

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

JUST LIKE HOME 2,	:	<b>O P I N I O N</b>
Appellant,	:	
- vs -	:	<b>CASE NO. 2010-T-0007</b>
OHIO DEPARTMENT OF HEALTH,	:	
Appellee.	:	

Administrative Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CV 2438.

Judgment: Affirmed.

*James J. Leo*, 10350 Sage Creek Drive, Galena, OH 43021 (For Appellant).

*Richard Cordray*, Attorney General, and *Kristen Duff Starr*, Assistant Attorney General, State Office Tower, 26<sup>th</sup> Floor, 30 East Broad Street, Columbus, OH 43215 (Appellee).

DIANE V. GRENDELL, J.

{¶1} Appellant, Just Like Home 2 (JLH2), appeals the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court upheld the order of appellee, Ohio Department of Health (ODH), revoking and not renewing the license of JLH2 pursuant to R.C. 3722.05 and Ohio Admin. Code Chapter 3701-20. For the following reasons, we affirm the decision of the trial court.

{¶2} JLN2 is an adult care facility, located in Warren, Ohio, that had been licensed by the State of Ohio through ODH. An Annual Survey of the facility was conducted and on August 28, 2008, an ODH surveyor issued a report alleging JLN2 was severely out of compliance with certain rules and regulations and that the environment at JLN2 jeopardized the health and safety of the residents.

{¶3} The survey listed that JLN2 was deficient in the following: providing proof of insurance; fire drill compliance; manager qualifications; resident contact prior to disease testing; staff training requirements; staff first aid training; personal care service training; ongoing training; minimal annual continuing education requirements; record storage; medications administration; housing a resident in need of skilled nursing; repackaging of medications; timing of initial health assessments; annual health assessment; resident admission tuberculosis testing; annual testing for tuberculosis; incident involving a resident's reasonable access given to his/her walker; safe clean environment; and maintenance of logs.

{¶4} The Revised Code provides, "[i]f an adult care facility fails to comply with any requirement \*\*\*, the director of health may do any one or all of the following: (A) \*\*\* deny, revoke, or refuse to renew the license of the facility; (B) Give the facility an opportunity to correct the violation \*\*\*; (C) Issue an order suspending the admission of residents to the facility \*\*\*; (D) Impose a civil penalty \*\*\*; (E) Petition the court of common pleas for injunctive relief \*\*\*." R.C. 3722.05. Further, R.C. 3722.06 provides "except in cases of violations that jeopardize the health and safety of any of the residents, if the director determines that a licensed adult care facility is in violation of this chapter or of rules adopted pursuant to this chapter, the director shall give the facility an opportunity to correct the violation."

{¶5} After the inspection, the ODH sent a letter to JLH2 proposing to revoke its license, rather than renew, based on numerous violations of R.C. Chapter 3722 and OAC Chapter 3701-20. JLH2 was not provided with a Plan of Correction or an opportunity to correct the deficiencies.

{¶6} JLH2 filed an appeal and requested a hearing. A hearing was held and various documents were admitted into evidence.

{¶7} Priscilla Harrison, a registered nurse and surveyor for adult care facilities, testified regarding the violations and deficiencies she observed at JLH2. The owner and operator of JLH2, Eugenia Mihas, also testified regarding the deficiencies and findings in the survey.

{¶8} Additionally, in a post hearing brief, JLH2 raised an argument involving a residential group home known as Stimmel Elderly Care. The ODH conducted a survey of Stimmel, finding numerous violations, some similar or identical to the violations found in the instant case. The ODH entered into a settlement agreement with Stimmel, allowing the facility to remain in operation if the deficiencies were corrected.

{¶9} The Hearing Officer issued a Report and Recommendation, recommending that the ODH revoke and not renew the license to operate JLH2. The Hearing Officer found “that the deficiencies, or the combination of the deficiencies cited by the surveyors support a finding that reflect significant health and safety risks to the residents. Most pervasive and persuasive are the lack of training of staff in personal care and safety issues, the confusion as to who is or is not an employee, the failure to perform tuberculosis testing, and the total lack of organized records.”

{¶10} Furthermore, the Hearing Officer found that “[b]ased on the testimony of all the witnesses as well as the documents that were admitted into evidence, and given

the weight that must be accorded to the evidence, ODH has proven, by a preponderance of the evidence, the [there were] multiple and repeat deficiencies and violations of R.C. Chapter 3721 and OAC Chapter 3701-17.”

{¶11} An order was subsequently issued by the ODH, adopting the Hearing Officer’s Report and Recommendation and revoking JLH2’s license.

{¶12} JLH2 appealed the decision to the trial court.

{¶13} The trial court found that the decision of the ODH was not unlawful, unreasonable, or against the manifest weight of the evidence. Further, the court found that the “decision affirming the recommendations of the hearing officer in this matter were based on probative, reliable, and substantial evidence and were in accordance with law.” Accordingly, the trial court affirmed the decision of the ODH to revoke the license of JLH2. Additionally, the trial court placed a stay on the judgment, to remain in effect pending any appeal.

{¶14} JLH2 timely appeals and raises the following assignments of error:

{¶15} “[1.] The lower court erred in concluding that procedural due process only requires that agencies follow procedures and, if such procedures are followed, arbitrary results are irrelevant.

{¶16} “[2.] The lower court erred when it essentially found that the outcome for JLH2 was an arbitrary one, but failed to conclude that JLH2’s due process rights were violated.”

{¶17} “R.C. 119.12 sets forth a specific standard of review for administrative appeals; namely, a court of common pleas must affirm the decision of an administrative agency when that decision is supported by reliable, probative, and substantial evidence

and is in accordance with the law.” *Ruckstuhl v. Ohio Dept. of Commerce*, 11th Dist. No. 2008-G-2873, 2009-Ohio-3146, at ¶19 (citation omitted).

{¶18} “The evidence required by R.C. 119.12 can be defined as follows: (1) ‘Reliable’ evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) ‘Probative’ evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) ‘Substantial’ evidence is evidence with some weight; it must have importance and value.” *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571 (footnotes omitted).

{¶19} “We review the court of common pleas decision for an abuse of discretion. \*\*\* Where issues of law are involved, however, ‘we exercise a plenary power of review.’ \*\*\* ‘That is, issues of law require an “independent determination of the law to be applied to the facts found by the agency and held by the common pleas court to be supported by reliable, probative and substantial evidence.”” *Ruckstuhl*, 2009-Ohio-3146, at ¶22 (citations omitted).

{¶20} “Appellate review is limited to determining whether the trial court abused its discretion in finding the board’s decision was supported by reliable, probative and substantial evidence.” *Id.* at ¶51 (citation omitted).

{¶21} Furthermore, “[u]nder this standard of review, we cannot reverse the common pleas court’s decision if it contains a mere error in judgment; instead, a reversal can only occur when the lower court’s ruling was based upon a ‘perversity of will, passion, prejudice, partiality, or moral delinquency.’” *Id.*, quoting *Chlysta v. Ohio State Dental Bd.*, 174 Ohio App.3d 465, 2007-Ohio-7112, at ¶27 (citation omitted).

{¶22} These requirements are based on the “long-accepted principle that considerable deference should be accorded to an agency’s interpretation of rules the agency is required to administer.” *State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 1994-Ohio-486.

{¶23} As JLH2’s assignments of error are both interrelated, they will be addressed together.

{¶24} JLH2 first argues that “because JLH2 was given the ultimate penalty and because Stimmell received no penalty, despite committing most of the same violations, the ultimate outcome for JLH2 was arbitrary” and, therefore, violated due process. Further, JLH2 claims that “[p]rocedural due process requires the avoidance o[f] arbitrary results and thereby limits ODH’s discretionary authority such that ODH may not treat similarly situated entities differently, as JLH2 and Stimmell were treated differently.”

{¶25} “The Due Process Clause of the Fourteenth Amendment to the United States Constitution is applicable, to some extent, in most administrative hearings.” *State ex rel. B.F. Goodrich Co. v. Indus. Comm. of Ohio* (1991), 73 Ohio App.3d 271, 274 (citation omitted). “Procedural due process, as it applies to administrative hearings \*\*\*, includes the right to a reasonable notice of hearing as well as a reasonable opportunity to be heard.” *Id.* at 275 (citation omitted).

{¶26} “However, due process is a flexible concept and calls for such procedural safeguards as the particular situation demands. \*\*\* The United States Supreme Court and Ohio Supreme Court both use the test expressed in *Mathews v. Eldridge* (1976), 424 U.S. 319, 335 \*\*\*, as the basis for due process analysis in administrative hearings. \*\*\* Under that test, the court must weigh the following three factors to determine whether the process granted in the administrative proceeding is constitutionally

adequate: (1) the private interest at stake; (2) the risk of an erroneous deprivation of that interest and the probable value of additional procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *LTV Steel Co. v. Indus. Comm. of Ohio* (2000), 140 Ohio App.3d 680, 688-689 (citations omitted).

{¶27} JLH2 does not argue that it did not receive proper notice and/or a reasonable opportunity to be heard. JLH2 essentially argues that it was denied meaningful review, because Stimmell was accorded different treatment for similar violations. "[A] violation of due process ensued when the decision maker did not consider evidence presented at the hearing in some meaningful manner." *Aircraft Braking Sys. Corp. v. Ohio Civil Rights Comm.*, 9th Dist. No. 22841, 2006-Ohio-1304, at ¶27 (citation omitted).

{¶28} "[A] party had been sufficiently 'heard' for due-process purposes when the decision maker 'in some meaningful manner, considered evidence obtained at [a] hearing.'" *Id.* at ¶29 (citations omitted); *Community Concerned Citizens, Inc. v. Union Twp. Bd. of Zoning Appeals*, 12th Dist. No. CA91-01-009, 1991 Ohio App. LEXIS 5718, at \*17 ("[t]here is nothing in the record to indicate that the members had not reviewed the matter thoroughly. Therefore, there was no due process violation \*\*\*.").

{¶29} In the instant situation, the record reflects evidence of violations that are serious in nature. Accordingly, there was no due process violation.

{¶30} JLH2 next argues that the decision to revoke its license was not in accordance with the law. JLH2 argues that "ODH may not treat some similarly situated entities vastly differently -- without creating an arbitrary result \*\*\*."

{¶31} “[T]he conscious exercise of some selectivity in enforcing a statute fair on its face does not in and of itself amount to a constitutional violation.” *Whitehall v. Moling* (1987), 40 Ohio App.3d 66, 69 (citation omitted). “[T]he mere fact that a governmental agency applied a statute differently in one instance is not sufficient to establish selective enforcement. Instead, in order to establish a violation of the right to equal protection, a party must show that the agency purposely or intentionally discriminated in its application of the statute.” *Tsagaris v. Department of Commerce*, 11th Dist. No. 95-T-5256, 1996 Ohio App. LEXIS 2001, at \*11-\*12; *Snowden v. Hughes* (1944), 321 U.S. 1 (for selective enforcement to constitute a denial of equal protection, the defendants must demonstrate purposeful or intentional discrimination).

{¶32} “[A] defendant must demonstrate actual discrimination due to invidious motives or bad faith. Intentional or purposeful discrimination will not be presumed from a showing of differing treatment.” *State v. Freeman* (1985), 20 Ohio St.3d 55, 58 (citation omitted); See *State ex rel. Celebrezze v. Thermal-Tron, Inc.* (1992), 71 Ohio App.3d 11, 19 (“The defendants presented evidence that other businesses \*\*\* were either not prosecuted or received lesser fines. \*\*\* Even assuming, *arguendo*, that Thermal-Tron demonstrated it was situated similarly to these other businesses, nothing in the record indicates the Ohio EPA acted with invidious motives or bad faith. \*\*\* Thus, we find no violation of the defendants’ equal protection rights.”).

{¶33} There is nothing in the record to indicate actual discrimination due to invidious motives or bad faith.

{¶34} Furthermore, although JLH2 and Stimmell were cited for some of the same deficiencies; various violations that jeopardized the residents’ health and safety



were found at JLH2 while the violations were not found at Stimmell. JLH2 and Stimmell had different violations, circumstances, and procedural facts.

{¶35} Accordingly, the trial court did not abuse its discretion in finding that the ODH's decision was supported by reliable, probative and substantial evidence and was in accordance with the law.

{¶36} JLH2's assignments of error are without merit.

{¶37} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, affirming the decision of the ODH revoking JLH2's license, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.