**[Cite as *Citizens for Akron v. Ohio Elections Comm.*, 2011-Ohio-6387.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| Citizens for Akron et al., | : | |
| Appellants-Appellees, | : | No. 11AP-152 (C.P.C. No. 10CVF01-111) |
| v. | : | No. 11AP-153 (C.P.C. No. 10CVF01-112) |
| Ohio Elections Commission, | : | |
| | | (REGULAR CALENDAR) |
| Appellee-Appellant. | : | |

D E C I S I O N

Rendered on December 13, 2010

*McTigue & McGinnis, LLC, Donald J. McTigue* and *J. Corey Colombo,* for appellees.

*Michael DeWine,* Attorney General, *Erick D. Gale* and *Michael J. Schuler,* for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BRYANT, P.J.

**{¶1}** Appellee-appellant, the Ohio Elections Commission ("OEC"), appeals from judgments of the Franklin County Court of Common Pleas reversing the orders of the OEC that concluded appellants-appellees, Citizens for Akron, Jeff Fusco and Phillip Chiarappa (collectively "Citizens for Akron") violated R.C. 3517.21(B)(10). Because the common pleas court properly determined the OEC failed to file the complete record of proceedings, as required under statute, we affirm.

**I. Facts and Procedural History**

**{¶2}** The proceedings before the OEC, on appeal in consolidated case Nos. 11AP-152 and 11AP-153, addressed statements in the campaign literature of Citizens for Akron, distributed before the November 2009 election, regarding candidates for Akron City Council.

*A. Case No. 11AP-152*

**{¶3}** Case No. 11AP-152 encompasses OEC case Nos. 2009E-040 and 2009E-049. In case No. 2009E-040, the OEC received a letter from the Summit County Board of Elections on September 24, 2009, stating the board received a complaint from Ernie Tarle that alleged Citizens for Akron violated R.C. 3517.21(B)(10). The statute provides, in relevant part, that "[n]o person * * * shall knowingly and with intent to affect the outcome" of a political campaign, "[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not." R.C. 3517.21(B)(10).

**{¶4}** Tarle, a candidate for the Ward 6 seat on the Akron City Council, reported that Citizens for Akron, a political action committee, distributed campaign literature with a picture of Tarle and the statement "recalled for bribery" in bold red type on the front of the piece. The back of the document stated: "Recalled From City Council – Ernie Tarle is the only Akron Councilmember recalled in our city's history. Akron voters recalled Tarle amidst suspicion of bribing a fellow councilmember with an envelope full of money before a critical vote." Tarle's affidavit to the Summit County Board of Elections averred the statement "recalled for bribery" was false because he "was cleared of any wrongdoing by

a jury in 1998." (11AP-152 Certified Record.) The Summit County Board of Elections voted unanimously to refer the matter to the OEC.

**{¶5}** In case No. 2009E-049, the OEC received a complaint from Tarle on September 30, 2009 concerning the same piece of campaign literature. Tarle explained in his letter that although the "recalled for bribery" statement was untrue, the statement on the back side of the document, that Tarle was recalled "amidst suspicion of brib[ery]," was "accurate." Tarle attached a news article to his letter that explained a jury acquitted Tarle of the bribery charges on November 26, 1998, but Akron voters removed Tarle from his position as the Ward 7 Akron City Councilmember in a November 3 recall election.

**{¶6}** On October 1, 2009, the OEC held a probable cause hearing where it voted to consolidate case Nos. 2009E-040 and 2009E-049. The OEC commissioners found probable cause that Citizens for Akron violated R.C. 3517.21(B)(10) and set the matter for a full hearing before the OEC held on October 29, 2009. On December 21, 2009, the OEC mailed Citizens for Akron notice of its October 29, 2009 order finding that, in making the statement "recalled for bribery," Citizens for Akron violated R.C. 3517.21(B)(10) by clear and convincing evidence. The OEC determined not to refer the matter for further prosecution but instead decided to issue a letter of public reprimand.

*B. Case No. 11AP-153*

**{¶7}** Case No. 11AP-153 concerns OEC case No. 2009E-029. On September 2, 2009, the OEC received a complaint from Willie L. Smith alleging that Citizens for Akron published false statements in campaign literature in violation of R.C. 3517.21(B)(10). The literature stated Smith, a candidate for the Ward 5 Akron City Council seat, not only was

the "recall committee chairman" of a committee to recall Mayor Plusquellic but was a "recall petition circulator." At the September 3, 2009 probable cause hearing, the OEC found probable cause that the statements violated R.C. 3517.21(B)(10). The OEC set the matter for a full hearing on October 15, 2009 but continued the hearing, on Citizens for Akron's motion, to the October 29, 2009 meeting of the OEC.

