

ORIGINAL

IN THE SUPREME COURT OF OHIO

BROOKWOOD PRESBYTERIAN CHURCH)

Appellant,)

-vs-)

OHIO DEPARTMENT OF EDUCATION,)

Appellee.)

Case No. 2009-1926

Appeal from the Court of Appeals for
Franklin County, Ohio

(Court of Appeals Case No. 09AP-303)

APPELLANT'S REPLY BRIEF

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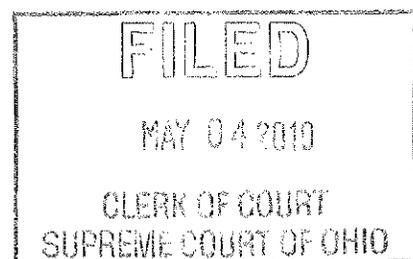


TABLE OF CONTENTS

PAGE

Table of Authorities	ii
I. Argument.....	1
A. Appellee contends no record exists, but then cites to the record in several places within its Merit Brief and attaches part of the record to its Appendix.....	1
B. Deflating the conflation contention of Appellee.....	3
C. Appellee’s “hallmarks of adjudication” argument is a red herring.....	7
II. Conclusion	10
III. Certificate of Service	11

TABLE OF AUTHORITIES

Cases

Matash v. State Dept. of Ins. (1964), 177 Ohio St. 55, 202 N.E.2d 305..... 3

Ray v. Ohio Unemployment Comp. Bd. of Rev. (1993), 85 Ohio App.3d 103,
619 N.E.2d 106 3

Statutes

R.C. 119.01 8, 4

R.C. 119.12 2, 7 - 10

R.C. 3314.02 2, 4, 6

R.C. 3314.015 2, 4, 6 - 9

Administrative Code

O.A.C. 3301-102-02 2

O.A.C. 3301-102-03 5, 8, 9

I. ARGUMENT

Appellant Brookwood Presbyterian Church (“Brookwood”) submits this Reply to the Merit Brief of Appellee Ohio Department of Education (“ODE”), pursuant to S.Ct. Prac. R. 6.4. Brookwood objects to and opposes each of the arguments and counter-propositions of law submitted by ODE in its brief, but will limit its response here to certain of the statutory arguments presented by ODE. Brookwood stands by its initial Merit Brief in its entirety, and Brookwood does not withdraw or concede any of its Propositions of Law merely by failing to address one or more of the arguments made by ODE in its Merit Brief.

A. ODE contends no record exists, but then cites to the record in several places within its Merit Brief and attaches part of the record to its Appendix.

In its Statement of Facts and again in its discussion of Brookwood’s Proposition of Law No. 4, ODE insists that “it could not certify a record to the trial court because no record exists.” (See, e.g., ODE Merit Brief, p. 4, bottom, and p. 18.) Yet, throughout its Statement of Facts and in its discussion of Proposition of Law No. 3, ODE makes both general and specific reference to its “record” in this case, in order to justify its decision to categorically disapprove sponsorship of community schools to any church organization.

First, at pp. 3-4 of its Merit Brief, ODE specifically refers to the Brookwood application and some of the supporting documents which Brookwood submitted to ODE – including the January 31, 1964 “IRS Letter” and other “evidence of the educational endeavors of the national Presbyterian church. . . .” Yet at the bottom of this same page, ODE admits that it “informed the trial court that no record existed because the Department had not conducted a public hearing in the matter.”

Next, in attempting to defend its failure to adopt rules required by R.C. 3314.015(B)(3) which set forth some criteria to govern ODE's determination whether a proposed sponsor is an "education-oriented" entity for the purpose of satisfying R.C. 3314.02(C)(1)(f)(iii),¹ ODE refers to "the Department's record" of having approved seven 501(c)(3) entities as sponsors. Yet Brookwood has never seen this so-called "record," and this "record" was not submitted to the trial court in this matter either.

Finally, at page 17 of its Merit Brief, ODE again cites to "Brookwood's documentation accompanying its request to be considered as an eligible applicant for sponsorship." Yet according to ODE there is no record in this case. How is it that ODE is permitted to cite and rely upon a non-existent record when it suits the agency, but the actual entire record – including documents created by ODE and which support Brookwood – "does not exist" and thus may not be cited to or relied upon by Brookwood in this matter?

ODE's position is the equivalent of a trial court failing to forward any documents (such as the original complaint, answer, pretrial motions, pretrial decisions, etc.) on an appeal to the court of appeals because the trial court granted a motion to dismiss, and there was thus no "trial transcript" to certify to the court. The record of proceedings required to be certified to the reviewing court by ODE in an R.C. 119.12 appeal is more than the mere transcript of an evidentiary hearing. In a sponsorship application process of the type at issue in this matter, the record of proceedings consists at a minimum of the application, supporting documents, internal memos, meeting minutes, correspondence, evidence of the internal decision process, and the

¹ A review of the rule cited by ODE, at its Merit Brief p. 15, reveals that ODE's rule-adopted "criteria" for an "education-oriented entity" is nothing more than a word-for-word parroting of the over-all statutory requirements for a sponsor that is a tax-exempt entity under section 501(c)(3) of the Internal Revenue Code. Compare O.A.C. 3301-102-02(H) with R.C. 3314.02(C)(1)(f). That is, ODE's criterion for identifying an education-oriented entity is whether it is an education-oriented entity. Circular is ODE's reasoning.

final decision of ODE – that is, all of the evidence considered by the agency in reaching its “decision . . . to disapprove an entity for sponsorship of a community school” for purposes of R.C. 3314.015(D).

ODE’s reference to information outside the record on appeal must be stricken, particularly when it is ODE’s position that no record exists. This is precisely the reason for the rule recognized by this Court in *Matash v. State Dept. of Ins.* (1964), 177 Ohio St. 55, 202 N.E.2d 305, at syllabus, construing R.C. 119.12:

Where an appeal from an order of an administrative agency has been duly made to the Common Pleas Court pursuant to Section 119.12, Revised Code, and the agency has not prepared and certified to the court a complete record of the proceedings within twenty days after receipt of the notice of appeal and the court has granted the agency no additional time to do so, the court must, upon motion of the appellant, enter a finding in favor of the appellant and render a judgment for the appellant.

As one court of appeals has described it: “It is also axiomatic that an administrative agency must accept and include all relevant evidence presented by the parties. The [agency] cannot erroneously prepare an incomplete record and then take advantage of an error which it has created.” *Ray v. Ohio Unemployment Comp. Bd. of Rev.* (1993), 85 Ohio App.3d 103, 107, 619 N.E.2d 106.

B. Deflating the conflation contention of ODE

The central theme throughout ODE’s brief in this matter is centered upon a statutory fallacy: that is, that Brookwood has somehow “conflated” or combined a two-step statutory decision process that ODE follows when deciding whether an entity should be approved as a sponsor of community schools in Ohio. ODE erroneously argues that step-one of this process involves an “eligibility” determination, while step-two involves whether an “eligible” entity should be approved as a sponsor. (See ODE’s Merit Brief, bottom p. 6.)

Yet Brookwood has conflated nothing, because the General Assembly has not created a two-step decision process within the statutory scheme of sponsor approval set forth in R.C. 3314.02 and R.C. 3314.015. There exists but one decision to be made by ODE when it receives an application from an entity concerning sponsorship of community schools: should the application be approved or disapproved. The primary statute relevant to the decision before this Court, R.C. 3314.015(D), unambiguously states that “*the* decision of the department to disapprove an entity for sponsorship of a community school . . . may be appealed by the entity.” Not “the decision on the merits of the entity’s application;” not “the decision to disapprove an ‘eligible’ entity;” and not “except for eligibility determinations, . . .”. None of these words, upon which ODE’s entire argument here is based, were used by the General Assembly in enacting R.C. 3314.015.

Only by adding words which the General Assembly did not use can ODE arrive at a two-step decision process, one of which may not be appealed. The words actually used by the General Assembly do not support ODE’s arguments here. Instead, ODE has created this decisional dichotomy as a creative, extra-statutory way to attempt to explain away Brookwood’s explicit right to a Chapter 119 appeal granted in R.C. 3314.015(D). ODE creates this dichotomy out of whole cloth – it has no support in the language used by the General Assembly.

Neither the word “eligible” nor “eligibility” occurs anyplace within either R.C. 3314.02 or R.C. 3314.015, connected to the word “entity” or otherwise. Nor were any synonyms of those words used by the General Assembly. As set forth at length in Appellant’s Merit Brief, regardless of the particular reason or reasons for its decision, whenever ODE decides to disapprove “an entity” for sponsorship of community schools, its decision “may be appealed by

the entity.” R.C. 3314.015(D). ODE’s efforts to argue around the General Assembly’s unambiguous language by inserting language of its own must fail.

