

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

WCI, Inc., dba Cheeks,	:	
Appellant-Appellant,	:	
v.	:	No. 16AP-72
	:	(C.P.C. No. 15CV-7970)
Ohio State Liquor Control Commission	:	
et al.,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	
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D E C I S I O N

Rendered on June 30, 2016

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**On brief:** *Cicero Adams, LLC, Anthony R. Cicero and Luke Lirot (Pro Hac Vice)* for appellant.

**On brief:** *Mike DeWine, Attorney General, and Charles E. Febus*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Appellant, WCI, Inc., dba Cheeks, a liquor permit holder, appeals the decision of the Franklin County Court of Common Pleas affirming an order of appellee, the Ohio State Liquor Control Commission ("Commission"), which required the paying of a forfeiture of \$25,000 or the revocation of the permit holder's license. For the following reasons, we affirm the decision of the trial court.

{¶ 2} WCI brings four errors for our consideration:

I. The Ohio State Liquor Control Commission's decision was not supported by reliable, probative nor substantial evidence of appellant's wrongdoing in accordance with the law.

II. The Ohio State Liquor Control Commission's decision and the penalty imposed for the conduct of a third party violates appellant's due process rights.

III. The Ohio State Liquor control commission's decision is unconstitutional because it is overbroad and cannot be reconciled with other penalties for more serious violations.

IV. The Ohio State Liquor Control Commission's penalty violates the appellant's 8th Amendment rights by being overwhelmingly excessive.

### **Facts and Case History**

{¶ 3} Appellant, WCI, Inc., which does business as Cheeks, runs a business in the Dayton area. Cheeks is a club that serves alcohol and has dancers perform on stage as well as allowing dancers to perform individual dances for patrons in private areas of the club.

{¶ 4} On March 8, 2014, the Department of Public Safety conducted an investigation of Cheeks. While performing a private dance for one the investigators, the dancer behaved in a manner that violated R.C. 2907.40(C)(2). An employee knowingly touched the investigator while nude or seminude. The investigator reported that at the end of the private dance, the performer led the investigator to a table that was located at the entrance of the private area where she gave another employee an undetermined amount of money. (Public Safety Report at 2.)

{¶ 5} The performer's violations were the basis for the Commission's actions against WCI, which was found to be in violation of Ohio Adm.Code 4301:1-1-52. A hearing was held on August 5, 2012, in which WCI stipulated to the facts in the record as they pertained to Violation 2. (Tr. at 6.) At the hearing, WCI presented documents and argued mitigating circumstances of how it attempts to prevent the behavior that occurred at its club on March 8, 2014.

{¶ 6} The Commission issued an order on August 20, 2015, finding that WCI had violated Ohio Adm.Code 4301:1-1-52(B):

[N]o permit holder, his agent, or employee shall knowingly or willfully allow in and upon his licensed permit premises any persons to:

\* \* \*

(2) Appear in a state of nudity.

{¶ 7} The Commission ordered a revocation of WCI's D-5 liquor permit, or in lieu of revocation, the option to pay a \$25,000 forfeiture. WCI filed a motion for reconsideration of the penalty only. On September 10, 2015, the Commission denied the motion. WCI filed a notice of appeal with the Franklin County Court of Common Pleas pursuant to R.C. Chapter 119 and filed a motion for stay of the order, which was granted.

{¶ 8} On January 5, 2016, the trial court issued its decision affirming the Commission's order of September 10, 2015. The court found that Ohio Adm.Code 4301:1-1-52 ("Rule 52"), is constitutional and that the Commission acts within its authority when it regulates or sanctions a permit holder when there is evidence of a violation of regulations. The trial court found that the Commission's order was supported by reliable, probative and substantial evidence and is in accordance with law. WCI timely appealed to this court.

### Standard of Review

{¶ 9} R.C. 119.12 allows an appeal to the common pleas court for a party "adversely affected" by an order of an administrative agency or commission issued pursuant to "adjudication." "To constitute an adjudication for purposes of R.C. 119.12, a determination must be (1) that of the highest or ultimate authority of an agency which (2) determines the rights, privileges, benefits, or other legal relationships of a person." *Gwinn v. Ohio Elections Comm.*, 187 Ohio App.3d 742, 2010-Ohio-1587, ¶ 10 (10th Dist.); see also R.C. 119.01(D)(defining "adjudication").

