

SANDRA KURT

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SUMMIT COUNTY
CLERK OF COURTS THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

FRED ZURZOLO,

Plaintiff-Appellant

vs.

**OHIO DEPT. OF PUBLIC SAFETY,
BUREAU OF MOTOR VEHICLES,**

Defendant-Appellee

CASE NO: CV-2015-11-5134

JUDGE McCARTY

JUDGMENT ENTRY

This matter is before the court on an administrative appeal related to the disqualification of Plaintiff Appellant, Fred Zurzolo's ("Appellant") commercial driver's license. ("CDL"). Appellant was notified on March 25, 2015 that his CDL was being disqualified after he plead guilty to Akron Municipal Ordinance 73.30-Leaving the scene of an accident. Appellant requested a formal hearing which was held on August 14, 2015. In the Report detailing his findings of fact and conclusions of law, the Hearing Examiner upheld the decision of the Ohio Bureau of Motor Vehicles ("BMV") to disqualify Appellant's CDL. Appellant appealed the Hearing Examiner's decision and on October 16, 2015, the Registrar of the BMV issued a Final Adjudication Order which adopted the Hearing Examiner's Findings and Conclusions. The Final

Adjudication Order also approved and confirmed the Hearing Examiner's Recommendation. Appellant timely filed this appeal on November 3, 2015.

STATEMENT OF CASE AND LAW

A. Factual Background

On or about July 3, 2014, Appellant was driving a commercial vehicle westbound on I-76 in Akron, Summit County, Ohio. (TR.5). A one-ton landscaping type truck struck Appellant from behind (TR.5). In turn, Appellant struck the vehicle in front of him. (TR.5). The landscaping truck failed to stop and exited the highway at the closest exit. (TR.5). Appellant decided to exit and follow the landscaping truck in an effort to obtain a license plate number. (TR. 5-6) A witness to the accident followed Appellant and pulled up next to him. (TR.6). The witness wrote down Appellant's license plate number, and Appellant provided his name and telephone number to the witness as well. (TR.6). When Appellant returned to the scene of the accident, he was unable to locate the car he struck. (TR.6).

Appellant returned to his place of employment and told his employer about the accident. (TR.6). Appellant's employer called the Akron Police Department the next day to report the accident. (TR.7-8). Appellant went to the traffic division of the Akron Police Department and was cited for hit/skip. (TR.8). Appellant eventually plead guilty to the hit/skip charge. (TR.8). As a result of the conviction, Appellant was notified by the BMV of the disqualification of his CDL pursuant to R.C.4506.15(A)(11) and R.C.4506.16(D)(1).

B. Standard of Review

Bureau of Motor Vehicles administrative appeals are governed by the standard of review set forth in R.C.119.12, which states in pertinent part:

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the

court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

Thus, the scope of the common pleas court's review of the BMV's order is limited to whether the order is (1) supported by reliable, probative and substantial evidence; and (2) in accordance with law. *Harris Group Home v. Ohio Dep't of Health*, 9th Dist. No. 21033, 2002-Ohio-5043, 2002 Ohio App. LEXIS 5064, ¶8 quoting *Bottoms Up, Inc. v. Liquor Control Comm.* (1991), 72 Ohio App.3d 726, 728, 596 N.E.2d 475. The Ohio Supreme Court has defined the evidence required by R.C. 119.12 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 ¶8 quoting *Our Place, Inc. v. Ohio Liquor Comm.*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992).

In undertaking its review, the common pleas court must give deference to the agency's resolution of evidentiary conflicts, but the findings of the agency are by no means conclusive. *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 470, 1993 Ohio 182, 613 N.E.2d 591 (1993). The common pleas court must presume the agency's findings of fact are correct and defer to them unless the court determines that the findings "are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Id.* at 471. "With respect to purely legal questions, however, the court is to exercise independent judgment." *VFW Post 8586 v. Ohio Liquor Control Comm.*, 83 Ohio St. 3d 79, 82, 1998 Ohio 181, 697 N.E.2d 655 (1998).

