

[Cite as *Shree Swaminarayam Corp. v. Ohio Lottery Comm.*, 2016-Ohio-2641.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103527

**SHREE SWAMINARAYAM CORP. D.B.A.
HARI SUNOCO**

PLAINTIFF-APPELLANT

vs.

OHIO LOTTERY COMMISSION

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-836218

BEFORE: Stewart, P.J., S. Gallagher, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: April 21, 2016

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MELODY J. STEWART, P.J.:

{¶1} Appellant Shree Swaminaryam Corp. (“SSC”) filed an application with the Ohio Lottery Commission for a lottery retail sales license. The director of the lottery commission denied the application as contrary to the public interest, convenience, or trust — SSC’s president and principal, Haresh Patel, previously had two lottery retail sales licenses revoked after his wife had been caught tampering with lottery tickets and Patel, aware of her actions, failed to report them to the commission or stop them. SSC appealed to the court of common pleas, and the court upheld the denial of the license. This appeal followed, raising four assignments of error for our review.

{¶2} The primary argument raised on appeal is that the denial of a lottery sales agent license for SSC constituted a blanket rejection of all licenses for any company in which Patel has an ownership interest. SSC argues that there is no provision in the law for a permanent revocation of a lottery sales license or a permanent denial of an application.

{¶3} Because this appeal involves the state of Ohio, through the commission, it is governed by R.C. 119.12(A). That section permits a party adversely affected by an administrative order to file an appeal with the court of common pleas. When reviewing an order of an administrative agency, a common pleas court must affirm the order if, upon consideration of the entire record, the order is in accordance with law and is supported by

reliable, probative, and substantial evidence. *Our Place, Inc. v. Ohio Liquor Control Commission*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992); *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 110, 407 N.E.2d 1265 (1980).

{¶4} When a court of appeals reviews a decision rendered by the court of common pleas in an administrative appeal under R.C. 119.12, it is limited to determining whether the trial court abused its discretion. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.*, 63 Ohio St.3d 705, 707, 590 N.E.2d 1240 (1992). However, this deference applies only to questions of fact; an appellate court has plenary review of purely legal questions. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343, 587 N.E.2d 835 (1992).

{¶5} When an applicant for a lottery sales agent license or the holder of such a license is a director, officer, manager, or controlling shareholder of a corporation, that individual's character or general fitness can be considered as part of the application for a lottery sales agent license or the decision to suspend or revoke a license. *See* R.C. 3770.05(D)(2). The director of the lottery commission can refuse to issue a license if the director determines in light of the applicant's character or general fitness "the granting of a license as a lottery sales agent would be inconsistent with the public interest, convenience, or trust[.]" *Id.*

{¶6} The commission issued a proposed denial of SSC's application for a lottery sales agent license. The matter was referred to a hearing officer who made the following findings of fact:

In summary, the Lottery revoked Applicant's licenses following full hearing rights, after it was discovered that pre-scratched tickets were being sold to the public from one of his locations and that Patel was aware that his wife had engaged in fraudulent activity and had failed to report or stop it. In fact, the Lottery found 212 pre-scratched tickets for sale in 10 different Lottery games at one of Patel's prior locations. *See* Exhibit 8. The Lottery revoked licenses at two stores and specifically concluded that Patel had made fraudulent representations through prior sales, had failed to take adequate security precautions to safeguard the tickets, and that continued licensing would be inconsistent with the public interest, convenience or trust. Patel did not appeal the revocation.

{¶7} The hearing officer noted that Patel represented that his wife continued to work at one of the two locations where a license had previously been revoked, but that she would not be working at the new location where SSC sought licensing. The hearing officer also found that Patel "testified that he realized his prior conduct was wrong" and that "[o]ther than telling her to stop, [Patel] neither took steps to prevent his wife from continuing fraudulent conduct after he discovered it, nor reported the discovered fraud to the Lottery." Expressing "sympathy" for Patel's situation (the hearing officer thought the wife's behavior put "considerable stress" on Patel's marriage), the hearing officer nonetheless concluded that the lottery commission revoked the license because "Patel became aware of the fraud, allowed his wife to continue working in the store, and did nothing to prevent further fraud."

