

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

THOMAS J. O'WESNEY, P.E.	:	JUDGES:
	:	Hon. W. Scott Gwin P.J.
Plaintiff-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009-CA-00074
STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND SURVEYORS	:	
	:	<u>OPINION</u>
Defendant-Appellee	:	

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of  
Common Pleas, Case No. 2008-CV-04489

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 7, 2009

APPEARANCES:

For Plaintiff-Appellant

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*Gwin, P.J.*,

{¶1} Plaintiff-Appellant, Thomas J. O'Wesney, P.E. appeals the February 27, 2009 judgment of the Stark County Court of Common Pleas that affirmed the decision of Defendant-Appellee, State Board of Registration for Professional Engineers and Surveyors, to suspend for six months Appellant's engineering license.

#### STATEMENT OF THE FACTS AND CASE

{¶2} Appellant has been practicing engineering for over forty (40) years, is licensed in seven (7) states, including Ohio, and never had any prior disciplinary action.

{¶3} On January 3, 2007 Roger Sorensen, P.E. and Seanan Ammar, consultants for HUD and Board Investigator Amanda Ware visited the premises located at 1796 Miday Road, East Canton, Ohio 44705. Mr. Sorensen and Mr. Ammar inspected the foundation of the manufactured home to determine if the foundation met the HUD Foundation Guidelines for Manufactured Homes dated September 1996. Mr. Sorensen and Mr. Ammar prepared a report of their findings and submitted the report to the U.S. Department of Housing and Urban Development. The report was received by the Ohio State Board of Registration for Professional Engineers and Surveyors on March 30, 2007.

{¶4} On July 26, 2007 Ms. Amanda H. Ware, Investigator for the Board, filed charges with the Board naming Appellant. The charges alleged on May 3, 2006 the Board received a complaint alleging that appellant made an inspection of the existing foundation of a manufactured building located at 1796 Miday Road, East Canton, Ohio 44705 and erroneously approved the foundation as structurally adequate. The complaint further alleged that the structure did not meet or exceed the U.S. Department

of Housing and Urban Development (HUD) Foundation Guidelines for Manufactured Housing dated September 1996 as reported by Appellant. The Board, by letter dated August 8, 2007, charged Appellant with alleged violations of Ohio law and rules pertaining to Registered Professional Engineers.

{¶15} Specifically, the Board charged Appellant with alleged violations of R.C. 4733.20(A) (2) and (A) (5); Ohio Adm. Code 4733-35-01, 4733-35-02, and 4733-35-03(C). The Board notified Appellant that he was entitled to an adjudication hearing upon the allegations in accordance with R.C. Chapter 119 provided such a request for hearing was received by this Board within 30 days. Appellant timely requested a hearing on the allegations.

{¶16} An evidentiary hearing at which Appellant elected to represent himself was held before the Hearing Officer on June 17, 2008. The following evidence was adduced at the hearing.

{¶17} In February 2006, Appellant was requested by a realtor to do a structural inspection of the foundation of a prefabricated manufactured home at 1796 Midway Avenue in East Canton, Ohio (the "home"). The inspection was requested because the home was being purchased and the U.S. Department of Housing and Urban Development ("HUD") was underwriting the loan for the purchase price. A prefabricated manufactured home is built in a factory, transported to a location and then assembled and put on supports. The home was a "double wide" with two halves assembled at the site.

{¶18} On February 10, 2006, Appellant conducted an on-site inspection of the foundation of the home. He did calculations for the structural supports of the home and

concluded that those supports were adequate to carry all loads required by State and local building codes. Appellant also concluded that the structure met or exceeded the HUD Foundation Guidelines for manufactured homes dated September 1996 ("HUD Foundation Guidelines"). Appellant sent a letter dated February 10, 2006 to the realtor detailing his findings and conclusions.

{¶9} On April 29, 2006, Kambiz Gholizadeh, P.E., sent a letter to the Board questioning Appellant's conclusion that the home at 1796 Miday Avenue met or exceeded the HUD Foundation Guidelines. Specifically, Mr. Gholizadeh asserted that there were no visible anchors to secure the building to the foundation and the masonry piers supporting the structure were "dry stacked," meaning they were not cemented together. Mr. Gholizadeh indicated that he believed structures must be anchored to the foundation and all masonry blocks must be mortared together in order to meet the HUD Foundation Guidelines. Mr. Gholizadeh stated in his letter "If the practice by [Appellant] is acceptable, I would like to know and to practice the same."