C. Analysis

The court has reviewed the transcript and record of the administrative proceedings as well as the Final Adjudication Order and briefs submitted by the parties. Appellant presents two assignments of error for the court's consideration. First, Appellant argues "Failure to Properly Institute Disqualification" and second, Appellant argues "Failure to Establish that the Appellant Violated R.C. 4549.03 or a Municipal Ordinance "substantially similar thereto".

As to the first argument, Appellant argues that the notice he received failed to comply with the requirement of O.A.C.4501:1-1-24(B) which states: "The notice shall also inform the driver that at the hearing he may appear in person or by his attorney or may present his position, argument, or contentions in writing and that at the hearing he may present evidence and examine witnesses appearing for and against him." In fact, the first notice of disqualification did not contain all of the requisite language; however, the notice of hearing dated April 22, 2015 did contain the language.

In the Final Adjudication Order, the Registrar rejected Appellant's argument that the BMV issued a defective notice. The Registrar concurred with the Hearing Examiner's conclusion, and found that Appellant was represented at all stages of the proceedings and has shown no prejudice related to any defects in the notice. Upon review, this court finds, with respect to the notice, the Final Adjudication Order is in accordance with law and supported by reliable, probative and substantial evidence. Appellant's first assignment of error is overruled.

Appellant's next argument is that the record is devoid of evidence that Appellant was convicted of a violation of R.C. 4549.02, 4549.03, or a substantially similar law. Consequently, Appellant contends that his disqualification was not proper under R.C. 4506.16(D)(1). Appellant centers his argument on alleged "impermissible fact-finding" by the Hearing Examiner.

Appellant asserts that the Hearing Examiner reviewed Akron City Code 73.30¹ despite the fact that a copy of the ordinance was never entered into evidence at the hearing, and thereby considered facts not in evidence.

This argument raised by Appellant is a purely legal question. The law is not a fact required to be admitted into evidence in a judicial or quasi-judicial proceeding. Akron City Code 73.30 is referenced in the record. The citation for violating Akron City Code 73.30, and the Journal Entry of the Akron Municipal Court in Case No. 14TRD13273, wherein Appellant plead no contest and was found guilty of the charge, are part of the record. The Hearing Examiner was permitted to consider the substance of Akron City Code 73.30, regardless of whether a copy of the ordinance was presented as an exhibit, just as this court can consider that law without viewing it as evidence. Appellant has not provided any legal authority for the proposition that the ordinance itself was required to be submitted as evidence. The court finds that the administrative agency's consideration of the ordinance was not only in accordance with the law, but necessary in resolving a question of law.

Appellant also asserts a related argument that the Hearing Examiner, and subsequently the Registrar, could not have concluded that Akron City Code 73.30 is substantially similar to R.C. 4549.02 or 4549.03. R.C. 4506.16 states, in pertinent part:

(D) The registrar of motor vehicles shall disqualify any holder of a commercial driver's license or commercial driver's license temporary instruction permit, or any operator of a commercial motor vehicle for which a commercial driver's license or permit is required, from operating a commercial motor vehicle as follows:

(1) Upon a first conviction for a violation of any provision of divisions (A)(2) to (12) of section 4506.15 of the Revised Code or a similar law of another state or a foreign jurisdiction...

¹ Referenced in the Hearing Examiner's Report and Recommendation as "73.20(A)", in an apparent typographical error.

R.C. 4506.15(A)(11) states a prohibition where a person who holds a commercial driver's license [f]ail[s] to stop after an accident in violation of sections 4549.02 to 4549.03 of the Revised Code.

The record reflects that the Hearing Examiner did compare Akron City Code 73.30 to R.C. 4549.03, and found that it applied as a similar law of a foreign jurisdiction. In finding that Akron City Code 73.30 was the law of a "foreign jurisdiction," the Hearing Examiner looked to R.C. 4506.01(U), which defines a foreign jurisdiction, as it applies to Chapter 4506 of the Ohio Revised Code, as "any jurisdiction other than a state." In finding that the State established that Appellant was convicted of a law similar to R.C. 4549.03, the Hearing Examiner concluded that the Registrar properly issued a notice disqualifying Appellant's commercial driving privilege under R.C. 4506.16(D)(1).

