Administrative Law Newsletter

Produced by the Ohio Attorney General's Office

Spring 2008

Caselaw Update

Administrative Appeals—Definition of "License"

Bexley Public Radio Foundation v. eTech Ohio Comm'n (Feb. 15, 2008), Franklin Cty. C. P. Ct. No. 07CVF-10-13282

Holding: Permission to participate in eTech's programs did not constitute a license within the meaning of Revised Code Chapter 119.

Summary: The appellant, Bexley Public Radio Foundation ("BPRF") sought to become an affiliate of eTech, a state agency created to promote access to educational technology. The agency advised BPRF that it was not eligible to participate in eTech's programs because it did not have a noncommercial educational license from the FCC. BPRF requested a hearing, but no hearing was held. BPRF appealed, and eTech filed a motion to dismiss asserting that R. C. Chapter 119 did not apply. BPRF argued R. C. Chapter 119 was applicable because eTech's denial constituted a denial of a license. The common pleas court granted the motion to dismiss, finding that Chapter 119 was not applicable. The court cited to Tenth District caselaw defining a license as permission by competent authority to do an act which, without such permission, would be illegal. *Trubee v. Ohio Expositions Comm'n* (1997), 10th Dist. No. 96APD05-705, 1997 Ohio App. LEXIS 1289; *Abt v. Ohio Expositions Comm'n* (1996), 110 Ohio App.3d 696, 700. Because the approval of eTech did not constitute authority to do an act which, without such approval, would be illegal, the approval did not constitute a license. Accordingly, Chapter 119 did not apply. **(AAG CHRISTA METZGER).**

Administrative Appeals—Statement of Time and Manner of Appeal

Drago v. Ohio Dep't of Mental Retardation and Developmental Disabilities (Feb. 26, 2008), Tenth Dist. No. 07AP-838, 2008-Ohio-768

Holding: Agency complies with R. C. 119.09 where it includes statement of time and manner of appeal in a separate document mailed with a certified copy of the order.

Summary: The common pleas court dismissed an administrative appeal for lack of subject matter jurisdiction because the appellant failed to comply with the requirement to file an original notice of appeal with the agency, and a copy with the court. The appellant asserted that this defect should be excused because the agency's order did not properly provide the appellant with a statement of the time and manner of appeal, as required

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by R. C. 119.09. The section provides that the agency must mail a certified copy of the order "and a statement of the time and method by which an appeal may be perfected." The agency included such a statement in a cover letter mailed to the appellant along with a certified copy of the agency's order. The appellant, relying on language in *Hughes v. Ohio Dep't of Commerce*, 114 Ohio St.3d 47, 2007-Ohio-287, 868 N.E.2d 246, asserted that the statement should have been included in the order itself. The Tenth District held that the language in R. C. 119.09 was controlling, and that the agency complied with R. C. 119.09 by including the statement in a document mailed along with a certified copy of the agency's order. There was no need to include the language in the body of the order itself. **(AAG Jennifer Adair).** ■

Application for Licensure—Environmental Review Appeals Commission

Trans Rail America, Inc. v. Enyeart (Dec. 31, 2007), Tenth Dist. No. 07AP-273 and 07AP-284, 2007-Ohio-7144.

Holding: Applicant was entitled to appeal to the Environmental Review Appeals Commission to seek an order directing a county health department to act on the application for licensure.

Summary: Applicant submitted an application to a county health department on multiple occasions, each time being advised by the department that the application was incomplete and would not be acted upon. The applicant filed an appeal before the Environmental Review Appeals Commission ("ERAC"). The department argued that the rejection of an incomplete application was not appealable, and the ERAC agreed, dismissing the appeal. The Tenth District reversed, based upon the language of the ERAC's governing statute, which authorizes not only of appeals of "actions," but also authorizes the ERAC to order the performance of acts. The Tenth District therefore held that the ERAC had jurisdiction to order the health department to act on the application, by either issuing or denying a license to the applicant. ■

Criminal Convictions—Crime of Moral Turpitude

Ansar v. State Medical Board of Ohio (Dec. 7, 2007), Franklin Cty. C. P. Ct. No. 07CVF02-02181.

Holding: A misdemeanor count of filing a false police report constitutes a crime of moral turpitude.

Summary: Medical Board brought disciplinary action against physician based upon misdemeanor conviction for filing a false police report. Physician's conviction resulted from physician stabbing himself in the presence of his young child, then throwing the knife into his wife's car, and reporting to police that he had been stabbed by his wife. On appeal, the common pleas court found that this crime was one of moral turpitude. **(AAG Barbara Pfeiffer).** ■

Hearing Examiner—Bias

Meadowbrook Care Center v. Ohio Dep't of Job and Family Services (Dec. 4, 2007), Tenth Dist. No. 06AP-871, 2007-Ohio-6534.

Holdings:

(1) There is a presumption of honesty and integrity on the part of a decision-maker, and the party asserting a disqualifying interest has the burden to overcome the presumption.

(2) To succeed in an assertion of bias of a hearing examiner, a party must show "a personal bias so extreme as to display clear inability to render a fair judgment."

(3) The outcome of a proceeding may not alone stand as proof of bias.

Summary: The appellant facility, on appeal, raised the hearing examiner's alleged bias as an assignment of error. The Tenth District Court of Appeals found no abuse of discretion in the common pleas court's finding of no error. The Tenth District first noted that there is a presumption of honesty and integrity on the part of a decision-maker, and that the party asserting a disqualifying interest therefore bears the burden. The Tenth District further held that to succeed in an assertion of bias of a hearing examiner, the party must show "a personal bias so extreme as to display clear inability to render a fair judgment." The court found no showing of such a basis. The Tenth District further rejected the appellant's attempts to show bias through a purported statistical analysis of the hearing examiner's decisions. The court noted that the outcome of a proceeding may not alone stand as proof of bias, and held that it could not make a conclusory judgment from such statistics, where there was no corroborating evidence or context to show that the hearing examiner's decisions were improper. The court, having agreed with the hearing examiner's assessment of the law and facts in the case, affirmed the common pleas court's dismissal of the appeal. **(AAG Anne Light Hoke).** ■

Res Judicata—Claim Preclusion Applied to Administrative Actions

Johns 3301 Toledo Café, Inc. v. Liquor Control Comm'n (Feb. 5, 2008), Tenth Dist. No. 07AP-632, 2008-Ohio-394.

Holdings:

(1) The doctrine of res judicata, including claim preclusion, applies to administrative proceedings of a quasi-judicial nature.

(2) Agency was not barred by the doctrine of claim preclusion from bringing an action based upon felony conviction, where previous action was based upon acts underlying the conviction.

Summary: In 2002, the Commission initiated charges against the appellant, arising out of the owner's attempt to purchase stolen liquor. The Commission found that the permit holder violated a rule providing that no agent of the permit holder shall use the licensed permit premises to receive stolen property. The decision of the Commission was reversed on appeal, based upon a finding that the alleged violation did not occur on the permit holder's premises. In 2003, the owner was convicted of receiving stolen property, resulting from his 2002 attempt to purchase stolen liquor. The Commission in 2004 again initiated charges against the permit holder, this time alleging that a convicted felon held an interest in the liquor permit. The permit holder asserted that, due to the 2002 action, the 2004 action was barred pursuant to the doctrine of claim preclusion.

The Tenth District Court of Appeals noted that the doctrine of *res judicata*, including claim preclusion, applies to administrative proceedings of a quasi-judicial nature. Administrative proceedings are deemed quasi-judicial if notice, a hearing, and an opportunity to present evidence are provided. The court found that the Commission's hearings met this test, and that claim preclusion could be applied. The court held, however, that the two actions at issue in this case were not based upon the same set of operative facts, because different facts were necessary to prove each allegation. The appellate court therefore affirmed the decision of the common pleas court, which found that the Commission's charges were not barred by the doctrine of claim preclusion. **(AAG Charles Febus).** ■

Violations—Discipline in Another State

Coniglio v. State Medical Board of Ohio (Sept. 25, 2007), Tenth Dist. No. 07AP-298, 2007-Ohio-5018.

Holding: In an action based upon professional discipline in another state, the licensee may not collaterally attack the other state's action in Ohio Chapter 119 proceedings.

Summary: Medical Board brought disciplinary action against a physician based upon the refusal of the Nevada Medical Board to grant the physician a license in that state. In the Ohio proceeding, the physician sought to challenge the evidentiary basis of the Nevada board's decision. The Tenth District Court of Appeals held that the Ohio proceedings could not be used as a means of collaterally attacking the Nevada decision. Regardless of the alleged problems with the Nevada board's decision, the decision itself provided a basis for discipline in Ohio. Ohio courts may not permit a collateral attack on an out of state action, nor may they reverse a penalty imposed by an Ohio board, as long as that penalty is authorized by law. **(AAG Damion Clifford).** *Note: The Supreme Court of Ohio declined to assert jurisdiction over an appeal of this decision.* ■

Violations—Impairment

Ridgeway v. State Medical Board of Ohio (March 25, 2008), Tenth Dist. No. 07AP-446, 2008-Ohio-1373.

Holdings:

(1) Charge of "impairment of the ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse of drugs, alcohol, or other substances that impair ability to practice" does not require showing of patient harm.

(2) Common pleas court properly recognized that the Medical Board has special expertise and knowledge to determine whether a physician is impaired as defined under the Medical Practice Act.

Summary: Medical Board charged physician with "impairment of ability to practice according to acceptable and prevailing standards of care because of habitual or excessive use or abuse" of alcohol. The physician had multiple alcohol-related criminal charges and had undergone treatment for alcohol abuse, but the State presented no evidence of patient harm resulting from the physician's use of alcohol. The Tenth District Court of Appeals held that it was "within the province of the medical board to consider the issue of impairment even in the absence of evidence of a specific incident of patient harm." The court found persuasive the decisions of several courts in other states, which held that requiring patient harm in an impairment case ignored the preventative functions of disciplinary actions, and did not sufficiently protect the public from potential harm.

The Tenth District further upheld the common pleas court's recognition that the Medical Board has special expertise to determine whether a physician suffers from an impairment of the ability to practice as provided in the Medical Practice Act. The Tenth District held that the court's recognition of this expertise was consistent with the Supreme Court's admonition in *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748, that courts must accord due deference to a board's interpretation of the technical and ethical requirements of its profession. **(AAGs Kyle Wilcox and Damion Clifford).** ■

The Ohio Attorney General's *Administrative Law Newsletter* is provided to raise awareness regarding developments in administrative law. The contents of this newsletter should not be considered legal advice, and readers are encouraged to contact their assigned Assistant Attorney General for advice regarding a specific issue.

The *Newsletter* is published by
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