

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Enterman Enterprises, LLC,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-273 (C.P.C. No. 11CVF-10-13192)
Ohio Department of Health,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on December 31, 2012

Cicero Law Office, LLC, and Lori R. Cicero, for appellant.

Michael DeWine, Attorney General, Stacy L. Hannan and Angela M. Sullivan, for appellee.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Appellant, Enterman Enterprises, LLC, dba Ziggy's Ritz Night Club ("Ziggy's"), appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of appellee, the Ohio Department of Health, and its designee, the Dayton-Montgomery County Public Health Department ("Montgomery County"), finding Ziggy's in violation of Ohio's Smoke Free Workplace Act. Because the trial court did not abuse its discretion in finding reliable, probative, and substantial evidence to support the administrative decision, we affirm that judgment.

I. Factual and Procedural Background

{¶ 2} Ohio's Smoke Free Workplace Act, R.C. Chapter 3794, prohibits proprietors of public places or places of employment from permitting smoking in those places. R.C.

3794.02(A). It also prohibits the presence of ashtrays in any of those places. R.C. 3794.06(A).

{¶ 3} On December 21, 2009, Montgomery County received a complaint that people were smoking in Ziggy's, a bar in Dayton, Ohio. As a result, Montgomery County opened an investigation. Shortly thereafter, Andrew Evans and Jason Dreler, registered sanitarians for Montgomery County, inspected Ziggy's as part of that investigation. Evans and Dreler walked into Ziggy's and observed several patrons smoking in the bar. They also observed ashtrays set up around the bar in various locations. They remained in the bar for 15 minutes and did not observe any bar employee ask the patrons to stop smoking or to take their cigarettes outside.

{¶ 4} Based on those observations, Montgomery County found that Ziggy's violated Ohio's Smoke Free Workplace Act by permitting smoking in prohibited areas ("smoking violation") and by allowing the presence of ashtrays ("ashtray violation"). Because Ziggy's had prior violations, and because this violation was determined to be intentional, Montgomery County imposed a \$5,000 fine for these violations. Ziggy's requested and received an administrative review to contest the violations.

{¶ 5} At the hearing, Evans testified to the above version of events. Elizabeth Enterman, Ziggy's owner, testified that her bar has a no-smoking policy and has an area outside the bar for people to smoke. She also testified that there are no ashtrays in her bar for patrons. One of the bartenders working at the bar on the night of the investigation testified that she observed people smoking inside the bar. She asked them to put the cigarettes out before the investigators arrived but the smokers refused. (Tr. 41.)

{¶ 6} Based on the evidence presented at the hearing, the hearing examiner concluded that Ziggy's violated the Smoke Free Workplace Act by permitting smoking in prohibited areas and by allowing the presence of ashtrays. However, the hearing examiner found insufficient evidence to conclude that the violations were intentional. Accordingly, the hearing examiner recommended a \$2,500 fine for these violations. Appellee's director approved the hearing examiner's recommendations and the Franklin County Court of Common Pleas affirmed that decision.

{¶ 7} Ziggy's appeals and assigns the following errors:

I. The Ohio Department of Health failed to establish by a preponderance of the evidence that the proprietor of Ziggy's permitted smoking in violation of Ohio Revised Code 3794.

II. The Ohio Department of Health failed to establish by a preponderance of the evidence that the proprietor of Ziggy's failed to remove ashtrays and/or smoking receptacles used for disposing of smoking materials from a public place.

II. Standard of Review

{¶ 8} This appeal is governed by R.C. 119.12. R.C. 3794.09(C); *The Boulevard v. Ohio Dept. of Health*, 10th Dist. No. 09AP–837, 2010-Ohio-1328, ¶ 7. Therefore, the trial court reviews the agency's order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. Determining whether an agency order is supported by reliable, probative, and substantial evidence is essentially a question of the presence or absence of the requisite quantum of evidence. In undertaking this hybrid form of review, the trial court must give due deference to the administrative resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110-11 (1980).

{¶ 9} On appeal to this court, the standard of review is more limited. Unlike the common pleas court, the court of appeals does not determine the weight of the evidence. In reviewing the common pleas court's determination that an agency order is or is not supported by reliable, probative, and substantial evidence, the appellate court's role is limited to determining whether the common pleas court abused its discretion. *Ace Ventures L.L.C. v. Ohio Dept. of Transp.*, 10th Dist. No. 03AP-280, 2003-Ohio-6556, ¶ 6. On questions of law, the court of appeals' review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339 (1992), paragraph one of the syllabus.

III. First Assignment of Error—R.C. 3794.02 Smoking Violation

A. Did Ziggy's Permit Smoking?

{¶ 10} Ziggy's argues in this assignment of error that there was insufficient evidence in the record to prove that it permitted smoking. We disagree.

{¶ 11} To prove a violation of R.C. 3794.02(A), Montgomery County had to prove by a preponderance of the evidence that Ziggy's permitted smoking. *Pour House, Inc. v. Ohio Dept. of Health*, 185 Ohio App.3d 680, 2009-Ohio-5475, ¶ 18–20 (10th Dist.). A proprietor permits smoking when the proprietor affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent patrons from smoking, such as by posting no-smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. *Id.*, citing *Traditions Tavern v. Columbus*, 171 Ohio App.3d 383, 2006-Ohio-6655 (10th Dist.). Whether an owner of an establishment took reasonable measures to prevent its patrons from smoking depends on the particular circumstances and must be assessed on a case-by-case basis. *Pour House* at ¶ 18.

{¶ 12} Here, Evans' observations are reliable, probative, and substantial evidence that Ziggy's permitted smoking. He observed several patrons smoking for 15 minutes without being asked to put the cigarettes out. The smokers were openly smoking in close proximity to the bar and the bartender and Evans wrote in his report that the smokers were visible as soon as he walked into the bar. Based on similar facts, this court affirmed a smoking violation in *Parker's Tavern v. Ohio Dept of Health*, 195 Ohio App.3d 22, 2011-Ohio-3598, ¶ 15 (10th Dist.). Here, Evans stated that no one from the bar asked the smokers to put out their cigarettes for the 15 minutes that he was inside the bar. Moreover, the bartender's testimony that she had previously asked the patrons to stop smoking or to take the cigarettes outside is not determinative. *Id.* at ¶ 16. After considering all the circumstances, we cannot conclude that the trial court abused its discretion in finding reliable, probative, and substantial evidence to support the administrative decision.

B. Did the County's Investigation Comply with Ohio Adm.Code 3701-52-08(D)?

{¶ 13} Ziggy's also argues in this assignment of error that the Montgomery County inspectors did not conduct interviews as required by Ohio Adm.Code 3701-52-08(D) as part of its investigation. We disagree.

{¶ 14} Ohio Adm.Code 3701-52-08(D)(2) provides, in pertinent part:

The Ohio department of health may, in its discretion, investigate a complete report of violation or promptly transmit the report of violation to a designee in the

jurisdiction where the reported violation allegedly occurred for investigation and enforcement. If the report of violation is transmitted to a designee, the designee shall investigate all complete reports of violation. For the purposes of this chapter, an investigation may include but is not limited to:

- (a) A review of report of violation;
- (b) A review of any written statement or evidence contesting the report of violation;
- (c) Telephone or on-site interviews; and,
- (d) On-site investigations.

{¶ 15} Despite the permissive nature of this language, the next portion of the administrative code appears to make these investigative activities, including the interviews, mandatory in certain situations:

(3) Prior to issuing a proposed civil fine for a violation of Chapter 3794. of the Revised Code and this chapter, the department's investigation shall include all investigation activities set forth in paragraphs (D)(2)(a) to (D)(2)(d) of this rule.

{¶ 16} "Interview" is not defined by these regulations. *Parker's Tavern v. Ohio Dept. of Health*, 10th Dist. No. 10AP-968, 2011-Ohio-5767, ¶ 8 ("*Parker's Tavern II*"). When a statute or regulation fails to ascribe a definition to a word used, courts resort to the common, everyday meaning of the word. *Am. Fiber Systems, Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶ 24. Pursuant to Webster's Third New International Dictionary (1966), an "interview" is defined as "a meeting face to face: a private conversation; a formal meeting for consultation." Merriam-Webster's Online Dictionary further defines an "interview" as a "meeting at which information is obtained (as by a reporter, television commentator, or pollster) from a person." See Encyclopedia Britannica Company, Merriam-Webster, <http://www.merriam-webster.com/dictionary/interview> (accessed Dec. 28, 2012).

{¶ 17} We note that the administrative code does not describe who must be interviewed in an investigation or what questions must be asked. Here, the investigators' communication with the bartender was not extensive. Nevertheless, the investigators did

meet with the bartender in an attempt to gather information and did talk to her at least about the ashtrays in the bar. That communication is sufficient to constitute an interview as that term is commonly understood. *Parker's Tavern II* at ¶ 9-10.

{¶ 18} In conclusion, the trial court did not abuse its discretion by finding reliable, probative, and substantial evidence to support the smoking violation. Accordingly, we overrule Ziggy's first assignment of error.

IV. Second Assignment of Error—R.C. 3794.06(B) Ashtray Violation

{¶ 19} R.C. 3794.06(B) requires that proprietors remove ashtrays in any area where smoking is prohibited. Since R.C. 3794.02 prohibits smoking inside Ziggy's bar, any ashtrays inside the bar must be removed. Ziggy's contends that it removed ashtrays from its establishment, and therefore, it did not violate R.C. 3794.06(B). We disagree.

{¶ 20} Evans testified that during his 15-minute investigation of Ziggy's, he observed a number of ashtrays in the bar, both glass ashtrays and Altoid tins. Ziggy's argues that there was no evidence that the bar failed to remove the ashtrays. We disagree. During his time inside the bar, Evans did not see any employee remove the ashtrays from the bar. According to Evans, the bartender knew the ashtrays were there, as she disputed that one of the ashtrays was glass. Regardless of how the ashtrays came to be inside the bar, Ziggy's had an obligation to remove them. *Trish's Café & Catering, Inc. v. Ohio Dept of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 24-25 (10th Dist.) (ashtray violation supported by evidence that bartender acquiesced to the presence of ashtrays and failed to remove them). The trial court did not abuse its discretion by concluding that Ziggy's ashtray violation was supported by reliable, probative, and substantial evidence. We overrule second assignment of error.

V. Conclusion

{¶ 21} Having overruled Ziggy's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
