

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

OHIO LICENSED BEVERAGE ASSOCIATION

FINAL APPEALABLE ORDER

Plaintiff,

vs.

Case No. 07CVH04-5103

OHIO DEPARTMENT OF HEALTH, et al.,

Judge Cain

Defendants.

TERMINATION NO. 18
BY: [Signature]

DECISION AND ENTRY GRANTING PLAINTIFF'S PETITION FOR A PERMANENT INJUNCTION

DECISION AND ENTRY GRANTING DEFENDANTS' MOTION TO CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH TRIAL ON THE MERITS, FILED MAY 4, 2007

DECISION AND ENTRY DENYING THIRD-PARTY'S, VETERANS OF FOREIGN WARS, POST #7754, MOTION TO INTERVENE, FILED MAY 11, 2007

Rendered this 17th day of May 2007.

CAIN, J.

This matter is primarily before this Court on Plaintiff's Petition for a Permanent Injunction. This Petition was initially filed on April 13, 2007 and then amended on April 16, 2007. On May 14, 2007 the Court held a hearing whereby the parties were afforded an opportunity to present evidence and arguments in their respective favors. The parties have also submitted numerous briefs as to the issues involved in this case. Due to the fact that all the issues before the Court are purely legal in nature, it can now proceed with its final decision in this matter.¹

As number of issues have been discussed in the context of this lawsuit. Was the ballot language concerning Issue 5, i.e. the SmokeFree Workplace Act

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(hereinafter the "SmokeFree Act")², presented to the public on November 7, 2006 misleading? Did the sponsors, promoters and drafters of the SmokeFree Act sell it to the public under the presumption of the existence of an exemption that was not really there? Did these same sponsors, promoters and drafters secure the votes of the members of various private clubs via the assurance that the SmokeFree Act would not cover their establishments? In short, was the Ohio voting public fooled by a ballot issue that purported to be something that it was not? These are all great questions that should be answered. However, contrary to the beliefs of some, these questions have nothing to do with the present case.

This is not a case concerning whether the sponsors, promoters and drafters of the SmokeFree Act and its accompanying ballot language misled the public, or more particularly the members of private clubs. This is not a case concerning whether the inclusion of the "private club" exemption in the SmokeFree Act was just a sham to get more votes. From reading the newspapers and listening to the public at large, one might believe that it is. However, this case is actually simple. The only real question before the Court is: Did Defendant, the Ohio Department of Health, exceed its authority in promulgating Rule 3701-52-04(G)? The answer is a simple "yes".

Before the Court can explain as to why this is so, it must review some basic law.

In Ohio, injunctions are separated into three categories: (1) the temporary restraining order, which is issued ex parte without notice in an emergency situation to last only until a hearing can be set; (2)

¹ On May 4, 2007 Defendants filed a motion to consolidate the preliminary injunction hearing in this case with trial pursuant to Civ. R. 65. This motion is granted.

² The SmokeFree Act has been codified and can be found in R.C. 3794.

the preliminary injunction issued with notice and after a hearing to maintain the status quo until there can be a full trial on the merits; and, (3) the permanent injunction issued after a trial on the merits.

Ohio Serv. Group, Inc. v. Integrated & Open Sys., LLC (Franklin, 2006), 2006-Ohio 6738 at ¶13, n.2. The Court has already issued a temporary restraining order and since the Court is consolidating the preliminary injunction phase of this case with the trial phase, the Court does not need to issue a preliminary injunction. All the Court has to do is examine the issues before it and determine whether Defendants should be permanently enjoined from enforcing Rule 3701-52-04(G) as it is presently written. When making a decision such as this, it is helpful for the Court to take the following factors into consideration.

In general, courts will consider the following factors in deciding whether to grant injunctive relief: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction.

Corbett v. Ohio Bldg. Auth. (Franklin, 1993), 86 Ohio App. 3d 44, 49.

While the Court will not be looking at Plaintiff's probability of success on the merits, but instead the actual merits of Plaintiff's case, the other factors listed above are helpful in determining other issues presented in this case. Defendants have argued that Plaintiff lacks standing to bring the present challenge to the language of Rule 3701-52-04(G). They have argued that Plaintiff cannot show that it has been injured, or will be injured, by the implementation of the disputed language and that it cannot show that it fits into the "public right" exception to standing. Defendants' arguments concerning standing rise or fall based upon the Court's determination as

to the merits of Plaintiff's claim. Further, if Plaintiff can show that it satisfies the last three factors listed above, it will have shown that it has suffered an injury and therefore has standing. As the Court's decision is explained, it will become clear that Plaintiff does in fact have standing and that it does satisfy all the necessary elements to be granted a preliminary injunction, and hence a permanent injunction.

The Court can now turn to the main issue before it. As stated earlier, the Court is faced with just one question: Did Defendant, the Ohio Department of Health, exceed its authority in promulgating Rule 3701-52-04(G)? The law as to this matter is clear.

It is well settled that an administrative agency has only such regulatory power as is delegated to it by the General Assembly. Authority that is conferred by the General Assembly cannot be extended by the administrative agency." *D.A.B.E.*, 96 Ohio St. 3d at 259. Administrative rules may not formulate public policy, but rather are limited to developing and administering policy already established by the General Assembly. *Id.* "Implied power is only incidental or ancillary to an express power, and, if there be no express grant, it follows, as a matter of course, that there can be no implied grant." *Id.*, quoting *State ex rel. A. Bentley & Sons Co. v. Pierce* (1917), 96 Ohio St. 44, 47, 117 N.E. 6. "An administrative agency may not legislate by enacting rules which are in excess of legislative policy, or which conflict with the enabling statute." *Taber v. Ohio Dep't of Human Servs.* (1998), 125 Ohio App. 3d 742, 750, 709 N.E.2d 574, quoting *P.H. English v. Koster* (1980), 61 Ohio St.2d 17, 19, 399 N.E.2d 72.

Pacella v. Ohio Dept. of Commerce, Div. Of Real Estate (Franklin, 2003), 2003-Ohio-3432, ¶27. "An administrative rule is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute." *McAninch v. Crumbley* (1981), 65 Ohio St. 2d 31, 34. "It is well established, however, that administrative rules, in general, may not add to or *subtract from* ... the legislative enactment." *Central Ohio Joint Vocational School Dist. Bd. of Edu.*

v. Admr., Ohio Bureau of Employment Serv. (1986), 21 Ohio St. 3d 5, 10. "[A] rule is invalid where it clearly is in conflict with any statutory provision." Id. "An administrative rule that would preclude the use of a statute must yield to the statute." DLZ Corp. v. Ohio Dept. of Admin. Servs. (Franklin, 1995), 102 Ohio App. 3d 777, 781.

The question now becomes: Does Rule 3701-52-04(G) add or subtract from its enacting legislation, R.C. 3794.03(G)? To determine this, the Court must take a close look at the language of both. R.C. 3794.03(G) states:

The following shall be exempt from the provisions of this chapter:

(G) Private clubs as defined in section 4301.01(B)(13) of the Revised Code, provided all of the following apply: the club has no employees; the club is organized as a not for profit entity; only members of the club are present in the club's building; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club; smoke from the club does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter; and, if the club serves alcohol, it holds a valid D4 liquor permit. (Emphasis added).

Rule 3701-52-04(G), the rule promulgated to effectuate the above statutory enactment, states:

Private clubs shall be exempt from the provisions of Chapter 3794 of the Revised Code and Chapter 3701-52 of the Administrative Code provided all of the following apply: the club has no employees; the club is organized as a not for profit entity; only members of the club are present in the club's building; no persons under the age of eighteen are present in the club's building; the club is located in a freestanding structure occupied solely by the club; smoke from the club does not migrate into an enclosed area where smoking is prohibited under the provisions of this chapter; and, if the club serves alcohol, it holds a valid D4 liquor permit. For purposes of this exemption, the term employees does not include members of the private club who provide services to the private club. (Emphasis added).

It is clear on its face that Rule 3701-52-04(G) deviates from the language found in R.C. 3794.03(G) in that it adds the bolded language above. But, can this be considered an addition to or subtraction from the underlying legislative enactment? Put more directly, did the Ohio Department of Health add something that is not contemplated by the language of R.C. 3794.03(G)? This question forces the Court to look more closely at the definitions of some key words and phrases used by the SmokeFree Act and its supporting rules. These words and phrases are "employee", "employer" and "place of employment".

As defined by the SmokeFree Act, as well as the rules promulgated pursuant to it, "employee" is defined as:

"Employee" means a person who is employed by an employer, or who contracts with an employer or third person to perform services for an employer, or who otherwise performs services for an employer for compensation or for no compensation.