In a case such as this, where the issue is whether the General Assembly intended decisions of ODE to be subject to administrative appeal, the characteristics of the internal process which ODE has set up to handle applications for sponsorship of community schools is largely irrelevant. ODE is generally free to set up any administrative process it wants to determine whether an entity should be approved as a sponsor of community schools, *as long as* its administrative process does not conflict with the language used by the General Assembly. Yet ODE’s apparent process as described in its Merit Brief here conflicts on its face with the statutory language, because it replaces the singular word “entity” used by the General Assembly with “eligible entity” in numerous – but not all – places within the Administrative Code.

Indeed, even ODE’s administrative rules are internally inconsistent with, and do not support, ODE’s argument to this Court. ODE contends in its Merit Brief that the very first decision it must make when it receives a sponsorship application is whether the applicant is an “eligible entity.” Yet ODE’s own administrative rules seem to preclude this “eligibility” determination step. Those rules explicitly state that no entity except an “eligible entity” can even get a hold of an application for sponsorship to begin with: “An *eligible entity* shall obtain a written application from the department to become a sponsor and shall complete it and submit it to the department no later than the deadlines posted on the department’s website.” (Emphasis added.) O.A.C. 3301-102-03(B). In this case, of course, it is undisputed that Brookwood obtained an application from the department, completed it and submitted it to the department. Brookwood was not subjected to an “eligibility” determination before it was even allowed to obtain an application.

In addition, ODE cannot logically argue that this case turns on the question of “eligibility” or that “eligibility” determinations are not appealable while “decisions on the merits” are, because even ODE claims in its Merit Brief that the eligibility question (a preliminary question which Brookwood has shown does not exist in the statutory language at all) includes at least five (5) separate elements. See R.C.3314.02(C)(1)(f)(i)-(iv), paraphrased at Appellee’s Brief at p. 3. ODE erroneously contends, at page 9 of Appellee’s Brief, that none of its so-called “eligibility” determinations are subject to a Chapter 119 appeal. Yet only one of those five criteria is made “final” by the General Assembly. (See R.C. 3314.015[B][3].)

The General Assembly did not choose to make ODE’s determination that “the entity has assets of at least \$500,000 and a demonstrated record of financial responsibility,” R.C. 3315.02(C)(1)(f)(ii), a “final” determination in R.C. 3314.015(B) – and yet ODE lists this as one of its preliminary “eligibility” determinations which are not subject to administrative appeal. Similarly, the General Assembly did not choose to make ODE’s determination that “the entity has as demonstrated record of successful implementation of educational programs,” R.C. 3315.02(C)(1)(f)(iii), a “final” determination in R.C. 3314.015(B) – and yet ODE lists this as one of its preliminary “eligibility” determinations which are not subject to administrative appeal.

The absence of a two-step decision process is obvious on the face of the statutory language used by the General Assembly. There is only one (1) legal “decision” that ODE is charged to make: whether to approve or disapprove the applying entity as a sponsor of community schools. This one (1) decision is made up of several individual factual determinations spelled out in subsection (C)(1), and elsewhere in R.C. 3314.02 and 3314.015.

Thus, contrary to ODE’s creative formulation, the actual language of R.C. 3314.015 makes only one of ODE’s so-called “eligibility” determinations “final” (R.C.

3314.02(C)(1)(f)(iii)-first phrase, see R.C. 3314.015[B][3]), while the rest of them are not final (R.C. 3314.02[C][1][f][i], [ii], [iii]-second phrase and [iv]). And all of these individual determinations, which collectively make up ODE’s legal decision to approve or disapprove the application for sponsorship, are subject to administrative appeal in accordance with R.C. 119.12. See, R.C. 3314.015(D).

In sum, the General Assembly did not create an “administrative split personality” with respect to the right of appeal from ODE’s decision to disapprove a sponsorship application. The fact that ODE may have developed a split personality on its own does not trump the language used by the General Assembly in R.C. 3314.015(D). ODE’s two-step process argument is a legal fiction which has no support whatsoever in the statutes at issue in this case.

C. ODE’s “hallmarks of adjudication” argument is a red herring.

Whether or not any part of ODE’s decision to approve or disapprove an entity for sponsorship of a community school “bears any hallmarks of adjudication,” ODE’s decision is still appealable under R.C. 119.12 - because R.C. 3314.015(D) says it is.

Maintaining its false “dichotomy of decision” premise, ODE attempts to draw some neat distinction on page 11 of its Brief when it states that “eligibility determinations like this one are made by the Department’s Office of Community Schools.” Yet truth be told, each and every determination involving an application for sponsorship is made by the Department’s Office of Community Schools.