{¶ 10} Pursuant to R.C. 119.12, a reviewing trial court must affirm the order of an administrative agency if it is supported by reliable, probative, and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980). "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. "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. "Substantial" evidence is evidence with some weight; it must have importance and value. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571

(1992). In reviewing the decision of an administrative agency, considerable deference should be accorded to an agency's interpretation of rules the agency is required to administer. *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382 (1994). Although the trial court must give deference to the administrative agency's resolution of evidentiary conflicts, the agency's findings are not conclusive. *Univ. of Cincinnati* at 111.

{¶ 11} In reviewing an order of an administrative agency, an appellate court's role is more limited than that of a common pleas court reviewing the same order. It is incumbent on the common pleas court to examine the evidence. Such is not the charge of the appellate court. The appellate court is to determine only if the common pleas court has abused its discretion. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 261 (1988). "The term 'abuse of discretion' connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). As to questions of law, "this court must make its own independent determination of the law to be applied to the facts found by the agency and held by the common pleas court to be supported by reliable, probative and substantial evidence." *Franklin Cty. Bd. of Commrs. v. State Emp. Relations Bd.*, 92 Ohio App.3d 585, 588 (10th Dist.1993).

#### **Assignments of Error**

{¶ 12} The first assignment of error argues that the trial court erred in finding that the Commission's order was supported by reliable, probative and substantial evidence: specifically that the punishment was in accordance with the law. There clearly is reliable, probative and substantial evidence to support both the violation and the punishment and we find that the Commission's order was in accordance with the law.

{¶ 13} WCI did stipulate to certain facts in the investigator's report but the hearing brought to light other facts that support a forfeiture of \$25,000 or revocation of the liquor license. (Tr. at 6.) There were cameras that were supposed to be monitoring the private dance rooms. (Tr. at 17.) WCI could not determine what the cameras were supposed to show. Either the cameras were malfunctioning or were not being monitored. *Id.* The investigator's report stated that at the end of the private dance the performer led the

investigator to a table that was located at the entrance of the private area where she gave another employee an undetermined amount of money. (Public Safety Report at 2.)

{¶ 14} The Commission also noted at the hearing that WCI was recently before them for actions that occurred on January 3, 2013 in which WCI's liquor license would have been revoked unless they paid a \$10,000 forfeiture. (Tr. at 19.) The evidence indicates that the Commission has required substantial forfeitures from WCI before for similar violations. The Commission chose to impose an increased forfeiture of \$25,000 rather than a \$10,000 forfeiture that was imposed less than one year before.

{¶ 15} The first assignment of error is overruled.

{¶ 16} The second assignment of error argues that the Commission's order violates WCI's due process rights. WCI states in its brief that Ohio Adm.Code 4301:1-1-52 violates due process by imputing criminal liability for the acts of other persons. WCI argues essentially that it was not in a position to prevent the performer from removing her clothes and being nude and thus should not be subject to what WCI considers criminal punishment.

{¶ 17} First, it is well settled that a liquor permit does not create a property right subject to traditional due process. *WCI, Inc. v. Ohio Liquor Control Comm.*, 116 Ohio St.3d 547, 2008-Ohio-88, ¶ 24, citing *State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 27 (1935) (The holdings are uniformly to the effect that such a license does not create a property right within the constitutional meaning of that term, nor even a contract, and that it constitutes a mere permission to engage in the liquor business, which may be revoked in the prescribed legislative manner).

{¶ 18} Second, a liquor permit holder may be sanctioned through the suspension or revocation of its liquor permit for the violation of any restriction of R.C. Chapter 4301 and 4303, or any lawful rule of the Commission, or for other sufficient cause. *See Elhanise, Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 13AP-937, 2014-Ohio-2243, ¶ 11.

{¶ 19} "Pursuant to [R.C. 4301:1-1-52], \* \* \* the triggering event for sanctions is not the permit holder's employee's conviction of a crime but the permit holder's awareness of the employee's illegal conduct. Thus, the Ohio Liquor Control Commission can punish a permit holder for its employee's behavior, regardless whether the employee

works for the permit holder when he or she is convicted." *WCI, Inc.* at ¶ 21 (WCI's liquor license was revoked due to an employee selling cocaine on the premises). "[R.C. 4301:1-1-52] prevent[s] a permit holder from allowing criminal conduct by its employees and then avoiding sanctions by firing the employees after they get caught but before they are convicted." *Id.* at ¶ 22.

{¶ 20} "[T]he clear language of Regulation 52 permits a finding of a violation where only an employee or agent of the permit holder knowingly allows certain activities on the permit premises. Simply put, Regulation 52 does not require knowledge on the part of the permit holder." *Goldfinger Ents., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1172, 2002-Ohio-2770, ¶ 11.

{¶ 21} We also note that "this court has previously held that, regardless of their nominal status as independent contractors, dancers are agents of the permit holder for the purposes of Regulation 52." *Insight Ents. v. Liquor Control Comm.*, 87 Ohio App.3d 692 (10th Dist.1993) (a liquor permit holder may not insulate himself from liability by structuring his business in a manner that leaves all those actually operating the business as independent contractors, with no implication of the permit holder for any violations occurring on the premises).

{¶ 22} It is clear from the record that WCI, through its employees, either willfully allowed or actually knew that the performer in question was nude: the cameras that monitor the private dance area were either not functioning or not monitored, and the performer gave money to a club employee immediately following the dance while exiting the private dance area. The performer clearly should be considered an agent of WCI for purposes of Rule 52. Therefore, WCI's argument that it is being punished for actions it did not have control over is not well-taken, nor is its argument that due process is somehow violated.

{¶ 23} The second assignment of error is overruled.

{¶ 24} The third assignment of error states that the Commission's order is unconstitutional for being overbroad and cannot be reconciled with other penalties for more serious violations. WCI only argues that Rule 52 is unconstitutional under the First and Fourteenth Amendment to the United States Constitution in the third assignment of error while arguing that the forfeiture is excessive in the fourth assignment of error. The

question of whether Rule 52 violates the First and Fourteenth Amendment to the United States Constitution has already been settled.

{¶ 25} The United States Supreme Court held that content-neutral time, place and manner regulations of protected speech will survive constitutional scrutiny "so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). "[T]he constitutionality of regulations that purport to ameliorate the deleterious secondary effects of sexually oriented establishments under the intermediate-scrutiny standard announced in [*Renton*]." *Entertainment Prods., Inc. v. Shelby Cty.*, 721 F.3d 729, 734 (6th Cir.2013).

{¶ 26} "Rule 52 is a content-neutral regulation aimed at ameliorating the adverse secondary effects associated with nude dancing in an environment that sells liquor." *J.L. Spoons, Inc. v. Ohio Dept. of Pub. Safety*, 31 F. Supp.3d 933, 938-39 (N.D.Ohio 2014), *See Renton* at 47 (finding that the *Renton* ordinance is content neutral because it "is aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community"). (Emphasis sic.)

{¶ 27} "Rule 52's requirement that dancers at establishments that serve alcohol wear, at a minimum, pasties, passes constitutional scrutiny." *J.L. Spoons* at 943. "The evidence establishes that the State, when it promulgated Rule 52, had a reasonable evidentiary basis for concluding that nude dancing in adult cabarets leads to undesirable secondary effects." *Id.* at 951. *J.L. Spoons* clearly shows that Rule 52 passes constitutional scrutiny.

{¶ 28} The third assignment of error is overruled.

{¶ 29} The fourth assignment of error argues that the Commission's order violates WCI's rights found in the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution for being overwhelmingly excessive. WCI argues that a \$25,000 forfeiture is excessive for what it characterizes as minor violation of Rule 52 since it is grossly disproportional to the gravity of WCI's offense.

{¶ 30} This argument is without merit and has already been addressed by this court. "The purpose of the Eighth Amendment is to limit the government's power to punish. \* \* \* Suspension and revocation of state-issued permits generally are remedial

measures and not 'punishment' subject to the protections of the Eighth Amendment." *Four Horsemen, Inc. v. Ohio Liquor Comm.*, 10th Dist. No. 97APE05-612 (Sept. 16, 1997), citing *Austin v. United States*, 509 U.S. 602, 609 (1993). The constitutional provisions, under the Ohio Constitution, Article I, Section 9 and the Eighth Amendment to the United States Constitution relate to criminal proceedings, not civil proceedings like statutory appeals filed under R.C. 119.12. *Auchi v. Liquor Control Comm.*, 10th Dist. No. 06AP-493, 2006-Ohio-6003, ¶ 10.

{¶ 31} Further, in light of WCI's previous violations, including a forfeiture of \$10,000 ordered less than one year before the Commission's decision in this case, we cannot characterize the \$25,000 forfeiture as excessive.

