[Cite as *Stein v. Geauga Cty. Bd. of Health*, 2003-Ohio-2104.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

FRANKLIN A. STEIN, II,	:	**O P I N I O N**
Appellant,	:	**CASE NO. 2002-G-2439**
- vs -	:	
THE GEAUGA COUNTY BOARD, OF HEALTH, et al.,	:	
Appellees.	:	

Administrative Appeal from the Geauga County Court of Common Pleas, Case No. 01 A 000612.

Judgment: Reversed and remanded.

Franklin A. Stein, II, pro se, 15385 Punderson Road, Burton, OH 44021 (Appellant).

David P. Joyce, Geauga County Prosecutor, and *Rebecca F. Schlag,* Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellees).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant Franklin A. Stein, II, ("appellant") appeals from the decision of the Geauga County Court of Common Pleas. The court upheld the decision of the Geauga County Board of Health ("board"), finding that a nuisance existed on appellant's property and ordering him to install a new sewer system.

{¶2} On June 27, 2001, appellant appealed the board's order to the Geauga County Court of Common Pleas. The appeal involved a finding by the board that a nuisance existed on appellant's property in Burton. The board claimed that appellant's sewer disposal system violated the sewage code and ordered appellant to install a new system, after obtaining an installation permit, within thirty days. Appellant argued that the findings were unreasonable, unsupported by the evidence, arbitrary, capricious, unconstitutional, and illegal. Appellant requested that a complete transcript of all the original papers, testimony, and evidence be prepared and filed with the court. The board gave notice that it filed the transcript on August 1, 2001.

{¶3} The matter was discussed and determined at two board meetings, held on April 16, 2001 and May 21, 2001. The board determined that a code violation existed on appellant's property and moved that he be required to install a sewage disposal system within thirty days of the Board Order to correct the nuisance. A written notice of the board's order was mailed to appellant on May 24, 2001.

{¶4} In his brief filed with the court of common pleas, appellant complained that the records before the court were incomplete, with much of the testimony missing from the record. Appellant maintained that the person investigating the complaint stated he had no probable cause to continue the investigation after the September 5, 2000 visit and that the odor had nothing to do with appellant's property. In response, the board attached an affidavit from Linda Feigle, a lab supervisor with the Geauga County Department of Water Resources. Feigle stated that, contrary to appellant's assertion, the samples taken were contaminated; dirt and debris would not affect the biochemical oxygen demand results of the tests. Further, Feigle averred that large amounts of

chlorine or household cleaners would be detected prior to sampling and the sample would not be tested. Small amounts of those substances would most likely elevate the test results for a few days.

{¶5} On November 15, 2001, the court of common pleas ordered the tape recordings of the April 16 and May 21, 2001 meetings be filed with the court along with a transcript of the portions of the tapes containing the proceedings relating to appellant's property. The board filed the tapes and transcripts on December 11, 2001.

{¶6} On April 19, 2001, the court of common pleas stated it had reviewed the minutes of the board meeting and a verbatim transcript of that hearing. The court determined that the board's decision was supported by a preponderance of substantial, reliable, and probative evidence. The court found that appellant did not demonstrate that the board's decision was unconstitutional, illegal, arbitrary, capricious, or unreasonable.

{¶7} Appellant assigns the following errors for review:

{¶8} "[1.] The trial court erred in not requiring the appellee to provide a complete record of the administrative hearing until after the briefs were filed.

{¶9} "[2.] The trial court erred in not striking affidavit of Lisa Feigle.

{¶10} "[3.] The trial court erred in making its favorable ruling for the appellees based on the sole questionable testimony by the Health Commissioner and his promise under oath to perform additional investigation.

{¶11} "[4.] The court erred in basing its ruling on all hearsay testimony by the Health Commissioner."

{¶12} Appellant's four assignments of error will be addressed collectively, as similar issues of law and fact are presented. Appellant basically is disputing evidentiary issues. In his first assignment of error, appellant argues that the tapes and transcripts of the hearings were filed after the briefs were filed with the court of common pleas, preventing him from utilizing the transcripts in writing his brief. Appellant also challenges the admission of the Feigle affidavit and some of the Health Commissioner's testimony.

{¶13} R.C. 2506.03(A)(1) confines a court of common pleas, in considering an administrative appeal, to the transcript filed pursuant to R.C. 2506.02, unless the transcript filed does not contain a report of all the evidence admitted or proffered by the appellant. The court can then hear the appeal upon the transcript and such additional evidence as is introduced by any of the parties. At the hearing, any party may call, as if on cross-examination, a witness who previously gave testimony in opposition to that party.

{¶14} Judicial review of a R.C. Chapter 2506 administrative appeal normally is confined to review of the complete transcript filed by the administrative agency with the court of common pleas. R.C. 2506.02 requires the filing of a transcript by the officer or body from which the appeal is taken. See *Kiel v. Green Local School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 149. If that transcript is deficient or incomplete, R.C. 2506.03 provides for the trial court to conduct an evidentiary hearing to "fill in the gaps." The record of the evidence may be incomplete without a transcript of all the original testimony. *McCann v. Lakewood* (1994), 95 Ohio App.3d 226. The court of common pleas must hear the appeal upon the transcript of the administrative proceedings and

such additional evidence any of the parties may wish to introduce. *Eckmeyer v. Kent City School Dist. Bd. of Edn.* (Nov. 3, 2000), 11th Dist. No. 99-P-0117, 2000 Ohio App. LEXIS 5123. The court is required to hear such additional evidence as may be introduced by either party in the proceeding. See *Fleischmann v. Medina Supply Co.* (1960), 111 Ohio App. 449. The court of common pleas' authority to hear additional evidence under R.C. 2506.03 resembles a de novo hearing, requiring the court of common pleas to weigh the evidence presented to determine whether there is a preponderance of reliable, probative, and substantial evidence supporting the agency's decision. *Boncha v. Mentor Mun. Planning Comm.* (May 1, 1998), 11th Dist. No. 97-L-084, 1998 Ohio App. LEXIS 1943.

{¶15} The court of common pleas ordered the board to provide it with a complete, verbatim transcript of the two hearings, after noting deficiencies in the transcript filed by the board. This order could only have been made pursuant to R.C. 2506.03(A)(1). Once the court of common pleas ordered a complete transcript, the parties obtained the right to introduce additional evidence and cross-examine witnesses who had previously given testimony against that party. It must be noted that the Feigle affidavit was not a part of the original transcript. As such, the court of common pleas was without authority to consider it when making its ruling, unless the evidence had been introduced at a hearing. See *Kiel,* supra. The court of common pleas did not afford the parties an opportunity to present evidence at a hearing. Therefore, the court of common pleas erred by not holding an evidentiary hearing on the matter pursuant to R.C. 2506.03. Appellant would have had the opportunity to address his evidentiary concerns regarding the testimony of the Health Commissioner at such a hearing.

Appellant's first, second, third, and fourth assignments of error have merit and are well-taken. The judgment of the Geauga County Court of Common Pleas is reversed and the case is remanded for proceedings consistent with this opinion.

CYNTHIA W. RICE, J., concurs.

JUDITH A. CHRISTLEY, J., concurs in judgment only with concurring opinion.

JUDITH A. CHRISTLEY, J., concurring.

{¶16} I respectfully concur in judgment only with the majority's opinion for the following reasons.

{¶17} After considering appellant's assignments of error, the majority determined that the court of common pleas erred by not holding an evidentiary hearing on this matter pursuant to R.C. 2506.03. The majority maintains that the verbatim transcript of the tape recordings ordered by the trial court was additional evidence under R.C. 2506.03; thus, the trial court was obligated to hold an evidentiary hearing.

{¶18} R.C. 2506.03(A)(1) and (A)(2)(d) specifically state:

{¶19} "(A) The hearing of such appeal shall proceed as in the trial of a civil action, but the court shall be confined to the transcript as filed pursuant to section 2506.02 of the Revised Code unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:

{¶20} "(1) The transcript does not contain a report of all evidence admitted or proffered by the appellant;

{¶21} "(2) The appellant was not permitted to appear and be heard in person, or by his attorney, in opposition to the final order, adjudication, or decision appealed from, and to do any of the following:

{¶22} "(d) Offer evidence to refute evidence and testimony offered in opposition to his position, arguments, and contentions[.]"

