

[Cite as *Parrish v. Ohio Dept. of Agriculture* , 2006-Ohio-6434.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Howard Parrish,	:	
Appellant-Appellee,	:	
v.	:	No. 06AP-314
Ohio Department of Agriculture,	:	(C.P.C. No. 05CVF-09-10064)
Appellee-Appellant.	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on December 7, 2006

Chester, Willcox & Saxbe, LLP, Charles R. Saxbe, Gerhard A. Gosnell, II, Timothy S. Horton, and Deborah A. Scott, for appellee.

Jim Petro, Attorney General, and James R. Patterson, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Ohio Department of Agriculture ("ODA"), appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court reversed an order of the Director of the ODA and determined that Howard Parrish, appellee, had not violated Ohio Adm.Code 901-19-04(N), 901-19-02(D) and (H), and R.C. 901.73(B).

{¶2} Appellee serves on the Williams County Fair Board ("fair board") and is the grandfather of Caprianna Parrish, a minor whose gilt hog won grand champion gilt hog on

September 12, 2004, at the 2004 Williams County Fair. Frank Parrish is appellee's son and Caprianna's father. Caprianna's hog was identifiable via permanent ear notches and a temporary ear tag. At the conclusion of the fair, on September 18, 2004, appellee directed Caprianna to return the hog to appellee's farm. Ohio Adm.Code 901-19-02(H) requires the animal be kept at the fairgrounds and transported for slaughter at the conclusion of the fair. However, the fair board had instituted a conflicting rule in the mid-1990s that permitted exhibitors to retain their animals at the conclusion of the fair and deliver them to the slaughterhouse at a later time. Jacoby's Ole Smokehouse Meats ("Jacoby's") was the designated slaughter facility for the champion and reserve champion animals from the 2004 Williams County Fair.

{¶3} The ODA discovered that Caprianna's hog had not been delivered to Jacoby's, and an ODA livestock inspector, Clair Armstrong, and an ODA enforcement agent, H.G. Hill, went to appellee's farm on September 21, 2004. Appellee told the ODA representatives that the hog was present at the farm and claimed Jacoby's requested that the hog not be delivered until later that day. Appellee offered to show the animal to the representatives, but they declined. The ODA representatives then went to Jacoby's, and its owner, James Keefer, told them that appellee had just called him and was bringing the hog to him for slaughter.

{¶4} Appellee presented a hog with the grand champion's removable ear tag to Jacoby's, and the hog was slaughtered. However, later investigation of the hog's ears revealed that, although the removable tag identified it as the grand champion, its ear notches were those of a hog owned by Frank that had been exhibited at the 2004

Williams County Fair by Erik Maugherman. The grand champion hog has never been produced, and there is no evidence as to its whereabouts.

{¶5} On December 14, 2004, the ODA proposed to suspend appellee from livestock exhibitions in Ohio through December 31, 2006, for violating Ohio Adm.Code 901-19-04(N), 901-19-02(D) and (H), and R.C. 901.73(B). The ODA also proposed administrative action against Caprianna and Frank, who settled their actions and are not parties to this appeal. Appellee sought review by an independent hearing officer, who issued a recommendation on August 3, 2005, finding that appellee had violated Ohio Adm.Code 901-19-02(D) and (H). The ODA objected to the recommendation, and the director of the ODA issued an August 26, 2005 order finding appellee had violated Ohio Adm.Code 901-19-04(N), 901-19-02(D) and (H), and R.C. 901.73(B), and suspended appellee from participation in all Ohio livestock exhibitions through December 31, 2006.

{¶6} Appellee appealed the order to the Franklin County Court of Common Pleas. The court issued a judgment on March 16, 2006, in which it reversed the director's order and found appellee had not committed any violations. The ODA appeals the judgment of the court, asserting the following three assignments of error:

- I. The Trial Court erred and abused its discretion in holding that Ohio Department of Agriculture Order #2005-255 is not supported by reliable, probative, and substantial evidence.
- II. The Trial Court erred and abused its discretion in holding that Ohio Department of Agriculture Order #2005-255 is an abuse of discretion.
- III. The Trial Court erred and abused its discretion in vacating Ohio Department of Agriculture Order #2005-255 and reinstating Appellee's right to handle, sell or offer for sale, and judge livestock at Ohio livestock exhibitions.

