[Cite as *1st Class Driving Academy v. State*, 2009-Ohio-5174.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

1ST CLASS DRIVING ACADEMY AND SHARON GASTON Plaintiffs-Appellants	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Patricia A. Delaney, J.
-vs-	
STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY DIVISION OF ADMINISTRATION GOVERNOR'S HIGHWAY SAFETY OFFICE Defendant-Appellee	Case No. 09CA000006 O P I N I O N

CHARACTER OF PROCEEDING:	On Appeal from Knox County Court of Common Pleas, Case No. 08 OT 07-434
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	September 29, 2009

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee
E. JOEL WESP GREGORY P. BARWELL 41 South High Street, Suite1275 Columbus, OH 43215	RICHARD CORDRAY Ohio Attorney General BY: JANYCE C. KATZ WALTER J. MCNAMARA Assistant Attorneys General 30 East Broad Street, 26th Floor Columbus, OH 43215

Delaney, J.

{¶1} Appellants 1st Class Driving Academy and Sharon Gaston appeal the January 7, 2009, judgment entry of the Knox County Court of Common Pleas affirming the decision of Appellee, Ohio Department of Public Safety, Governors Highway Safety Office to suspend Appellants licenses as a Driving Training School and Training Manager.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant 1st Class Driving Academy is a licensed commercial business that provides driving instruction to beginning students as well as to individuals who want to become driving instructors. 1st Class Driving is owned and operated by Appellant Sharon Gaston. Gaston is licensed as a Training Manager; whereas she is authorized to train individuals who want to become driving instructors. The Ohio Department of Public Safety regulates and licenses driving training schools, owners and instructors of schools pursuant to Ohio Revised Code Chapters 4508 and 5502. The Governor's Highway Safety Office has the responsibility for oversight of the driving schools.[1] In order to perform its oversight responsibilities, Appellee employs private contractors to conduct inspections of the driver training schools.

{¶3} In 2006, during the inspection of another driver training school, Appellee received a complaint from a former employee of Appellants. The complainant stated that she did not feel she received the proper driver instructor training from Appellants. Shortly thereafter, Appellee received a second complaint regarding the training given by

[1] Prior to 2005, the Ohio State Highway Patrol was responsible for oversight of the driving schools through the Ohio Department of Public Safety.

Appellants. Based upon the complaints, Appellee commenced an investigation of 1st Class Driving Academy.

{¶4} Jay Johnson, a self-employed contractor with Appellee, conducted the investigation. Johnson was under contract with Appellee from July 2005 to July 2007. Prior to working as a self-employed contractor with Appellee, Johnson was part-owner and operator of a driver training school that was a competitor of Appellants. At the time of the investigation, Johnson no longer had any financial interest in the driver training school, but he did conduct driver-training courses through the American Red Cross.

{¶5} Based on the investigation, Appellee sent written Notices of Opportunity for Hearing to Appellants on December 14, 2006. In the Notices, Appellee proposed to take disciplinary action against Appellants for the following violations:

{¶6} (1) "The investigation revealed that documentation produced by Sharon Gaston and maintained by 1st Class Driving Academy contained false and misleading information and revealed that a licensed training manager was not supervising from the back seat during the training of new instructor(s)." This was in violation of Ohio Administrative Code 4501-7-05(O), 4501-7-05(P), 4501-7-05(Q) and 4501-7-13(G);

{¶7} (2) "Documentation from the complaint investigation and records provided by Sharon Gaston for instructor training purposes reveal that the training provided by Sharon Gaston did not meet the requirements approved by DPS and that Ms. Gaston was allowing instructors at her school to act as licensed training managers during the training of new instructors." This was in violation of O.A.C. 4501-7-05(A), 4501-7-05(B)(1), and 4501-7-05(D)(6);

{¶8} (3) "Documentation produced by Sharon Gaston and maintained by 1st Class Driving Academy reveal that a licensed training manager was not supervising from the back seat during the training of new instructors. The documentation shows that Ms. Gaston was assigning other licensed instructors to serve the Training Manager functions during training of new instructors. A lesson plan and route sheet was [sic] not provided by the training manager and was not used during the lessons." This was in violation of O.A.C. 4501-7-10(A)(3)(a) and 4501-7-01(B)(1); and

{¶9} (4) "During the investigation, Sharon Gaston terminated the interview with Jay Johnson and failed to maintain and provide requested documents as required by OAC." This was in violation of O.A.C. 4501-7-13(A)(8), 4501-7-13(B)(7), 4501-7-13(C) and 4501-7-13(H).

{¶10} Appellants filed requests for hearings with Appellee, which were held on October 9, 2007 and December 3, 2007.

