

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Adams Quality Heating & Cooling

Court of Appeals No. E-13-040

Appellant

Trial Court No. 2012-CV-0808

v.

Erie County Health Department

DECISION AND JUDGMENT

Appellee

Decided: May 30, 2014

* * * * *

Andrew R. Mayle, Jeremiah S. Ray, and Ronald J. Mayle, for appellant.

Kevin J. Baxter, Erie County Prosecuting Attorney, and Jason R. Hinnners,
Assistant Prosecuting Attorney, for appellee.

* * * * *

JENSEN, J.

Procedural History and Statement of Facts

{¶ 1} The undisputed facts relevant to the appeal are as follows: Mark Adams is the owner of Appellant, Adams Quality Heating & Cooling. Appellant is licensed to engage in the business of plumbing by the state of Ohio.

{¶ 2} In August of 2010, appellant performed plumbing work on a home addition located on Kelley's Island, in Erie County, Ohio. At the time, appellant was not registered with the Erie County Health Department ("ECHD") to engage in the plumbing business, in contravention of local rule. Also, appellant performed the work without first seeking a permit from the county health commissioner.

{¶ 3} In December of 2011, the ECHD learned that plumbing work had been performed on the Kelley's Island home without a permit. The director of construction programs contacted the general contractor of the project and learned of appellant's name. The director then contacted appellant, alleging that appellant had failed to register or secure a permit.

{¶ 4} On February 3, 2012, appellant submitted to the health department a registration application, along with the requisite fee and bond. The health commissioner issued appellant a registration certificate on February 22, 2012. Appellant did not, however, pay the permit fee or the penalty for failing to obtain a permit. Appellant also failed to submit design specifications of the completed project.

{¶ 5} On August 29, 2012, the health commissioner notified appellant that a hearing would be held on the issue of "your failure to obtain a plumbing permit for [the work performed on Kelley's Island in August of 2010.]" A hearing was held

before a committee of the Erie County Board of Health on September 11, 2012.

At the conclusion of the hearing, the ECHD issued the following decision:

The plumbing registration of [appellant] * * * is hereby suspended until such time as [appellant] pays the costs of the permit; the penalty costs for failure to obtain a permit; and provides a schematic of the plumbing work * * * in accordance with Plumbing Regulations [Code] effective September 1, 2006 as amended, Section 4, Register of Persons in The Plumbing Business.

{¶ 6} On October 31, 2012, appellant filed an administrative appeal pursuant to R.C. 2506.01 in the Erie County Court of Common Pleas.

{¶ 7} The trial court affirmed ECHD's decision "in all respects, except to the extent that it requires [appellant] to provide a 'schematic' in accordance with the Ohio Plumbing Code." The court reasoned,

While this Court appreciates and understands [ECHD's] desire to have a schematic, that is – in all reality – probably impossible. The work is finished, it is not readily accessible because it is behind walls, etc. Moreover, the evidence shows that [the homeowner] is refusing [appellant] access to the property. [Appellant] is unwilling, and understandably so, to submit some drawing from memory years after the fact without access to the property and for fear that it would be inaccurate and expose him to potential liability.

This Court finds that insofar as the condition of re-registering [appellant] is requiring that he submit a “schematic” in accordance with the Ohio Plumbing Code, the action of ECHD, in this particular scenario, is unreasonable and arbitrary. * * * [I]n the unique circumstances of this case, [appellant] could never comply with the prerequisite of providing what’s required of him. This Court finds that suspending his registration on this condition is unreasonable and arbitrary.

{¶ 8} The common pleas court stopped short, however, of ordering appellant’s name back onto the plumbing registry. Instead, it ordered that appellant’s “registration be considered at the appropriate time and after appropriate requirements have been complied with.” The common pleas court did not provide details or otherwise explain how appellant could comply.

{¶ 9} Appellant filed a notice of appeal with this court on July 22, 2013.

Appellant raises four assignments of error for our review:

I. The trial court erred in not finding Section 4.6 of the Plumbing Regulation is void because it is a licensing provision beyond the board’s statutory authority and therefore unenforceable.

II. The trial court erred in finding that – in 2010 – the Plumbing Regulation applied to plumbing work performed on residential additions.

III. The trial court erred in not reversing the Board of Health entirely and instructing the board to reinstate Adams to the plumbing registry.