{¶10} Mr. Gholizadeh had previously inspected the foundation for the home at 1796 Miday Avenue at the request of the same realtor and determined that the structure did not meet the HUD Foundation Guidelines. He notified the realtor of his conclusions prior to Appellant's conclusions to the contrary.

{¶11} The Board treated Mr. Gholizadeh's letter as a complaint. As a result, the Board sent Appellant a letter on June 12, 2006 informing him that a complaint had been filed concerning his letter to the realtor concluding that the structure at 1796 Miday Avenue met or exceeded HUD Foundation Guidelines. The letter explained that there appeared to be no visible anchors to secure the building and the masonry piers

appeared to be dry-stacked. The letter requested that Appellant respond to the complaint.

{¶12} Appellant submitted a letter to the Board in response in which he stated that he determined the structure was more than adequate to meet the requirements of the required building codes as well as standard engineering practice. He also stated that he concluded the structure met the HUD Foundation Guidelines.

{¶13} Appellant also alleged in his letter that Mr. Gholizadeh found that the structure did not meet HUD Foundation Guidelines because Mr. Gholizadeh wanted to profit. Appellant alleged that Mr. Gholizadeh told the realtor that he could repair the foundation for a sum of money to bring it into compliance with HUD Foundation Guidelines. Appellant also indicated in his letter that he had spoken with Mr. Gholizadeh by telephone about the matter and Mr. Gholizadeh told him that he (Appellant) was "costing him money."

{¶14} By letter of November 16, 2006, this Board notified the Office of Manufactured Housing Programs of HUD of the complaint against Appellant and asked HUD to further investigate the issue of whether the structure met the HUD Foundation Guidelines.

{¶15} Seanan Ammar is currently employed as a Project Manager for NIS Solutions in Sterling, Virginia. (Mr. Ammar's curriculum vita is State's Exhibit 17). NIS has a contract with HUD to perform permanent foundation reviews for HUD throughout the United States for minimum property standards.

{¶16} Roger Sorensen is a registered Professional Engineer in Texas and Virginia. He is currently employed as a field engineer with the Institute for Building

Technology and Safety in Herndon, Virginia ("IBTS"). (Mr. Sorensen's curriculum vita is State's Exhibit 15). IBTS serves as a monitoring agent for HUD. Mr. Sorensen inspects foundations for HUD when requested to do so.

{¶17} On January 3, 2007, Mr. Ammar, Mr. Sorensen, and Amanda Ware, an Investigator employed by the Board, inspected the home to determine whether it met the HUD Foundation Guidelines. They found that there were no means to anchor the structure to the foundation and the masonry piers were dry-stacked.

{¶18} In May 2007, the Board sent letters to Appellant telling him it had evidence that the structure did not meet HUD Foundation Guidelines and provided him with a copy of the NIS report. The Board requested Appellant response.

{¶19} Appellant responded to the Board by letter dated June 27, 2007. (State's Exhibit 8). In his response, Appellant stated he performed calculations that led him to conclude that it was structurally sound and in good shape. Appellant also indicated that he believed he saw the required anchorage to the foundation. He further noted that he found the foundation satisfactorily supported the structure for over 16 years with no settlement or movement.

{¶20} Section 101-2 "Existing Construction" of the HUD guidelines upon which Appellant relies reads in pertinent part:

{¶21} "Existing Construction. Practices recommended in the handbook are not intended to be applied retroactively to existing sites unless the authority and the jurisdiction consider such application is essential for safety and health of occupant. Upgrade of existing anchorage as in footing shall meet the intent of the definition of permanent foundation stated herein".

{¶22} Neither Mr. Ammar nor Mr. Sorensen contacted the Stark County, Ohio Building Department to determine whether the home complied with local building code requirements.

{¶23} On August 19, 2008, the Hearing Officer issued his Report and Recommendation, finding no deceptive or misleading intent by Appellant. However, the Hearing Officer found that sufficient evidence was presented to conclude that Appellant's actions were in violation of R.C. 4733.20(A)(5) and of Ohio Adm. Code 4733-3503(C). The Hearing Officer recommended that Appellant receive a public reprimand and a fine of \$1,000.00.

{¶24} Appellee considered the Hearing Officer's Report and Recommendation, as well as objections filed by Appellant. Appellee approved a Resolution adopting the Report and Recommendation of the Hearing Officer. However, the Appellee modified the Hearing Officer's recommended sanction by including a six-month suspension of Appellant's engineering license. On September 23, 2008, Appellee issued a Final Order.

{¶25} Appellant timely appealed the Final Order to the Stark County Court of Common Pleas. On February 27, 2009, the trial court affirmed Appellee's decision to suspend Appellant's engineering license. Appellant now appeals.

{¶26} Appellant raises six Assignments of Error:

{¶27} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE BOARD'S ORDER WAS SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND WAS IN ACCORDANCE WITH LAW.

{¶28} “II. THE BOARD'S FINDING THAT THE HOME WAS NOT EXEMPTED FROM THE SPECIFIC HUD PERMANENT FOUNDATION GUIDELINES WAS NOT SUPPORTED BY RELIABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE, NOR WAS IT IN ACCORDANCE WITH LAW.

{¶29} “III. THE BOARD'S CONCLUSION THAT MR. O'WESNEY VIOLATED O.A.C. 4733-35-03(C) AND R.C. 4733.20(A)(5) WAS NOT SUPPORTED BY RELIABLE, SUBSTANTIAL AND PROBATIVE EVIDENCE, NOR WAS IT IN ACCORDANCE WITH LAW.

{¶30} “IV. THERE EXISTED NO RELIABLE, SUBSTANTIAL OR PROBATIVE EVIDENCE, AND IT WAS NOT IN ACCORDANCE WITH LAW FOR THE BOARD TO MODIFY THE RECOMMENDED PENALTY OF THE HEARING EXAMINER.

{¶31} “V. THE BOARD'S DISCIPLINE WAS INCONSISTENT, ARBITRARY, CAPRICIOUS AND UNREASONABLE.

{¶32} “VI. THE TRIAL COURT ABUSED ITS DISCRETION IN STRIKING THE BOARD'S OWN NEWS RELEASES ATTACHED AS EXHIBITS TO APPELLANT'S BRIEF.”

#### STANDARD OF REVIEW

{¶33} For the purposes of simplicity, we will first discuss our standard of review regarding Appellant's arguments before this Court as set forth by this court in *Contini v. Ohio State Bd. Of Educ.*, Licking App. No. 2007CA0136, 2008-Ohio-5710.

{¶34} In an administrative appeal pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. Reliable, probative and substantial evidence



has been defined as: (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, 589 N.E.2d 1303. *Contini*, supra at ¶ 16. See, also *Rhodes v. Ohio Counselor, Social Worker and Marriage and Family Therapist Bd.*, Muskingum App. No. CT2009-0011, 2009-Ohio-5666 at ¶ 33.

{¶35} In determining evidentiary conflicts, the Ohio Supreme Court in *University of Cincinnati v. Conrad* (1980), 63 Ohio State 2d 108, 407 N.E.2d 1265, directed courts of common pleas to give deference to the administrative resolution of such conflicts. The Supreme Court noted when the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265; *Contini*, supra at ¶ 17; *Rhodes*, supra at ¶ 34.

{¶36} On appeal to this Court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707, 590 N.E.2d 1240. In reviewing the trial court's determination that Appellee's order was supported by reliable, probative and substantial evidence, this Court's role is limited to determining whether the trial court abused its

discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App. 3d 675, 680, 610 N.E.2d 562. *Contini*, supra at ¶ 18; *Rhodes*, supra at ¶ 35.

{¶37} The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140.

{¶38} It is pursuant to this standard that we review appellant's assignments of error.

I., II. & III.

