

[Cite as *Holtz v. Ohio Dept. of Commerce*, 2009-Ohio-6304.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92403

CARROLL M. HOLTZ

PLAINTIFF-APPELLEE

vs.

OHIO DEPARTMENT OF COMMERCE, ETC.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-651473

BEFORE: Cooney, A.J., Boyle, J., and Sweeney, J.

RELEASED: December 3, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

COLLEEN CONWAY COONEY, A.J.:

{¶ 1} Defendant-appellant and cross-appellee, Ohio Department of Commerce, Division of Financial Institutions (“Division”), appeals the common pleas court’s decisions (1) reversing and vacating the Division’s order that denied the application of plaintiff-appellee and cross-appellant, Carroll Michael Holtz (“Holtz”) seeking to renew his residential mortgage loan officer’s license (“license”), and (2) ordering the Division to grant Holtz’s license renewal application. Finding no merit to the appeal, we affirm.

{¶ 2} This case arose in February 2008, when the Division denied Holtz’s application to renew his license. Holtz appealed to the common pleas court, which reversed and vacated the Division’s order, finding that it was not in accordance with law. The Division now appeals, raising two assignments of error. Holtz raises two cross-assignments of error for our review.

{¶ 3} In its first assignment of error, the Division argues that the common pleas court erred as a matter of law in determining that Ohio Adm.Code 1301:8-7-01(K) conflicted with R.C. 2913.02 and was therefore a nullity. We reach the same conclusion—that Ohio Adm.Code 1301:8-7-01(K) is a nullity—but on different grounds.

Common Pleas Court's Judgment Entry

{¶ 4} The common pleas court issued a detailed judgment entry explaining its reasons for overruling the Division's order under R.C. 119. The court first observed that the Division had denied Holtz's license renewal application based on prior convictions for breaking and entering in 1968 and 1971.

{¶ 5} The common pleas court held that R.C. 1322.041 establishes the application procedure for residential mortgage loan officer licenses. Under R.C. 1322.041(A)(3), the Division should deny such licenses to applicants convicted of criminal offenses enumerated in R.C. 1322.031(A)(2). That provision specifically includes "any criminal offense involving theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, or any criminal offense involving money or securities."

{¶ 6} R.C. Chapter 1322 does not define the above-referenced crimes, so a court must look to other portions of the Revised Code for these definitions. R.C. 1322.031(A)(2) provides that if the applicant has been convicted of "any such offenses other than theft," the superintendent of the Division of Financial Institutions ("superintendent") should disregard the conviction if

the applicant proves by a preponderance of the evidence that he or she is honest and will not reoffend.

{¶ 7} The lower court interpreted the statute as meaning that if the applicant had committed the crimes outlined in R.C. 1322.031(A)(2), he or she could redeem himself or herself before the superintendent and obtain a license, but if the applicant had committed “theft,” the superintendent must deny the license. The court held that R.C. Chapter 1322 did not mention other criminal offenses found in the Revised Code that shared the element of dishonesty, meaning that other offenses such as breaking and entering should not impact an application for a loan officer license.

{¶ 8} The common pleas court further held that R.C. 1322.12 “authorizes the ‘superintendent of financial institutions * * * [to] adopt reasonable rules to administer and enforce sections 1322.01 to 1322.12 of the Revised Code to carry out the purposes of those sections.’” The court then examined Ohio Adm.Code 1301:8-7-01(K), promulgated by the Division, which provides that “theft,” within the context of R.C. 1322.041 means “those offenses set forth as a theft offense in division (K) of section 2913.01 of the Revised Code except for those offenses, other than theft, specifically enumerated in * * * division (A)(2) of section 1322.031 of the Revised Code.”

{¶ 9} The common pleas court concluded that this Ohio Administrative Code provision gave the term “theft” a different meaning than “theft” as defined in R.C.1322.031(A)(2), creating a different loan-officer-license-application scheme than the legislature created in the Revised Code. The Division had rejected Holtz’s application because his two convictions for breaking and entering were “theft offenses” under the Ohio Administrative Code scheme. Ultimately, the lower court held that the Ohio Administrative Code provision impermissibly conflicted with R.C. 2913.01(K), which defines the specific offense of “theft,” rendering the Ohio Administrative Code provision a nullity. Accordingly, the court reversed and vacated the Division’s order. We now review that decision.