**{¶8}** At the October 29, 2009 meeting, as reflected in the OEC's December 21, 2009 letter, the OEC declared an administrative dismissal concerning the statement that Smith was a "recall petition circulator." It, however, found a violation of R.C. 3517.21(B)(10) by clear and convincing evidence as to the statement that Smith was "a recall committee chairman." The OEC determined not to recommend the matter for further prosecution but instead decided to issue a letter of public reprimand.

*C. Appeal*

**{¶9}** On January 5, 2010, Citizens for Akron filed notices of appeal from both orders stating, as grounds for the appeals, that: (1) the OEC's decisions violated Citizens for Akron's right to protected political speech and right to association; (2) the OEC did not have clear and convincing evidence of a violation of R.C. 3517.21(B)(10); (3) the statement "recalled for bribery" was a statement of opinion; (4) Citizens for Akron and Smith had reached a settlement in the matter; and (5) reliable, probative and substantial evidence did not support the OEC's decisions, and those decisions were not in accordance with law. The OEC filed the certified records from the underlying cases on February 4, 2010, but neither record contained the October 29, 2009 hearing transcript. The OEC instead submitted affidavits of the OEC's executive director and the court reporter who recorded the October 29, 2009 hearing to explain the omission.

**{¶10}** The court reporter stated that after completing the October 29 hearings, she transferred the data on her computer to a mobile storage drive. When she later attempted to retrieve the data from her company's permanent archives, she realized she had not downloaded the case from the mobile storage device. The court reporter attempted to retrieve the data from that device but was unsuccessful due to a hard drive crash. Although the court-reporting agency sent the mobile storage device to several data recovery companies, none were able to retrieve the information, as the device suffered from a "level 3 surface crash." (Affidavit of Jennifer Koontz & Knoll Ontrack Data Services Report.) The OEC Executive Director similarly stated that after requesting the October 29, 2009 transcript from the court-reporting agency, the agency informed him the data for the hearing "was corrupted beyond recovery and could not be transcribed." (Affidavit of Philip C. Richter.)

**{¶11}** On February 12, 2010, Citizens for Akron filed a motion to reverse the OEC's decisions for failure to file the complete record of proceedings, as the omission of the October 29, 2009 hearing transcript would "undoubtedly prejudice" Citizens for Akron in pursuing their appeal. The OEC filed a memorandum opposing the motion, asserting that, even if the missing transcript prejudiced Citizens for Akron, the appropriate remedy was to remand the matter to the OEC for a rehearing.

**{¶12}** The common pleas court issued a decision and entry on April 23, 2010 denying Citizens for Akron's motion to reverse and concluding Citizens for Akron was not entitled to judgment absent a showing of prejudice. The court determined the requisite prejudice was lacking because, pursuant to R.C. 119.09, Citizens for Akron was "entitled

to a rehearing for purposes of making the necessary stenographic record." (Apr. 23, 2010 Decision, 7.)

**{¶13}** Citizens for Akron attempted to appeal from the trial court's April 23, 2010 decision, but this court dismissed the appeal for lack of a final, appealable order. Citizens for Akron subsequently filed a merit brief with the common pleas court, asserting both that reliable, probative and substantial evidence did not support the OEC's orders and that the orders were not in accordance with law. The OEC responded that the court should not reverse its orders, as the transcript was absent due to an equipment malfunction. Instead, it asserted, the proper remedy was to order a rehearing.

**{¶14}** The common pleas court issued a decision and judgment entry on January 24, 2011 reversing the orders of the OEC. The court determined R.C. 119.09, the rehearing statute, did not apply to the facts of the case; although a rehearing under R.C. 119.09 is available "on request of the party," Citizens for Akron did not request a rehearing. (Jan. 24, 2011 Decision, 2.) Addressing the OEC's contention that the court on its own should remand the case for a rehearing, the court noted OEC cited "no authority * * * that permits the Court to order rehearings without the request of the party pursuant to R.C. 119.09." (Jan. 24, 2011 Decision, 5.)

**{¶15}** In the end, the common pleas court decided the orders involved numerous factual issues, such as whether the statements were false or matters of opinion, but the certified records did not contain "affidavits or other statements of the evidence comparable to an App.R. 9(C) statement." (Jan. 24, 2011 Decision, 4.) As a result, the court concluded, it was unable to resolve the appeals because it could not determine whether reliable, probative and substantial evidence supported the OEC's findings. The

court acknowledged its April 23, 2010 decision found prejudice lacking, but stated the court "reconsidered this issue" and decided Citizens for Akron demonstrated the requisite prejudice. (Jan. 24, 2011 Decision, 4.)

