

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

WCI, INC. DBA CHEEKS.,

CASE NO.: 15CVF-09-7970

Appellant,

JUDGE: WOODS

VS.

**OHIO STATE LIQUOR CONTROL
COMMISSION, ET AL.,**

Appellees.

DECISION AND ENTRY

**ON THE MERITS OF A REVISED CODE 119.12 ADMINISTRATIVE APPEAL
AFFIRMING THE STATE LIQUOR CONTROL COMMISSION'S ORDER OF
SEPTEMBER 10, 2015**

WOODS, J.

This action comes before the Court upon an appeal of an Order of the Liquor Control Commission (Commission) dated September 10, 2015 that sanctioned the Appellant.

The appeal, pursuant to the provisions of R.C. §119 was commenced by the Appellant on September 10, 2015. The record from the administrative proceeding has been provided with attachments. After requesting additional time, the parties filed their respective Briefs. As set forth below, the Order of the Commission is **AFFIRMED**.

STATEMENT OF THE CASE

Appellant appeals the Order of the Commission giving it the choice of accepting a \$25,000.00 fine or forfeit its D5 permit.

STATEMENT OF THE FACTS

The Appellant does business as Cheeks. Cheeks is club that provides dancers to perform on stage as well as allowing dancers to perform individual dances for patrons in a private area of the establishment. The Commission's Order concerned conduct attributed to one such dancer named Jessica L. Clarke. Ms. Clarke went by the name of Kianna.

Franklin County Ohio Court of Appeals Clerk of Courts- 2016 Feb 03 8:44 AM-16AP000072

On March 8, 2014 Department of Public Safety employees conducted an investigation of Cheeks. While performing a private dance for one of the investigators, Ms. Clarke behaved in a manner that violated R.C. §2907.40(C)(2) Illegal Sexually Oriented Contact While Being Nude. Ms. Clarke's violation was the bases of the Commissions actions against the Appellant. The fact that Ms. Clark's criminal matter was reduced has no relevance to the issues of this appeal.

The record reflected that the Appellant had had a history of two similar violations, with the most recent being September of 2013. The Appellant was notified of the violation and given an opportunity to be heard. The Appellant stipulated to the facts as contained within the investigator's reports. As such the evidence established a violation of O.A.C. 4301-1-52 (Rule 52). At the hearing the Appellant attempted to mitigate its damages by putting forth evidence of the efforts taken by the Appellant to stop, discourage, regulate, educate and/or prohibit the dancers from violating the law. The Appellant also questioned the constitutionality of Rule 52 while conceding that the constitutionality of that rule has already been established.

The matter is ready for consideration by this Court.

STANDARD OF REVIEW

Review by this Court of an administrative agency, such as the Commission, is governed by R.C. §119.12 and the multitude of cases addressing that section. The most often cited case is that of *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 407 N.E.2d 1265. The *Conrad* decision states that in an administrative appeal filed pursuant to R.C. 119.12, the trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. The court stated at pages 111 and 112 that:

In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the

administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.

Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court may reverse, vacate or modify the administrative order. Thus, where a witness' testimony is internally inconsistent, or is impeached by evidence of a prior inconsistent statement, the court may properly decide that such testimony should be given no weight. Likewise, where it appears that the administrative determination rests upon inferences improperly drawn from the evidence adduced, the court may reverse the administrative order.

The *Conrad* case has been cited with approval numerous times.

The quality of proof was further articulated by the Ohio Supreme Court in *Our Place v. Liquor Control Comm.* (1992), 63 Ohio St. 3d 570 as follows:

“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. *Id.* at 571.

This Court must examine the record to determine whether the Commission’s Order is supported by reliable, probative and substantial evidence and is in accordance with law. *Red Hotz, Inc. v. Liquor Control Commission* (1993), Tenth App. Dist. Case No. 93AP-87, 1993 Ohio App. LEXIS 4032 relying on *Grecian Gardens v. Bd. Of Liquor Control* (1964), 2 Ohio App.2d 112.

The Court will also review the case law concerning the constitutionality of Rule 53.

Based on the above noted authority, the Court will review the appeal on the merits.

REVIEW ON THE MERITS

The Appellant has asserted that the rule in question leading to the sanction is unconstitutional. The Appellant has also asserted that the Commission’s Order was not

supported by reliable, probative and substantial evidence. Nor was it in accordance with law.

This Court will address those claims one at a time:

Constitutionality:

The Appellant asserted that Rule 52 was facially unconstitutional and also unconstitutional as applied. However, both of those legal questions have been addressed in prior rulings. In regard to a facial challenge, Rule 52 was found to be constitutional in *J.L. Spoons, Inc. v. Dragani*, 538 F.3d 379 at 382.

In *J.L. Spoons, Inc. v. Ohio Dep't of Pub. Safety*, 31 F.Supp.3d 933 (N.D. Ohio 2014) the Federal Court held:

For the forgoing reasons, the Court finds that Rule 52 serves a substantial governmental interest. The evidence establishes that the State, when it promulgated Rule 52, had a reasonable evidentiary basis for concluding that nude dancing in adult cabarets leads to undesirable secondary effects. Dr. Linz's report and testimony concerning the impact of Rule 52 does not "cast direct doubt" on the State's secondary effects rationale. In addition, the State has presented evidence that the combination of nude dancing with the consumption of alcohol by dancers and patrons increases the likelihood of criminal activity within the premises of adult cabarets. Accordingly, the Court upholds Rule 52 and dismisses Plaintiffs' as applied challenge.

Based upon current case law, it is will settled that Rule 52 is constitutional. Hence, reviewing Appellant's constitutional arguments, both facial and as applied leads, to the same conclusion. Rule 52 is constitutional.

Furthermore it is well settled that the Commission may regulate and sanction a permit holder, such as the Appellant, when there is evidence that the permit holder or its agent, etc. violate the language of the regulation. Hence, there is no reason for this Court to hold that the Commission acted without appropriate authority or constitutional authority when it sanctioned the Appellant.

Appellant's constitutional arguments have no merit.

§119 Appeal:

By stipulating to the facts contained within the investigator's report, the Appellant admitted to the violation. The Appellant presented evidence of the efforts it took to avoid these types of violation in an apparent effort to secure some leniency. In the end the Commission issued a lawful sanction. This Court, pursuant *Henry's Café, Inc., v. Bd. Of Liquor Control*, 170 Ohio St. 233 cannot modify the sanction.

The Commission's Order is supported by reliable, probative and substantial evidence and is in accordance with law. The Order is **AFFIRMED**.

DECISION

The Court finds that the September 10, 2015 Order of the Commission is supported by reliable, probative and substantial evidence and is in accordance with law. The Order is

AFFIRMED.

THIS IS A FINAL APPEALABLE ORDER

Judge William Woods

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Franklin County Court of Common Pleas

Date: 01-05-2016
Case Title: WCI INC -VS- OHIO STATE LIQUOR CONTROL COMMISSION
Case Number: 15CV007970
Type: DECISION/ENTRY

It Is So Ordered.



/s/ Judge William H. Woods

Court Disposition

Case Number: 15CV007970

Case Style: WCI INC -VS- OHIO STATE LIQUOR CONTROL
COMMISSION

Case Terminated: 10 - Magistrate

Final Appealable Order: Yes