{¶7} The ODA argues in its first assignment of error that the common pleas court erred in finding that the commission's order was not supported by reliable, probative, and substantial evidence. Under R.C. 119.12, when a common pleas court reviews an order of an administrative agency, it must consider the entire record and determine whether the agency's order is "supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12. "Reliable" evidence is evidence that is dependable and may be confidently trusted. *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571. In order to be reliable, there must be a reasonable probability that the evidence is true. *Id.* "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.* "Substantial" evidence is evidence with some weight; it must have importance and value. *Id.*

{¶8} The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Veterinary Medical Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Even though the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶9} An appellate court's standard of review in an administrative appeal is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. It is not the function of the appellate court to examine the evidence. *Id.* The appellate court is to determine only if the trial court has abused its discretion. *Id.*

Abuse of discretion is not merely an error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *Id.* Absent an abuse of discretion on the part of the trial court, an appellate court may not substitute its judgment for that of an administrative agency or a trial court. *Id.* Nonetheless, an appellate court does have plenary review of purely legal questions in an administrative appeal. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, at ¶15. Accordingly, we must also determine whether the common pleas court's decision is in accordance with law.

{¶10} In the present case, the commission alleged appellee violated Ohio Adm.Code 901-19-04(N), 901-19-02(D) and (H), and R.C. 901.73(B). Ohio Adm.Code 901-19-04 provides:

This is a mandatory rule.

No person shall:

* * *

(N) Fail to render assistance as provided by section 901.73 of the Revised Code.

R.C. 901.73(B) provides:

While the director or the director's designee is sampling or testing the livestock, the owner or custodian of the livestock shall render assistance in accordance with sections 941.05 and 941.08 of the Revised Code. Any person who refuses to cooperate with the director or the director's designee in the inspection, sampling, and testing of livestock may be prohibited by the director acting under section 901.74 of the Revised Code from participating in any exhibition.

Ohio Adm.Code 901-19-02 provides:

This is a mandatory rule.

* * *

(D) In a partial terminal show at least the grand champion and the reserve grand champion shall be slaughtered. Prior to the show, the sponsor of the exhibition may require that additional livestock from a partial terminal show shall be slaughtered. The livestock shall be consigned to slaughter either at the conclusion of the show or immediately following the exhibition.

* * *

(H) Livestock destined for slaughter or consignment to a licensed livestock facility shall not be removed from the exhibition grounds until the livestock is transported to slaughter or to the licensed livestock facility or until the sponsor approves movement of the livestock to another secure area for:

(1) Disease control in accordance with paragraph (B)(4) of rule 901:1-18-03 of the Administrative Code; and

(2) Quarantine for residue to allow a withdrawal time as determined by the approved fair veterinarian or in accordance with the instructions listed on the drug use notification form to elapse and may be subject to testing.

{¶11} The ODA initially argues in its first assignment of error that the trial court erred in holding the ODA lacked reliable, probative, and substantial evidence to support its finding that appellee had removed the animal from the exhibition grounds in violation of Ohio Adm.Code 901-19-02(D) and (H). Appellee averred in his affidavit that, after the hog won grand champion, he directed his granddaughter to remove the animal from the fairgrounds and return it to his farm. ODA Agent Armstrong acknowledged in her affidavit that, during her visit to appellee's farm, she was told by appellee that the hog was present and was invited to see the hog, but she declined for bio-safety reasons. Thus, appellee

ostensibly violated Ohio Adm.Code 901-19-02(D) and (H), as he prevented the slaughter of a show champion by removing it from the exhibition grounds.

{¶12} However, appellee presents several counterarguments as to why he was not in violation of Ohio Adm.Code 901-19-02(D) and (H). Appellee first contends he was following a local fair board regulation that allows animals to be taken back to the owners' farms for the animals' safety and security. Gene Lautenzenheiser, Richard J. Missler, Barbara Saul, and Leonard Ludwig, who are members of the fair board, all indicated in their respective affidavits that this local rule had been in place for at least ten years. However, this rule clearly contradicts the Ohio Administrative Code regulations quoted above. The Ohio Administrative Code regulations are "Mandatory Rules," as specifically provided by Ohio Adm.Code 901-19-02, and the fair board was without authority to supercede the regulation with its own local rules. See R.C. 901.72(B) (the rules of the director that apply to exhibition related food safety and the health, safety, and welfare of livestock shall apply to every exhibition operated within Ohio and to every sponsor); Ohio Adm.Code 901-19-01(W) ("mandatory rule" means any rule adopted by the director relating to food safety or the health, safety, or welfare of livestock and from which a sponsor may not exempt itself or its exhibition). We find unpersuasive appellee's defense that there can be no violation of the Ohio Administrative Code merely because the local board rules had been followed for many years. Despite this long standing practice, it was still contrary to the "Mandatory Rules" found in Ohio Adm.Code 901-19-02(D) and (H).

{¶13} Also in defense of his actions, appellee asserts that the slaughterhouse used by the board was overcrowded the weekend of the fair and was left unlocked and insecure. This contention was supported by the affidavit of Jacoby's owner, Keefer.

However, while appellee uses the animal's safety and security as a justification for the violation, this exception is not one contemplated by Ohio Adm.Code 901-19-02(H)(1) in terms of "disease control" or "quarantine." "Disease control," as defined by Ohio Adm.Code 901:1-18-03(B)(4), is "the immediate removal of any animal which in the opinion of the approved veterinarian places other animals at unacceptable risk of disease." "Quarantine" means to isolate the animal from other animals to prevent contamination of the other animals in the livestock competition. See Ohio Adm.Code 901-19-01(GG). The "safety and security" of the animals is not contemplated by the exception, and appellee cites no authority to the contrary.

{¶14} Appellee next argues that he could not have violated Ohio Adm.Code 901-19-02(D) and (H) because the animal in question was not his, and he was not a "designee" of the animal's owner. If he can be found in violation of these sections, appellee reasons, the ODA should have also pressed charges against the other members of Caprianna's family. The ODA counters that appellee may be sanctioned under Ohio Adm.Code 901-19-02(D) and (H) because he was the "designee" of his granddaughter, Caprianna. The ODA points out that appellee was responsible for overseeing where the hog was transported and in deciding to remove the hog from the fairgrounds to his farm. In addition, the ODA argues that appellee is a designee by definition, as the code indicates a "designee" may be a member of the exhibitor's family.

{¶15} Ohio Adm.Code 901-19-01(G) defines a designee as a "member of the exhibitor's family or household or any other registered or authorized representative of the exhibitor." We agree with the ODA that appellee was a "designee" and, thus, could be sanctioned under Ohio Adm.Code 901-19-02(D) and (H). Appellee involved himself in the

situation giving rise to the violation by overseeing the handling and transportation of his granddaughter's hog. Ohio Adm.Code 901-19-01 defines a designee, in part, as an "authorized representative of the exhibitor." Appellee was the hog owner's grandfather and a nationally recognized hog expert and exhibition judge. It was under his direction and advisement that his granddaughter removed the animal from the fairgrounds to his farm. Appellee admits in his affidavit: "I transported the Fair Grand Champion hog bearing tag number 295 from the Fair to my farm." While appellee points out the animal was raised at his granddaughter's house one and one-half miles away from his farm, when the animal was removed it was taken to his farm, not to his granddaughter's house. From this activity, it is evident that appellee was exerting influence and control over the owner of the animal and, therefore, undertook the responsibility to ensure that the animal was taken to slaughter per the Ohio Administrative Code requirements. The evidence, as explained above, demonstrates that, at his direction, he prevented the animal from being properly slaughtered. Under these circumstances, the evidence demonstrates that appellee was acting as an authorized representative of his granddaughter Caprianna.

{¶16} We also find appellee's relationship as grandfather to Caprianna clearly brought him within the first portion of the definition of "designee," as he was a "member of the exhibitor's family or household." See Ohio Adm.Code 901-19-01(O) ("family" means the immediate family of an exhibitor and includes the exhibitor's grandparent). The distinction between appellee and the other members of Caprianna's family is that appellee inserted himself into his granddaughter's hog exhibition activities by supervising several aspects of her conduct, including how and when the hog was transported from

the fair. For these reasons, we find appellee violated Ohio Adm.Code 901-19-02(D) and (H), and the trial court's determination to the contrary was an abuse of discretion.

{¶17} The second issue under this assignment of error is whether appellee failed to render assistance to the ODA with regard to the incident, in violation of Ohio Adm.Code 901-19-04(N) and R.C. 901.73(B). The ODA claims that appellee failed to cooperate with agents and interfered with the ODA investigation by switching the ear tags on the hog prior to slaughter. Further, the ODA argues that this switch was not the result of oversight, as appellee was an experienced exhibitor and should have been able to decipher the ear notches, but was intentionally done to avoid delivering the grand champion hog to slaughter. Appellee counters that he delivered the hog to slaughter based upon the removable ear tag placed in the animal's ear at the competition and not based upon the permanent ear notches. Appellee claims he was unfamiliar with his granddaughter's hog and had not taken the time to memorize its ear notches.

{¶18} Ohio Adm.Code 901-19-04(N) and R.C. 901.73(B) provide that, in order to fail to cooperate, one must fail to render assistance in the investigation or refuse to cooperate with the investigation. While appellee may have failed to ensure the proper hog was delivered, and may have failed to deliver the hog to slaughter, this fact alone does not rise to the level of failing to render assistance or to cooperate with the investigation. There was no evidence presented that demonstrated appellee acted to impede the investigation or failed to render assistance when asked by the ODA to do so. In fact, there is no evidence that he was asked by the agents to do any more than answer questions, which he did.

{¶19} Although the director of the ODA gave no reason for his finding that appellee violated Ohio Adm.Code 901-19-04 and R.C. 901.73(B), it appears that the ODA found appellee failed to cooperate based upon his switching the hogs prior to slaughter, thus acting to interfere with the ODA investigation. This may seem, at first glance, to be circumstantial evidence that, because appellee originally had the correct hog in his possession but a different hog was slaughtered, he must have switched the tags. It is true that circumstantial and direct evidence possess the same probative and evidentiary value. *State v. Jenks* (1991), 61 Ohio St.3d 259, 272. However, the evidence presented in this case in this regard is not circumstantial, but merely speculative. Speculation has been described as "theorizing about a matter upon which the evidence is *insufficient* to support a conclusion either way." (Emphasis sic.) *Mid America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, at ¶156. Here, there is no evidence whatsoever that appellee changed the ear tag on the animal in question, and there exists significant uncertainty as to the chain of custody of the hog. In the criminal setting, the prosecution bears the burden of establishing a chain of custody and must establish that it is reasonably certain that substitution, alteration, or tampering did not occur. See *State v. Blevins* (1987), 36 Ohio App.3d 147, 150. Any breaks in the chain of custody diminish the weight of the evidence. *Id.* While the owner of the slaughterhouse in the present case indicated in one affidavit that the animal that appellee delivered was the animal that was slaughtered, the definiteness of his assertion is belied by appellee's undisputed averment that there were no witnesses from the ODA or Jacoby's present at the time he unloaded the hog, and that the pen at Jacoby's was outside, unlocked, and unguarded. In another affidavit, the owner of Jacoby's confirmed such, averring that the holding facility at his

business is not locked, was not locked when appellee delivered the hog in question, and is otherwise accessible at all hours. Given the gap in the chain of custody, during which any person could access the hog, it is just as possible that an unknown third party switched the tag to injure the reputation of appellee. Evidence to support the reasonableness of the theory that substitution, alteration, or tampering by a third party may have occurred is found in the Williams County Sheriff Department report of the interview with Tyler Maugherman in connection with the release of animals from appellee's farm. Maugherman, a former employee of appellee, stated that people were "out to get" appellee because his animals always took first place at the livestock exhibitions. In the absence of some proof to establish a chain of custody with reasonable certainty, we find that the trial court did not abuse its discretion in finding appellee did not act to interfere with the ODA investigation. For these reasons, the ODA's first assignment of error is sustained in part and overruled in part.

{¶20} We will address the ODA's second and third assignments of error together, as they both relate to the sanctions it imposed. The ODA argues in its second assignment of error that the trial court erred and abused its discretion in holding that the ODA abused its discretion when it disqualified appellee from exhibitions in Ohio through December 31, 2006. The ODA argues in its third assignment of error that the trial court erred and abused its discretion in vacating the ODA's order and reinstating appellee's right to handle, sell or offer for sale, and judge livestock at Ohio livestock exhibitions. An appellate court may remand to the administrative agency for reconsideration of the penalty only in cases where the reviewing court finds one of multiple violations to be unsupported by reliable, probative, and substantial evidence. See *Monkey Joes, Inc. v.*

Ohio State Liquor Control Comm., Franklin App. No. 03AP-723, 2004-Ohio-1010, at ¶22, citing *Rossiter v. Ohio State Med. Bd.*, Franklin App. No. 01AP-1252, 2002-Ohio-2017; *Linden Med. Pharmacy, Inc. v. Ohio State Bd. of Pharmacy* (May 8, 2001), Franklin App. No. 00AP-641; and *STJ Entertainment L.L.C. v. Liquor Control Comm.* (Dec. 18, 2001), Franklin App. No. 01AP-610. As we have found in the present case that two of the violations providing the grounds for the ODA's order disqualifying appellee from exhibitions were not supported by reliable, probative, and substantial evidence, we remand the matter to the ODA so that it may, at its discretion, reconsider an appropriate sanction given our above determinations. Therefore, the ODA's second and third assignments of error are sustained.

{¶21} Accordingly, the ODA's first assignment of error is sustained in part and overruled in part, and the ODA's second and third assignments of error are sustained. The judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded to the ODA to reconsider the original sanctions imposed in light of our determinations herein.

*Judgment affirmed in part and reversed in part;
cause remanded.*

BRYANT and FRENCH, JJ., concur.