**II. Assignments of Error**

**{¶16}** OEC appeals, assigning the following errors:

> **First Assignment of Error:** The trial court erred by relying on the "absolute rule" set forth in *Gwinn v. Ohio Elections Commission*, 187 Ohio App.3d 742, 2010-Ohio-1587, which requires automatic reversal of an agency's decision only when the agency completely fails to certify the administrative record.
>
> **Second Assignment of Error**: The trial court erred in holding that Appellees demonstrated sufficient prejudice to require reversal of the Ohio Elections Commission's decisions based on an incomplete administrative record, when the omission in the record resulted from an unintentional error on the part of the court reporter and Appellees refused to request rehearings.

**III. First Assignment of Error–Application of *Gwinn***

**{¶17}** The OEC's first assignment of error asserts the common pleas court erred in holding that "the 'absolute rule,' as set forth in *Gwinn* decides this case." (Appellant's brief, 7.) The trial court's decision, however, did not apply an "absolute rule."

**{¶18}** Upon receiving a notice of appeal, an agency must "prepare and certify to the court a complete record of the proceedings in the case" within 30 days. R.C. 119.12. "A 'complete record of proceedings' in a case is a precise history of the proceedings from their commencement to their termination." *Checker Realty Co. v. Ohio Real Estate Comm.* (1974), 41 Ohio App.2d 37, paragraph two of the syllabus. "Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected." R.C. 119.12.

**{¶19}** In *Gwinn v. Ohio Elections Comm.*, 187 Ohio App.3d 742, 2010-Ohio-1587, appeal not allowed, 126 Ohio St.3d 1548, 2010-Ohio-3855, "[t]he elections commission never certified to the common pleas court a record of the administrative proceedings in the case or sought an extension of time for that purpose." Id. at ¶6. Analyzing Ohio Supreme Court precedent, *Gwinn* established two rules for cases where an agency improperly certifies the record. The general rule "is absolute: an administrative agency's failure to certify to the common pleas court a complete record of appealed administrative proceedings within the R.C. 119.12 time limit requires the common pleas court, upon motion, to enter a finding in favor of and a judgment for the appellant." Id. at ¶15. "[B]y contrast," when "an administrative agency timely certified to the court of common pleas the record of its administrative proceedings but with an unintentional error or omission in an otherwise complete record, the party appealing the administrative action pursuant to R.C. 119.12 is not entitled to a judgment in his or her favor absent a showing of prejudice." Id. at ¶16, citing *Arlow v. Ohio Rehab. Servs. Comm.* (1986), 24 Ohio St.3d 153; *Lorms v. Dept. of Commerce* (1976), 48 Ohio St.2d 153, syllabus.

**{¶20}** In its January 24, 2011 decision here, the common pleas court acknowledged both rules set out in *Gwinn*. The court, near the end of its decision, stated that although the unavailability of the transcript was not the fault of either party, "as held in *Gwinn*, R.C. 119.12 states an 'absolute rule' that an agency's failure to certify a complete record requires the Court to render a judgment for the Appellants." (Jan. 24, 2011 Decision, 5.) The OEC leans on that language to contend the common pleas court relied on the "absolute rule" from *Gwinn* when it should have applied the rule requiring the party

appealing the administrative action to demonstrate prejudice before the court reverses the agency's decision based on an incomplete record.

**{¶21}** Despite the trial court's reference to the "absolute rule" from *Gwinn*, the common pleas court's decision makes clear that the court analyzed the appeal and disposed of the case under the second rule from *Gwinn*. The court acknowledged the OEC filed "partial records of the proceedings, omitting the transcripts of the October [29], 2009 evidentiary hearings." (Jan. 24, 2011 Decision, 2.) The court also detailed the prejudice resulting to Citizens for Akron as a result of the missing transcript, as the missing transcript left the court unable to determine the validity of the appeals. The court further pointed out that a rehearing, the remedy proposed by the OEC, would cause Citizens for Akron to "incur additional attorney's fees, costs, inconvenience, and delay in order to effectuate their statutory right to review of their appeals." (Jan. 24, 2011 Decision, 5.) To emphasize that it appreciated the significance of prejudice to its ruling, the court supported its conclusion by contrasting *Lorms*, a case where prejudice was lacking, and *Bergdahl v. Ohio State Bd. of Psychology* (1990), 70 Ohio App.3d 488, 492, one where prejudice was found.