{¶39} Appellant's first, second and third Assignments of Error argue the trial court abused its discretion in finding the Board's decision was supported by reliable, probative and substantial evidence. Appellant's objection centers upon three evidentiary findings: (1) Whether the Board's Final Order is supported by reliable, probative, and substantial evidence and is in accordance with law; (2) Whether the Board's finding that the subject home was not exempted from the HUD Permanent Foundations Guide for Manufactured Housing was correct and supported by reliable, probative and substantial evidence in accordance with law; and (3) Whether the Board's conclusion that appellant violated R.C. 4733.20(A)(5) and Ohio Adm. Code Section 4733-35-03(C) was correct and supported by reliable, probative and substantial evidence in accordance with law.

{¶40} Appellant additionally argues that the trial court abused its discretion because it did not make legal findings or discuss the evidence to support the trial court's conclusion that the Board's decision was supported by reliable, probative and substantial evidence in accordance with law. [Appellant's Brief at 11-12].

{¶41} This Court has previously held that a trial court does not err in failing to make separate findings of fact and conclusions of law in an appeal from administrative adjudication pursuant to R.C. 119.12 when it hears no additional evidence. *Rashid v. Ohio Liquor Control Comm.* (1988), 50 Ohio App. 3d 32, 552 N.E.2d 663. See also, *Huntsman v. Ohio State Bd. Of Educ.*, Stark App. No. 2008CA00220, 2009-Ohio-4282 at ¶26. See also, *Satterfield v. Ohio State Bd. of Registration for Professional Engineers and Surveyors* (May 20, 1999), Adams App. No. 98CA670; *General Motors Corp. v. Joe O'Brien Chevrolet, Inc.* (1997), 118 Ohio App.3d 470, 693 N.E.2d 317 (Civ.R. 52 has no application to administrative proceedings unless the court is making factual determinations on the basis of additional evidence not before the administrative agency).

{¶42} The February 27, 2009 judgment entry shows that the trial court reviewed the administrative record and based its decision on legal conclusions. It made no new findings from the administrative record. Accordingly, the trial court did not err in failing to make separate findings of fact and conclusions of law, or in failing to discuss the evidence to support the trial court's conclusion that the Board's decision was supported by reliable, probative and substantial evidence in accordance with law.

{¶43} In the Hearing Officer's lengthy Report and Recommendation, he addressed appellant's argument concerning the distinction between whether Subparagraph 101-2 essentially "grandfathers" all construction that was in existence in 1996 from the specific requirements of the HUD Permanent Foundation Guidelines:

{¶44} "I am compelled to note, however, that Subparagraph 101-2 certainly is far from clear as to its meaning and effect. In fact, neither Mr. Ammar nor Mr. Sorensen

were able to adequately explain at the hearing the meaning of Subparagraph 101-2 other than to indicate that all structures must meet the specific requirements of the HUD Permanent Foundation Guidelines. The subparagraph certainly appears at first glance to grandfather existing structures unless local building authorities have determined that the HUD requirements are essential for the safety and health of the occupants.

{¶45} Regardless of the distinction as to whether the structure was “grandfathered” in, Mr. O'Wesney failed to disclose the fact that the foundation did not in fact meet the specific requirements of the present HUD Permanent Foundation Guidelines. In this regard, the Hearing Officer noted:

{¶46} “More troubling and more of a concern to me in the instant case is that, even if Subparagraph 101-2 exempted the home at 1796 Miday Avenue from the specific HUD Permanent Foundation Guidelines (and I have concluded it did not), Appellant's report to the realtor misrepresented the facts. Even if the structure was grandfathered, Mr. O'Wesney's report, to be accurate and forthright, should have stated that the structure did not meet the specific requirement of the HUD Permanent Foundation Guidelines, but it was not required to because it was an existing structure that was grandfathered under Subparagraph 101-2.

{¶47} “Mr. O'Wesney's affirmative statement in his report that the structure met the HUD Permanent Foundation Guidelines not only omitted the important information that he came to that conclusion only because he believed it was grandfathered, but it certainly led to the false conclusion that the structure did meet all requirements of the HUD Permanent Foundation Guidelines. The home at 1796 Miday Avenue clearly did not meet the HUD requirements. However, anybody reading the report would certainly

not know that. A reasonable person reading Mr. O'Wesney's report would believe the structure met all HUD requirements and have no idea that his conclusion was based solely upon his determination that it did not have to meet those requirements.