R.C. 3794.01(D); *see also* Rule 3701-52-01(F). The SmokeFree Act, as well as the promulgated rules, define an "employer" as:

"Employer" means the state or any individual, business, association, political subdivision, or other public or private entity, including a nonprofit entity, that employs or contracts for or accepts the provision of services from one or more employees.

R.C. 3794.01(E); *see also* Rule 3701-52-01(G). Finally, a "place of employment" is defined by the SmokeFree Act, which is again mirrored by the promulgated rules, as:

"Place of employment" means an enclosed area under the direct or indirect control of an employer that the employer's employees use for work or any other purpose, including but not limited to, offices, meeting rooms, sales, production and storage areas, restrooms, stairways, hallways, warehouses, garages, and vehicles. An

enclosed area as described herein is a place of employment without regard to the time of day or the presence of employees.

R.C. 3794.01(C); see also Rule 3701-52-01(N).

When viewing the above definitions in conjunction with R.C. 3794.03(G), it becomes clear that the "private club" exemption found in the SmokeFree Act is an exemption in name alone. It lacks all substance. Under the definitions provided by the SmokeFree Act, it is almost impossible for a private club to have no employees. The definitions of "employee", "employer" and "place of employment" are so broad that they cover any person, doing just about anything, in any place. It is almost impossible for a private club to have anybody do anything for it and not have that person be considered its employee for the purposes of the SmokeFree Act. If a private club has a treasurer, that person provides a service to the club, and regardless of whether that person is paid or not, he/she will be considered the private club's employee. The Court cannot think of a scenario under the SmokeFree Act in which the "private club" exemption would actually apply. Regardless of the statements made in R.C. 3794.03(G) that a "private club" exemption exists, no such exemption actually does exist.

In a misguided attempt, Defendants have attempted to salvage the "public club" exemption from oblivion. Defendants have extensively argued that the added language in Rule 3701-52-04(G) is their attempt to reconcile the definition of "employee" with the provision for a "private club" exemption. They argue that taking members of private clubs outside of the definition of an "employee" effectuates the "private club" exemption and therefore effectuates the intent of

the voters who voted for the SmokeFree Act, an intent that Defendants argue included the provision of a "private club" exemption.

The Court applauds the efforts of Defendants in attempting to effectuate the will of the people. However, by doing so they have exceeded their rule making authority. The Court cannot determine the intent of individual voters when they voted for the SmokeFree Act. This intent cannot be gleaned from the SmokeFree Act itself because it provides for both a "private club" exemption and definitions that swallow that exemption. The Court has to presume that the public at large knew what they were voting for. This is regardless of how the ballot language read. As to the ballot language, it is impossible for the Court to poll each and every voter who voted for the SmokeFree Act in order to determine if they were swayed by the ballot language or the actual language of the SmokeFree Act. The Court cannot poll the public to determine if it was their intent to have a "private club" exemption that mirrors the language found in R.C. 3794.03(G) or one that mirrors the language of Rule 3701-52-04(G). As can be seen, intent is impossible to determine in this case and is frankly completely irrelevant to the issue presently before the Court.

As a side note, intent never really becomes an issue in this case. Before the Court can look at issues of legislative intent or the will of the people, it must first determine that there is some sort of ambiguity in the language of the SmokeFree Act. Defendants argue that this ambiguity exists in the conflict between the provision for a "private club" exemption and the definition of the word "employee". Contrary to the beliefs of Defendants, no ambiguity actually

exists. The language of R.C. 3794.03(G) and R.C. 3794.01(D) is clear. While this language leads to the nullification of the "private club" exemption when put into practical use, it is by no means ambiguous. In the face of no ambiguity in the language of the SmokeFree Act, the intent of the voters becomes completely irrelevant.

This brings the Court full circle. The "private club" exemption found in R.C. 3794.03(G) does not state that members of a private club are exempt from the definition of "employee". R.C. 3794.01(D), defining "employee", does not exclude members of private clubs from its definition. Therefore, the disputed language found in Rule 3701-52-04(G) exempting private club members from the definition of "employee" is an addition to the language passed in the SmokeFree Act and is invalid on its face. This is a simple case of looking at the plain language of R.C. 3794.03(G) and R.C. 3794.01(D), and seeing that Rule 3701-52-04(G) improperly adds to it. Defendant, the Ohio Department of Health, exceeded its authority in drafting the disputed language found in Rule 3701-52-04(G). Defendants should be permanently enjoined from enforcing Rule 3701-52-04(G) as written.