**{¶22}** The common pleas court correctly applied the rule from *Gwinn* that when an agency files a partial record of the proceedings, a court will overturn an agency's decision upon a finding of prejudice. The OEC's first assignment of error is overruled.

**IV. Second Assignment of Error–Rehearing Unavailable**

**{¶23}** The OEC's second assignment of error asserts that for three separate reasons the trial court erred in concluding the omitted October 29, 2009 hearing transcript prejudiced Citizens for Akron and required a reversal of the OEC's orders.

*A. R.C. 119.09 and Rehearing*

**{¶24}** Citing to R.C. 119.09, the OEC contends Citizens for Akron could not "be prejudiced by omission of the transcript when the Committee has had the opportunity to request a rehearing to create the transcript." (Appellant's brief, 8.)

**{¶25}** R.C. 119.09, titled "Adjudication hearing," sets forth the provisions governing adjudication hearings before agencies. The statute provides that, where the record of an adjudication hearing may be the basis of an appeal, "a stenographic record of the testimony and other evidence submitted shall be taken at the expense of the agency." A "stenographic record" is "a record provided by stenographic means or by the use of audio electronic recording devices." R.C. 119.09. An agency is not required to make a stenographic record of every adjudication hearing. Rather, in any situation where R.C. 119.01 through 119.13 requires an adjudication hearing, "if an adjudication order is made without a stenographic record of the hearing, the agency shall, on request of the party, afford a hearing or rehearing for the purpose of making such a record which may be the basis of an appeal to court." Id.

**{¶26}** R.C. 119.09 by its terms does not apply here. The statute delineates the circumstances where a party has the opportunity to request a hearing or rehearing in order to create a stenographic record: where an agency renders an adjudication order and has not made a stenographic record of the adjudication hearing. Here, the court reporter made a stenographic record of the proceedings and stored the record on her mobile storage device. R.C. 119.09 further states that the agency shall afford the hearing or rehearing "on request of the party." Citizens for Akron never requested a rehearing,

and the OEC cites no authority to support its proposition that the rehearing provision of R.C. 119.09 may be used to force an unwilling party to proceed with a rehearing.

**{¶27}** The OEC nonetheless asserts we should not follow a "hyper-technical reading of R.C. 119.09," but rather R.C. 119.09 "should be read to authorize rehearings where a transcript does not exist – whether it was never created or subsequently destroyed before being used by either party." (Reply brief, 4.) The OEC'S contention violates basic rules of statutory construction dictating that when a statute is clear on its face, as is R.C. 119.09, the statute is not to be enlarged or construed other than as its words demand. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St.3d 354, 357, citing *Hough v. Dayton Mfg. Co.* (1902), 66 Ohio St. 427. Indeed, strict compliance with other provisions of Chapter 119 of the Revised Code is the general rule. See *Hughes v. Ohio Dept. of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-2877, ¶17 (stating that "[j]ust as we require an agency to strictly comply with the requirements of R.C. 119.09, a party adversely affected by an agency decision must likewise strictly comply with R.C. 119.12 in order to perfect an appeal"); *Nibert v. Ohio Dept. of Rehab. & Corr.*, 84 Ohio St.3d 100, 102, 1998-Ohio-506, quoting *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.* (1994), 69 Ohio St.3d 521, 525 (interpreting the R.C. 119.12 appeal requirements and stating " '[t]here is no need to liberally construe a statute whose meaning is unequivocal and definite' "); *Sinha v. Dept. of Agriculture* (Mar. 5, 1996), 10th Dist. No. 95APE09-1239 (deciding an appellant was entitled to judgment under R.C. 119.12 when the agency certified the record to the court of common pleas 31 days after the notice of appeal was filed).

**{¶28}** Relying on *Jefferson Cty. Child Support Enforcement Agency v. DeLauder,* 151 Ohio App.3d 640, 2003-Ohio-693, the OEC contends "[o]ther Ohio courts have agreed that a party appealing from an administrative agency cannot be prejudiced for an omitted transcript where the appealing party refused to request a rehearing." (Appellant's brief, 9.) In *DeLauder*, however, the Child Support Enforcement Agency did not stenographically record the adjudication hearing. Id. at ¶26. The court determined that, because a party has the opportunity under R.C. 119.09 to request a rehearing for the purposes of making a stenographic record, the lack of a stenographic record did not violate due process. Id. at ¶29, 31. The same reasoning does not apply here because the OEC stenographically recorded the hearing in the first instance. As further distinction, the rules governing the Child Support Enforcement Agency do not require that the agency make a stenographic record of agency proceedings, but the OEC rules expressly require that a "stenographic record shall be made of all proceedings of the commission." Ohio Adm.Code 3517-1-12; cf. Ohio Adm.Code 5101:12-30-25(E). The OEC's first argument is unpersuasive.