{¶ 10} Our review requires us to interpret R.C. Chapter 1322. After the court’s decision and the parties’ submission of their appellate briefs, the General Assembly substantially modified several statutes within this chapter. However, we review the versions of the statutes in effect when the court decided the issue, pursuant to the rule that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” R.C. 1.48.

Standard of Review

{¶ 11} “An appellate court’s scope of review on issues of law is plenary * * *.” *Bartchy v. State Bd. of Edn.*, 120 Ohio St.3d 205, 2008-Ohio-4826, 897

N.E.2d 1096, citing *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343, 587 N.E.2d 835.

The instant appeal requires us to determine whether the common pleas court interpreted the law correctly. We hold that it did.

{¶ 12} During the relevant time period, R.C. 1322.041 provided, in pertinent part:

“[T]he superintendent of financial institutions shall issue a loan officer license * * * if the * * * following conditions are met:

* *

“The applicant has not been convicted of or pleaded guilty to any criminal offense described in division (A)(2) of section 1322.031 of the Revised Code, and the applicant has not pleaded guilty to or been convicted of a violation of an existing or former law of this state, any other state, or the United States that substantially is equivalent to a criminal offense described in that division. However, if the applicant has been convicted of or pleaded guilty to any such offense other than theft, the superintendent shall not consider the offense if the applicant has proven to the superintendent, by a preponderance of the evidence, that the applicant’s activities and employment record since the conviction show that the applicant is honest, truthful, and of good reputation, and there is no basis in fact for believing that the applicant will commit such an offense again.”

{¶ 13} In turn, R.C. 1322.031 includes the offenses of “theft, receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money

laundering, or drug trafficking, [and] any criminal offense[s] involving money or securities.”¹

{¶ 14} Therefore, under R.C. 1322.041, the superintendent must deny licenses to applicants with a prior conviction for theft but may grant licenses to applicants who have been convicted of receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, and any criminal offenses involving money or securities or substantially equivalent offenses under state or federal law if the applicants show by a preponderance of the evidence that they are honest and will not reoffend. Finally, the superintendent may freely grant licenses to applicants who have committed crimes other than those outlined in R.C. 1322.031 after the superintendent ascertains that “the applicant’s character and general fitness command the confidence of the public and warrant the belief that the business will be operated honestly and fairly in compliance with the purposes of [R.C.] 1322.01 to 1322.12 * * *.”

¹R.C. 2913.02 defines the crime of “theft.” It states:
“No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
(1) Without the consent of the owner or person authorized to give consent;
(2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
(3) By deception;
(4) By threat;
(5) By intimidation.”

{¶ 15} R.C. 1322.12 authorizes the superintendent to “adopt reasonable rules to administer[,] * * * enforce[, and effect the purposes of] sections 1322.01 to 1322.12 of the Revised Code * * *.” “However, an administrative rule may not add to or subtract from a legislative enactment. *Cent. Ohio Joint Vocational School Dist. Bd. of Edn. v. Ohio Bur. of Emp. Servs.* (1986), 21 Ohio St.3d 5, 10, 21 OBR 269, 487 N.E.2d 288. If it does, the rule clearly conflicts with the statute, and the rule is invalid. *Id.*” *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589. Ohio Adm.Code 1301:8-7-01(K) conflicts with R.C. Chapter 1322, so we find it invalid.

{¶ 16} Ohio Adm.Code 1301:8-7-01(K) provides:

“‘Theft,’ as used in sections 1322.04 and 1322.041 of the Revised Code and this chapter, means those offenses set forth as a theft offense in division (K) of section 2913.01 of the Revised Code except for those offenses, other than theft, specifically enumerated in division (A)(8) of section 1322.03 and division (A)(2) of section 1322.031 of the Revised Code.”