In the Final Adjudication, the Registrar agreed with the claim in Appellant's Objection to the Report and Recommendation, that an Akron ordinance is not law of a foreign jurisdiction. Appellant's argument on that point consists of a single sentence, devoid of any basis or explanation, in a footnote. The basis for the Registrar's finding that an Akron ordinance is not law of a foreign jurisdiction under R.C. 4506.16(D)(1) is equally unclear and without explanation. The Hearing Examiner cited to a competent authority for his finding: R.C. 4506.01(U), defining "foreign jurisdiction". Neither the Appellant nor the Registrar stated a basis for the concluding the contrary.

Nevertheless, the Registrar cited R.C. 4506.16(E) as the appropriate basis for considering Appellant's conviction under Akron City Code 73.30, as grounds for disqualification of Appellant's CDL under R.C. 4506.16 R.C. and 4506.15(A)(11). R.C. 4506.16(E) states:

For the purposes of this section, conviction of a violation for which disqualification is required includes conviction under any municipal ordinance that is substantially similar to any section of the Revised Code that is set forth in division (D) of this section and may be evidenced by any of the following:

(1) A judgment entry of a court of competent jurisdiction in this or any other state...

The only notable distinction in the analysis is the wording “similar” as compared to “substantially similar”. The court finds, in light of the comparison of the statutes at issue, the distinction is of no consequence.

The Registrar found R.C. 4506.16(E) applicable to R.C. 4506.16(D)(1), which requires disqualification of a commercial driver’s license upon a first conviction for a violation of any provision of divisions R.C. 4506.15(A)(2) to (12) for a period of one year. The Registrar noted that the Hearing Examiner found Akron City Code 73.30 to R.C. 4549.03 to be similar. The Registrar also independently indicated that a comparison of Akron City Code 73.30 to R.C. 4549.03 shows that the laws are substantially similar. Further, the record clearly reflects Appellant’s citation and the subsequent judgment entry for violation of Akron City Code 73.30

This court finds that Akron City Code 73.30 to R.C. 4549.03 are similar laws as contemplated by R.C. 4506.16(D)(1) and substantially similar as contemplated by R.C. 4506.16(E). The court resolves this legal question by reviewing the substance and intent of the laws, the prohibited conduct, and the penalty for violating either law. Both Akron City Code 73.30 and R.C. 4549.03 seek to codify the obligation of a driver involved in an accident or collision to stop immediately at the scene of the accident, thereby instituting a criminal penalty for a “hit and run.” Additionally, both laws require the driver to stop “immediately” to provide his or her relevant identification and contact information. Further, both provide for the same penalty range for a violation, as they are both misdemeanors of the first degree. It also appears, based on the undisputed facts in the record, that Appellant’s actions of leaving the scene without immediately stopping would violate R.C. 4549.03 as well.

Upon review, this court finds that Appellant has not presented any basis in law, or demonstrated error upon the record, to support the contention that the BMV failed to establish that Appellant violated R.C. 4549.03 or a municipal ordinance substantially similar thereto. The record contains reliable, probative and substantial evidence to support the Final Adjudication Order. Further, this court finds that the Final Adjudication Order is in accordance with law. Appellant's second assignment or error is overruled.

CONCLUSION

After reviewing the record and applicable law, the court finds that the Final Adjudication Order is supported by the preponderance of substantial, reliable and probative evidence and in accordance with the law. The Final Adjudication Order of the Ohio Bureau of Motor Vehicles is affirmed.

This is a final and appealable order and there is no just cause for delay.

IT IS SO ORDERED.



JUDGE ALISON MCCARTY

Pursuant to Civ. R. 58(B), the Clerk of Courts shall serve upon all parties notice of this judgment and its date of entry on the journal.

cc: Attorney D. Timothy Huey
Attorney Peter P. Lorenz
Assistant Attorney General Christie Limbert