*B. Remand for Rehearing*

**{¶29}** The OEC next asserts the common pleas court erred in holding that "no authority has been cited that permits the Court to order rehearings without the request of the party pursuant to R.C. 119.09." (Jan. 24, 2011 Decision, 5.) The OEC contends the proper remedy here was a "remand for a rehearing * * * to enable the parties to create the transcript and record upon which [Citizens for Akron] may properly appeal." (Appellant's brief, 10.)

**{¶30}** A court of common pleas may affirm the order of the agency if it finds, upon consideration of the entire record, that not only does reliable, probative, and substantial evidence support the order, but the order is in accordance with law. R.C. 119.12. "In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." Id. "Remand" is not expressly listed in R.C. 119.12, but "the power to reverse and vacate decisions necessarily includes the power to remand the cause to the decision maker." *Superior Metal Prods. v. Admr. Ohio Bur. of Emp. Servs.* (1975), 41 Ohio St.2d 143, 146. A remand for further proceedings thus may be appropriate in some circumstances. See *In re Rocky Point Plaza Corp.* (1993), 86 Ohio App.3d 486, 496 (concluding that "[s]ince the statements contained in the public hearing before the commission and the board as a matter of law are legally insufficient to constitute substantial, reliable and probative evidence * * * it is appropriate for the case to be remanded to the board for a new hearing and determination").

**{¶31}** Although the OEC contends the necessary circumstances are present and an appropriate "other ruling" here would have remanded the case for a rehearing, the OEC does not ask that its orders be set aside or reversed. The common pleas court properly noted the OEC has not cited any case, nor have we found any, where an appellate court remanded the case for the agency to recreate a necessary portion of the record. Moreover, the OEC's request, in effect, renders a portion of R.C. 119.12 meaningless insofar as the statute instructs that when the agency fails to file the certified record, the court, upon motion, shall "enter a finding in favor of the party adversely affected." The OEC's second argument lacks merit.

*C. Public Policy*

**{¶32}** The OEC lastly contends "the trial court's analysis is against public policy and will set a dangerous precedent for administrative appeals" because "whenever evidence before an administrative agency is accidently destroyed (through no fault of the agency), the appealing party automatically wins." (Appellant's brief, 10.) Appealing parties will not "automatically win," because the appealing party is entitled to judgment only if it can establish prejudice. Cf. *Lorms* (concluding that even though the commission omitted two letters from the certified record, the appellant could not establish prejudice because the record adequately summarized the letters); *Arlow* (determining the agency's unintentional omission of case numbers from the certified records did not prejudice the claimants). Moreover, to the extent the OEC contends this case will set a "dangerous precedent," its argument is unpersuasive. The court reporter's hard drive crash is unfortunate, but as the OEC notes, it was an accident and a rare occurrence. It thus is unlikely to occur again, much less with great frequency.

**{¶33}** In the final analysis, "administrative agencies have the responsibility to furnish the record of appealed administrative proceedings to the common pleas court for its review." *Gwinn* at ¶13. The legislature has chosen to place the risk of an error in the certification of the record on the agency by providing that the party, upon motion, is entitled to judgment in their favor if the agency fails to timely certify the record. R.C. 119.12. See *State ex rel. Crockett v. Robinson* (1981), 67 Ohio St.2d 363, 365 (stating the language of R.C. 119.12 is clear that "if the agency fails to comply, then the court must enter a finding in favor of the party adversely affected" so that the party will "be put in the same position as if the court had ruled on the merits"). The OEC's own rule

required the OEC to make a stenographic recording of the October 29, 2009 evidentiary hearing. Ohio Adm.Code 3517-1-12. The agency chose the court-reporting agency which would transcribe the October 29, 2009 hearing, and the OEC accordingly bears the risk of an error occurring to the stenographic recording. The OEC's third argument lacks merit.

**{¶34}** The OEC's second assignment of error is overruled.

**V. Disposition**

**{¶35}** Having overruled both of the OEC's assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas reversing the OEC's orders.

*Judgments affirmed.*

KLATT and TYACK, JJ., concur.

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