

[Cite as *The Boulevard v. Ohio Dept. of Health*, 2010-Ohio-1328.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The Boulevard,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-837 (C.P.C. No. 08CVF10-15622)
Ohio Department of Health et al.,	:	(ACCELERATED CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on March 30, 2010

Sirkin, Pinales & Schwartz LLP, and *H. Louis Sirkin*, for appellant.

Richard Cordray, Attorney General, and *Stacy Hannan*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Appellant, The Boulevard, appeals from a judgment of the Franklin County Court of Common Pleas affirming a decision of appellee, the Ohio Department of Health, and its designee, the Springdale Health Department (hereinafter, "Springdale"), finding The Boulevard in violation of Ohio's Smoke Free Workplace Act. For the following reasons, we affirm that judgment.

{¶2} On December 7, 2006, Ohio's Smoke Free Workplace Act, R.C. Chapter 3794, became effective. In part, the law prohibits proprietors of public places or places of employment from permitting smoking in those places. R.C. 3794.02(A).

{¶3} On June 11, 2008, Springdale received a complaint that people were smoking in The Boulevard, a bar in Cincinnati, Ohio. As a result, Springdale opened an investigation. Shortly thereafter, Ella Jergens, a registered sanitarian for Springdale, inspected The Boulevard as part of that investigation. On June 30, 2008, Jergens walked into The Boulevard and observed a patron smoking in the bar.

{¶4} Based on Jergens' observation, Springdale found that The Boulevard violated Ohio's Smoke Free Workplace Act by permitting smoking in prohibited areas ("smoking violation"). Because The Boulevard had prior smoking violations, Springdale imposed a \$1,000 fine for this smoking violation. The Boulevard, through counsel, requested an administrative review to contest the smoking violation.

{¶5} At the administrative hearing, Jergens explained that she entered The Boulevard on June 30, 2008 and observed a patron smoking at the bar for a lengthy period of time. She observed a bartender directly across from the patron but did not see the bartender ask the patron to extinguish the cigarette or to take the cigarette outside. Given the bartender's failure to request that the patron stop smoking in the establishment, Jergens concluded that The Boulevard permitted smoking and, therefore, violated R.C. 3794.02(A). At the end of the hearing, Springdale affirmed the smoking violation. The Franklin County Court of Common Pleas affirmed that decision.

{¶6} The Boulevard appeals and assigns the following errors:

FIRST ASSIGNMENT OF ERROR: THE COMMON PLEAS COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO DISMISS.

SECOND ASSIGNMENT OF ERROR: THE COMMON PLEAS COURT ERRED IN OVERRULING APPELLANT'S CONSTITUTIONAL CHALLENGES TO THE SMOKE FREE WORKPLACE ACT.

THIRD ASSIGNMENT OF ERROR: THE COMMON PLEAS COURT ERRED IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT A VIOLATION OF THE SMOKE-FREE [ACT].

{¶7} This appeal is governed by R.C. 119.12. R.C. 3794.09(C). Therefore, the trial court reviews the agency's order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with law. Determining whether an agency order is supported by reliable, probative, and substantial evidence is essentially a question of the presence or absence of the requisite quantum of evidence. In undertaking this hybrid form of review, the trial court must give due deference to the administrative resolution of evidentiary conflicts, but the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11.

{¶8} On appeal to this court, the standard of review is more limited. Unlike the common pleas court, the court of appeals does not determine the weight of the evidence. In reviewing the common pleas court's determination that an agency order is or is not supported by reliable, probative, and substantial evidence, the appellate court's role is limited to determining whether or not the common pleas court abused its discretion. *Ace Ventures L.L.C. v. Ohio Dept. of Transp.*, 10th Dist. No. 03AP-280, 2003-Ohio-6556, ¶6. On questions of law, the court of appeals' review is plenary. *Univ. Hosp., Univ. of*

Cincinnati College of Medicine v. State Emp. Relations Bd. (1992), 63 Ohio St.3d 339, paragraph one of the syllabus.

{¶9} In its first assignment of error, The Boulevard contends that the trial court erred by denying its motion to dismiss. We disagree.

{¶10} After The Boulevard filed its notice of appeal to the trial court, it filed a motion to dismiss. In that motion, The Boulevard claimed that dismissal was warranted because Springdale violated the procedures laid out in Ohio Adm.Code 3701-52-08(F)(2)(a)(v) and (vi) by not filing a report and recommendation and by not allowing written objections to such report after the administrative review. Given these procedural deficiencies, The Boulevard argued that Springdale erred in affirming the smoking violation, and therefore, the trial court should grant its motion to dismiss.

{¶11} The trial court affirmed Springdale's decision without ruling on The Boulevard's motion to dismiss. Therefore, the trial court implicitly denied the motion. *Am. Business Mtge. Servs., Inc. v. Barclay*, 10th Dist. No. 04AP-68, 2004-Ohio-6725, ¶8.

{¶12} On appeal, The Boulevard continues to argue that Springdale's failure to comply with certain procedural requirements required the trial court to grant its motion to dismiss. We disagree.

{¶13} A trial court must dismiss an R.C. 119.12 administrative appeal if it lacks subject matter jurisdiction over such appeal. A trial court lacks subject matter jurisdiction over an R.C. 119.12 appeal when the appealing party fails to strictly comply with the requirements of R.C. 119.12. *Flowers v. Ohio Dept. of Commerce*, 8th Dist. No. 86765, 2006-Ohio-2585, ¶17, citing *Harrison v. Registrar, Bureau of Motor Vehicles*, 11th Dist. No. 2002-T-0095, 2003-Ohio-2546, ¶16. Here, The Boulevard does not argue that it

failed to strictly comply with the statutory requirements of R.C. 119.12. Therefore, The Boulevard has not demonstrated that the trial court lacked subject matter jurisdiction over its appeal.

{¶14} The procedural deficiency alleged by The Boulevard was a potential basis for challenging the validity of Springdale's decision. However, The Boulevard failed to assert this argument in its merit brief to the trial court. Instead, The Boulevard advanced this argument solely in support of its motion to dismiss. This alleged procedural deficiency did not adversely affect the trial court's jurisdiction. Because the trial court had subject matter jurisdiction over The Boulevard's appeal, it did not err by denying The Boulevard's motion to dismiss. Accordingly, we overrule The Boulevard's first assignment of error.

{¶15} The Boulevard claims in its second assignment of error that the trial court erred by rejecting its constitutional challenges to Ohio's Smoke Free Workplace Act. Specifically, The Boulevard claims that the Act is unconstitutionally vague and violates its right to due process. This court recently considered and rejected these very arguments in *Deer Park Inn v. Ohio Dept. of Health*, 10th Dist. No. 09AP-67, 2009-Ohio-6836, ¶15-22. In light of that holding, we overrule The Boulevard's second assignment of error.

{¶16} Lastly, The Boulevard argues in its third assignment of error that there was insufficient evidence in the record to prove that it permitted smoking. We disagree.

{¶17} To prove a violation of R.C. 3794.02(A), Springdale had to prove by a preponderance of the evidence that The Boulevard permitted smoking. *Pour House, Inc. v. Ohio Dept. of Health*, 10th Dist. No. 09AP-157, 2009-Ohio-5475, ¶18-20. A proprietor permits smoking when the proprietor affirmatively allows smoking or implicitly allows

smoking by failing to take reasonable measures to prevent patrons from smoking, such as by posting no smoking signs and notifying patrons who attempt to smoke that smoking is not permitted. *Id.*, citing *Traditions Tavern v. Columbus*, 171 Ohio App.3d 383, 2006-Ohio-6655.

{¶18} Here, Jergens stated that she walked into The Boulevard and observed a patron smoking a cigarette for a lengthy period of time. She further indicated that the bartender could see the patron smoking, and that the bartender did not request the patron to stop smoking in the establishment. Jergens' observations are reliable, probative, and substantial evidence upon which the trial court could rely to affirm the smoking violation. Accordingly, the trial court did not abuse its discretion when it affirmed The Boulevard's smoking violation, and we overrule The Boulevard's third assignment of error.

{¶19} Having overruled The Boulevard's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.
