[Cite as *Sinnet v. Ohio Dept. of Health*, 2009-Ohio-6990.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Joe Sinnett dba Joez Tabernacle Lounge,	:	
	:	
Appellant-Appellant,		
	:	No. 09AP-437
v.		(C.P.C. No. 08CVF-08-11213)
	:	
Ohio Department of Health et al.,		(REGULAR CALENDAR)
	:	
Appellees-Appellees.		
	:	

D E C I S I O N

Rendered on December 31, 2009

Donaldson Law Offices, L.P.A., John D. Donaldson and *Joshua A. Dunkle*, for appellant.

Richard Cordray, Attorney General, *Angela M. Sullivan* and *Carol V. Mosholder*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant, Joe Sinnett ("appellant"), filed this appeal seeking reversal of a judgment of the Franklin County Court of Common Pleas affirming the decision of the Mansfield/Ontario/Richland County Health Department ("the Health Department"), designee for the Ohio Department of Health ("ODH"),[1] finding that appellant committed violations of R.C. 3794.02(A) and 3794.06(B). For the reasons that follow, we affirm.

[1] We refer to the Health Department and ODH collectively as "appellees."

{¶2} Appellant is the proprietor of Joez Tabernacle Lounge, an establishment located in Mansfield, Ohio. The Health Department conducted an investigation of the establishment based on complaints it had received alleging that the establishment was violating the Smoke Free Workplace Act, R.C. Chapter 3794. Based on that investigation, the Health Department sent appellant a Proposed Civil Fine Letter informing appellant that it had found violations of R.C. 3794.02(A), which prohibits an establishment from allowing smoking in a prohibited area, and R.C. 3794.06(B), which prohibits the presence of ashtrays in a prohibited area. The proposed civil fine was in the amount of $200, based on appellant having been found to have committed a previous violation and the violation having been intentional.

{¶3} Appellant contested the findings in a letter dated January 7, 2008. On June 24, 2008, the Health Department held a hearing regarding the alleged violations. At the hearing, Health Department investigator Sue Chalfant testified about the charged violation. At the conclusion of her direct testimony, appellant was offered the opportunity to cross-examine Chalfant about her testimony, but appellant stated that he had no questions at that time.

{¶4} During the presentation of appellant's case, appellant attempted to call Chalfant for the purpose of obtaining additional testimony from her. The hearing officer denied appellant the opportunity to recall Chalfant as a witness, since she had already testified during the Health Department's case.

{¶5} Appellant testified on his own behalf during the hearing. During his testimony, appellant stated that he was not denying that people were smoking in the establishment, nor was he denying that ashtrays were present. Instead, appellant argued

that he believed the establishment was not subject to the Smoke Free Workplace Act. Appellant argued that he did not believe the owner of an establishment should be responsible for the actions of its customers when those customers smoke. Appellant also pointed to provisions of the Act regarding lodging facilities and family-owned places of employment in which contractors and third parties are intermittently present, arguing that those provisions applied to him and therefore exempted him from the Act.

{¶6} During the hearing, appellant expressed a number of disagreements with the Smoke Free Workplace Act. Appellant stated:

> Now, make no doubt about this. I am not here in anyway and I want it to be made very clear to everyone in this room and the entire world, I do not – do not have any use for this law. I do not respect it. I do not support it and I will go to any length that I possibly can to oppose it and get it revised. I do not appreciate socialist, politically correct agendas funded by the Robert Wood Johnson Foundation to ignore my 9th and 14th constitutional protections.
>
> * * *
>
> I have no intention whatsoever of complying with more than the minimum required me by law. And that is all that I intend to do.

(Tr. 26-27.)

{¶7} The hearing officer issued a report finding that appellant had committed the alleged violations. The hearing officer rejected appellant's arguments that his establishment was exempt from the Act's coverage of lodging facilities and family-owned businesses in which contractors and third parties are only intermittently present, finding that those provisions do not apply to appellant's establishment, which is a lounge located adjacent to a hotel. The report also found that the violation had been intentional, thus triggering appellant to file objections to that report. On July 22, 2008, the Health

Department sent a letter to appellant informing him that the hearing officer's report had been affirmed and that a fine of $200 had been imposed.

{¶8} Appellant then filed an administrative appeal with the Franklin County Court of Common Pleas pursuant to R.C. 119.12. Appellees filed a motion seeking dismissal of the appeal on the grounds that appellant, a non-attorney, had filed the notice of appeal on behalf of the establishment's liquor permit holder, an LLC. The trial court analyzed the record and concluded that appellees had never manifested an intention to charge the permit holder with violating the Smoke Free Workplace Act. The trial court concluded that appellant was being charged individually with the violations, and, therefore, his filing of the appeal was proper.

{¶9} The trial court then considered the merits of the appeal. The trial court first considered appellant's argument that the establishment was not subject to the Smoke Free Workplace Act. The court rejected this argument, finding that the provisions of the Act apply to appellant's establishment. The trial court then considered appellant's argument that his right to due process was violated when the hearing officer refused to allow him to cross-examine Chalfant during the administrative hearing. The court found that the denial of the right to cross-examination was a violation of the right to due process, but concluded that appellant had suffered no substantive harm. Finally, the trial court considered appellant's argument that the finding that the violations were intentional should be reversed, an argument that the trial court also rejected.

{¶10} Appellant then filed this appeal and asserts two assignments of error:

ASSIGNMENT OF ERROR I.

THE COURT BELOW ABUSED ITS DISCRETION WHEN IT DETERMINED THAT, WHILE THE DENIAL OF THE RIGHT

OF APPELLANT TO CROSS-EXAMINE APPELLEES' WITNESSES WAS A DENIAL OF APPELLANT'S RIGHT TO DUE PROCESS, SUCH A FINDING DID NOT REQUIRE DISMISSAL OF THE CIVIL FINE FOR VIOLATION OF O.R.C. CHAPTER 3794 OR ANOTHER REVIEW HEARING WITH APPROPRIATE DUE PROCESS PROTECTIONS.

ASSIGNMENT OF ERROR II.

THE COURT BELOW ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT THE APPELLEES' DECISION TO DOUBLE THE FINE FOR VIOLATION OF CHAPTER 3794 OF THE OHIO REVISED CODE WAS SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH THE LAW.

{¶11} Pursuant to R.C. 119.12, a court of common pleas reviewing the decision of an administrative agency may affirm the agency's order if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence, and is otherwise in accordance with law. *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826. This requires the common pleas court to engage in a two-step process. The first involves a hybrid factual/legal inquiry, in which the court defers to the agency's resolution of evidentiary conflicts and factual findings, unless the court concludes that the agency's findings are internally inconsistent, impeached by evidence in the record, rest upon improper inferences, or are otherwise unsupportable. *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 1993-Ohio-182. The second step requires the court of common pleas to construe and apply the law. Id.

{¶12} An appellate court's review of a trial court's determination regarding an administrative order is more limited, being confined to a consideration of whether the trial court abused its discretion in making that determination. *State ex rel. Commercial*

Lovelace Motor Freight, Inc. v. Lancaster (1986), 22 Ohio St.3d 191. However, the appellate court's review of issues of law is plenary. *Bartchy*, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339.

{¶13} In his first assignment of error, appellant argues that the trial court erred in its conclusion regarding the hearing officer's refusal to allow him to cross-examine Health Department investigator Chalfant during the administrative hearing. The trial court concluded that appellant did not waive his right to cross-examine Chalfant after her direct testimony during the Health Department's case in chief and should have been allowed to call her for the purpose of cross-examination during the presentation of his defense. However, the trial court concluded that this error did not require reversal of the Health Department's order because no harm resulted. The trial court based this conclusion on the fact that appellant admitted during his testimony that people were smoking and ashtrays were present in his establishment.

{¶14} We agree that appellant should have been allowed to recall Chalfant as a witness during presentation of his defense, and appellant would have been allowed to question her as if on cross-examination. We also agree with the trial court's conclusion that the hearing officer's refusal to allow appellant to recall Chalfant constituted error. Finally, we cannot say that the trial court abused its discretion in concluding that this error did not require reversal of the Health Department's order or remand to the Health Department for additional proceedings.

{¶15} During her direct testimony, Chalfant testified about the violations she observed during her investigation. In his testimony, appellant did not dispute any of Chalfant's testimony and, in fact, largely confirmed what she said. Specifically, appellant

admitted that people were smoking in the establishment and that ashtrays were present. Appellant's position during the hearing was that he believed his establishment was not subject to the Smoke Free Workplace Act. Because this argument could not have been supported by any cross-examination testimony Chalfant could have provided, there is no indication that the result of the hearing would have been different if he had been allowed to recall Chalfant as a witness during presentation of his case. Thus, the trial court did not abuse its discretion when it concluded that no prejudice resulted from the error. Appellant's first assignment of error is therefore overruled.

{¶16} In his second assignment of error, appellant argues that the trial court erred when it concluded that the decision doubling the fine to $200 was supported by reliable, probative, and substantial evidence, and was otherwise in accordance with the law.

{¶17} Appellant was charged with permitting smoking in a prohibited area in violation of R.C. 3794.02(A) and Ohio Adm.Code 3701-52-02(A) and with having ashtrays present in an area where smoking was prohibited in violation of R.C. 3794.06(B) and Ohio Adm.Code 3701-52-02(F). R.C. 3794.09 sets forth the penalties for violating the Smoke Free Workplace Act, and provides, in relevant part:

> (A) Upon the receipt of a first report that a proprietor of a public place or place of employment or an individual has violated any provision of this chapter, the department of health or its designee shall investigate the report and, if it concludes that there was a violation, issue a warning letter to the proprietor or individual.
>
> (B) Upon a report of a second or subsequent violation of any provision of this chapter by a proprietor of a public place or place of employment or an individual, the department of health or its designee shall investigate the report. If the director of health or director's designee concludes, based on all of the information before him or her, that there was a violation, he or she shall impose a civil fine upon the

> proprietor or individual in accordance with the schedule of fines required to be promulgated under section 3794.07 of this chapter.

{¶18} R.C. 3794.07(B) provides that the fine for a violation of R.C. 3994.02(A) shall be not less than $100 and not more than $2,500. That section further provides that the fine "shall be doubled for intentional violations[.]" The penalty schedule adopted by the ODH provides that for violations of R.C. 3794.02(A) and 3794.06(B), a first violation results in issuance of a warning letter, and a second violation results in imposition of a $100 fine.

{¶19} The trial court considered the record and found that appellant had been issued a warning letter for a previous violation of Chapter 3794. Thus, the trial court concluded that $100 was the appropriate fine for the violations at issue. As for the Health Department's doubling of the fine to $200, the trial court cited evidence from the administrative hearing that showed appellant did not accept the Smoke Free Workplace Act. Specifically, the trial court cited the arguments appellant made for why the Act did not apply to him and found that appellant's meritless attempts to argue that the Act did not apply to him showed this lack of acceptance.

{¶20} We cannot say that the trial court abused its discretion when it concluded that the Health Department's conclusion that appellant intentionally violated the provisions of the Smoke Free Workplace Act was supported by reliable, probative, and substantial evidence, and was otherwise in accordance with the law. Appellant's statements that he opposed the Act, coupled with his attempts to argue that various provisions of the Act exempted his establishment from its coverage when those provisions clearly did not apply, constituted sufficient reliable, probative, and substantial evidence to support the

conclusion that appellant was acting intentionally. Therefore, appellant's second assignment of error is overruled.

{¶21} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and KLATT, JJ., concur.

_____