This brings the Court back to the issue of standing. Plaintiff clearly has an injury in that it, and its members, will be hurt by the enforcement of a rule that is invalid on its face. If a permanent injunction is not granted, Plaintiff's members, who include bars that are subject to the same law as private clubs, will be treated differently under the law. Private clubs will be able to circumvent the SmokeFree Act while Plaintiff's members will not. This is an injury to Plaintiff's members'

property rights and their basic ability to compete on a level playing field as dictated by law. Regardless of how much Rule 3701-52-4(G), as it is currently written, is subject to actual abuse, Plaintiff's members will suffer injury. Furthermore, as general members of the public, Plaintiff's members have an interest in seeing that the SmokeFree Act is properly administered and is properly used as it was intended, *i.e.* to protect employees from the harmful effects of cigarette smoke in the workplace. It is the opinion of the Court that Plaintiff and its members possess ample grounds for standing in the present matter.

Plaintiff has successfully shown that it is entitled to a permanent injunction as to the enforcement of Rule 3701-52-04(G) as written. Plaintiff has shown that the Ohio Department of Health exceeded its authority when it promulgated the language stating: "For purposes of this exemption, the term employees does not include members of the private club who provide services to the private club". Plaintiff has shown that its members will experience irreparable harm if this language is enforced as written. Plaintiff has shown that others similarly situated as Plaintiff's members, as well as the potential employees of private clubs, will also suffer injury if Rule 3701-52-04(G) is enforced as written. Finally, Plaintiff has shown that the public interest will be served by the granting of a permanent injunction in that the SmokeFree Act will be enforced in the manner it is written and not in a manner that exceeds Defendants' authority. Plaintiff is entitled to the injunction it seeks.

As a final thought on this matter, the Court notes that it is not this Court that has nullified the "private club" exemption. It is not the Ohio Department of Health that nullified it, nor will the Ohio Department of Health be in error by enforcing the smoking ban against private clubs. This is true because from the very beginning there was never a "private club" exemption in the SmokeFree Act. There was an apparition that called itself a "private club" exemption, but that exemption did not really exist. It is not within the Court's power to correct this situation.

One more thing needs to be addressed in the contexts of the present decision. On May 11, 2007 the Veterans of Foreign Wars, Post #7754 (hereinafter "VFW 7754") moved to intervene in this case. At the hearing held on May 14, 2007 counsel for VFW 7754 stated that he supported the arguments present by Defendants in this matter. Since this is so, the Court sees no benefit to allowing VFW 7754 to intervene in this case. All intervention would allow is the presentation of more evidence as to the supposed intent of the voters and maybe some evidence as to the impact that a permanent injunction may have on VFW 7754. As stated earlier, the intent of the voters is irrelevant in this case. Whether VFW 7754 will be injured as a result of a permanent injunction is also irrelevant. This case is about the statutory language found in the SmokeFree Act and Defendants' interpretation of that language. Defendants' interpretation exceeded their authority. While stating a "private club" exemption exists, the definitions found in R.C. 3794.01 relegate that exemption into almost oblivion. Any injury to VFW 7754 will be caused by the SmokeFree Act itself, not a permanent

injunction issued by the Court. The presence of VFW 7754 does not aid this case and therefore it is not permitted to intervene.

After review and consideration, the Court rules as follows:

Plaintiff's Petition for a Permanent Injunction is GRANTED. It is hereby ORDERED that Defendants, the Ohio Department of Health, its director, Alvin B. Jackson, and its acting director, Anne R. Hamish, are hereby permanently enjoined and restrained from implementing and enforcing the following language found in Rule 3701-52-04(G): "For purposes of this exemption, the term employees does not include members of the private club who provide services to the private club." This decision shall have no other effect on the enforcement of any provision of R.C. 3794 or the rules promulgated pursuant to it.

Defendants' Motion to Consolidate Preliminary Injunction Hearing with Trial on the Merits is hereby GRANTED.

Third-Party's, Veterans of Foreign Wars, Post #7754, Motion to Intervene is hereby DENIED.

This decision and entry shall constitute a final appealable order in this matter.

IT IS SO ORDERED.



David E. Cain, Judge