{¶23} If a transcript is deficient or incomplete the trial court is obligated to conduct an evidentiary hearing. In general, such deficiencies are represented by instances "where the transcript of the administrative proceeding is incomplete, either because it did not contain all of the evidence which actually was presented or because the appealing party's right to be heard and to present evidence was infringed in some manner." *Schoell v. Sheboy* (1973), 34 Ohio App.2d 168, 172. See, also, *Rutherford v. Gahanna-Jefferson City School Dist. Bd. of Edn.* (Sept. 16, 1997), 10th Dist. Nos. 97APE02-162 and 97APE02-200, 1997 Ohio App. LEXIS 4218, at 9-10.

{¶24} Neither of the above is the situation here. The original record presented to the common pleas court was not a transcript, rather, by all accounts, it was a summary of the administrative proceedings. This is evident by the fact that the summary filed on August 1, 2001, was neither certified nor labeled as a transcript. Furthermore, the trial court referred to this summary as the "minutes" of the Geauga County Board of Health, and proceeded to specifically request a verbatim transcript and accompanying tape recordings.

{¶25} R.C. 2506.02 speaks specifically of a "complete transcript." It says nothing about a summary or a statement of the proceedings or a paraphrase of the testimony. It is presumed that the legislature intended the ordinary meaning of the

words it employed in these statutes. *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶22. Transcript ought to mean transcript. Arguably, the common pleas court, upon proper motion, could have ruled against the Board of Health on this basis alone. *Neague v. Worthington City School Dist.* (1997), 122 Ohio App.3d 433.

{¶26} What I do agree with is that once the transcript was obtained, the parties should have been given an opportunity to submit additional briefing. This would have also provided the opportunity to determine if this verbatim transcript contained any omissions, etc. If so, then the appropriate affidavit challenging the completeness of the transcript could have been filed.

{¶27} The majority opinion apparently concludes that the original summary somehow constituted a "transcript" as required by R.C. 2506.02. If so, it is still unknown whether the verbatim transcript of the tape recordings of the two board hearings actually introduced new evidence that was not present in the original summary filed on August 1, 2001. Furthermore, there was no affidavit making this assertion.

{¶28} Before any deficiencies may be cured at the trial court level, R.C. 2506.03 requires that the defects either appear on the face of the transcript or be brought to the attention of the trial court by affidavit. *Rutherford* at 10. Appellant failed to submit an affidavit with such an averment with the trial court and there were no facial deficiencies of the original summary. Therefore, I disagree with the majority's finding that the verbatim transcripts were additional evidence that obligated the trial court to conduct an evidentiary hearing.

{¶29} The submission of the Lisa Feigle affidavit, however, was additional evidence. This affidavit was added subsequent to the trial court's receipt of the original summary. Before it could be considered, there had to be an additional affidavit from the board that the verbatim transcript was incomplete in some statutory noted manner. See, e.g., *Hypabyssal, Ltd. v. Akron Hous. Appeals Bd.* (Nov. 22, 2000), 9th Dist. No. 20000, 2000 Ohio App. LEXIS 5422, at 7. There was no such affidavit.

{¶30} Further, it is unclear whether the trial court relied upon or even looked at the affidavit when reviewing the board's findings. Presumably, without an affidavit from the Board, the common pleas court did not consider the affidavit. Upon remand, the court will be able to specifically confirm this.

{¶31} Further, I note that before the common pleas court could consider the affidavit of Lisa Feigle it first had to have an affidavit from the Board indicating that this evidence had been left out of the verbatim transcript. That does not seem to be the case as one of appellant's claims is that Feigle's opinion was originally presented as hearsay testimony. Thus, it would seem that the intent of the Board was to supplement its hearsay evidence with an actual affidavit. If that were the case, the court could not consider this affidavit as it did not meet any of the statutory exceptions. Hence, no evidential hearing would be required.

{¶32} Therefore, I agree that this matter should be reversed and remanded to allow both parties to rebrief the matter in light of the verbatim transcript. At that point, each side will have an opportunity to submit affidavits challenging any omissions in the verbatim transcript. Thus, to that extent, I agree with a reversal and remand.