

DANIEL M. HERRICK  
IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

MAY 06 2013

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EXECUTIVE AGENCIES

DAVID P. FILING,	)	
Appellant,	)	CASE NO. CV 2012-06-3734
	)	JUDGE THOMAS A. TEODOSIO
-vs-	)	
	)	
OHIO CONSTRUCTION INDUSTRY	)	
LICENSING BOARD,	)	<b>FINAL ORDER</b>
	)	
Appellee.	)	

This matter is before the Court on appeal from the Final Order of the Electrical Section of the Ohio Construction Industry Licensing Board, issued on June 11, 2012, denying Appellant David Filing's application to take the electrical exam. Appellant has filed its Assignments of Error and Brief in Support and Appellee has filed its Brief in Opposition. Upon consideration thereof, the Final Order of the Electrical Section of the Ohio Construction Industry Licensing Board is affirmed.

On October 17, 2011, the Appellant applied to sit for the Ohio Electrical Contractor Licensing Examination. On March 26, 2012, a hearing on the application was held by the Appellee, the Ohio Construction Industry Licensing Board ("Board"). On May 3, 2012, the Hearing Examiner issued a Report and Recommendation, finding that Appellant should be denied to sit for the examination. On June 11, 2012, the Board issued its Final Order denying David Filing's application to sit for the exam. The appeal to this Court followed.

"The standard of review governing the trial court in an administrative appeal is set forth in Ohio's Administrative Procedure Act, R.C. 119.12. When an administrative agency's adjudication is appealed to the court of common pleas, that court may affirm the order of the

agency if it finds, based upon consideration of the entire record and such additional evidence admitted by the court, "that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12; *Lies v. Veterinary Medical Bd.* (1981), 2 Ohio App. 3d 204, 206-07, 441 N.E.2d 584. The statute directs the common pleas court to function as an appellate court. The review of the administrative record is a hybrid review which is neither a trial de novo nor an appeal on questions of law only. *Crumpler v. State Bd. of Edn.* (1991), 71 Ohio App. 3d 526, 528, 594 N.E.2d 1071; *Lies v. Veterinary Medical Bd.*, supra, at 207. A reviewing court should not substitute its judgment for that of an administrative board. *Kisil v. Sandusky* (1984), 12 Ohio St. 3d 30, 34, 465 N.E.2d 848." *Bingham v. Ohio Veterinary Med. Licensing Bd.*, 1998 Ohio App. LEXIS 532 (9<sup>th</sup> Dist. 1998).

**Assignment of Error One: "Mr. Oran Post conducted himself in an improper manner in failing to recuse himself from consideration of Appellant's petition for licensure during which he appeared to be a witness; thereby violating Appellant's due process and equal protection rights to a fair and impartial panel."**

Mr. Oran Post is one of the members of the Ohio Construction Industry Licensing Board who voted on Board's decision to deny Appellant's application to sit for the Ohio Electrical Contractor Licensing Examination. Appellant presents evidence that Mr. Post's name appears on two of the documents presented in support of Appellant's application. Exhibit I is a document Mr. Post had signed in 1986 as the former Electric Inspector for the City of Cuyahoga Falls, indicating that he had inspected and approved work done by Mr. Filing. Exhibit J is a certificate of attendance for a course on the 1996 National Electrical Code, attended by Appellant, and signed by the instructor, Oran Post.

Based upon these two documents, Appellant argues that Mr. Post should have recused himself from the proceedings, based upon the Industrial Commission Rules of Ethics. Appellant points to language in OAC 4121-15-10(B)(1)(e)(iv) stating “An adjudicator shall disqualify himself or herself in a proceeding in which there arises the appearance of impropriety or the adjudicator’s impartiality might reasonably be questioned, including but not limited to instances where . . . the adjudicator . . . [i]s to the adjudicator’s knowledge likely to be a material witness in the proceeding.” The Court does not find this argument well taken.

First, the section of the Administrative Code, 4121-15-10, to which Appellant directs the Court is not applicable to the Ohio Construction Industry Licensing Board. The section of the Code in question governs the Industrial Commission. The Ohio Construction Industry Licensing Board is not a function or division of the Industrial Commission.

Second, the documents in question, to the extent that they have any impact whatsoever on the proceedings, work in support of Mr. Filing’s application to sit for the examination. They are evidence of a favorably inspected job and completion of coursework. There is nothing to indicate the appearance of impropriety or that Mr. Post’s impartiality might reasonably be questioned. Furthermore, these exhibits were admitted at the hearing without objection.