Neither the applicable statutes nor the agency’s own administrative rules make any distinction between “eligibility” and “ultimate merit” decisions, and they do not grant any one type of decision on to the agency’s Office of Community Schools and other decisions to the Board or the Superintendent or to any other individual or office within the agency. Indeed,

ODE's own rules provide that the agency's entire decision process is conducted solely by "the department" upon its review of an application. See, O.A.C. 3301-102-03. No oral hearing is provided at any step of the application review process, yet the applicant is certainly given "notice" through the statute and rules themselves that the agency will "hear" the entity's "evidence" submitted in the application itself. See e.g., O.A.C. 3310-102-03(E), "An eligible entity shall provide as part of its initial written application, as well as during the application review process, *evidence* requested and deemed necessary by the department . . ." (Emphasis added.)

These are the only "hallmarks of adjudication" necessary where the right to an administrative appeal in accordance with R.C. 119.12 is expressly granted by a jurisdictional statute enacted by the General Assembly, e.g. R.C. 3314.015(D). See: R.C.119.12, first paragraph (related to denying an applicant issuing or renewing a license or registration of a licensee) and second paragraph: "Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal . . ."

The question of whether an administrative agency's decisions are subject to appeal under R.C. 119.12 does not turn on whether a formal "adjudication" has taken place. Instead, agency functions subject to R.C. 119.12 includes any of those set forth in the initial definition of the Administrative Procedure Act, R.C. 119.01(A)(1):

(A)(1) "Agency" means, except as limited by this division, any official, board, or commission having authority to promulgate rules or make adjudications in the civil service commission, the division of liquor control, the department of taxation, the industrial commission, the bureau of workers' compensation, *the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code*, and the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the

state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses. * * * (Emphasis added.)

As even ODE recognized in its first pleading filed in the court of common pleas in this matter (ODE's Motion to Dismiss, R. 23, pp. 4-5), this definition has three parts. First, it includes five (5) specific boards and commissions that have authority to promulgate rules or make adjudications.

The second part of the definition, applicable here, includes the "functions" of any "administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 to 119.13 of the Revised Code." The applicable "function" in this case, of course, is the "decision . . . to disapprove an entity for sponsorship of a community school," and this function is performed by the "department," i.e., ODE. This "function" is "made subject to sections 119.01 to 119.13 of the Revised Code" (and specifically to section 119.12) by R.C. 3314.015(D) and O.A.C. 3301-102-03(G).

Finally, the third part of the R.C. 119.01(A)(1) definition includes "the licensing functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state having the authority or responsibility of issuing, suspending, revoking, or canceling licenses." An argument could easily be made that the sponsorship approval function of ODE set forth in R.C. 3314.015 is sufficiently analogous to the decision whether to issue a license based upon review of an application for such license, that it also falls within this third part of R.C. 119.01(A)(1).

It should be noted that although ODE has – albeit without legislative direction – transformed the word "entity" into "eligible entity" in much of its administrative rules, the agency did not use that convention in relation to the right to an appeal in accordance with R.C.

119.12. That is, even in its own administrative rules, ODE recognizes that its decision “to disapprove an entity [any old entity] for sponsorship of a community school may be appealed by the entity in accordance with section 119.12 of the Revised Code.” ODE correctly did not attempt to limit the scope of this right of appeal in its administrative rules, promulgated in accordance with Chapter 119 of the Revised Code. Its attempt to limit the scope of administrative appeal in its arguments here should also be rejected.

II. CONCLUSION

For all the foregoing reasons, as well as those set forth in its initial Merit Brief, Brookwood seeks reversal of the decision of the lower courts dismissing Brookwood’s administrative appeal for lack of subject matter jurisdiction, and to reinstate that appeal. In addition and pursuant to R.C. 119.12, Brookwood also urges this Court to issue a mandate directing the common pleas court to enter a final order and entry which: (1) finds that ODE’s Decision is not in accordance with law; (2) reverses the Decision of ODE for failure of that agency to file its record on appeal; (3) renders judgment in favor of Brookwood upon its eligibility to be a sponsor of community schools in Ohio; and (4) awards compensation to Brookwood for its fees in accordance with R.C. 2335.39, all as authorized under R.C. 119.12.

Respectfully submitted,



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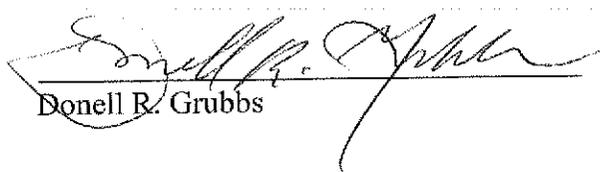
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Appellant was served by regular U.S. Mail, postage prepaid, upon the following this 4th day of May, 2010:

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