{¶8} In conclusions of law, the hearing officer found:

The Hearing Officer suggests that the director consider several factors in his decision-making. First, the director may wish to consider the likelihood of repetition of the prior incident, which the Hearing Officer deems remote. Second, the director may wish to consider the degree to which public trust has been compromised by Patel's prior inaction in the face of fraud. Finally, it may be appropriate for the director to consider the potential loss in

revenue that could occur at the Premises if lottery operations are not allowed to continue there once the purchase is completed. Patel has been nothing, if not persistent, in his stated desire to resume lottery operations. He appears sincere and repentant. Ultimately, the director has full discretion to exercise here.

{¶9} Noting that the director had “complete discretion” to deny an application for a lottery sales agent license under R.C. 3770.05(D)(2) if the director determined that issuing a license would be inconsistent with the public interest, convenience, or trust, the hearing officer concluded by stating:

[t]o the extent the Lottery continues to have concerns about the honesty or integrity of the operations that would be conducted at the new location, based on the undisputed record, the Hearing Officer finds that the Lottery has grounds to deny this application.

{¶10} After considering and rejecting SSC’s objections to the hearing officer’s findings of fact and conclusions of law, the director of the Ohio Lottery denied the license application on grounds that granting it would be inconsistent with the public interest, convenience, or trust.

{¶11} SSC argues that the director’s decision to deny its license application amounted to a permanent denial of a license to any company with which he is associated. It maintains that the director is holding the 2010 license revocations against it as shown not only by his refusal to grant the current application, but by refusing to reinstate Patel’s two previously revoked licenses. SSC maintains that these three refusals effectively bar it or any company associated with Patel from ever obtaining a license.

{¶12} The court properly rejected that argument because SSC’s application for a license or application for the reinstatement of previously revoked licenses did not

constitute a permanent bar on future applications. SSC (or Patel) can file new applications in the future, but the director is under no obligation to reinstate previously revoked licenses in light of Patel's past transgressions.

{¶13} The director could find Patel's past conduct of failing to stop his wife from scratching lottery tickets and then selling them had so undermined public confidence in him as a sales agent that his license application should be denied. The financial success of the lottery depends to a great extent upon the public's confidence that the lottery is operated in an ethical and honest fashion. This principle is specifically incorporated into R.C. 3770.05(D)(2), which grants the director discretion to refuse to grant a license or to revoke a license based on the public interest, convenience, or trust. The director's decision to deny SSC's license application on grounds that the lottery had concerns about the honesty or integrity of operations should SSC be granted a license was a decision well-within the director's broad discretion to make.

{¶14} SSC claims that Patel has "learned from his interactions" with the commission and put in place safeguards to ensure that no additional fraud occurs in the future should he be granted a license. But establishing safeguards to ensure that his wife does not commit future fraud does nothing to address Patel's own conduct of finding out about his wife's actions and continuing to allow her to work in the store despite knowing that she was committing lottery fraud. It was Patel's inaction that led to the licenses being revoked. While Patel appeared remorseful over his part in the prior license revocations, the director could rationally find that Patel's inaction so violated the honesty

and integrity of the lottery system that granting SSC a license would undermine the public trust in the lottery. The court's finding to that effect was not an abuse of discretion.

{¶15} SSC next argues that the director abused his discretion by failing to give weight to the hearing examiner's findings characterizing Patel as "sincere and repentant" and that Patel had a "remote" likelihood of repeating the prior incident.

{¶16} The scope of our review in administrative appeals from the court of common pleas dictates that we reject SSC's argument. We do not directly review the director's decision to deny the license; rather, we consider whether the court of common pleas abused its discretion by finding that the director's decision to deny SSC's license application was supported by reliable, probative, and substantial evidence. *State ex rel. Commercial Lovelace Motor Freight, Inc. v. Lancaster*, 22 Ohio St.3d 191, 193, 489 N.E.2d 288 (1986).

{¶17} It is important to underscore that SSC did not raise an issue of fact on appeal to the court of common pleas. What SSC challenged below was the manner in which the director, despite the recommendation of the hearing officer, exercised his discretion when viewing the facts to determine whether granting SSC's license application would be inconsistent with the public interest, convenience, or trust. What is key is that the hearing officer correctly noted that R.C. 3770.05(D)(2) gave the director "complete discretion" because the decision to grant a license involved the director's subjective consideration of the facts. The court of common pleas properly deferred to the director's discretion. "Appellate courts must not substitute their judgment for those of an

administrative agency or a trial court absent the approved criteria for doing so.” *Lorain City Bd. of Edn. v. State Emp. Relations Bd.*, 40 Ohio St.3d 257, 260-261, 533 N.E.2d 264 (1988). That another director viewing the same facts might have reached the opposite decision does not amount to an abuse of discretion. *Cox v. Fisher Fazio Foods*, 13 Ohio App.3d 336, 337, 469 N.E.2d 1055 (8th Dist.1984). Given the hearing officer’s findings, the deference the court showed to the director’s decision did not amount to an abuse of the court’s discretion.

{¶18} Even though the hearing officer did find that Patel appeared sincere and repentant over his past conduct, the hearing officer also found that the director’s concerns over the honesty and integrity of operations conducted by Patel would, by themselves, justify the decision to deny the license application. As the hearing officer noted, “the Lottery’s integrity is its sole stock in trade.” The hearing officer’s observations of Patel’s reformed character did not supersede the director’s discretion to conclude that granting SSC a license would undermine public confidence and trust in the lottery.

{¶19} SSC next argues that the hearing officer’s report was flawed as a matter of law because it did not contain a recommendation.

{¶20} R.C. 119.09 states that the examiner conducting an adjudication hearing for any agency “shall submit to the agency a written report setting forth the referee’s or examiner’s findings of fact and conclusions of law and a recommendation of the action to be taken by the agency.”

{¶21} The hearing officer’s report, under the heading “recommendation,” stated:

The proposed denial of a lottery license is supported by the record on limited grounds. It is my recommendation, based upon the evidence submitted and testimony received, that the director has grounds to deny the Applicant's license as contemplated, but only to the extent that he determines that due to the * * * experience, character, or general fitness of * * * [Patel] * * * the granting of a license as a lottery sales agent would be inconsistent with the public interest, convenience, or trust.

(Ellipses sic.)

{¶22} SSC argues that the hearing officer did not give a personal recommendation to either grant or deny the license application, but merely stated that the director had grounds for denying the license application.

{¶23} A hearing officer's failure to make a specific recommendation is not fatal when the report indicates a basis for upholding the initial agency decision. *See In re Heritage [at Heather Hill]*, 10th Dist. Franklin No. 09AP-256, 2009-Ohio-6480, ¶ 51-52.

The hearing officer not only gave his recommendation that the director had grounds to deny the application, but stated that the proposed denial was supported by the record. To the extent there is equivocation in the hearing officer's recommendation in light of his statement of the factors that the director should weigh when considering the application, we view it as an acknowledgment that the director had the sole discretion to weigh the factors under R.C. 3770.05(D)(2). Nevertheless, there is no doubt that the hearing officer found the proposed denial of SSC's license application to be supported by the record. This sufficiently stated a recommendation for purposes of R.C. 119.09.

{¶24} We likewise reject SSC's final argument that the director failed to modify the hearing officer's report to explain why the application was denied. SSC's argument

is premised on its belief that the director reached a different conclusion than the hearing officer. That argument is belied by the record. The director had nothing to modify because he stated that he was “adopting the Findings of Fact, Conclusions of Law, and Recommendation of the Hearing Examiner, which determined that the Lottery has grounds to deny your client’s Application.” The director’s decision was consistent with the hearing officer’s recommendation that “[t]he proposed denial of a lottery license is supported by the record on limited grounds.”

{¶25} Judgment affirmed.

It is ordered that appellee recover of said appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
ANITA LASTER MAYS, J., CONCUR