

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert & Sherry Morgan	:	
dba Dew Drop Drive Thru,	:	
	:	
Appellants-Appellees,	:	No. 08AP-1088
	:	(C.P.C. No. 08CVF05-6787)
v.	:	
	:	(REGULAR CALENDAR)
Liquor Control Commission,	:	
	:	
Appellee-Appellant.	:	
	:	

D E C I S I O N

Rendered on June 30, 2009

The Gearhiser Law Firm, Inc., and Kurt O. Gearhiser, for appellants-appellees.

Richard Cordray, Attorney General, and Scott A. Longo, for appellee-appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, the Ohio Liquor Control Commission ("appellant" or "the commission"), filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas finding in favor of appellees, Robert and Sherry Morgan, dba

Dew Drop Drive Thru ("appellees" or "the permit holder"), in their Chapter 119 administrative appeal. For the reasons that follow, we affirm.

{¶2} On July 2, 2004, two underage individuals, Andrew Wigton and Stephanie Lust, died in an automobile accident in which alcohol appeared to have played a part. After an investigation conducted by agents with the Ohio Department of Public Safety, the permit holder was sent a violation notice dated January 21, 2005 based on a determination that the permit holder had sold the alcohol consumed by the underage individuals. The violation notice indicated that appellees' violation was "allowing improper conduct (sale/furnishing alcohol to underage person resulting in a fatality)." (R. 27.)

{¶3} On March 29, 2005, the Ohio Attorney General's office sent a letter to the permit holder asking for certain information, including whether the permit holder denied the charge. At the bottom of the letter, the charge was identified as "[Ohio Adm.Code] 4301:1-1-52(B) Allowing Improper Conduct (Sale/Furnishing Alcohol to Underage Person Resulting in Fatality)." (R. 28.) The commission sent a notice setting the case for hearing on September 12, 2006. That notice provides that the purpose of the hearing was to "determine whether your Permit#(s) should be suspended and/or revoked and/or a forfeiture ordered for alleged violation of the provision(s) of the Ohio Revised Code and/or the regulation(s) of the Liquor Control Commission, to wit: * * *." (R. 29.) The notice does not identify any provision of law violated by the permit holder.

{¶4} The next indication in the record of any action taken in the case is a letter dated October 5, 2006 from the Investigative Unit of the Ohio Department of Public Safety. That letter identifies the alleged violation as "Sale and/or Furnishing to Minor" but does not identify a specific provision of the Revised Code or Administrative Code. (R.

26.) The letter indicated that the case had been considered by the Citation Review Board, and that the board had decided to proceed with the citation. Although no documents in the record explain this action, at the hearing ultimately held by the commission, the assistant attorney general explained that the case had been referred to the Citation Review Board because the original charge of allowing improper conduct was not an appropriate charge for the conduct alleged. (Tr. 6.)

{¶5} The commission subsequently issued a notice setting the hearing for December 5, 2006. That notice stated that the purpose of the hearing was:

[T]o determine whether your Permit#(s) should be suspended and/or revoked and/or a forfeiture ordered for alleged violation of the provision(s) of the Ohio Revised Code and/or the regulation(s) of the Liquor Control Commission, to wit:

Violation #1 On or about July 2, 2004, you and/or your agent(s) and/or employee(s) and/or your unidentified agent(s) and/or employee(s) did sell beer in and upon the permit premises to CHRISTOPHER REYNOLDS and/or RAHUL VERMA (DOB 4/18/86, Age 18), who were then and there under twenty-one years of age, in violation of Section 4301.69(A) of the Ohio Revised Code.

Violation #2 On or about July 2, 2004, you and/or your agent(s) and/or employee(s) and/or your unidentified agent(s) and/or employee(s) did furnish beer in and upon the permit premises to CHRISTOPHER REYNOLDS and/or RAHUL VERMA (DOB 4/18/86, Age 18), who were then and there under twenty-one years of age, in violation of Section 4301.69(A) of the Ohio Revised Code.

(R. 30.)