IV. The trial court erred in not admitting into the record a copy of the legal publication of the plumbing regulation.

The Standard of Review

{¶ 10} This case presents an appeal of a decision by an administrative agency pursuant to R.C. 2506.01. The standard of review applied by the court of appeals in such cases is narrower than the one applied by the lower court. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 735 N.E.2d 433 (2000). “The common pleas court considers the ‘whole record,’ including any new or additional evidence admitted under R.C. 2506.03, and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence.” *Id.* at 147. By contrast, the standard of review applied by the court of appeals is more limited:

This statute grants a more limited power to the court of appeals to review the judgment of the common pleas court only on questions of law, which does not include the same extensive power to weigh the preponderance of substantial, reliable and probative evidence, as is granted to the common pleas court. It is incumbent on the trial court to examine the evidence. Such is not the charge of the appellate court. * * * The fact that

the court of appeals * * * might have arrived at a different conclusion than the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so. (Citations omitted.) *Id.* at 147.

{¶ 11} Thus, the role of an appellate court in an appeal pursuant to R.C. 2506.01 is limited to reviewing questions of law, which the court reviews de novo, and to determining whether the trial court abused its discretion in applying the law. *Three Wide Entertainment v. Athens Bd. of Zoning Appeals*, 194 Ohio App.3d 1, 2011-Ohio-2304, 954 N.E.2d 191, ¶ 10 (4th Dist.). “Abuse of discretion” suggests 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, 450 N.E.2d 1140 (1983).

The Plumbing Regulations in Effect in 2010

{¶ 12} We begin with the second and fourth assignments of error, which we consider together.

{¶ 13} Evidence in the record indicates that the ECHD adopted the “Erie County Combined General Health District Plumbing Regulations” on April 25, 2006, that the regulations were published on August 22 and 26, 2006, and that they became effective on September 1, 2006.

{¶ 14} Two versions of the regulations were admitted into evidence during the hearing: the 2006 original version as exhibit 1A and an updated version, dated March 27, 2012, identified as exhibit 2. Both versions apply to, and require permits for, “newly constructed additions.”

{¶ 15} In support of his second assignment of error, appellant’s appears to make the following argument: (a) that in 2007, the plumbing regulations were modified; (b) that the modification omitted references to “newly constructed additions;” (c) that the modified version was posted on the ECHD website; (d) that the modified version took effect once published on the website; and (e) that it remained in effect in 2010 when appellant did the plumbing project. Appellant concludes that if he was not obligated to obtain a permit to work on the new addition at issue, then he was not in violation of any rule “which would entirely resolve this case.” Appellant states, “[b]ottom line, the clauses making the regulation applicable to additions were not in force in 2010.”

(Emphasis in original.)

{¶ 16} The alleged 2007 version, which purportedly omits any references to “newly constructed additions” was not offered or received into evidence during the hearing. It is not part of the record, nor was it offered as an exhibit at any stage of the proceedings.

{¶ 17} The trial court found,

From a review of the record, as this Court has deemed it, there is insufficient evidence to conclude that the [2006] ECHD Regulations were

not properly published and unenforceable. In order to reach such a conclusion, this Court would have to make certain assumptions not clearly borne out by the record. To name a few, this Court would have to find that the [2007] online version was the official version, and that when this work was done, and immediately prior thereto, it did not include additions. Moreover, the record is not clear what specific provisions did not apply to additions – the requirement to register, to obtain a permit, provide a bond or just submit plans/schematic? This Court cannot conclude on the record before it that the [2006] Regulations weren't properly published. It appears they were. * * *

{¶ 18} We agree. The only evidence in the record demonstrates that appellant was required to obtain a permit before working on the newly constructed addition. Stated another way, there is no evidence to suggest that the permit rule was inapplicable to additions. “It is incumbent on the trial court to examine the evidence.” *Henley*, 90 Ohio St.3d at 147, 735 N.E.2d 433. Based upon the record before it, the common pleas court found insufficient evidence to conclude that the 2006 plumbing regulations were unenforceable. We have reviewed the record and cannot say that the common pleas court erred, as a matter of law, in finding that the ECDH's order was unsupported by a preponderance of substantial, reliable, probative evidence. Appellant's second assignment of error is not well-taken.

{¶ 19} In his fourth assignment of error, appellant argues that the common pleas court erred “in not admitting in the record a copy of the legal publication of the plumbing regulation.” Appellant wished to supplement the record with a 2006 published notice from the *Sandusky Register* newspaper indicating that the plumbing regulations could be found on the ECHD’s website. Appellant filed his motion to supplement the record only after the record had been filed in the lower court, a case management conference had been conducted, and the matter had been briefed.

{¶ 20} Appellant argues that the lower court should have allowed the record to be supplemented pursuant to R.C. 2506.03(A)(5). The statute provides “[t]he hearing of an [administrative] appeal * * * shall be confined to the transcript * * * unless it appears, on the face of that transcript or by affidavit filed by the appellant, that * * * [t]he officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.”

{¶ 21} The record, as certified by the secretary for the Erie County Board of Health, included the hearing transcript, the exhibits, and the committee’s findings of fact. Those findings are three pages in length and consist of 17 enumerated paragraphs. Therefore, on its face, R.C. 2506.03(A)(5) does not apply, as it only allows a record to be supplemented when findings of fact are not filed with the transcript. *See Galli v. Columbus Bd. of Zoning Adjustment*, 193 Ohio App.3d 415, 2011-Ohio-1896, 952 N.E.2d 525, ¶ 16 (10th Dist.) (Though findings of fact were “summary in nature” they

sufficiently set forth the basis for the board’s decision thereby precluding supplementation of the record under R.C. 2506.03(A)(5)).

{¶ 22} We find, as a matter of law, that the lower court properly denied appellant’s motion to supplement the administrative record under R.C. 2506.03(A)(5). Appellant’s fourth assignment of error is not well-taken.

The Erie County Plumbing Registry

{¶ 23} Next, we address appellant’s first and third assignments of error. In the first, appellant argues that Section 4.6 of the plumbing regulation is, in essence, a licensing provision that usurps the authority of the Ohio Legislature. In the fourth assignment of error, appellant argues that ECHD’s suspension of him from the plumbing registry was unreasonable and arbitrary.

{¶ 24} The Ohio Construction Industry Licensing Board is responsible for licensing plumbers. R.C. 3703.07. The licensing board may discipline plumbers, which includes revoking a plumber’s license. R.C. 4740.10(3).

{¶ 25} At the local level, boards of health have general authority to adopt rules to protect the public health. R.C. 3709.21 provides that a board of health of a general health district may “make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and prevention, abatement, or suppression of nuisances.”

{¶ 26} Pursuant to R.C. 3709.21, the Erie County Board of Health enacted the plumbing regulations. Section 4 of the regulations establishes a registry of “all persons

engaged in or intending to engage in the plumbing business.” (Section 4.1.) Section 4.7 prohibits any person, whose name is not on the registry, from doing any plumbing work in Erie County. In order to become registered, a person must submit an application, pay a registration fee, submit a “license/permit bond” in the amount of \$20,000, and attend an annual training session. (Sections 4.3 - 4.5). Each registration expires at the end of the calendar year and is renewable on an annual basis. (Section 4.1).

{¶ 27} At issue here is Section 4.6, which provides

Upon the recommendation of the Health Commissioner, the Board of Health may, after a hearing, remove the name of any person from the register of persons in the plumbing business that has demonstrated inability or unwillingness to comply with this regulation and the Ohio Plumbing Code, Chapters 4101:3-1 through 4101:3-13 of the Ohio Administrative Code in effect August 11, 2005, as may be subsequently amended. Such person may have his/her name reinstated on the register of persons in the plumbing business by the Board of Health upon recommendation of the Health Commissioner after satisfactory demonstration of ability and willingness to comply with this regulation and the Ohio Plumbing Code, Chapters 4101:3-1 through 4101:3-13 of the Ohio Administrative Code in effect August 11, 2005, as may be subsequently amended.

{¶ 28} Appellant argues that Section 4.6 is void because it is “a licensing provision beyond the board’s statutory authority * * *.” Appellant argues that the

provision is, in essence, a “backdoor” licensing provision, which usurps the state’s regulatory powers. Appellant cites no authority to support his claim.