{¶11} On January 22, 2008, the Hearing Officer issued a lengthy Report and Recommendation ruling that there was a preponderance of the evidence to find that Appellants violated O.A.C. 4501-7-05(A) and (Q), 4501-7-10(A)(3)(a), and 4501-7-13(A)(8), (B)(7), (C) and (G). The Hearing Officer found insufficient evidence existed to support that Appellants failed to provide route sheets and lesson plans pursuant to O.A.C. 4501-7-05(A)(3). The Hearing Officer recommended that Appellants' licenses as a Driver Training School and Training Manager be revoked.

{¶12} Appellants filed written objections to the Report and Recommendation with the Director of the Ohio Department of Public Safety. In their objections,

Appellants argued that the Director should reject the Hearing Officer's findings and the recommendation and dismiss the charges against Appellants.

{¶13} On July 3, 2008, the Director issued its Adjudication Order. In its Adjudication Order, the Director adopted the Findings of Fact and Conclusions of Law as being supported by the evidence. The Director modified the Recommendation of the Hearing Officer because it found based upon the information contained in the Appellants' objections, the penalty to be excessive. The Director ordered that Appellants' licenses be suspended for one year; that Appellants be placed on probation for one year; that the Department would stay six months of the suspension, subject to compliance with the O.A.C. and Gaston successfully completing a Driver Training Manager Course. If Gaston successfully completed the Driver Training Manager Course, the Department would stay an additional three months of the remaining six months suspension.

{¶14} Appellants appealed the Adjudication Order to the Knox County Court of Common Pleas pursuant to R.C. 119.12. In their administrative appeal, Appellants argued the decision of Appellee was not supported by a preponderance of substantial, reliable, and probative evidence. Their appeal also raised a constitutional challenged to the investigative authority of Appellee.

{¶15} On January 7, 2009, the trial court issued its judgment entry upholding the Adjudication Order. The trial court found that the Order was supported by the preponderance of substantial, reliable, and probative evidence. The trial court did not address Appellants' constitutional question in its judgment entry.

{¶16} It is from this decision Appellants now appeal.

{¶17} Appellants raise three Assignments of Error:

{¶18} "I. THE COURT OF COMMON PLEAS ERRED BY FINDING THAT THE DECISION OF THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY DIVISION OF ADMINISTRATION GOVERNOR'S HIGHWAY SAFETY OFFICE IS SUPPORTED BY A PREPONDERANCE OF SUBSTANTIAL, RELIABLE AND PROBATIVE EVIDENCE.

{¶19} "II. THE COURT OF COMMON PLEAS ERRED BY FINDING THAT THE DECISION OF THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY DIVISION OF ADMINISTRATION GOVERNOR'S HIGHWAY SAFETY OFFICE IS SUPPORTED BY LAW AS TO WHETHER THE NOTICE OF ADMINISTRATIVE ACTION ISSUED TO APPELLANT BY THE DEPARTMENT OF PUBLIC SAFETY DIVISION OF ADMINISTRATION GOVERNOR'S HIGHWAY SAFETY OFFICE WAS VALID AND IN ACCORDANCE WITH O.R.C. §119.07."

{¶20} III. "THE COURT OF COMMON PLEAS ERRED BY FINDING THAT THE DECISION OF THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY DIVISION OF ADMINISTRATION GOVERNOR'S HIGHWAY SAFETY OFFICE IS IN ACCORDANCE WITH THE LAW IN THAT THE DEPARTMENT DID NOT VIOLATE THE RIGHTS OF APPELLANTS BY CONDUCTING AN INVESTIGATION USING NON-STATE EMPLOYEES OF APPELLANTS BUSINESS OPERATIONS WITHOUT ADMINISTRATIVE OR LEGISLATIVE AUTHORITY."

I

{¶21} Appellants argue in their first Assignment of Error the trial court erred in finding the decision of the Director of the Department of Public Safety was supported by a preponderance of substantial, reliable, and probative evidence. We disagree.

{¶22} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. Reliable, probative and substantial evidence has been defined as: (1) "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. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value." *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303.

{¶23} In determining evidentiary conflicts, the Ohio Supreme Court in *University of Cincinnati v. Conrad* (1980), 63 Ohio State 2d 108, 407 N.E.2d 1265, directed courts of common pleas to give deference to the administrative resolution of such conflicts. The Supreme Court noted when the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265.

