

[Cite as *In re Tucker v. Benjamin*, 2005-Ohio-1042.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: SUITABILITY OF MATTHEW H.
TUCKER

Appellee

vs.

ANN H. WOMER BENJAMIN,
SUPERINTENDENT, OHIO
DEPARTMENT OF INSURANCE

Appellant

JUDGES:

Hon. John F. Boggins, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2004CA00240

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2004CV1334

JUDGMENT:

Reversed

DATE OF JUDGMENT ENTRY:

March 7, 2005

APPEARANCES:

For Appellant

SCOTT MYERS
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For Appellee

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Farmer, J.

{¶ 1} On June 26, 2003, the Ohio Department of Commerce, Division of Securities, issued a cease and desist order against appellee, Matthew Tucker, a licensed insurance agent, for selling unregistered securities and selling securities without a license. Thereafter, appellee entered into a consent decree wherein he admitted to selling securities without a license.

{¶ 2} As required by law, appellee notified the Ohio Department of Insurance (hereinafter "ODI") of the consent decree. ODI sent a notice to appellee stating he was unsuitable to be an insurance agent. A hearing before a hearing officer was held on December 11, 2003. By report dated February 25, 2004, the hearing officer recommended the revocation of appellee's insurance agent's license with reapplication in four years. Appellant, Ann Womer, ODI's Superintendent, adopted the hearing officer's report and recommendation. See, Order dated April 1, 2004.

{¶ 3} On April 15, 2004, appellee filed an appeal with the Court of Common Pleas of Stark County. By judgment entry filed June 30, 2004, the trial court affirmed the license suspension, but modified the sanction to a one year suspension.

{¶ 4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶ 5} "THE COURT OF COMMON PLEAS OF STARK COUNTY ERRED AS A MATTER OF LAW BY MODIFYING THE SANCTION IMPOSED BY THE OHIO DEPARTMENT OF INSURANCE IN DIRECT CONTRAVENTION OF *HENRY'S CAFÉ*

V. *BD. OF LIQUOR CONTROL* (1959), 170 OHIO ST. 233 AND CASES CITED THEREAFTER."

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{¶ 6} Appellant claims the trial court erred in modifying the sanction. We agree.

{¶ 7} This case involved a R.C. 119.12 appeal and pursuant to said statute, a trial court's review is limited:

{¶ 8} "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

{¶ 9} Appellate review is limited to determining whether the trial court abused its discretion in finding the agency's decision was supported by reliable, probative and substantial evidence. *Sohi v. Ohio State Dental Board* (1998), 130 Ohio App.3d 414. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983) 5 Ohio St.3d 217.

{¶ 10} Appellant's order revoked appellee's insurance agent's license with reapplication in four years. In its review, the trial court did not conclude the securities violation lacked nexus to the insurance agent's license, and did not find error in ODI's conclusions that appellant violated the conditions and terms of his license pursuant to R.C. 3905.14(B)(17). The trial court modified the sanction "by finding that the

suspension that is supported by reliable, probative and substantial evidence would be in a duration of one (1) year." See, Judgment Entry filed June 30, 2004.

{¶ 11} We find the trial court's modification to be contrary to the law of this jurisdiction consistently followed by this court:

{¶ 12} "On appeal from an order of an agency (as defined in Section 119.01, Revised Code) to the Court of Common Pleas, the power of the court to modify such order is limited to the ground set forth in Section 119.12, Revised Code, i.e., the absence of a finding that the order is supported by reliable, probative, and substantial evidence.

{¶ 13} "On such appeal, the Court of Common Pleas has no authority to modify a penalty that the agency was authorized to and did impose, on the ground that the agency abused its discretion." *Henry's Café v. Board of Liquor Control* (1959), 170 Ohio St. 233, paragraphs two and three of the syllabus.

{¶ 14} "The court below was not authorized to modify the penalty ordered by the board on the basis that the Board abused its discretion or because the court felt that lesser disciplinary action would be more appropriate under all of the circumstances. As long as the court below found that there was reliable, probative and substantial evidence in the record***, the court was required to affirm the order***." *In re Appeal of Jane E. K. McCallum from Removal* (November 23, 1982), Morrow App. No. CA-600. See also, *Gruber v. Ohio Department of Human Services* (1994), 98 Ohio App.3d 72; *FOE Aerie 0760 Kokosing v. Liquor Control Commission* (November 6, 1996), Knox App. No. 96CA000020.

{¶ 15} Accordingly, we find the trial court's modification of the sanction sub judice was unlawful. The original sanction is reimposed.

{¶ 16} The sole assignment of error is granted.

{¶ 17} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby reversed.

By Farmer, J.

Boggins, P.J. and

Wise, J. concur.

JUDGES

SGF/jp 0301

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: SUITABILITY OF MATTHEW :
H. TUCKER :
 :
 :
 Appellee :

	:	JUDGMENT ENTRY
vs.	:	
	:	
ANN H. WOMER BENJAMIN,	:	
SUPERINTENDENT, OHIO	:	
DEPARTMENT OF INSURANCE	:	
	:	
Appellant	:	CASE NO. 2004CA00240

For the reasons stated in the Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Stark County, Ohio is reversed, and the original sanction is reimposed.

JUDGES