{¶ 29} The Supreme Court of Ohio has specifically found that “a board of health of a general health district has neither expressed nor implied power * * * to enact rules and regulations for the *licensing* of plumbers in such general health district * * *.” (Empasis added.) *Wetterer v. Board of Health*, 167 Ohio St. 127, 139, 146 N.E.2d 846 (1957). On the other hand, although a board of health may not regulate licensing, it may require that those engaging in plumbing work within its jurisdiction first register to do so. R.C. 4740.12(B)(2).¹

{¶ 30} Appellant argues that the removal of one’s name from a registry effectively bars that person from engaging in his livelihood and is akin to licensing, in contravention of *Wetterer v. Board of Health*. We disagree. R.C. 3709.21 specifically grants to county boards of health the authority to adopt rules protecting the public health. Establishing a mechanism to enforce state and local laws, that also safeguards a person’s due process rights, falls within the ambit of a health department’s regulatory authority. We do not view a temporary suspension from a plumbing registry akin to the permanent revocation of a license for several

¹ R.C. 4740.12(B) provides that “nothing in this chapter shall be construed to limit the operation of * * * any ordinance or rule of any political subdivision, district, or agency of the state that * * * (2) requires the registration and assessment of a registration or license fee of tradespersons who perform * * * plumbing * * *.” *See also* 1960 Ohio Atty.Gen.Ops. No. 60-1462.

reasons. First, the ECHD's authority is limited in both time and space. That is, it may not permanently halt a person's ability to plumb. Section 4.6 specifically calls for reinstatement to the registry "after satisfactory demonstration of ability and willingness to comply" with state and local law. Second, the ECHD has no authority to affect a plumber's right to work outside the confines of the county. Third, we note that the disciplinary process set forth in ECHD's plumbing registry is similar to other counties throughout the state. For example, section 5.2 of the Cuyahoga County Board of Health Plumbing Regulation provides,

The Board may suspend or revoke a certificate of registration for cause, which shall include, but not be limited to, refusal or failure to comply with the Ohio Plumbing Code, related state codes, and/or the regulations of the Board; for failure to successfully complete a project; or for conditions considered to be a hazard to the health, safety and welfare of the public.

{¶ 31} Likewise, Section 117 of the Lucas County Building Code creates a registration for specialty contractors, including plumbers. It provides that a certificate of registration "may, after hearing, be suspended or revoked * * * if [the certificate holder] willfully, or by reason of incompetence, violated any statutes of the State of Ohio or any rule or regulation adopted by Lucas County relating to work performed under requirements for certification."

{¶ 32} Similarly, section 703.03 of the Franklin County District Board of Health provides that “[v]iolation of [the plumbing regulation], or any other applicable laws, rules, or regulations, shall be cause for a suspension or revocation of registration.”

{¶ 33} Section 4.6 of the ECHD’s plumbing regulation is no more onerous than the regulations cited above. We find that the ECHD did not exceed its authority in establishing Section 4.6, including the disciplinary measures set forth therein. Appellant’s first assignment of error, that Section 4.6 should be found void, is not well-taken.

{¶ 34} While we find that the ECHD did not exceed its authority in promulgating Section 4.6, we agree with appellant that its discipline of him in this case was unreasonable. In his third assignment of error, appellant argues that the lower court erred in “not instructing the [ECHD] to reinstate [appellant] to the plumbing registry.”

{¶ 35} The ECHD conditioned appellant’s reinstatement to the registry on his payment of the permit and fine *and* his providing a schematic of the plumbing project. The lower court found that it would be “impossible” for appellant to provide a schematic because the work is obscured by finished drywall or tile; that appellant cannot recall sufficient details to create a schematic from memory; and that appellant no longer has

access to the property. We agree with the trial court that appellant “could never comply with the prerequisite of providing what’s required of him” and that “suspending his registration on this condition is unreasonable and arbitrary.”

{¶ 36} “An act or decision is ‘unreasonable’ when it is not governed by reason * * * or is irrational.” *Reed v. Vermilion Local School Dist.*, 83 Ohio App.3d 323, 614 N.E.2d 1101 (6th Dist.1992), citing *Cedar Bay Constr., Inc. v. Fremont*, 50 Ohio St.3d 19, 22, 552 N.E.2d 202, 205 (1990). The ECHD’s decision to deny appellant reinstatement to the registry until he performed what amounts to an impossible act is unreasonable and irrational. It effectively bars appellant from ever working in Erie County, which exceeds the agency’s authority under *Wetterer v. Board of Health*, 167 Ohio St. at 139, 146 N.E.2d 846. Therefore, we find that it was error of the lower court not to order that ECHD allow appellant to reapply to the plumbing registry.

{¶ 37} We remand this case to the lower court. Pursuant to R.C. 2506.04, we instruct that the court modify the ECHD decision and order it to accept appellant’s properly supported registration application under Sections 4.3 – 4.5 of the plumbing regulations. The judgment of the Erie County Court of Common Pleas is affirmed in all other respects. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.