{¶48} “In my view, for this reason, Mr. O'Wesney's report does not include all relevant and pertinent information. The omission of that pertinent information would, or reasonably could, lead to the incorrect conclusion that the structure did, in fact, meet all HUD requirements.”

{¶49} The Hearing Officer and the Board specifically found the Appellant in violation of R.C. 4733.20(A) (5) and Ohio Adm. Code Rule Nos. 4733-35-03(C). R.C. 4733.20(A) provides:

{¶50} “(A) Pursuant to this section, the state board of registration for professional engineers and surveyors may fine, revoke, suspend, refuse to renew, or limit the registration, or reprimand, place on probation,... or impose any combination of these disciplinary measures on any applicant or registrant, or revoke the certificate of authorization of any holder found to be or to have been engaged in any one or more of the following acts or practices:

{¶51} “(5) Violation of this chapter or any rule adopted by the board.

{¶52} “\* \* \*”

{¶53} The code of ethics adopted by the board is found at Ohio Adm. Code Chapter 4733-35. It provides as follows:

{¶54} “In order to safeguard the life, health, property and welfare of the public and the state of Ohio, to maintain integrity and high standards of skills and practice in the professions of engineering and surveying, the following rules of professional

conduct, promulgated in accordance with Chapter 4733. of the Revised Code, shall be binding upon every person holding a certificate of registration as a professional engineer or as a professional surveyor.

**{¶155}** “The engineer or surveyor, who holds a certificate of registration from the Ohio state board of registration for professional engineers and surveyors, is charged with having knowledge of the existence of the reasonable rules and regulations hereinafter provided for his or her professional conduct as an engineer or surveyor, and also shall be deemed to be familiar with their several provisions and to understand them. Such knowledge shall encompass the understanding that the practice of engineering, or of surveying, is a privilege, as opposed to a right, and the registrant shall be forthright and candid in statements or written responses to the board or its representatives on matters pertaining to professional conduct.”

**{¶156}** Ohio Adm. Code 4733-35-03 further states:

**{¶157}** “The Engineer or Surveyor shall:

**{¶158}** “\* \* \*

**{¶159}** “(C) Be completely objective in any professional report, statement or testimony and shall include all relevant and pertinent information in the report, statement or testimony when the result of omission would, or reasonably could, lead to a fallacious conclusion;

**{¶160}** “\* \* \*”

**{¶161}** In reviewing an administrative decision, the trial court reviews the order to determine whether the order was supported by reliable, probative and substantial evidence and in accordance with the law. In determining evidentiary conflicts, the trial

court is to give deference to the administrative resolution of such conflicts. *Conrad*, supra. When the evidence before the court consists of conflicting testimony of approximately equal weight, the common pleas court should defer to the determination of the administrative body, which, acting as the finder of fact, had the opportunity to determine the credibility and weight of the evidence. *Conrad* at 111, 407 N.E.2d 1265.

{¶62} When the matter reaches the appellate level, we review the trial court's decision through a smaller window, whether the trial court's judgment is an abuse of discretion. Upon our review of the record before us and with the understanding that the trial court must defer the resolution of evidentiary conflicts to the Hearing Officer who had opportunity to determine the witnesses' credibility and weigh the evidence, we cannot find the trial court abused its discretion in affirming the administrative order and its resolution of those evidentiary conflicts.

{¶63} We agree with the trial court that reliable, probative, and substantial evidence existed to support a finding that Appellant failed to include all relevant and pertinent information in his report and the result of the omission would, or reasonably could, lead to a fallacious conclusion.

{¶64} Appellant's first, second and third assignments of error are overruled.

#### IV. & V.

{¶65} Appellant's fourth and fifth Assignments of Error argue the trial court abused its discretion in not reversing the Board's decision to modify the hearing examiner's recommended sanction. In his fourth assignment of error, appellant contends that the Board erred by modifying the penalty recommended by the hearing

examiner. In his fifth assignment of error, appellant contends that the Board's discipline was inconsistent, arbitrary, capricious and unreasonable. We disagree.

