

TENTH APPELLATE DISTRICT

Tri County Beverage,	:	
Appellant-Appellant,	:	No. 12AP-373 (C.P.C. No. 11CVF-06-8391)
v.	:	
Bureau of Environmental Health, Ohio Department of Health,	:	No. 12AP-441 (C.P.C. No. 11CVF-02-2129)
Appellee-Appellee.	:	(REGULAR CALENDAR)
	:	

D E C I S I O N

Rendered on December 18, 2012

Cicero Law Office, LLC, and Lori R. Cicero, for appellant.

*Michael DeWine, Attorney General, Angela M. Sullivan, and
Stacy L. Hannan, for appellee.*

APPEALS from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Appellant, Tri County Beverage ("Tri-County"), appeals the judgments of the Franklin County Court of Common Pleas, which affirmed administrative decisions by appellee, the Ohio Department of Health ("ODH"), and its designee, the Seneca County General Health District ("Health District"), finding Tri-County in violation of the Ohio Smoke-Free Workplace Act ("Smoke-Free Act"). This court sua sponte consolidated these appeals, and we affirm the trial court's judgments for the following reasons.

I. BACKGROUND

{¶ 2} Tri-County is a bar and drive-thru. In case No. 12AP-373, the Health District determined that Tri-County violated the Smoke-Free Act because its proprietor, Richard Miller, failed to remove an ashtray from the bar. In case No. 12AP-441, the Health District determined that Tri-County violated the Smoke-Free Act because Miller permitted a patron to smoke in the bar. Tri-County contested the violations and requested administrative review before an independent decision-maker.

{¶ 3} Matt Beckman, a sanitarian for the Health District, testified as follows at the administrative hearing in case No. 12AP-373. Beckman went to Tri-County on August 27, 2009. While inside the bar, he found a wastebasket containing a beer can "that had ashes and the smell of a cigarette butt." (Case No. 12AP-373 Tr. 13.) Miller told Beckman that a drive-thru patron gave him the can and asked him to throw it away. Beckman did not believe Miller, however. Instead, Beckman inferred that a patron from the bar placed the ash-filled can in the wastebasket, and he determined that the Smoke-Free Act required Miller to remove the can because it was in the bar.

{¶ 4} David Angals and Gary Dillon are regular patrons at Tri-County, and they testified that people smoke outside the bar and dispense their ashes in beer cans provided by bartenders. Dillon indicated that smokers bring the ash-filled cans back to the bar for disposal because Miller did not "want any cigarette butts laying outside." (Case No. 12AP-373 Tr. 32.) Tri-County employee Michael Scott also testified about that procedure for patrons who smoke. He indicated that Tri-County keeps a dozen cans for patrons who smoke. Lastly, Miller reiterated at the hearing that the can found by Beckman was given to him by a drive-thru patron.

{¶ 5} The independent decision-maker issued a report and recommendation, in which he concluded that Tri-County violated the Smoke-Free Act. Tri-County objected, but ODH approved the recommendation. Tri-County appealed to the trial court, and that court affirmed.

{¶ 6} In case No. 12AP-441, Beckman testified as follows at the administrative hearing. The Health District received an anonymous complaint that Tri-County was

violating the Smoke-Free Act. Beckman investigated the complaint on January 29, 2010. Beckman smelled "a strong odor" of smoke when he went inside the bar at Tri-County, and he saw a man holding a cigar. (Case No. 12AP-441 Tr. 21.) The cigar had smoke billowing from it, and "[i]t was obviously burning for a little while." (Case No. 12AP-441 Tr. 27.) Miller was facing the smoker while sitting at a nearby table. Beckman determined that Tri-County violated the Smoke-Free Act because a patron was allowed to smoke in the bar, and Beckman spoke with Miller about the violation.

{¶ 7} Miller testified that someone was sitting between him and the person Beckman claimed had been smoking. Therefore, Miller said he did not see that person smoke. He also claimed that he did not smell smoke. Lastly, he noted that Beckman discussed the smoking violation with him for two or three minutes. Ashley Drake works at Tri-County, and she testified that she did not smell smoke in the bar on January 29, 2010. She noted, however, that she was busy working in the drive-thru.

{¶ 8} During closing argument, counsel for Tri-County claimed that the evidence failed to establish a violation of the Smoke-Free Act. Counsel also contended that the charge against Tri-County was invalid because Beckman did not interview Miller during his investigation. The independent decision-maker issued a report and recommendation, in which he upheld Beckman's finding that Tri-County violated the Smoke-Free Act. Tri-County objected, but ODH approved the recommendation. Tri-County appealed to the trial court, and that court affirmed.

II. ASSIGNMENTS OF ERROR

{¶ 9} Tri-County filed timely notices of appeal and assigns the following errors:

[Case No. 12AP-373] THE OHIO DEPARTMENT OF HEALTH FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE PROPRIETOR OF TRI COUNTY BEVERAGE FAILED TO REMOVE ASHTRAYS AND/OR SMOKING RECEPTACLES USED FOR DISPOSING OF SMOKING MATERIALS FROM A PUBLIC PLACE.

[Case No. 12AP-441] THE OHIO DEPARTMENT OF HEALTH FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THE PROPRIETOR OF TRI-COUNTY BEVERAGE PERMITTED

SMOKING IN VIOLATION OF R.C. 3794.02(A) AND O.A.C.
3701-52-02(A) AND WAS IMPROPERLY FINED.

III. DISCUSSION

{¶ 10} Because they concern similar issues, we address Tri-County's two assignments of error together. In those assignments of error, Tri-County contends that the trial court erred by affirming ODH's conclusion that it violated the Smoke-Free Act. We disagree.

{¶ 11} Tri-County first argues that the charges against it were invalid because Beckman did not interview Miller during his investigations on August 27, 2009 and January 29, 2010. Ohio Adm.Code 3701-52-08(D)(2)(c) and (D)(3) required Beckman to conduct interviews during his investigations. This court has defined "interview" as a " 'meeting at which information is obtained.' " *Parker's Tavern v. Ohio Dept. of Health*, 10th Dist. No. 10AP-968, 2011-Ohio-5767, ¶ 8, quoting *Merriam-Webster's Online Dictionary* (2012), <http://www.merriam-webster.com/dictionary/interview> (accessed December 12, 2012).

{¶ 12} Miller acknowledged that Beckman discussed the smoking violation with him during the January 29, 2010 investigation. To be sure, the discussion lasted only two or three minutes, but an "extensive" meeting is not required. *Parker's Tavern* at ¶ 10. Therefore, we hold that Beckman interviewed Miller on January 29, 2010.

{¶ 13} We next address Tri-County's claim that Beckman did not conduct an interview during his investigation on August 27, 2009. As an initial matter, Tri-County failed to preserve that issue for appellate review because it was not raised at the administrative hearing. See *Trish's Café & Catering, Inc. v. Ohio Dept. of Health*, 195 Ohio App.3d 612, 2011-Ohio-3304, ¶ 19 (10th Dist.). In any event, the record established that Beckman interviewed Miller during the investigation on August 27, 2009.

{¶ 14} Because Beckman interviewed Miller during his investigations, the charges against Tri-County were valid. We now turn to the merits of Tri-County's claim that the trial court erred by affirming ODH's decision that it violated the Smoke-Free Act. The trial court was required to determine whether ODH's decision was in accordance with

law and supported by reliable, probative, and substantial evidence. *See The Blvd. v. Ohio Dept. of Health*, 10th Dist. No. 09AP-837, 2010-Ohio-1328, ¶ 7. In applying this standard, the trial court needed to give "due deference" to ODH's "resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111 (1980).

{¶ 15} Our review is more limited. *The Blvd.* at ¶ 8. We determine whether the trial court abused its discretion by finding that ODH's decision was supported by reliable, probative, and substantial evidence. *See Pour House, Inc. v. Ohio Dept. of Health*, 185 Ohio App.3d 680, 2009-Ohio-5475, ¶ 12 (10th Dist.). An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). On questions of law, our review is plenary. *See Pour House* at ¶ 12.

{¶ 16} ODH concluded that Tri-County violated the Smoke-Free Act because its proprietor allowed a patron to smoke a cigar in the bar on January 29, 2010. Tri-County contends that the trial court abused its discretion by affirming that decision.

{¶ 17} R.C. 3794.02(A) prohibits smoking in public places. A business violates R.C. 3794.02(A) if its proprietor "affirmatively allows smoking or implicitly allows smoking by failing to take reasonable measures to prevent it." *Pour House* at ¶ 19. The Supreme Court of Ohio has concluded that a proprietor implicitly permitted smoking when multiple patrons smoked in front of him, and he did nothing to stop them. *Wymyslo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 45.

{¶ 18} Here, Beckman testified that a patron was smoking a cigar in a public place at Tri-County and that Miller did nothing to stop him. Tri-County contends, however, that the record failed to establish that Miller knew the patron was smoking. It notes that Miller testified that someone was blocking his view of the patron and that Miller and Drake indicated that they did not smell smoke. But ODH rejected Miller and Drake's claim that they did not smell smoke, and the trial court deferred to that conclusion. Pursuant to *Conrad*, it was reasonable for the court to do so because Beckman indicated that the patron's cigar emitted "a strong odor of smoke" and "was obviously burning for a little while." (Case No. 12AP-441 Tr. 21, 27.) In addition, ODH did not believe Miller's testimony that he did not see the patron smoke, and the trial

court properly deferred to that finding given that Miller and the patron were sitting near each other. Consequently, reliable, probative, and substantial evidence established that Miller permitted a patron to smoke at Tri-County. Therefore, the trial court did not abuse its discretion by affirming ODH's decision that Tri-County violated R.C. 3794.02(A).

{¶ 19} Next, ODH concluded that Tri-County violated the Smoke-Free Act because Miller failed to remove an ashtray from the bar on August 27, 2009. Tri-County contends that the trial court abused its discretion by affirming that decision.

{¶ 20} Under R.C. 3794.06(B), a proprietor is required to remove ashtrays from inside public places of his business. A violation under R.C. 3794.06(B) occurs if the proprietor fails to remove the ashtrays or acquiesces to their presence. *Trish's Café* at ¶ 24. An ashtray is a "receptacle that is used for disposing of smoking materials including but not limited to ash and filters." Ohio Adm.Code 3701-52-01(A). Here, while looking through a wastebasket in the bar, Beckman found a beer can "that had ashes and the smell of a cigarette butt." (Case No. 12AP-373 Tr. 13.) That beer can was an ashtray pursuant to Ohio Adm.Code 3701-52-01(A).

{¶ 21} Tri-County claims that Miller simply threw the beer can away after a drive-thru patron gave it to him. But Beckman determined that a patron from the bar placed the beer can in the wastebasket and that Miller unlawfully failed to remove the can from the public place. It was within the province of the trial court to accept that conclusion because the evidence established that Miller allowed patrons to smoke outside with beer cans used as ashtrays and, in spite of R.C. 3794.06(B), he required the smokers to bring the ash-filled cans back in the bar for disposal. Nevertheless, even if a drive-thru patron gave Miller the beer can, R.C. 3794.06(B) prohibited Miller from bringing it into the bar.

{¶ 22} Consequently, reliable, probative, and substantial evidence established that Tri-County, through its proprietor, failed to comply with its duty to remove an ashtray from the bar. Therefore, the trial court did not abuse its discretion by concluding that Tri-County violated R.C. 3794.06(B).

{¶ 23} In summary, the trial court did not abuse its discretion by affirming ODH's conclusion that Tri-County violated the Smoke-Free Act on August 27, 2009, and January 29, 2010. We overrule appellant's first and second assignments of error.

IV. CONCLUSION

{¶ 24} Having overruled appellant's two assignments of error, we affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

TYACK and SADLER, JJ., concur.
