

On October 1, 2013 a telephone hearing was conducted before Hearing Officer Tim Gates concerning the Appellant's appeal. Mr. McGrievy, the attorney involved in the transaction wherein Appellant obtained the business, testified as follow:

...our client was approached ah early in 2010 I believe it was May or June ah the by the seller that owned the real estate of this property indicating that the current tenant was delinquent in rent and payment of other obligations. That they were planning on terminating the lease of the tenant and they wanted to know if my client was interested in purchasing that facility plus 2 others.

Hr. Tr. at 30:1-6. He further testified as to the assets involved in the transaction:

Q: oh I was gonna say does that include um, um beds um equipment, medical equipment and stuff like that?

A: Yes it is a lease so basically um all the assets of the facility including the real property the furniture fixtures everything in the building also the rights titles and interest to be able to be licensed and certified as a nursing home operator. When a lease is terminated those rights, titles, and interest to that goes back to the real estate owner um to protect that facility so that it can be operated by another party or sold. Um and in this case that's what happened once the landlord terminated the lease all those rights went back to Lebanon Real Estate, LLC., which was then sold to our client ah Cedarview Realty, LTV.

Id. at 31:15-26. Other than account receivables, Mr. McGrievy testified that the only other assets retained by Cedarview Health would have been some miscellaneous office equipment. *Id.* at 31:4-8. Mr. McGrievy also testified that November 18, 2010 was the "effective day of the takeover." *Id.* 33:13-14.

Mr. McGrievy also testified that there was a secondary reason why the agreement included provisions governing the number of employees to be maintained by Appellant. According to Mr. McGrievy, that clause was included in the agreement in order to avoid issues with the Worker's Adjustment and Retraining Notification Act. Hr. Tr. at 36:13-20. Further, the residents of the facility under the prior ownership remained (the day after the 'takeover' the same residents were at the nursing home). *Id.* at 38:6-16.

The Hearing Officer also heard testimony from Jan Gilliland, who worked for NRC Staffing ("NRC"). NRC had an agreement with Appellant to staff the facility. Hr. Tr. at 43:12-26; 44:1. Ms. Gilliland confirmed that money received after but had been earned prior to the

'takeover' was collected and provided to the prior operator; the prior operator had retained its account receivables. Further, evidence was presented that in November of 2010, out of the ninety-six (96) full time employees, Appellant had retained eighty-one (81). See Exhibit E. Also, evidence was presented indicating that Appellant held itself out as the successor on its web page. A screen capture of the web page indicated that Appellant held itself out as having fifty (50) years of experience.

Upon conclusion of the hearing, the Commission held that all of the 'trade or business' of Cedarview Health had been transferred to Appellant. The Commission determined that the 'trade or business' was a nursing home and that business was transferred. Furthermore, the Commission looked to the underlying lease agreement and noted that it spoke to all assets at the 115 Oregonia Road, Lebanon, Ohio address. Hence, the office equipment later claimed to be Cedarview Health's was not noted to be separate from the property leased. The Commission stated:

It would be contrary to the intent of Section 4141.24(F) to allow a transferee to escape liability that would be imposed to a successor in interest by claiming that the transferee did not in fact receive certain assets to which the transferee was entitled under the transferee's agreement with the transferor.

The Commission also reviewed the following language from O.A.C. §4141-17-01(A): "all real, personal and intangible property used in the operation of the trade or business and includes the employer's workforce." The Commission held that the Appellant could be held to be a successor even when less than one hundred percent (100%) of the employees remained with the successor. The Commission opined that the language of the code did not require 'all' of the workforce. Further, the Commission determined that the retention by Cedarview Health of its accounts receivables was irrelevant to the final determination. Accounts receivable were deemed not to be an item 'used in the operation of the trade or business' by the Commission. Therefore the Appellant was found to be a successor and the Commission mailed its decision of February 13, 2013 to that effect.

Appellant did appeal the Commission's Decision to this Court and the matter has now been fully briefed. This case is ready for review.

II. STANDARD OF REVIEW

R.C. 4141.26(D) sets forth the standard of review to be applied by a trial court when considering appeals of decisions rendered by the Commission relevant to the issues presented herein. R.C. 4141.26(D) provides, in part, the following:

After an appeal has been filed in the court, the commission, by petition, may be made a party to such appeal. Such appeal shall be given precedence over other civil cases. The court may affirm the determination or order complained of in the appeal if it finds, upon consideration of the entire record, that the determination or order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the determination or order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. An appeal may be taken from the decision of the court of common pleas of Franklin county.

This appeal also deals with the interpretation of a code and/or statute. It is well established that courts must accord due deference to an administrative agency's interpretations of its own administrative rules. *Leon v. Ohio Bd. Of Psychology*, 63 Ohio St.3d 683, 687, 590 N.E.2d 1223 (1992).

The General Assembly created these administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. See *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 614 N.E.2d 748, paragraph one of the syllabus. Thus, the Ohio Supreme Court has held that unless the construction is **unreasonable or repugnant** to that statute or rule, this court should follow the construction given to it by the agency. (Emphasis added.)

Salem v. Koncelik, 164 Ohio App.3d 597, 2005-Ohio-5537, 843 N.E.2d 799 (10th Dist.). From within this framework, this Court will render its decision.

III. ANALYSIS

This appeal clearly deals with the interpretation of a statute and the administrative code provisions associated with contribution rates. Here, Appellant contends that it is not a successor. The evidence establishes that at the time of the transfer, Cedarview Health had a negative balance and higher than normal contribution rates. Therefore, it is not in the best interest of Appellant to be a successor.

R.C. 4141.24(F) states as follows:

If an employer transfers all of its trade or business to another employer or person, the acquiring employer or person shall be the successor in interest to the transferring employer and shall assume the resources and liabilities of such transferring employer's account, and continue the payment of all contributions, or payments in lieu of contributions, due under this chapter.

If an employer or person acquires substantially all, or a clearly segregable and identifiable portion of an employer's trade or business, then upon the director's approval of a properly completed application for successorship, the employer or person acquiring the trade or business, or portion thereof, shall be the successor in interest. The director by rule may prescribe procedures for effecting transfers of experience as provided for in this section.

Appellant points out that the word 'all' is contained in the automatic successor paragraph, while 'substantially all' is contained in the voluntary second paragraph of the statute. Appellant reasons that the statute differentiates from 'all' and places a specific meaning to the word (i.e., all means all) given the purposeful use of the phrase 'substantially all' within the same statute. Because of this distinction, Appellant contends that 'all' of the business was not transferred because testimony indicates some office equipment was removed by Cedarview Health and Cedarview Health retained its account receivables.

According to the Commission, however, everything needed to run a licensed nursing home was provided to Appellant while Cedarview Health no longer conducted that business. Hence, 'all' of the business was transferred to Appellant. The account receivables are irrelevant to the ongoing 'trade or business.'

Ultimately, Appellant's assertion that 'all' means 'all' though simplistic, leads to an unreasonable conclusion. Taken to the extreme, when following Appellant's reasoning, if all but one pencil is transferred, then there is no automatic successor. Or, perhaps, more realistic, if all but one employee continues, even if that one employee left voluntarily to retire, there is no automatic successor. Given these situations, it was reasonable for the Commission to read the term 'all' as a modifier of 'trade or business.' Here, Cedarview Health did not continue in the nursing home business and ceased using the equipment and employees transferred to the Appellant. In effect, Appellant was transferred everything required in order to continue the business from Cedarview Health. The Commission's interpretation of the statute is not an unnatural or repugnant interpretation. Whereas, the Appellant's interpretation leads to unreasonable results.

Furthermore, the Commission held that the transferring documents in fact did give everything to the successor. The Commission determined that the agreement documents specifically afforded Appellant with the right to retain all of the equipment. Appellant's unilateral decision to allow Cedarview Health to keep some of the equipment, was within Appellant's purview to allow, and should not be an avenue for the Appellant to avoid becoming Cedarview Health's successor.

When construing a statute, the primary concern of the interpreting court is the intent of the General Assembly when enacting the provision.

In order to determine the legislature's intent, the court must look to the statute itself and, 'if such intent is clearly expressed therein, the statute may not be restricted, constricted, qualified, narrowed, enlarged or abridged[.]' In turn, a court must 'read words and phrases in context and construe them in accordance with rules of grammar and common usage.' A court, however, 'must keep in mind that a strong presumption exists against any construction which produces unreasonable or absurd consequences.' (Internal citations omitted.)

Roberts v. RMB Enters., 197 Ohio App.3d 435, 442, 2011-Ohio-6223, 967 N.E.2d 1263 (12th Dist.). The Commission's interpretation is not only rational but it helps to preserve the intent of the statute.

Further, when determining what is included in the phrase 'trade or business,' the Commission compared the prior version of O.A.C. 4141-17-01, which applied to Appellant's case, with its newer version. The newer version of O.A.C. 4141-17-01 reads:

4141-17-01. Automatic successorship

For the purposes of section 4141.24 of the Revised Code:

(A) "Trade or business" includes all real, personal and intangible property integral to the operation of the trade or business, and may include the employer's workforce as applicable.

The previous, older version that applies in this case reads:

(A) "Trade or Business" includes all real, personal and intangible property used in the operation of the trade or business and includes the employer's workforce.

When comparing the two sections, the Commission determined that the intent was that the word "all" spoke to the property used in the operation of the business, but did not address the 'employer's work force.' This interpretation also helps preserve the intent of the statutory language. If 'all' in the code is equivalent to all of the employer's workforce, then the employer's workforce becomes a new restrictive condition that is not contained within R.C. 4141.24(F).

This Court holds that, upon consideration of the entire record, the Commission's Decision is supported by reliable, probative, and substantial evidence and is in accordance with law.

IV. DECISION:

The Court hereby **AFFIRMS** the Decision mailed February 5, 2014.

THIS IS A FINAL APPEALABLE ORDER.

IT IS SO ORDERED.

JUDGE TIMOTHY S. HORTON

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Franklin County Court of Common Pleas


Date: 08-11-2014

Case Title: CEDARVIEW NURSING REHABILITATION CENTER -VS- OHIO
STATE DEPARTMENT JOB FAMILY SERVICE ET AL

Case Number: 14CV002540

Type: DECISION/ENTRY

It Is So Ordered.

A handwritten signature in black ink is written over a blue circular seal. The seal contains the text "FRANKLIN COUNTY OHIO" around the top and "ALL THINGS ARE POSSIBLE" around the bottom. The signature is written in a cursive style.

/s/ Judge Timothy S. Horton

Court Disposition

Case Number: 14CV002540

Case Style: CEDARVIEW NURSING REHABILITATION CENTER -
VS- OHIO STATE DEPARTMENT JOB FAMILY SERVICE ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 14CV0025402014-03-1999980000
Document Title: 03-19-2014-MOTION TO DISMISS
Disposition: MOTION RELEASED TO CLEAR DOCKET