{¶66} Pursuant to R.C. 119.09, an agency is permitted to modify an order of a hearing examiner. That statute provides, in pertinent part:

{¶67} “\* \* \* The recommendation of the referee or examiner may be approved, modified, or disapproved by the agency, and the order of the agency based on such report, recommendation, transcript of testimony and evidence, or objections of the parties, and additional testimony and evidence shall have the same effect as if such hearing had been conducted by the agency. No such recommendation shall be final until confirmed and approved by the agency as indicated by the order entered on its record of proceedings, *and if the agency modifies or disapproves the recommendations of the referee or examiner it shall include in the record of its proceedings the reasons for such modification or disapproval.*”

{¶68} (Emphasis added).

{¶69} On August 19, 2008, the Hearing Officer issued his report and recommendation finding no deceptive or misleading intent by Appellant, who has been a registered professional engineer for forty (40) years, licensed in seven (7) different states without any prior discipline. The Hearing Officer recommended a reprimand and \$1,000 fine. In modifying the hearing examiner's recommended sanction, the Board stated:

{¶70} “After an examination of the record of the administrative hearing and the Report and Recommendation of the Hearing Officer, the Board modifies the recommendation of the Hearing Officer. The Board hereby modifies the



recommendation to include a six (6) month suspension of Respondent's professional engineer registration..."

{¶71} The Board is not required to follow the recommendations of the hearing examiner. See *Graziano v. Amherst Village Bd. of Edn.* (1987), 32 Ohio St.3d 289, 293, 513 N.E.2d 282, 285. The Board's standard of review requires an acceptance of the hearing officer's findings unless such findings are against the preponderance of evidence. In contrast, the referee's recommendations are to be given due deference, yet they are not to be merely rubber stamped by the Board. See *Aldridge v. Huntington Local Sch. Dist. Bd. of Edn.* (1988), 38 Ohio St.3d 154, 157, 527 N.E.2d 291, 293-294.

{¶72} To the extent that Appellant contends that the trial court erred in failing to modify the penalty imposed because the evidence does not support the Board's action, Appellant's argument is without merit. We have previously determined, in addressing Appellant's first, second and third assignments of error, that the trial court did not abuse its discretion in finding that the order of the Board was supported by reliable, probative and substantial evidence. The common pleas court, in concluding that the Board's order was supported by such evidence, is "precluded from interfering or modifying the penalty which the agency imposed, so long as such penalty is authorized by law." *DeBlanco v. Ohio State Medical Bd.*(1992), 78 Ohio App.3d 194, 202, 604 N.E.2d 212, 217, citing *Henry's Cafe, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233, 10 O.O.2d 177, 163 N.E.2d 678. See also, *Roy v. Ohio State Medical Bd.* (1992), 80 Ohio App.3d 676, 683, 610 N.E.2d 562, 567. Because the Board's sanction was authorized by statute, the trial court could not order modification of the penalty imposed. *Henry's Café, Inc.*, supra. The Supreme Court of Ohio has held that "the fact that the court of

appeals, or this court, might have arrived at a different conclusion than did the administrative agency is immaterial. Appellate courts must not substitute their judgment for those of an administrative agency or a trial court absent the approved criteria for doing so.” *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261, 533 N.E.2d 264. In this case, the Board’s decision set forth in some detail the factors and evidence in the record that the Board considered exacerbating, leading to modification of the proposed penalty.

{¶73} Despite the facts in the case at bar, the precedent of *Henry’s Café* unfortunately binds us. “The case involving [appellants] emphasizes how harsh the effects of *Henry’s Café* can be. As a practical matter, courts have no power to review penalties meted out by the commission. Thus, we have little or no ability to review a penalty even if it seems on the surface to be unreasonable or unduly harsh. \* \* \* Perhaps the time to reconsider *Henry’s Café* has arrived, but the Supreme Court of Ohio must be the court to do that reconsideration. We, as an intermediate appellate court, are required to follow the syllabus of *Henry’s Café* unless or until such reconsideration occurs.” *Lindner v. Ohio Liquor Control Comm.* (May 31, 2001), Franklin App. No. 00AP-1430. See, also, *Goldfinger Enterprises, Inc. v. Ohio Liquor Control Comm.*, Franklin App. No. 01AP-1172, 2002-Ohio-2770 at ¶22.

{¶74} Since, in this case, there is supporting evidence for the Board’s order the trial court did not err in affirming the board’s decision and penalty.

{¶75} Appellant’s fourth and fifth assignments of error are overruled.

## VI.

{¶76} In his sixth assignment of error, appellant contends the trial court abused its discretion in striking the Board's own news releases attached as Exhibits to Appellant's brief. We disagree.

{¶77} In hearing an administrative appeal, the court of common pleas is confined to the record certified by the agency. R.C. 119.12. R.C. 119.12 further provides that:

{¶78} "unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency. 'Newly discovered evidence refers to evidence that was in existence at the time of the administrative hearing, but which was incapable of discovery by due diligence; however newly discovered evidence does not refer to newly created evidence.' \* \* \*"

{¶79} "In interpreting Civ. R. 60(B)(2), which is analogous to R.C. 119.12 as it pertains to newly discovered evidence, this court has held that the moving party has the burden of demonstrating: '(1) that the evidence was actually "newly discovered"; that is it must have been discovered subsequent to the trial; (2) that the movant exercised due diligence; and (3) that the evidence is material, not merely impeaching or cumulative and that a new trial would probably produce a different result.'" *Clark v. State Bd. of Registration for Professional Engineers & Surveyors* (1997), 121 Ohio App.3d 278, 287-288, 699 N.E.2d 968, citing *Diversified Benefit Plans Agency, Inc. v. Duryee* (1995), 101 Ohio App.3d 495, 501-502, 655 N.E.2d 1353.

{¶80} In the case sub judice, appellant moved the trial court to admit evidence of disparate treatment. Appellant specifically sought to introduce news releases purportedly from the Board's website that show that the Board did not suspend the licenses of other licensees whom Appellant contends committed more serious violations than Appellant did.

{¶81} Appellant's argument that he had no way of knowing that the exhibits would be relevant until the Board issued its order suspending his license is feckless. Appellant was free to offer whatever mitigating evidence he wished before the Hearing Officer. Further, Appellant was afforded the opportunity to argue the appropriate sanction in the event that the Hearing Officer would find a violation.

{¶82} In *CVS/Pharmacy # 3131 v. Ohio State Bd. of Pharm.*, Cuyahoga App. No. 82215, 2003-Ohio-3806, CVS motioned the trial court to supplement the record with nine exhibits containing excerpts from the official minutes of Board meetings held in 2000 and 2001. Each excerpt dealt with the Board's previous enforcement actions against terminal distributor licensees. The trial court denied CVS' motion. On appeal, CVS argued that the minutes from these prior adjudications could not have been ascertained prior to the hearing because the issues addressed by the evidence only became ripe after the hearing. To hold otherwise, it is argued, would require all licensees appearing in an adjudication hearing, as a precautionary measure, to introduce all of the past enforcement actions taken by the Board. The Court of Appeals disagreed noting,

{¶83} "The evidence CVS sought to introduce was not newly discovered. CVS has not demonstrated that they were unable to obtain these records prior to the hearing.

In addition, the trial court could have determined that such evidence was merely for the purpose of impeaching the Board's decision. Nothing would suggest that such evidence would have altered the outcome of the hearing. Lastly, CVS has provided no authority for the position that an administrative board is bound by prior decisions under a doctrine of stare decisis." Id. at ¶ 38.

{¶84} In the case at bar, appellant's evidence is not "newly discovered." As is stated above, "newly discovered evidence," as such term is used in R.C. 1119.12, refers to evidence that, although in existence at the time of an administrative hearing, was incapable of discovery by due diligence. *Diversified Benefit Plans Agency*, supra, at 501-502, 655 N.E.2d 1353. Appellant has not demonstrated that he was unable to obtain all of these records prior to the hearing. Appellant cites no precedent, or any other authority, for reversal of an otherwise valid sanction on the basis that violators that are more culpable were not punished more severely. Each licensee is different and nothing prohibits a Board from imposing two different sanctions upon individuals convicted of similar violations.

{¶85} Appellant's sixth assignment of error is overruled.

{¶186} Accordingly, the judgment of the Court of Common Pleas, Stark County, Ohio is affirmed.

By Gwin, P. J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

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HON. JULIE A. EDWARDS

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HON. PATRICIA A. DELANEY

WSG:clw 1109

