

[Cite as *Tri Cty. Beverage v. Bur. of Environmental Health*, 2013-Ohio-2983.]
IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tri County Beverage,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-886 (C.P.C. No. 12CVF-04-5207)
Ohio Department of Health,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on July 9, 2013

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

Michael DeWine, Attorney General, and Frank S. Carson, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Tri County Beverage, appeals the judgment of the Franklin County Court of Common Pleas, which affirmed an administrative decision by appellee, Ohio Department of Health, and its designee, the Seneca County General Health District ("Health District"), finding appellant in violation of the Ohio Smoke-Free Workplace Act ("Smoke-Free Act"). For the following reasons, we reverse the judgment of the trial court.

I. BACKGROUND

{¶ 2} The Smoke-Free Act requires businesses to prohibit smoking in public places under its control. R.C. 3794.02(A). It also prohibits the presence of ashtrays in

any of those places. R.C. 3794.06(B). The law is enforced by appellee and its designee, the Health District.

{¶ 3} The Health District received a complaint that appellant, a bar in Seneca County, Ohio, was violating the Smoke-Free Act because its proprietor, Richard Miller, kept ashtrays in a storage room for use by customers in a prohibited area. Matt Beckman, a sanitarian for the Health District, went to the bar to investigate, discovered that there were two coffee cans in the storage room, and one of the cans contained cigarette butts and ashes. Based on Beckman's investigation, the Health District determined that appellant violated the Smoke-Free Act by failing to remove ashtrays from an area where smoking is prohibited, as required by R.C. 3794.06(B), and a \$5,000 fine was imposed because the Health District found that the bar intentionally violated the Smoke-Free Act.

{¶ 4} Appellant requested an administrative hearing to contest the violation and fine, as provided for in Ohio Adm.Code 3701-52-08(F)(2)(a). At the hearing, Beckman testified about his investigation of appellant, which took place around 5:30 p.m. on Thursday, February 17, 2011. Beckman noted that he went to the bar to investigate the complaint about illegal ashtrays being kept in a storage room. Upon entering the bar, Beckman smelled smoke and saw two bartenders and eight patrons. Beckman indicated that he needed to go to the storage room, and one of the bartenders told him that he was not allowed because money was kept there. After Beckman informed her that to prevent him from looking into the storage room would be impeding his investigation, the bartender acquiesced and let Beckman into the storage room. Once in the storage room, Beckman saw two coffee cans with lids on them. He opened the lid of one coffee can and saw that it contained cigarette butts and ashes. Beckman determined that appellant violated the Smoke-Free Act by keeping a coffee can with cigarette butts and ashes in the bar. Beckman testified that he was at the bar for a total of five minutes and that he never asked Miller or his staff any questions.

{¶ 5} Kathy Myers testified that she is employed as a bartender by appellant and was working when Beckman arrived for his investigation. She indicated that the coffee

cans Beckman found in the storage room were provided for patrons to use as ashtrays when they smoked outside and that the public does not have access to the storage room. Myers said that cans were placed outside when the bar opened and in the storage room at closing time. Myers noted that the bar opens around 6:30 or 7:00 a.m. and closes at 1:00 a.m. on Monday through Saturday and at midnight on Sunday. She indicated that the ashes and cigarette butts from the coffee cans are thrown in a dumpster in the morning before being set out, and she noted that staff does not go to the dumpster at night for safety reasons. At another point, Myers testified that the coffee can found by Beckman was in the storage room because no one had asked to use it, and the staff usually waits "until somebody asks for [the coffee can] and wants to go out and smoke. And then we'll get it out and set them outside." (Tr. 48.) Lastly, Myers noted that Beckman did not ask the bar staff any questions while he was there.

{¶ 6} Miller testified that the coffee cans used as ashtrays are stored inside the bar because he did not want to leave them unattended outside when the bar was closed. He also said that his understanding of the law was that he could store ashtrays in a bar area that had no public access, and he believed he was complying with the Smoke-Free Act. Miller further testified that his staff would have placed the coffee can, found by Beckman, outside the bar around 6:00 p.m. on the day of the investigation because business would have started to pick up by then.

{¶ 7} During closing argument, counsel for appellant asserted that the Smoke-Free Act violation levied against it cannot stand because the bar was in compliance with the law and because Beckman did not conduct an interview, as required by Ohio Adm.Code 3701-52-08(D)(2)(c) and (3), during the investigation. The hearing examiner issued a recommendation in which she concluded that appellant violated the Smoke-Free Act and that Beckman complied with his duty to interview. The hearing examiner also recommended that appellant be fined \$5,000 for intentionally violating the Smoke-Free Act.

{¶ 8} Appellant objected to the hearing examiner's conclusion that Beckman conducted an interview during his investigation. Appellant also objected to the finding

that the record established that the bar violated the Smoke-Free Act and to the determination that the bar intentionally violated the law.

{¶ 9} Appellee initially issued an adjudication order adopting the hearing examiner's recommendation, but it withdrew the order because it did not consider appellant's objections. Appellee subsequently issued an adjudication order overruling the hearing examiner's decision to find that appellant's violation was intentional and reduced the \$5,000 fine to \$2,500.

{¶ 10} In an appeal to the trial court, appellant again argued that it could not be penalized under the Smoke-Free Act because it complied with the law and that Beckman failed to comply with his duty to interview. The trial court concluded that appellant violated the Smoke-Free Act, pursuant to R.C. 3794.06(B), by failing to remove ashtrays from an area where smoking is prohibited and concluded that the Ohio Administrative Code did not require Beckman to conduct an interview during his investigation. Alternatively, the trial court determined that Beckman's contact with the bar staff constituted an interview. Therefore, the trial court affirmed appellee's adjudication order.

II. ASSIGNMENT OF ERROR

{¶ 11} Appellant filed a timely notice of appeal and assigns the following as error:

The common pleas court abused its discretion in finding there was sufficient evidence to support a finding of violation of R.C. 3794.06(B) and the trial court's decision was contrary to the law.

III. DISCUSSION

{¶ 12} In its single assignment of error, appellant argues that the trial court erred by affirming appellee's determination that it violated the Smoke-Free Act. We agree.

{¶ 13} We begin by setting forth the standard for reviewing decisions from an administrative agency, such as appellee. An agency's decision is subject to review by the common pleas court. R.C. 119.12. During that review, the common pleas court considers the entire record to determine whether reliable, probative, and substantial evidence supports the agency's decision and the decision is in accordance with law.

Univ. of Cincinnati v. Conrad, 63 Ohio St.2d 108, 110-11 (1980). The common pleas court's "review of the administrative record is neither a trial de novo nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative decision is in accordance with law. *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993).

{¶ 14} The common pleas court's decision is subject to review by the appellate court. *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 9 (10th Dist.). The appellate court's review is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993). The appellate court is to determine only whether the common pleas court abused its discretion. *Id.*; *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983) (noting that an abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable). Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court. *Pons* at 621. An appellate court, however, has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15 (10th Dist.).

{¶ 15} With that standard in mind, we consider the merits of appellant's appeal. Appellant first contends that the trial court's decision is contrary to law because it erroneously concluded that Beckman conducted an interview during his investigation. Although appellant labels the trial court's decision on that issue as being contrary to law, we have previously reviewed that issue under an abuse of discretion standard. *Liberty*

Inn v. Ohio Dept. of Health, 10th Dist. No. 12AP-574, 2013-Ohio-1018, ¶ 12-19. Therefore, we must determine whether the trial court abused its discretion in concluding that Beckman conducted an interview during his investigation.

{¶ 16} 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.

{¶ 17} In *Enterman Ents., LLC v. Ohio Dept. of Health*, 10th Dist. No. 12AP-273, 2012-Ohio-6230, ¶ 17, this court held that, despite the permissive nature of the language in Ohio Adm.Code 3701-52-08(D)(2)(c), the next portion of the administrative code makes these investigative activities, including the interviews, mandatory in certain situations. Specifically, Ohio Adm.Code 3701-52-08(D)(3) states:

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.

{¶ 18} Accordingly, Ohio Adm.Code 3701-52-08(D)(2)(c) and (3) imposed a duty on Beckman to interview because a penalty under the Smoke-Free Act was levied against appellant. Consequently, the trial court erred by concluding otherwise, and we next consider appellant's argument that Beckman did not comply with that duty.

{¶ 19} This court has defined "interview" as a " 'meeting at which information is obtained.' " *Parker's Tavern v. Ohio Dept. of Health*, 10th Dist. No. 10AP-968, 2011-Ohio-5767, ¶ 8, quoting *Merriam-Webster's Online Dictionary* (2013), <http://www.merriam-webster.com/dictionary/interview> (accessed February 27, 2013). There is no requirement that the interview be extensive. *Id.* at ¶ 10. This court has recognized that an interview occurs, pursuant to Ohio Adm.Code 3701-52-08(D)(2)(c) and (3), when an investigator asks the bar owner or staff questions relative to his investigation, and the bar owner or staff provides a response to those questions.

{¶ 20} Apart from the duty to interview, Ohio Adm.Code 3701-52-08(D)(2)(d) and (3) authorizes an investigator to conduct an on-site investigation of a bar. "Investigation" is not defined by these administrative code sections. When a statute or administrative rule fails to ascribe a definition to a word, courts resort to the common, everyday meaning of the word. *Id.* at ¶ 8. The term "investigation" has been defined as " 'detailed examination * * * searching.' " *State ex. rel. Cleveland Police Patrolmen's Assn. v. Cleveland*, 122 Ohio App.3d 696, 700 (8th Dist.1997), quoting Webster's Third New International Dictionary 1189 (1993). It is undisputed that Beckman was conducting an on-site investigation when he went to the bar to search for evidence of a Smoke-Free Act violation.

{¶ 21} Appellant argues that Beckman had no exchange with the bar staff that would constitute an interview, as that term is commonly understood. Appellee contends that Beckman's exchange with the bar staff about gaining access to the storage room constitutes an interview. Appellee relies on *Enterman Ents.*, which held that "the administrative code does not describe * * * what questions must be asked." *Id.* at ¶ 17. But, as above, there must still be some form of questioning from an investigator for an exchange with the bar staff or owner to constitute an interview.

{¶ 22} Beckman sought access to the storage room to see whether appellant was unlawfully storing ashtrays there, as had been reported to the Health District. He did not engage in any discussion, or pose any question to the bar staff during this time, but was instead in search for evidence of a Smoke-Free Act violation. Therefore, we find

that Beckman's demand to enter the storage room was part of his investigation rather than an interview. Beckman acknowledged as such when he indicated that any attempt to keep him out of the storage room would be impeding his investigation. We also find nothing in the record indicating that Beckman conducted an interview at any other time while at the bar. Beckman did not request any information about his findings in the storage room, and he testified that he did not ask a single question of anyone during the five minutes he was in the bar.

{¶ 23} For all these reasons, we hold that the trial court abused its discretion by concluding that Beckman complied with his duty to interview, pursuant to Ohio Adm.Code 3701-52-08(D)(2)(c) and (3). Pursuant to Ohio Adm.Code 3701-52-08(D)(3), appellee lacked authority to impose a penalty on appellant for the smoking violation because no interview was conducted. Therefore, we need not consider appellant's argument that the trial court abused its discretion in finding there was sufficient evidence to establish that appellant violated R.C. 3794.06(B). Consequently, we sustain in part and render moot in part appellant's single assignment of error.

IV. CONCLUSION

{¶ 24} In summary, we sustain in part and render moot in part appellant's single assignment of error. Having sustained the assignment of error in part, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter to that court for proceedings consistent with this decision.

*Judgment reversed;
cause remanded.*

KLATT, P.J., and BROWN, J., concur.