Third, the Court finds that Mr. Post was not a material witness in these proceedings. While his signature appeared on the two exhibits referenced above, there is no evidence that these exhibits had any effect on the outcome of the hearing. As noted above, these exhibits were entered by the Appellant in support of his application. There is no indication or theory that these documents were consequential in the Board’s determination to deny Appellant’s application. Furthermore, Mr. Post was not called upon to testify in any manner as to the two

exhibits in question. He did not give testimony at the hearing, by affidavit, or by deposition. Under these circumstances, the Court concludes that the mere fact that Mr. Post's signature appears on the two exhibits in question does not make him a material witness in this context.

Appellant's Assignment of Error One is OVERRULED.

**Assignment of Error Two: "The Ohio Construction Industry Licensing Board ("OCILB") misapplied and misinterpreted applicable law by not permitting Appellant to take the Electricians License Exam because Appellant met statutory requirements of R.C. 4740.06(B)(3)."**

**Assignment of Error Three: "OCILB abused its discretion by not allowing Appellant to sit for the Electricians License Exam because Appellant met statutory requirements of R.C. 4740.06(B)(3)."**

R.C. 4740.06(B)(3) states: "To qualify to take an examination, an individual shall . . . [e]ither have been a tradesperson in the type of licensed trade for which the application is filed for not less than five years immediately prior to the date the application is filed, be a currently registered engineer in this state with three years of business experience in the construction industry in the trade for which the engineer is applying to take an examination, or have other experience acceptable to the appropriate section of the board." This requirement is reiterated in O.A.C. 4101:16-3-02(H)(1).

O.A.C. 4101:16-3-02(H)(3)(a)(i) further provides that acceptable experience shall include "[f]ive years of experience in the licensed trade for which the individual is applying, if such experience is not during the five years preceding the application. The experience may be on projects both commercial and residential in nature. (a) Three years of the five years of experience must be obtained by performing construction work on commercial or residential projects in the licensed trade for which the individual is applying; (b) Education programs, other than an apprentice program approved by the state of Ohio, may be submitted in lieu of

work experience by the applicant up to a maximum of one year of the five years of experience necessary; (c) An engineer not currently registered in the state of Ohio must have at least five years of business experience in the construction industry in the licensed trade for which application is made; (d) Experience doing maintenance or repair work to be considered as applicable to the five years experience must be maintenance and repair work done on construction projects in the licensed trade for which the individual is applying and subject to the rules promulgated by the Ohio board of building standards pursuant to Chapter 3781 of the Revised Code; all other maintenance and repair experience on projects or structures not subject to the rules of the Ohio board of building standards promulgated pursuant to Chapter 3781 of the Revised Code shall not be considered applicable experience. (e) The individual shall provide documentation such as local licenses or registrations, permits obtained, pay stubs, W-2's, signed contracts, invoices, or verification of employment on company letterhead demonstrating that the applicant has spent a majority of his time during the five year experience period in the licensed trade for which the individual is applying.”

Appellant argues that O.A.C. 4101:16-3-02(H)(3)(a)(i) is “not an all-inclusive or exhaustive list.” Appellant was neither a tradesperson in the licensed trade for the five years prior to his application nor is he a currently registered engineer. The issue is thus whether Mr. Filing has “other experience acceptable to the appropriate section of the board” under R.C. 4740.06(B)(3) and O.A.C. 4101:16-3-02(H)(3)(a)(i). Although the list set out in O.A.C. 4101:16-3-02(H)(3)(a)(i) may not be an exhaustive list, it provides the Court with guidance as to what experience will be considered by the board. Specifically, the Code sets forth that “[e]xperience doing maintenance or repair work to be considered as applicable to the five years experience must be maintenance and repair work done on construction projects in the

licensed trade for which the individual is applying and subject to the rules promulgated by the Ohio board of building standards pursuant to Chapter 3781 of the Revised Code; all other maintenance and repair experience on projects or structures not subject to the rules of the Ohio board of building standards promulgated pursuant to Chapter 3781 of the Revised Code shall not be considered applicable experience.” The rules promulgated by the Ohio Board of Building Standards include the Ohio Building and Residential Codes and are set forth in O.A.C. Chapters 4101:1 through 4101:8.

Clearly work done outside the State of Ohio or work done outside of the trade in question would not qualify under O.A.C. 4101:16-3-02(H)(3)(a)(i). Essentially the issue is whether Appellant’s experience as a “maintenance electrician” for Akron Public Schools from 1996 through 2006, or any other electrical experience, qualifies him under O.A.C. 4101:16-3-02(H)(3)(a)(i). To qualify, the work must be “construction projects in the licensed trade.” Based upon the transcript of the hearing and the submitted exhibits, the Court is unable to conclude that Appellant has five years of experience obtained by performing construction work on commercial or residential projects in the licensed trade or otherwise met the qualifications under O.A.C. 4101:16-3-02(H)(3)(a)(i). While testimony suggests that Mr. Filing did work between 1981 and the mid-1990s that required the pulling of permits, the Court is unable to ascertain the duration of these projects and whether they were sufficient to meet the requirements of O.A.C. 4101:16-3-02(H)(3)(a)(i). Likewise, the Court is unable to ascertain what percentage, if any, of the work Appellant did for Akron Public Schools would qualify under O.A.C. 4101:16-3-02(H)(3)(a)(i). The O.A.C. requires the individual to “provide documentation such as local licenses or registrations, permits obtained, pay stubs, W-2’s, signed contracts, invoices, or verification of employment on company letterhead

demonstrating that the applicant has spent a majority of his time during the five year experience period in the licensed trade for which the individual is applying.” Appellant failed to provide sufficient documentation demonstrating that any of the requirements of O.A.C. 4101:16-3-02(H)(3)(a)(i) were met. It was therefore within the discretion of the Board to make the determination that Appellant had failed to meet the other “acceptable experience” requirement. Accordingly, Appellant’s Assignments of Error Two and Three are OVERRULED.

**Assignment of Error Four: “OCILB violated public policy by not allowing Appellant to sit for the electricians license exam because Appellant met statutory requirements of R.C. 4740.06(B)(3) and the directives set forth by Ohio Governor’s Initiative.”**

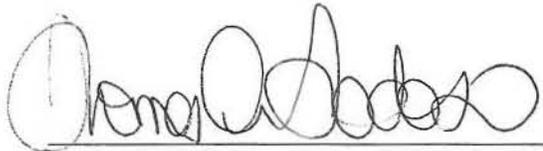
Appellant argues that he should be allowed to sit for the exam because Governor Kasich’s “Common Sense Initiative,” established under Executive Order 2011-01K, was designed to bring “common sense” to business regulations, and that it is “common sense” to allow Appellant to sit for the examination because he once held the licensure he seeks. The Court finds said argument not well taken. By its own language, Executive Order 2011-01K “does not confer any legal rights upon persons, businesses or other entities subject to the regulation of cabinet agencies, boards, or commissions. It does not provide a basis for legal challenges to rules, approvals or disapprovals, permits, licenses, or other actions or to any inaction of any government entity subject to it.” Appellant’s Assignment of Error Four is OVERRULED.

**Assignment of Error Five: “OCILB’s order is not supported by reliable, probative, and substantial evidence and was not in accordance with law.”**

Appellant argues that he has presented evidence, including the prior holding of an electrician's certificate, that would entitle him to sit for the examination, and that the decision of the Board to the contrary is arbitrary and capricious. This argument is not well taken. As noted above under Assignments of Error Two and Three, Appellant did not provide evidence that he met the requirements to sit for the examination. Appellant's Assignment of Error Five is OVERRULED.

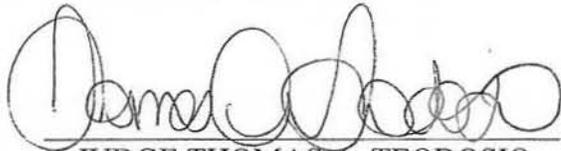
The Final Order of the Electrical Section of the Ohio Construction Industry Licensing Board, issued on June 11, 2012, is supported by reliable, probative, and substantial evidence and is in accordance with the law. Appellant's Assignments of Error are overruled, and the Final Order of the Electrical Section of the Ohio Construction Industry Licensing Board, issued on June 11, 2012, is AFFIRMED.

IT IS SO ORDERED.



JUDGE THOMAS A. TEODOSIO

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.



JUDGE THOMAS A. TEODOSIO

cc: Attorney Alexander R. Folk  
Attorney Barry D. McKew