{¶24} On appeal to this Court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the

evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. In reviewing the trial court's determination that Appellee's order was supported by reliable, probative and substantial evidence, this Court's role is limited to determining whether the trial court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680, 610 N.E.2d 562. 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* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶25} Appellants first argue that the trial court abused its discretion in affirming the decision of Appellee because the evidence presented was not reliable. Appellants state that the investigation into this matter and the evidence generated from the investigation was based upon the work of Johnson. Johnson, while now a self-employed contractor with the Department of Public Safety, Governor's Highway Safety Office, was formerly an owner and operator of a driver training school in direct competition with Appellants. Appellants argue that the evidence collected by Johnson and his testimony was not credible and should not be relied upon.

{¶26} During the administrative hearing, the evidence generated by Johnson's investigation and Johnson's deposition testimony were presented to the Hearing Officer. Johnson was questioned regarding any conflicts he may have had because of his former status as an owner of a competing driver training school. He testified as to how the investigation commenced, how he proceeded with the investigation, and the results of the investigation.

{¶27} As stated above, the trial court is to give deference to the administrative body in resolving evidentiary conflicts as it is the finder of facts who has the opportunity to determine credibility and weigh the evidence. When the matter reaches the appellate level, we review the trial court decision through a smaller window, whether the trial court's judgment is an abuse of discretion. Upon our review of the record before us and with the understanding that the trial court must defer the resolution of evidentiary conflicts to the Hearing Officer who had opportunity to determine the witnesses' credibility and weigh the evidence, we cannot find the trial court abused its discretion in affirming the administrative order and its resolution of those evidentiary conflicts.

{¶28} Appellants next argue that the trial court erred in affirming the decision of Appellee when the preponderance of the evidence showed that Appellants were not in violation of O.A.C. 4501-7-10, "Training required for the operation of motor vehicles other than commercial motor vehicles." As explained by the Hearing Officer, the Ohio Curriculum has a four phase program. In Phase 4, the driver instructor candidate must do "hands-on" where the instructor candidate actually teaches classes or behind the wheel training for three to five hours. During Phase 4, the training manager must be supervising. Gaston is the Training Manager. Appellants state that the Director erroneously adopted the finding of the Hearing Officer that Appellants were assigning driving instructors to act as training managers.

{¶29} The Hearing Officer's determination that Appellants violated O.A.C. 4501-7-10, in addition to the numerous other violations of the O.A.C. provisions, was based upon documentation provided by Appellants during the investigation. In her Report and Recommendation, the Hearing Officer thoroughly reviewed the documentary evidence

presented and compared the documentation to determine if there were any reporting discrepancies. During her review, the Hearing Officer determined that the documentation showed that during Phase 4 of the driver instructor training for Larry LeMaster, it was David Pyles, a licensed instructor, who provided LeMaster with some of his Phase 4 training, instead of Gaston. The Hearing Officer explicitly stated there was no evidence that Gaston directed her instructors to act as Training Managers, but the documentation demonstrated that an instructor had in fact acted as a Training Manager.

{¶30} Again, the trial court is to defer to the administrative body in the determination of evidentiary issues. *Conrad*, supra. We cannot find an abuse of discretion for the trial court to affirm the administrative decision based upon this determination.

{¶31} We therefore overrule Appellants' first Assignment of Error.

II

{¶32} In Appellants' second Assignment of Error, Appellants argue the trial court erred in not determining whether the Notices of Administrative Action issued on December 14, 2006 were valid and in accordance with R.C. 119.07. Appellants raised in their objections to the Hearing Officer's Report and Recommendation that the Notices were insufficient pursuant to R.C. 119.07.

{¶33} R.C. 119.07 states in pertinent part, "[n]otice shall be given by registered mail, return receipt requested, and shall include the charges or other reasons for the proposed action, the law or rule directly involved, and a statement informing the party that the party is entitled to a hearing if the party requests it within thirty days of the time

of mailing the notice." Under R.C. 119.07, the administrative agency is required to give Appellants notice of the charges or other reasons for the proposed action. "The purpose of such notice is to give the party charged with a violation adequate notice to enable the party to prepare a defense to the charges." *Sohi v. Ohio State Dental Board* (May 20, 1997), Franklin App. No. 96APD05-687 citing *Geroc v. Ohio Veterinary Medical Bd.* (1987), 37 Ohio App.3d 192, 199, 525 N.E.2d 501, quoting *Keaton v. State* (1981), 2 Ohio App.3d 480, 483, 442 N.E.2d 1315. "In addition, the due process clause of the Fourteenth Amendment to the United States Constitution, to some extent, is applicable to hearings before administrative agencies, and such procedural due process includes reasonable notice of the subject matter of the hearing. *State ex rel. LTV Steel Co. v. Indus. Comm.* (1995), 102 Ohio App.3d 100, 103-104, 656 N.E.2d 1016 (citations omitted). Hence, if relator was not given proper notice as required under R.C. 119.07 and as dictated under procedural due process principles, the [trial court] may reverse the board's order." Id.