{¶6} Apparently, the December 5, 2006 hearing date was continued. In a notice that states it was mailed on March 7, 2008, the commission scheduled a new hearing date for April 10, 2008. The notice states that the December 5, 2006 hearing date was

continued by the permit holder. At the hearing before the commission, counsel for the permit holder denied that the December 5, 2006 hearing had been continued at the permit holder's request, arguing that the hearing had been continued at the request of the Attorney General's office because witnesses were absent. (Tr. 7.) The assistant attorney general was not able to offer any information regarding the delays in the case. (Tr. 14.)

{¶7} After the hearing, the commission issued an order finding that the permit holder committed both of the violations alleged in the notice. The order stated that the permit holder had the option to either pay a \$5,000 forfeiture or have its permit revoked. The permit holder filed an appeal with the Franklin County Court of Common Pleas, pursuant to R.C. 119.12, setting forth a number of assignments of error, including that the commission violated its due process rights by unnecessarily and excessively delaying holding the hearing.

{¶8} The trial court issued a decision reversing the commission's order. The court did not address all of the assignments of error, focusing only on the fact that the delay between the time of the violation and the date on which the commission held the hearing was unexplained. The court found that this lengthy delay, without explanation, constituted a violation of the permit holder's due process rights.

{¶9} The commission then filed this appeal, alleging a single assignment of error:

The Common Pleas Court abused its discretion by finding the April 25, 2008 adjudication order of the Liquor Control Commission was not supported by Reliable, Probative and Substantial evidence and is not in accordance with law ruling that the pre-hearing delay from the date of the violation until the date of the final hearing was unexplained and unjustified and therefore in violation of the permit holder's right to due process.

{¶10} 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.*

{¶11} 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.

{¶12} In this case, the trial court found that the commission's order was not in accordance with law because the delay, for which no explanation was given, between the date of the alleged violation and the date upon which the commission held a hearing constituted a violation of the permit holder's right to due process. R.C. Chapter 119 does not include any provision such as a statute of limitations that places a time limit on an

agency's ability to begin the administrative adjudication process.¹ However, an administrative agency has a duty to hear matters before it without unreasonable delay and with due regard for the rights and interests of the litigants before it. *Immke Circle Leasing, Inc. v. Ohio Bur. of Motor Vehicles*, 10th Dist. No. 05AP-1179, 2006-Ohio-4227.

{¶13} In some cases, delays that occur during the hearing process have been deemed to be unreasonable, and therefore violations of the right to due process. For example, a two-year continuance between the start and conclusion of an administrative hearing has been held to be an unreasonable delay requiring reversal of the adjudication order. *In re Milton Hardware Co.* (1969), 19 Ohio App.2d 157. In another case, passage of 562 days from the date of an alleged violation to the date of the agency hearing was found to be unreasonable. *Yellow Cab Leasing, Inc. v. Ohio Motor Vehicle Dealers Bd.*, 5th Dist. No. 2002CA00105, 2002-Ohio-5296. See also *Mowery v. Ohio State Bd. of Pharmacy* (Sept. 30, 1997), 11th Dist. No. 96-G-2005 (nearly five-year delay between date of violation and commencement of administrative proceedings violated due process). However, we have specifically refused to find that a 283-day continuance of an administrative hearing was per se unreasonable. *Immke Circle Leasing*. See also *In re Christian Home for the Aged* (Aug. 4, 1988), 10th Dist. No. 88AP-242 (153-day delay not a violation of right to due process).

{¶14} The most important question in cases such as this one is whether the delay can be reasonably explained by the agency. In *Immke Circle Leasing*, part of the basis

¹ The only time limitation that exists in Chapter 119 is contained in R.C. 119.07, which requires the adjudicating agency to schedule a hearing at least 7 days, but no more than 15 days, from the date the party has requested a hearing. However, R.C. 119.09 allows the agency to continue this date on motion of the party or on its own motion.

for our conclusion that a 283-day continuance is not unreasonable was because the record contained information that partially explained the delay. *Id.* at ¶14. See also *Gourmet Beverage Center, Inc. v. Ohio Liquor Control Commission*, 10th Dist. No. 01AP-1217, 2002-Ohio-3338 (seven-year delay between party's request for administrative hearing and the date of the hearing explained by protracted litigation between the parties, and therefore not a violation of due process right).