{¶ 17} Therefore, Ohio Adm.Code 1301:8-7-01(K) defines “theft” as aggravated robbery; robbery; aggravated burglary; burglary; breaking and entering; safe cracking; tampering with coin machines; theft or aggravated theft; unauthorized use of a vehicle; unauthorized use of property, computer or telecommunication property, or LEADS equipment; possession or sale of an unauthorized device; telecommunications fraud; unlawful use of a

telecommunications device; misuse of credit cards; forging identification cards; criminal simulation; making or using slugs; trademark counterfeiting; Medicaid fraud; tampering with records; securing writings by deception; personating an officer; defrauding creditors; insurance fraud; workers' compensation fraud; cheating; theft in office; wrongful conversion; counterfeiting; and deceit. It also includes defrauding a livery or hostelry, denying access to a computer, corrupting sports, or substantially equivalent offenses under municipal ordinances or state or federal laws. Finally, it includes conspiracy or attempt to commit, or complicity in committing any of these offenses. But it excludes any criminal offense involving money or securities.

{¶ 18} The Division argues that we must defer to its interpretation of R.C. Chapter 1322. Indeed, where the General Assembly grants an administrative agency the power to promulgate and apply rules, courts should defer to administrative agencies' reasonable interpretations of statutes. See *Frisch's Restaurants, Inc. v. Ryan*, 121 Ohio St.3d 18, 2009-Ohio-2, 901 N.E.2d 777. But we need not uphold an unreasonable interpretation of the law.

{¶ 19} The plain language of R.C. 1322.041 shows that the General Assembly intended to bar only those applicants previously convicted of "theft"

from obtaining licenses. In contrast, the superintendent, through Ohio Adm.Code 1301:8-7-01(K), bars applicants convicted of a variety of offenses from obtaining licenses. As the common pleas court rightly held, “[T]he Revised Code repeatedly refers to ‘a theft offense’ and R.C. 2913.01(K) defines the precise meaning of the term. The legislature did not use the phrase ‘theft offense’ in R.C. 1322.041(A)(2) or (3); it specifically used the word ‘theft.’”

{¶ 20} Moreover, R.C. 1322.041 allows applicants to prove to the superintendent that they have rehabilitated themselves if they have been convicted of receiving stolen property, embezzlement, forgery, fraud, passing bad checks, money laundering, or drug trafficking, and any criminal offenses involving money or securities. But under Ohio Adm.Code 1301:8-7-01(K), an applicant convicted of breaking and entering could not redeem himself or herself. This is illogical because the kind of scheming, planning, and deceit involved in embezzlement, forgery, fraud, passing bad checks, money laundering, and “any criminal offenses involving money or securities” is far more relevant to a mortgage loan officer’s character and fitness than breaking and entering.

{¶ 21} Additionally, the Division’s definition of “theft” as applied to Holtz is fundamentally unfair. The Division had been granting Holtz a

license every year since 2002. To bar him from obtaining such a license now, based on 40-year-old convictions alone, would be unreasonable.

{¶ 22} Accordingly, we overrule the first assignment of error.

{¶ 23} In the second assignment of error, the Division argues that the lower court erred by substituting its judgment for that of the Division and failing to interpret R.C. 1322.041(A)(3) as required under Ohio law. However, the Division has not argued this assignment of error separately as required by App.R. 16(A). Moreover, we have already explained that a court need not defer to an administrative agency's interpretation of a statute when it is unreasonable. Pursuant to App.R. 12(A)(2), we overrule the second assignment of error.

{¶ 24} In light of our conclusion regarding the Division's first assignment of error, Holtz's cross-assignments of error are moot.

Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, ADMINISTRATIVE JUDGE

MARY J. BOYLE, J., and
JAMES J. SWEENEY, J., CONCUR

APPENDIX

CROSS-ASSIGNMENTS OF ERROR:

- I. THE TRIAL COURT ERRED IN NOT FINDING THAT R.C. 1322.041(A)(3) AS APPLIED TO APPELLEE VIOLATES SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION.

- II. THE TRIAL COURT ERRED IN NOT FINDING THAT R.C. 1322.041(A)(3) AS APPLIED TO THE APPELLEE IS UNCONSTITUTIONAL, IN VIOLATION OF THE FOURTEENTH AMENDMENT'S GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION.