[Cite as *Carrelli v. Dept. of Natural Resources*, 2010-Ohio-1516.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

MARY CARRELLI,	:	
Plaintiff-Appellant,	:	CASE NO. CA2009-11-041
	:	<u>O P I N I O N</u>
- vs -		4/5/2010
	:	
DIVISION OF WILDLIFE, DEPARTMENT OF NATURAL RESOURCES, STATE OF OHIO,	:	
	:	
Defendant-Appellee.	:	

CIVIL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. CVF2009-0669

Newman & Meeks, Robert B. Newman, 215 East Ninth Street, Suite 650, Cincinnati, Ohio 45202, for plaintiff-appellant

Richard Cordray, Ohio Attorney General, Daniel J. Martin, Rachel H. Stelzer, Ohio Department of Natural Resources, 2045 Morse Road, Bldg. D-2, Columbus, Ohio 43229-6605, for defendant-appellee

RINGLAND, J.

{¶1} Plaintiff-appellant, Mary Carrelli, appeals a decision of the Brown County Court of Common Pleas affirming the denial of a wild animal rehabilitator permit by defendant-appellee, Division of Wildlife, Department of Natural Resources, State of Ohio.

{¶2} Appellant is the founder and an active member of Second Chance Wildlife, a nonprofit organization dedicated to rehabilitating injured wildlife in Ohio. Since the early 1990s, appellant has been issued numerous wild animal permits, including Category II rehabilitator permits, by the Division of Wildlife authorizing her to rehabilitate wildlife at her farm. From 1990 until appellant relinquished her wildlife rehabilitation permit, she has rehabilitated or supervised the rehabilitation of over 9,000 animals.

{¶3} On June 25, 2007, another wildlife rehabilitator gave a wild bobcat kitten, an endangered species in Ohio, to appellant. Appellant accepted the kitten. At the time, appellant held a Category II rehabilitator permit and a letter permit to rehabilitate whitetail fawns, but neither the Category II permit, nor the letter permit, allowed appellant to rehabilitate bobcats without approval by the Division Chief, David Graham. Appellant did not write the chief requesting a letter permit for authority to rehabilitate the bobcat. Division employee, Carolyn Caldwell, asked appellant to make arrangements to turn the bobcat over to the agency in a July 1, 2007 phone call. Appellant refused to make the requested arrangements, stating that she refused to relinquish the bobcat.

{¶4} On July 2, appellant's husband left two voicemail messages for Caldwell stating that they, once again, would not give up the bobcat. Later that day, the division obtained and executed a search warrant to recover the bobcat from the Carrelli farm. Both appellant and her husband were present during the search warrant's execution. During the execution of the warrant, appellant's husband initially refused to relinquish the bobcat and was cited for deterring a wildlife official from carrying into effect a law or division rule. He later entered a no contest plea to the charge and was found guilty. On July 5, 2007, appellant voluntarily relinquished her Category II rehabilitator permit and letter permit to handle whitetail fawns. Chief Graham accepted the early termination of the permits.

{¶5} On or about June 9, 2008, appellant submitted an application to the

Division of Wildlife for a new Category II rehabilitator permit and a letter permit to rehabilitate whitetail fawns, bobcats and black bears. The permit application was denied by Chief Graham via written letter dated June 16, 2008. Appellant requested an administrative hearing on the subject of the denial of her application. Following a hearing, the hearing officer sustained the chief's denial, which was accepted by the agency. Appellant appealed to the Brown County Court of Common Pleas, where the agency's actions were affirmed. Appellant timely appeals, raising one assignment of error:

{¶6} "THE DIVISION OF WILDLIFE ERRED IN DENYING TO APPELLANT A CATEGORY II WILDLIFE REHABILITATOR PERMIT AND A LETTER PERMIT TO REHABILITATE WHITETAIL FAWNS, BOBCATS, AND BLACK BEAR CUBS."

{¶7} Appellant raises two issues for review in her sole assignment of error. First, appellant argues that denial of her application is a violation of due process. Second, appellant argues that, even if authority exists for the division chief to deny the permit, the decision in this case is not supported by reliable and probative evidence.

SUBSTANTIVE DUE PROCESS

{¶8} Substantive due process pursuant to the Fourteenth Amendment ensures protection to certain liberty interests enumerated in the Constitution or identified by the courts. See *State v. Burnett*, 93 Ohio St.3d 419, 426-427, 2001-Ohio-1581; *Rodick v. Thistledown Racing Club, Inc.* (C.A.6, 1980), 615 F.2d 736, 740. The liberty guaranteed by the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized * * * as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, 43 S.Ct. 625. The United States Supreme Court has acknowledged that the "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy* (1959), 360 U.S. 474, 492, 79 S.Ct. 1400.

{¶9} Appellant asserts that she possesses a liberty interest in receiving a wildlife rehabilitation permit since she is pursuing a career or occupation and, therefore, is entitled to protection under the Due Process Clause. Appellant suggests that her alleged liberty interest in obtaining a rehabilitation permit should receive similar treatment to protections afforded under the First Amendment, citing *Niemotko v. State of Maryland* (1951), 340 U.S. 268, 71 S.Ct. 328; *Staub v. Baxley* (1958), 355 U.S. 313, 78 S.Ct. 277; and *Dillon v. Municipal Court for the Monterey-Carmel Judicial District* (1971), 4 Cal.3d 860.

{¶10} Appellant's reliance is misplaced. The interests infringed under the First Amendment cases cited by appellant involve enumerated, fundamental liberty interests such as the free exercise of religion in *Niemotko*, or the freedom of speech and assembly in *Staub* and *Dillon* which are subject to heightened constitutional scrutiny. In contrast, the United States Supreme Court has held that a lower level of scrutiny applies to the interest of pursuing an occupation, career or profession. While "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment," that right "is nevertheless subject to reasonable government regulation." *Conn v. Gabbert* (1999), 526 U.S. 286, 291-292, 119 S.Ct. 1292. That liberty interest may not be interfered with "by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer* at 400. Similarly, the Ohio Supreme

Court has concluded that "[l]aws limiting rights, other than fundamental rights, are constitutional with respect to substantive due process * * * if the laws are rationally related to a legitimate goal of government." *Toledo v. Tellings*, 114 Ohio St.3d 278, 2007-Ohio-3724, ¶33.

{¶11} Accordingly, we must review whether Ohio's regulation of wildlife and the issuance of rehabilitation permits are sufficiently reasonable to satisfy due process concerns.

{¶12} "The ownership of and the title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people." R.C. 1531.02. Possession of a wild animal can only be obtained by individuals in accordance with the Revised or Administrative Codes. Id.

{¶13} The Chief of the Division of Wildlife is vested with the authority and control "in all matters pertaining to the protection, preservation, propagation, possession, and management of wild animals and may adopt rules * * * for the management of wild animals." R.C. 1531.08. Further, "[t]he chief may regulate * * * [the] possessing [of] wild animals, at any time and place or in any number, quantity, or length, and in any manner, and with such devices as he prescribes." Id.

{¶14} Wildlife rehabilitation permits are controlled by R.C. 1533.08, which states in pertinent part, "[e]xcept as otherwise provided by division rule, any person desiring to collect or possess wild animals that are protected by law * * * for * * * rehabilitation shall make an annual application to the chief of the division of wildlife for a wild animal permit on a form furnished by the chief. * * * The chief may issue to the applicant a permit to take, possess, and transport at any time and in a manner that is acceptable to the chief specimens of wild animals protected by law * * * [for] rehabilitation and under any additional rules recommended by the wildlife council. Upon the receipt of a permit, the holder may take, possess, and transport those wild animals in accordance with the permit."

{¶15} Further, Ohio Adm.Code 1501:31-25-03 describes the types of rehabilitator permits and the application procedure. The code lists Category I and Category II rehabilitator permits. Category I permits allow holders to rehabilitate certain types of animals while Category II permits allow the "permit holder to rehabilitate all species of wild animals except deer, coyote, or state or federal endangered species unless otherwise approved by the chief of the division of wildlife." Ohio Adm.Code 1501:31-25-03(F). Appellant applied for a Category II permit. The code lists certain criteria and standards a Category II permit holder must meet. Specifically, a Category II permit holder must (1) be at least 18 years of age; (2) provide proper facilities for all animals in their care in accordance with the requirements specified on the permit application form; (3) at least three years experience as a Category I rehabilitator; (4) provide documentation that they have veterinarian assistance and the ability to properly care for wild animals that are diseased, injured, or need rehabilitative care; (5) keep a record of all animals by species which are held for rehabilitation; and (6) comply with all provisions and conditions set forth in the permit and any of the Ohio wildlife rehabilitators association minimum standards for the care and welfare of animals. Ohio Adm.Code 1501:31-25-03.

{¶16} Appellant first contends her interest in receiving a rehabilitator permit is afforded similar protection to permitting schemes included in zoning laws. In support, appellant cites cases overturning the denial of zoning permits. See, e.g., *State ex. rel. Selected Properties v. Gottfried* (1955), 163 Ohio St. 469; *State ex. rel. Associated Land & Investment Corp. v. City of Lyndhurst* (1958), 168 Ohio St. 289. We find little guidance in the zoning cases cited by appellant due to the fundamental distinctions between wildlife rehabilitation and zoning regulations. Specifically, zoning regulations involve infringements upon privately-owned property, while appellant possesses no private property interest in the state's wildlife or receipt of a rehabilitation permit.

{¶17} Next, appellant asserts that licensing under the administrative code is automatic. Appellant claims that once the licensing criteria are met the division chief is required to issue a permit. In opposition, the Division of Wildlife argues that the chief has discretion in issuing permits. The division references R.C. 1533.08, which contains the phrase that the division chief "may issue a license." The division and appellant submit conflicting interpretations of this clause. While the Division of Wildlife claims the use of "may" in the statute indicates an intent that licensing is discretionary, appellant contends that "may" as used in R.C. 1533.08 must be construed as "shall." Appellant cites *Pennsylvania Cty. v. Public Service Comm.* (C.P.1913), 23 Ohio Dec. 453, 14 Ohio N.P.(N.S.) 262, urging that due process considerations sometimes require "may" to mean "shall."

{¶18} In *Dennison v. Dennison* (1956), 165 Ohio St. 146, 149, the Ohio Supreme Court stated, "[a]lthough it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word, 'shall,' is a mandatory one, whereas 'may' denotes the granting of discretion."

{¶19} Similarly, in *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 107, the court stated, "[i]n determining whether a statute is mandatory or permissive, it is often necessary, as in this case, to trace its use of the terms 'may' and 'shall.' The statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary, * * * at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation * * *. Ordinarily, the words 'shall' and 'may,' when used in statutes, are not used interchangeably or synonymously. * * * [T]o give to the words 'may' and 'shall' as used in a statute, meanings different from those given them in ordinary usage * * * the intention of the General Assembly that they shall be so construed must clearly appear from a general view of the statute under consideration * * * as where the manifest sense and intent of the statute require the one to be substituted for the other." (Internal citations omitted.)

{¶20} Further, "[s]tatutes relating to the same matter or subject * * * are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent. * * * [I]n reading such statutes and construing them together, we must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute." *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶20.

{¶21} R.C. 1533.08 reveals no clear intent requiring "may" to be given anything other than its original meaning. Further, due process concerns do not require us to construe "may" as "shall" since the regulations relating to wildlife rehabilitation, and the issuance of rehabilitation permits, are reasonable and relate to legitimate governmental purposes. The state of Ohio owns all nonprivately held wildlife "in trust for the benefit of all the people." R.C. 1531.02. The Revised Code entrusts the Division of Wildlife with the authority to control and manage all wildlife including the protection, preservation, and possession thereof. R.C. 1531.08. Additionally, the Revised Code specifically vests with the division chief the power to "regulate * * * [the] possessing [of] wild animals, at any time and place or in any number, quantity, or length, and in any manner, and with such devices as he prescribes." Id. Individuals can only possess wild animals in accordance with statute. R.C. 1531.02. Accordingly, we find a clear intent that the granting of wildlife rehabilitation permits by the chief is discretionary.

{¶22} When reviewing an application requesting a wildlife rehabilitation permit, the division chief is guided by statute to make decisions "for the benefit of all the people" pursuant to R.C. 1531.02, and in furtherance of the chief's "authority and control in all matters pertaining to the protection, preservation, possession, and management" of wild animals pursuant to R.C. 1531.08. Further, the chief is vested with the power to "regulate * * * [the] possessing [of] wild animals, at any time and place or in any number, quantity, or length, and in any manner, and with such devices as he prescribes." Id. Although granted broad authority, the chief's discretion is reasonably related to a legitimate governmental interest. The state, as the owner of wildlife, has a significant interest in the protection, preservation, possession, and management thereof.

{¶23} In *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, the Ohio Supreme Court upheld a similarly broad grant of authority. R.C. 4905.06 grants the general of the public utility commission the "power to inspect" public utilities, which "includes the power to prescribe any rule or order that the commission finds necessary for protection of the public safety." Id. at ¶13. Despite the "generous grant of discretion to issue safety-related orders," the Supreme Court concluded that the "commission expressly acted 'to improve the level of public safety,' and the terms of its order were rationally related to that end." Id. at ¶14. See, also, *Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 359.

{¶24} Although more definitive criteria or factors would be helpful to individuals seeking wildlife rehabilitation permits and to the chief in deciding whether to grant a permit, none are required since the current regulations withstand constitutional scrutiny. Whatever liberty interest appellant may have in pursuing an occupation in rehabilitating wildlife, the state maintains an ownership interest in the wildlife, which vested the division chief with the power to control the wildlife and the discretion to grant or deny rehabilitation permits.

DENIAL OF APPELLANT'S PERMIT

{¶25} Appeals of administrative agency decisions are governed by R.C. Chapter 2506. A common pleas court's standard of review for administrative appeals varies distinctly from the standard of review imposed upon an appellate court. A common pleas court reviewing an administrative appeal weighs the evidence in the whole record and determines whether the administrative order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. *Shields v. Englewood*, 172 Ohio App.3d 620, 2007-Ohio-3165, ¶28.

{¶26} An appellate court's review of such an administrative appeal is more limited in scope. *Henley v. Youngstown Bd. of Zoning Appeals*, 90 Ohio St.3d 142, 147, 2000-Ohio-493, quoting *Kisil v. Sandusky* (1984), 12 Ohio St.3d 30, 34. Unlike a common pleas court, the appellate court does not weigh the evidence or determine questions of fact. *Henley* at 147. Rather, the appellate court must affirm the common pleas court's decision unless it finds, as a matter of law, that the decision is not supported by a preponderance of reliable, probative, and substantial evidence. *Mills v. Union Twp. Bd. of Zoning Appeals*, Clermont App. No. CA2005-02-013, 2005-Ohio-6273, ¶6.

{¶27} Lastly, appellant argues that although the division chief has discretion to grant or deny the permit, his decision is not supported by reliable, probative and substantial evidence. Appellant contends that the chief could only consider evidence pertaining to the written permit requirements, could not consider her past history with the

Division of Wildlife, and she never committed a "past violation" that would justify a denial of a permit.

{¶28} After review of the record, we find reliable, probative and substantial evidence to support the agency's denial of appellant's application. Appellant clearly has stellar credentials for and experience in rehabilitating wildlife. Further, appellant met the minimum requirements to be considered for a permit. Nevertheless, the division chief has broad discretion in granting or denying wildlife rehabilitation permits and appellant has displayed a history of being uncooperative with the division.

{¶29} Chief Graham testified that he made the decision to deny appellant's application for a Category II rehabilitator permit based upon her history of willful defiance of the division's rules and regulations. Although earlier disagreements occurred between the agency and appellant, the 2007 bobcat incident is the primary reason for the denial. Appellant took possession of a bobcat kitten and refused to relinquish the animal. "It shall be unlawful for any person to * * * possess any of the native endangered species of wild animals * * * without first obtaining a written permit from the wildlife chief * * *." Ohio Adm.Code 1501:31-25-03(I). Appellant neither had a permit to possess the animal nor requested a letter permit from the division chief to possess the animal. Rather, the agency requested return of the bobcat kitten, but appellant refused and the agency was forced to obtain a search warrant to recover the animal.

{¶30} The regulation further provides that a permit holder is responsible for ensuring that wild animals are possessed by the permit holder's assistants in compliance with the permit. Id. at 1501:31-25-01(G)(2). Appellant's husband served as an assistant to appellant. When confronted with the search warrant, appellant's husband refused to relinquish the kitten. Appellant was present during execution of the warrant.

Appellant's husband was cited for deterring a wildlife officer from carrying into effect a law or division rule. Mr. Carrelli entered a no contest plea to the charge and was found guilty. This evidence relating to appellant's blatant disregard for the agency's requests is directly relevant to her current application.

{¶31} "Failure to comply with any provisions or conditions of the rehabilitator's permit, this rule, or any Division of Wildlife rule shall result in the revocation of the rehabilitator's permit." Ohio Adm.Code 1501:31-25-03(I). Appellant's possession of the bobcat kitten was beyond the scope of her previous Category II permit and was a violation of the Division of Wildlife law and rules.

{¶32} Additionally, appellant clearly voluntarily relinquished her permit in anticipation of either an investigation or immediate revocation of the permit by the agency. Appellant claims that no procedural due process was provided to determine whether a violation occurred. Yet, no process was warranted after appellant returned the permit since appellant no longer had a property interest in the permit. *Board of Regents of State Colleges v. Roth* (1972), 408 U.S. 564, 576, 92 S.Ct. 2701. Appellant cannot preemptively relinquish her permit to avoid potential agency action then reapply for a permit and claim that her past failure to comply with division rules, statutes and permit conditions cannot be considered.

{¶33} Appellant claims that the division's denial essentially amounts to a life-time ban for obtaining a rehabilitator's license. The division never suggests that she is banned for life from receiving a wildlife rehabilitator's permit. However, it is within the division chief's discretion to grant or deny any future applications pursuant to Ohio statutes and regulations.

{¶34} Appellant's sole assignment of error is overruled.

{¶35} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.