{¶15} At the hearing in this case, the assistant attorney general presenting the case argued that the delay could be explained in part by the time it took to conduct a full investigation of the alleged violations. This part of the delay amounted to approximately six and one-half months, representing the time that passed between the date of the alleged violation and the date upon which the violation notice was issued by the Department of Public Safety. Clearly, an agency must have some reasonable amount of time to investigate alleged violations, and the length of time would necessarily be dependent on the facts and circumstances of the alleged violation. We agree with the commission that the six and one-half months between the date of the alleged violation and the date of the issuance of the violation notice should not have been included for purposes of calculating the length of the delay.

{¶16} However, this still leaves a delay of over three years that must be considered. One such delay occurred between the time the violation notice was issued on January 21, 2005 and the first scheduled hearing date of September 12, 2006, an elapsed time of approximately 20 months. There is no explanation in the record for why this delay occurred.

{¶17} A second delay occurred apparently as a result of the case being referred for consideration by the Citation Review Board. There are no documents in the record explaining or otherwise memorializing the decision to refer the case to the Citation Review Board, nor is there anything in the record reflecting the commission's decision to continue the September 12, 2006 hearing date.² Instead, a new notice of hearing date was issued setting the case for hearing on December 5, 2006. However, there is some explanation in the record that there was a reason for the delay from September 12 until December 5, 2006, and thus the trial court should not have considered that as part of the delay.

{¶18} The final delay occurred between December 5, 2006 and April 10, 2008, a period of approximately 16 months. There is nothing in the record contemporaneous to the December 5, 2006 hearing date that memorializes the commission's decision to continue the hearing. The notice setting the hearing for April 10, 2008 indicates that the previous hearing date was continued at the permit holder's request, but the permit holder's counsel disputed this at the hearing, arguing that the hearing had been continued at the request of the Attorney General's office because witnesses were absent. The assistant attorney general stated at the hearing that he had no information regarding the continuance of the December 5, 2006 hearing. We cannot say the trial court abused its discretion in including this portion of the delay in its consideration.

{¶19} The commission essentially argues that even though there is no explanation in the record for the delay in holding the hearing in this matter, the trial court's

² The only indication in the record that the case had been referred to the Citation Review Board was the October 5, 2006 letter from the Department of Public Safety indicating that the board had decided to proceed with the case.

decision reversing the commission's order should be reversed because the permit holder can show no prejudice resulting from the delay. Nothing in the record shows that the permit holder's defense of the case was inhibited by the time that had passed prior to the hearing, such as that witnesses had disappeared or memories had lapsed. In fact, the permit holder received some benefit by the delay because it was able to continue in operation while the administrative hearing was pending.

{¶20} However, under the unique facts and circumstances of this case, we are unwilling to impose upon the permit holder the burden of showing it was prejudiced by the delay. The agency in an administrative proceeding has the duty of providing due process to parties in proceedings it institutes, and it is the agency that has full control over when its hearings are scheduled. Furthermore, although not apparently impaired in its defense of the alleged violation, the permit holder here nevertheless would have suffered from the stigma associated with a pending violation threatening its continued holding of its liquor permit. See *Yellow Cab Leasing* at ¶20 ("[W]e are loath to find that such a delay of such proportions is not prejudicial. Appellee had the stigma of an ongoing citation and had no means to pursue expeditious vindication.").

{¶21} In this case, the commission employed a process in scheduling its hearings in which no formal action was taken and placed on the record when a hearing date was continued, and thus no reason for the continuance was placed on the record at the time of the continuance. As a result, we have a record in which two long continuances, totaling approximately 36 months, occurred without any reason being given by the agency for why the delay occurred or, more importantly, was necessary. Had the commission created a record at the time the hearings were continued setting forth the reasons for the

continuances, including the reasons for the length of the delay, or even placed a reasonable explanation for the length of the delays on the record at the hearing that finally was held, our analysis of the trial court's decision may have been different.

{¶22} Under these unique facts and circumstances, we cannot say the trial court abused its discretion when it concluded that the delay between the occurrence of the alleged violation and the date upon which the commission held its hearing was unreasonable, and therefore a violation of the permit holder's right to due process. Accordingly, the commission's assignment of error is overruled.

{¶23} Having overruled the commission's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McGRATH, JJ., concur.
