights also testified. He too testified that the majority of the complaints concerning the Heat Nightclub were due to noise. (Hr. T. P. 24, L. 6.) In fact Mayor Fisher testified that it was not the alcohol issue that was troubling him. (Hr. T. P. 31, L. 12 – 16)

Brandon Sucher also testified for the Appellant. He was the liaison officer for the Huber Heights Police Division. Mr. Sucher was responsible for compiling the spreadsheet concerning police runs for the Appellant. Mr. Sucher testified of only two events happening inside the nightclub and the rest occurred mainly at closing time or were noise related. (Hr. T. P. 52, L. 12 – 22) Out of the seventy-five complaints listed by Mr. Sucher, thirty-eight were noise complaints. (Hr. T. P. 63, L. 13 – 17) Mr. Sucher was unable to recall any liquor violations.

The next witness at the December 5, 2012 hearing was Officer Siegrist. The Officer did not add any material testimony. He just supported some of the prior testimony from Officer Sucher concerning some of the more substantial criminal

activities. The next several witnesses were from the neighborhood. The all had general safety and noise issues with the nightclub.

Ms. Kennedy testified on behalf of the transfer. She supported the Appellee's position that the events documented by the Appellant were mainly noise complaints and the Appellee has done what it could to mollify the city and the neighborhood. However, the Appellee has the right to operate as a nightclub and it cannot violate other ordinances, such as fire codes, in addressing the noise issue. There was no testimony or evidence that Ms. Kennedy was an individual who had operated a liquor permit businesses in a manner that demonstrated a disregard for the laws, regulations, or local ordinances of this state or any other state. This Court was unable to locate any direct evidence that the Appellee and/or Ms. Kennedy had ever been in violation of any noise ordinance.

As stated earlier, the decision of the Commission to reverse the Division and allow for the change in membership interest is supported by reliable, probative and substantive evidence and is in accordance with law. More plainly put, there was no evidence established by the Appellant or the Division to support its claim that the Appellee and/or Ms. Kennedy violated R.C. §4303.292(A)(1)(b). The Order of December 5, 2012 is affirmed.

DECISION

The Order of December 5, 2012 is supported by reliable, probative and substantive evidence and is in accordance with law. It is **AFFIRMED**. The Motion to Consolidate is moot.

Costs to Appellant.

THIS IS A FINAL APPEALABLE ORDER

Copies to:

LOREN M BLY
2700 KETTERING TOWER
DAYTON, OH 45423
Attorney for Appellant

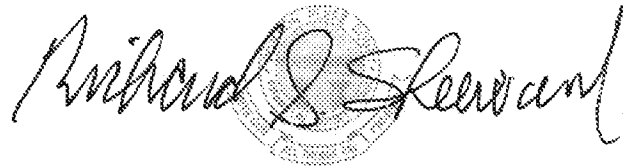
ANDROMEDA MCGREGOR
150 EAST GAY STREET 23 FL
COLUMBUS, OH 43215-3130
Attorney for Appellee Commission

KURT O GEARHISER
520 EAST RICH STREET
COLUMBUS, OH 43215-5318
Attorney for Appellee YAK Entertainment LLC

Franklin County Court of Common Pleas

Date: 04-12-2013
Case Title: HUBER HEIGHTS CITY OHIO -VS- OHIO STATE LIQUOR
CONTROL COMMISSION ET AL
Case Number: 12CV015622
Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in cursive script, reading "Richard S. Sheward", is written over a circular official seal. The seal is partially obscured by the signature and contains some illegible text and a central emblem.

Judge Richard S. Sheward

Court Disposition

Case Number: 12CV015622

Case Style: HUBER HEIGHTS CITY OHIO -VS- OHIO STATE
LIQUOR CONTROL COMMISSION ET AL

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 12CV0156222013-03-2599970000
Document Title: 03-25-2013-MOTION TO STRIKE
Disposition: MOTION IS MOOT
2. Motion CMS Document Id: 12CV0156222013-03-0699980000
Document Title: 03-06-2013-MOTION TO DISMISS
Disposition: MOTION IS MOOT
3. Motion CMS Document Id: 12CV0156222013-02-2299980000
Document Title: 02-22-2013-MOTION TO CONSOLIDATE
Disposition: MOTION DENIED