{¶ 32} The fourth assignment of error is overruled.

{¶ 33} Having overruled all of WCI's assignments of error and having found that the trial court's decision is supported by reliable, probative and substantial evidence and is in accordance with law, we affirm the decision.

*Judgment affirmed.*

LUPER SCHUSTER, J., concurs.

BRUNNER, J., concurs in part and dissents in part.

BRUNNER, J., concurring in part and dissenting in part.

{¶ 34} I concur with the majority in its decision as to the first, third and fourth assignments of error. Further, I respectfully concur in part and dissent in part concerning the second assignment of error (Majority at ¶ 16), concerning Ohio law on whether a holder of a liquor permit issued by the State of Ohio has a property interest in its permit. This is because a liquor permit has, in fact, been found to be a property interest by the U.S. Sixth Circuit Court of Appeals since 1991, in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991) ("An Ohio liquor licensee holds a substantial and valuable interest and has a claim to its continuation under state law. Accordingly, we hold that a holder of an Ohio liquor license has a property interest protected under the Due Process Clause."). As recently as 2014, the U.S. District Court of the Northern District of Ohio has recognized the viability of the *Brookpark* decision on this proposition of law.



*Gadd v. City of Warren*, N.D. Ohio No. 4:13cv1686 (Dec. 31, 2014) In *Gadd*, the court stated,

Defendants argue that Ohio state courts do not consider a liquor license something in which a person has a vested property interest. See *Salem v. Liquor Control Comm'n* (1973), 34 Ohio St. 2d 244, 245, 298 N.E.2d 138, 140; *Solomon v. Liquor Control Comm'n* (1965), 4 Ohio St. 2d 31, 36-37, 212 N.E.2d 595, 600; *State ex rel. Zugravu v. O'Brien* (1935), 130 Ohio St. 23, 26-27, 196 N.E. 664, 666. Defendants have also cited Sixth Circuit precedent holding the same. *BPNC, Inc. v. Taft*, 147 F. App'x 525, 530 (6th Cir. 2005) ("Liquor permits are not contracts and create no vested rights; they are merely temporary permits that are subject to revocation by the power authorizing their existence."). At the same time, however, *Brookpark* remains good law for the proposition on which *Gadd* relies. See *Chandler v. Vill. of Chagrin Falls*, 296 F. App'x 463, 470 n.4 (6th Cir. 2008) (citing *Brookpark* for the proposition that holders of liquor licenses as having a property interest in the license); *George-Khoury Family Ltd. P'ship v. Ohio Dep't of Liquor Control*, No. 04-3782, 2005 U.S. App. LEXIS 9807, 2005 WL 1285677, at \*5 (6th Cir. May 26, 2005) (same); *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 619 (6th Cir. 1997) (same). Case law is far from clear on whether a liquor license is a cognizable property interest under Ohio law.

The Court does not need to reach the issue of whether *Gadd* had a property interest in her liquor license, however, because Defendants afforded *Gadd* with adequate pre-deprivation procedural rights. "[O]nce it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [state law]." [*Cleveland Bd. of Edn. v. Loudermill*, 470 U.S. 532, 541 (1985)] "Rather, the Constitution defines what procedures are sufficient to satisfy due process." *Chandler*, 296 F. App'x at 470 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). The Supreme Court has held that due process is satisfied when a deprivation of a property interest is "preceded by notice and opportunity for hearing appropriate to the nature of the case." *Loudermill*, 470 U.S. at 542. "If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury." *Jefferson v. Jefferson Cnty. Pub. Sch. Sys.*, 360 F.3d 583, 588 (6th Cir.

2004) (citing *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)).

(Emphasis added.) I would follow the U.S. District Court's reasoning in *Gadd* and would resolve the schism between state and federal law on the issue of whether an Ohio liquor permit holder (versus an applicant for a liquor permit) has a property interest in the permit, and I would do so according to established federal law.

{¶ 35} *State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 27 (1935) should be distinguished, since subsequent actions by the Ohio legislature in providing for pre-deprivation hearings before the suspension, revocation of or issuing of a fine concerning a liquor permit have changed the 1935 post-Prohibition era character of liquor licenses to property that can be bequeathed and transferred for value, such that they are property to which due process rights attach.

{¶ 36} In addition to the rights to transfer, sell, bequeath, and renew, a holder of an Ohio liquor license also has the right to a hearing before revocation and the right to appeal any adverse determination of the Department. Ohio Rev. Code §§ 4301.27, 4301.28. *Brookpark Entertainment, Inc.* at 715.

{¶ 37} The *Brookpark Entertainment, Inc.* panel of the U.S. Sixth Circuit Court of Appeals, relying on *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168 (6th Cir.1990), extensively discussed the nature of the constitutionally protected property interest in issued Ohio liquor permits.

The defendants rely on a series of Ohio cases to support their contention that a liquor license is not property. In *State ex rel. Zugravu v. O'Brien*, 130 Ohio St. 23, 196 N.E. 664 (1935), the Ohio Supreme Court concluded that a liquor licensee had no property interest because the legislature could terminate the license. *Id.*, 196 N.E. at 666. In *Abraham v. Fioramonte*, 158 Ohio St. 213, 107 N.E.2d 321 (1952), the court relied on the fact that a license at that time could not be sold to conclude that it was not property. *Id.*, 107 N.E.2d at 327-28. The Ohio Court of Appeals has also held that a liquor license is not a property interest. *Scioto Trails Co. v. Ohio Dep't of Liquor Control*, 11 Ohio App. 3d 75, 462 N.E.2d 1386 (1983). The *Scioto Trails* court cited *Zugravu* for the proposition that no property interest attaches because the license is revocable. *Id.*, 462 N.E.2d at 1389. However, the court later conceded in dicta that some limited due process protection may attach to

liquor licenses. *Id.* at 1391. The court stated, however, that there could be no due process violation when citizens vote an entire precinct dry because the licensee may use the permit elsewhere. *Id.* Finally, in *Rickard v. Ohio Dep't of Liquor Control*, 29 Ohio App. 3d 133, 504 N.E.2d 724 (1986), another local option case, the court again conceded in dicta that due process may apply if the license holder could not transfer the license outside of the newly dry area. *Id.*, 504 N.E.2d at 729.

The Ohio cases cited by the defendants do not alter our conclusion that a liquor license is property. First, we emphasize that we do not rely on the labels that a state gives to the interests it has created. In deciding that Ohio liquor licenses were property for tax and bankruptcy purposes, we stated:

Although it is true that the state has the right to decide what property interests it wishes to create, it cannot thwart the operation of the Tax Code by classifying the interests it has created as something other than property rights. . . . While several Ohio courts have refused to label the rights granted to the [liquor] licensee as "property rights," the state nonetheless has chosen to grant the licensee rights tantamount to property rights in all but name.

*Terwilliger's*, 911 F.2d at 1171-72 (footnote omitted).

As in *Terwilliger's*, we do not find persuasive the labeling applied by the Ohio courts. Abraham refers to permits that could not be transferred or sold, unlike current permits. *Zugravu*, *Scioto Trails*, and *Rickard* hold that the license is not property because the legislature can revoke it. According to this argument, the holder cannot complain about the state-provided deprivation procedures, however unreasonable and arbitrary, because those procedures are part of the interest that the holder knowingly obtained. While this argument has some superficial appeal, the Supreme Court has explicitly rejected it.

It is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. . . . The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced

to a mere tautology. "*Property*" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985) (emphasis added; citations omitted).

An Ohio liquor licensee holds a substantial and valuable interest and has a claim to its continuation under state law. Accordingly, we hold that HN3 a holder of an Ohio liquor license has a property interest protected under the Due Process Clause. Therefore, the state must accord a liquor licensee due process before revoking the license.

(Emphasis sic.) *Brookpark Entertainment, Inc.* at 715-16.

{¶ 38} I would thus distinguish *Zugravu*, noting that contemporary statutory and regulatory language has evolved to the point that due process protections attach to an issued Ohio liquor permit such that a property interest in a liquor permit issued by the Ohio division of liquor control does exist. At the time *Zugravu* was decided, the liquor permit holder had no statutory appeal recourse and was relegated to filing a mandamus action in the Supreme Court of Ohio. That has not been the case for decades, and it is only appropriate that we recognize, as do federal courts having jurisdiction in Ohio, that today's liquor permits constitute property interest subject to due process.

{¶ 39} Further, and similarly to the court in *Gadd*, I would find that WCI, Inc. was afforded adequate procedural due process, and for these reasons, I would overrule WCI, Inc.'s second assignment of error.

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