{¶34} Appellants first argue that the Notices were improper because they were based upon an investigation conducted by Johnson. Appellants reiterate their allegations against Johnson that Johnson was not credible and conducted an improper investigation. As we have discussed above, it is for the administrative body to determine the credibility of the witnesses. It is not the trial court's duty to weigh the evidence, but to determine if the evidence is supported by a preponderance of the substantive and reliable evidence.

{¶35} Appellants tie this argument regarding Johnson to its next proposition that Appellee charged Appellants with irrelevant and improper administrative code violations

in order to place Appellants in a negative light, which ultimately resulted in the revocation of Appellants' licenses. We find this argument to be not well taken as it is the burden of the Department of Public Safety to demonstrate that Appellants committed the violations alleged in the Notices and it is the role of the administrative body to determine whether the preponderance of the evidence shows that Appellants committed the violations. We find Appellants were properly notified of the alleged violations for which Appellee determined were supported by the preponderance of the evidence.

{¶36} Finally, Appellants argue that the Hearing Officer stated that Appellants failed to provide student records to Appellee as required during their investigation. Appellants argue that they were not charged with failure to provide the records of students under O.A.C. 4501-7-13(A)(1-7). Appellee charged Appellants with violation of the provisions of O.A.C. 4501-7-13, which pertain to the records for instructors and driver training managers. Upon review of the Hearing Officer's Report and Recommendation, we find that the Hearing Officer made a Finding of Fact that Appellants did not comply with an investigatory records request that included student records among other requested records that would demonstrate the activities of the training managers and instructors. In her Conclusions of Law, the Hearing Officer found that Appellants were in violation of the O.A.C. 4501-7-13 provisions that pertain to only the records of the training managers and instructors.

{¶37} We conclude Appellants' arguments in regards to R.C. 119.07 were before the Director when it reviewed the Hearing Officer's Report and Recommendation and

adopted her Findings of Fact and Conclusions of Law. The trial court did not abuse its discretion in affirming the decision of Appellee.

{¶38} Appellants' second Assignment of Error is overruled.

III

{¶39} Appellants argue in their final Assignment of Error the trial court erred in not addressing their constitutional challenge to the authority of Appellee to conduct an investigation using non-state employees. Appellants state that R.C. 4508.02 does not permit the Department of Public Safety to conduct investigations – it may only conduct inspections.

{¶40} "In an R.C. 119.12 appeal, R.C. 119.12 expressly authorizes the common pleas court to rule on constitutional questions and it is error for the common pleas court to decline to rule on such issues when properly presented. *In re Bailey* (1989), 64 Ohio App.3d 291, 295 (court erred in declining to rule on procedural due process challenge to agency's audit methodology)." *In re Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co*. (Sept. 24, 1992), Franklin App. No. 91AP-1493.

{¶41} We agree the trial court erred in failing to rule on Appellants' constitutional challenge based on the record presented. However, for such an error to mandate reversal it must be deemed prejudicial. *In re Hal Artz Lincoln-Mercury, Inc*., supra. "This court may rule on the constitutionality of a statute, which is typically a pure question of law, and no prejudice would flow from a trial court's decision not to address the issue." Id. citing *In re Bailey*, supra.

{¶42} Appellants' question presents a question of law and we find Appellants' argument that Appellee is not permitted to conduct investigations has been addressed

in *Driving School Assn. of Ohio v. Shipley* (June 12, 1992), N.D. Ohio No. 1:92CV0083. In that case, the federal court held that the Ohio Department of Highway Safety did not act ultra vires when it conducts an investigation into complaints of a commercial driver training school pursuant to the authority granted to it by R.C. 4508.02. The court stated, "[w]hile it is true that the Department of Highway Safety is not *explicitly* authorized to contact a commercial driver training school's students to check the school's compliance with the regulations, the Department is given a general authorization to 'administer and enforce' the regulations to ensure compliance. Ohio Rev.Code § 4508.02(B). Of course, compliance can only be ensured through some sort of inquiry into the performance of the commercial driving school."

{¶43} We overrule Appellants' third Assignment of Error upon this persuasive authority.

{¶44} Accordingly, we affirm the decision of the Knox County Court of Common Pleas.

By Delaney, J.
Gwin, P.J. and
Hoffman, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

PAD/kgb

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

1ST CLASS DRIVING ACADEMY AND SHARON GASTON	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY – DIVISION OF ADMINISTRATION GOVERNOR'S HIGHWAY SAFETY OFFICE	:	
Defendant-Appellee	:	Case No. 09CA000006

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Knox County Court of Common Pleas is affirmed.

Costs to Appellants.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN