

[Cite as *Liberty Inn v. Ohio Dept. of Health*, 2013-Ohio-1018.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Liberty Inn,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-574 (C.P.C. No. 11CVF-9-11083)
Ohio Department of Health,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on March 19, 2013

Diehl & Hubbell, LLC, and Martin E. Hubbell, for appellant.

Michael DeWine, Attorney General, Angela M. Sullivan, and Catherine J. Calko, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Appellant, Liberty Inn ("Liberty Inn"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed an administrative decision by appellee, the Ohio Department of Health ("ODH"), and its designee, the Butler County Board of Health ("Board of Health"), finding that Liberty Inn violated the Ohio Smoke-Free Workplace Act ("Smoke-Free Act") and imposing a fine for that violation. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} The Smoke-Free Act requires businesses to prohibit smoking in public places under its control. R.C. 3794.02(A). The law is enforced by ODH and its designee, the Board of Health. R.C. 3794.07.

{¶ 3} The Board of Health received a complaint in October 2010 that Liberty Inn, a bar in Butler County, Ohio, was violating the Smoke-Free Act because its proprietor, Brian Rauch, allowed patrons to smoke inside. Jennifer Gruesser, a sanitarian for the Board of Health, went to Liberty Inn on November 5, 2010 and discovered patrons smoking inside the bar. Based on Gruesser's investigation, the Board of Health determined that Liberty Inn violated the Smoke-Free Act, and a \$2,500 fine was imposed against Liberty Inn for that violation.

{¶ 4} Liberty Inn 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, Gruesser testified about her November 5, 2010 investigation. She noted that she saw two patrons smoking inside Liberty Inn and that nobody from the bar approached the smokers while she was there. She indicated to the bartender that she wanted to talk with Rauch, and the bartender said that Rauch "had just gotten up out of his seat and would be back." (Tr. 12.) Gruesser spoke with Rauch when he returned, and their conversation lasted for "a couple minutes." (Tr. 16.) She asked him questions about his duty to prohibit smoking inside his bar. Rauch told her that he understood his responsibilities under the Smoke-Free Act, and that he has no-smoking signs posted in the bar. He also said that he asks patrons who smoke inside the bar to go outside to an area designated for smoking. Lastly, Gruesser testified that she did not ask Rauch specifically about the two smokers she saw in the bar because he provided all the information she needed for her investigation.

{¶ 5} Rauch testified, without providing details, that he spoke with Gruesser about how he handled smokers in the bar. He also testified that, before Gruesser's arrival, he approached the two patrons who were smoking inside the bar and asked them to smoke outside. He said that the patrons refused his request and continued to

smoke in the bar. Lastly, he testified that he did not tell Gruesser that he previously confronted the two smokers.

{¶ 6} During closing argument, Liberty Inn's attorney contended that the bar could not be penalized under the Smoke-Free Act because Gruesser did not comply with her obligation to conduct interviews, pursuant to Ohio Adm.Code 3701-52-08(D)(2)(c) and (3), during her investigation. The hearing examiner issued a recommendation in which he concluded that Liberty Inn violated the Smoke-Free Act, but did not address whether Gruesser conducted interviews in compliance with the administrative code. Liberty Inn objected to the recommendation based on there being no decision on that issue. ODH issued an adjudication order overruling Liberty Inn's objections and adopting the hearing examiner's recommendation.

{¶ 7} In an appeal to the trial court, Liberty Inn again argued that it could not be penalized under the Smoke-Free Act because Gruesser failed to conduct interviews during her investigation. The trial court concluded that "Gruesser's communications with [Liberty Inn's] owner and the bartender were sufficient to constitute 'interviews.'" (June 8, 2012 Judgment Entry, 6.) Therefore, the court affirmed ODH's adjudication order.

II. ASSIGNMENT OF ERROR

{¶ 8} Liberty Inn filed a timely notice of appeal and assigns the following as error:

The trial court abused its discretion when it held that Appellee's designee properly conducted interviews pursuant to Ohio Adm.Code 3701-52-08(D)(2).

III. DISCUSSION

{¶ 9} In its single assignment of error, Liberty Inn argues that the trial court abused its discretion when it concluded that Gruesser satisfied her obligation to interview during the November 5, 2010 investigation. We disagree.

{¶ 10} We begin by setting forth the standard for reviewing decisions from an administrative agency, such as ODH. 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).

{¶ 11} The common pleas court's decision is subject to review by the appellate court. See *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 the 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 the common pleas court or the administrative agency. *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.).

{¶ 12} With that standard in mind, we consider the merits of Liberty Inn's appeal. Liberty Inn does not contest ODH's finding that it violated the Smoke-Free Act on November 5, 2010. Liberty Inn only claims, as we have already noted, that the trial

court abused its discretion by concluding that Gruesser satisfied her obligation to interview during her investigation on that date. Liberty Inn contends that we must invalidate the penalty levied against it because of Gruesser's failure to interview.

{¶ 13} Ohio Adm.Code 3701-52-08(D)(2)(c) authorizes a sanitarian investigating a smoking violation to conduct "[t]elephone or on-site interviews." Ohio Adm.Code 3701-52-08(D)(3) makes the interview mandatory. 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).

{¶ 14} Liberty Inn first challenges the trial court's decision that Gruesser's conversation with Rauch was an interview. The evidence establishes that Gruesser met with Rauch to ask him questions about his duty to prohibit smoking inside his bar and Rauch provided answers to those questions, as set forth previously. Because information was requested, and obtained, when Gruesser spoke with Rauch, we conclude, pursuant to *Parker's Tavern*, that their conversation was an interview for purposes of Ohio Adm.Code 3701-52-08(D)(2)(c) and (3).

{¶ 15} Liberty Inn contends then that, even if Gruesser did interview Rauch, it was inadequate because it was brief. However, there is no requirement that the interview be "extensive." *Id.* at ¶ 10. Liberty Inn additionally asserts that Gruesser was required to ask Rauch about the smoking violation she observed. "[T]he administrative code does not describe * * * what questions must be asked" during an interview. *Enterman Ents., LLC v. Ohio Dept. of Health*, 10th Dist. NO. 12AP-273, 2012-Ohio-6230, ¶ 17. In *Enterman*, this court concluded that an interview by sanitarians was sufficient even though it did not address each smoking violation they discovered. *Id.* Here, Gruesser indicated that she obtained the information she needed from Rauch, i.e., how he handled his duty to prohibit smoking inside his bar. Although we believe that it would have been helpful had she inquired into the smoking violation that she discovered during her investigation, we conclude, pursuant to *Enterman*, that such is not required,

and that Gruesser's questioning of Rauch was sufficient for compliance with the administrative code.

{¶ 16} Next, Liberty Inn argues that Gruesser's conversation with the bartender was not an interview. We need not decide that issue because, for the following reasons, Gruesser satisfied her obligation to interview when she spoke with Rauch. Although Ohio Adm.Code 3701-52-08(D)(2)(c) refers to a sanitarian conducting "interviews," ODH argues that the plural use of "interviews" does not require that an investigator communicate or interview with more than one individual when conducting an investigation.

{¶ 17} R.C. 1.43(A) is a rule of construction courts consider when interpreting administrative rules. *See* R.C. 1.41. R.C. 1.43(A) applies "[i]n the absence of clear language * * * to the contrary" in an administrative rule and provides that "[t]he singular includes the plural, and the plural includes the singular." *See Wingate v. Hordge*, 60 Ohio St.2d 55, 58 (1979). Accordingly, we agree "interviews" does not mean multiple interviews are required.

{¶ 18} Additionally, we have found cases implicitly recognizing that an investigation under the Smoke-Free Act is proper when a sanitarian conducts only one interview. *See Enterman* at ¶ 13-17 (concluding that an investigation involving a single interview by sanitarians was proper); *Tri Cty. Beverage v. Bur. of Environmental Health, Ohio Dept. of Health*, 10th Dist. No. 12AP-373, 2012-Ohio-5978, ¶ 11-14 (concluding that an investigation involving a sanitarian's single interview was proper). We also find it illogical that a sanitarian would be required to conduct multiple interviews if he determined that sufficient information was obtained from one properly conducted interview. *See State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 543 (1996) (noting that a statutory construction must not lead to unreasonable or absurd results). Therefore, we apply R.C. 1.43(A) to interpret Ohio Adm.Code 3701-52-08(D)(2)(c) as authorizing either single or multiple interviews. Consequently, Gruesser need only have conducted one interview during her investigation, and she met that requirement when she interviewed Rauch.

{¶ 19} For all these reasons, we hold that the trial court did not abuse its discretion when it concluded that Gruesser satisfied her obligation to interview during her November 5, 2010 investigation. Accordingly, we overrule Liberty Inn's single assignment of error.

IV. CONCLUSION

{¶ 20} Having overruled Liberty Inn's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

CONNOR and DORRIAN, JJ., concur.
