DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-AA-1059

GREEN ISLAND HEAVEN & HELL, INC.,
T/A GREEN ISLAND CAFÉ/HEAVEN & HELL, PETITIONER,

v.

DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

On Petition for Review of an Order of the
Alcoholic Beverage Control Board
(2018-CMP-000208 & 18-251-00219)

(Submitted September 24, 2021 Decided March 16, 2023)

Before BECKWITH and DEAHL, *Associate Judges*, and WASHINGTON, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a hearing in August 2019, the Alcoholic Beverage Control Board ("Board") found that petitioner Green Island Heaven & Hell, Inc., t/a Green Island Café/Heaven & Hell, violated D.C. Code § 25-797 for failure to maintain control and ownership of a licensed establishment and twice violated D.C. Code § 25-823(a)(6) for failure to follow their security plan. Based on their prior violations and the Alcoholic Beverage Regulation Administration (ABRA) civil penalty schedule, petitioner was fined $30,000 and served a 30-day license suspension for each violation, totaling $90,000 in fines and a 90-day suspension. On appeal, petitioner argues: (1) the $90,000 fine was a heightened penalty imposed without fair notice in violation of their Fifth Amendment right to due process; and (2) the Board erred in finding the two violations of D.C. Code § 25-823(a)(6). We affirm.

I.

The following facts are not in dispute. Petitioner owns and operates the establishment Green Island Café/Heaven & Hell ("Green Island"), located at 2327 18th Street, NW in the Adams Morgan neighborhood. Green Island's first floor functions as a restaurant until 11 p.m., after which it is run as a bar. Green Island occasionally hosts live music events, including showcases of local bands. During one such event on August 17, 2018, at approximately 10:15 p.m., ABRA investigators were monitoring the neighborhood and saw that Green Island did not have security guards stationed outside. ABRA investigators observed two males stationed outside collecting money, who they learned were not employed by the establishment but rather worked for a promoter. ABRA Investigator Kevin Puente also observed that there were no security personnel stationed within the establishment. Petitioner's security plan states: "Two (2) Security personnel should always be positioned in the main entrance," and "inside security staff should be positioned throughout the property." Due to the absence of security during the music event, petitioner was charged with failure to maintain control of the premises and failure to follow their security plan.

On November 11, 2018, the corporate owner was bartending at Green Island and accidentally served a drink containing a toxic cleaning fluid to a patron. The owner called 911 and offered to call an ambulance. Petitioner's security plan states:

> Whenever an incident occurs inside or outside of the establishment, security personnel involved must fill out an incident report. The report must include all the proper and correct information. Management must then review and approve the report for accuracy and then record the document in the security log.

After reading a police report about the contaminated drink, ABRA Investigator Puente visited Green Island and asked the owner for an incident report. The owner could not provide a report, nor a security log documenting one, and so petitioner was charged with failure to follow their security plan. On May 15, 2019, the Board issued a notice of status and show cause hearing ("Notice") to Green Island and specified ABRA's claim that the charge was because "the establishment did not prepare an incident report after the incident occurred."

The Board conducted a show cause hearing, at which Green Island had the right to produce witnesses and evidence on their behalf and cross-examine witnesses. The evidence presented included testimony that discussed whether there was security on August 17, 2018, the time Green Island's security personnel arrived on a daily basis, the type of event being conducted on August 17, when the security plan called for security, and what Green Island's security procedures were.

Social event marketer Bill Wiggins testified that he was there on August 17 when a showcase with local bands was being held at Green Island. He testified that when the incident happened around 8 or 9 p.m., a security guard was not at the front because it was before the hours in which security personnel needed to be there. He also testified that while the event was going on, he sat at the door checking IDs, but he is not security.

James Perry, lead security for Green Island, testified that he was not there on August 17, there was one security person scheduled to get there at 10 p.m. and roam inside, and the event had provided "their own guy at the door." Perry was also not at the establishment on November 11 but testified that security was not scheduled for that day at 9 p.m.; that an incident log is kept at Green Island, but he has never seen it; and that any incident ranging from a fight to an injury requiring someone to be taken to the hospital would warrant an incident report.

Green Island's corporate owner, Mehari Weldemariam, testified that on August 17, the two people seen outside of Green Island[1] asked him if they could check IDs. Weldemariam testified that he had one security person who arrived around 9:45 p.m. and three other security personnel who arrived after 11 p.m. He also testified that his interpretation of the security plan was that it only applies after 10 p.m. and that he does not need security during dinner time. With respect to November 11, Weldemariam testified that he has "an incident report, a piece of paper that [he] wrote," but because the MPD officer said he did not need it, Weldemariam did not provide it to the officer. He testified that he took notes of the incident, there is an incident report, and it could be in his office, but that he did not bring it to the hearing. He also testified that nobody from ABRA asked for the incident report.

ABRA argued that the security plan did not specify that it only applied after 10 p.m. and therefore, it applied at any time. ABRA Investigator Puente explained

[1] At the hearing, photo exhibits showing a table outside the establishment with alcohol on it and two people behind it were admitted into the record.

that an establishment is "supposed to adhere to the security plan at all times [the establishment] is operating." He testified that Green Island's security plan did not specify when security should or should not be there and that the security plan discusses Green Island's obligations concerning crowd control. Puente also testified that a report should be made whenever there is an incident and that he did not receive a report when he asked for it days after the November 11 incident.

The Board sustained three charges against petitioner. The Board found that petitioner violated D.C. Code § 25-797(a) and (b) for allowing a third party to provide and control security on August 17, 2018. The Board found that petitioner violated the terms of its security plan by failing to have security guards on August 17 in violation of D.C. Code § 25-823(a)(6). Additionally, while the Board disagreed with petitioner that the security plan was not required during "restaurant hours," it also rejected and found petitioner's argument irrelevant because a live music event was taking place at Green Island when Investigator Puente visited. The Board also found that petitioner violated the terms of the security plan by failing to produce an incident report for the improperly poured drink on November 11 in violation of D.C. Code § 25-823(a)(6). Because petitioner never showed the incident report to ABRA or the Board, the Board did not credit petitioner's claim that an incident report was filled out and drew an adverse inference that the report did not exist.

These charges are all classified as primary-tier violations under 23 D.C.M.R. § 800.1. Because petitioner had three prior primary-tier violations adjudicated within the previous four years, petitioner was fined a mandatory $30,000 fine per violation and had its license suspended for 30 days per violation. This petition for review followed.

II.

Petitioner first argues that the Board imposed the $30,000 per-violation fine without fair notice in violation of their right to due process under the Fifth Amendment.

Due process requires "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). We are satisfied that the documents sent to petitioner, when read in conjunction with the relevant provisions of the D.C. Code and the D.C. Municipal Regulations, provided fair notice of the severity of the potential penalties petitioner faced.

The Notice informed petitioner of the possibility that their license would be "fined and suspended or revoked pursuant to D.C. Code §§ 25-823 and 830." Section 25-830(c)(1)(D) states that for "the fourth [primary-tier] violation within 4 years, the Board shall revoke the licensee's license or fine the licensee no less than $30,000 and suspend the licensee's license for 30 consecutive days."

D.C. regulations set out how a licensee's violations are counted. 23 D.C.M.R. § 808.3 states that "[t]he computation of violation history shall only include prior adjudicated cases whose dates of adjudication fall within the applicable review period for the instant case." Here, the applicable review period was four years. D.C. Code § 23-801.1(d). The petitioner was also provided with a record of their previous charges and the outcome of each case. The record reveals multiple primary-tier charges, but only three were "adjudicated" as defined by 23 D.C.M.R. § 808.4 within the applicable review period.

The ABRA civil penalty schedule, 23 D.C.M.R. § 800.1, lists violations by tier. The charges in this case, which were stated in the Notice, are categorized as "primary." With this, had petitioner read the relevant statutes and properly applied the calculation rules to their record, they would have discovered that the charges at issue would be their fourth primary-tier violation in four years, subjecting them to the mandatory $30,000 fine and 30-day suspension.

Petitioner also argues that the lower figures they have routinely been fined, along with the decision to fine per charge, demonstrate inconsistent and arbitrary enforcement, which would negate the sufficient notice provided by the Notice and relevant statutes. This is not so. As explained, this was the first time petitioner qualified for the $30,000 fine; previous fines were in line with the schedule. Furthermore, the record shows that for cases in which petitioner faced multiple charges, they were fined per charge, as here. Therefore, the Board did not engage in arbitrary or inconsistent enforcement.

III.

Petitioner next argues that there was insufficient evidence to find either of the violations for failure to follow the security plan under D.C. Code § 25-823(a)(6). We disagree.

Our review of administrative agency decisions "is limited to ensuring that the agency '(1) made findings of fact on each material, contested factual issue, (2) based those findings on substantial evidence, and (3) drew conclusions of law which followed rationally from the findings.'" *Walsh v. D.C. Bd. of Appeals & Rev.*, 826 A.2d 375, 379 (D.C. 2003) (quoting *Britton v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 681 A.2d 1152, 1155 (D.C. 1996)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, a standard satisfied with a minimal amount of evidence, given our deference to the agency's informed judgment and special competence in the matters before it." *Acott Ventures, LLC v. D.C. Alcoholic Beverage Control Bd.*, 135 A.3d 80, 88 (D.C. 2016) (internal citations, quotation marks, and brackets omitted). We give "full play to the right of the [fact-finder] to determine credibility, weigh the evidence, and draw justifiable inferences of fact, and mak[e] no distinction between direct and circumstantial evidence." *Slater-El v. United States*, 142 A.3d 530, 538 (D.C. 2016) (quoting *Medley v. United States*, 104 A.3d 115, 127 n.16 (D.C. 2014)). This court does "not review the record of an administrative proceeding de novo but, rather, examine[s] the record to determine whether the agency could reasonably have found the facts as it did." *Pendleton v. D.C. Bd. of Elections & Ethics*, 449 A.2d 301, 307 (D.C. 1982) (citing *Liberty v. Police & Firemen's Ret. & Relief Bd*., 410 A.2d 191, 192 (1979)).

We first address the failure to prepare an incident report. Petitioner raises three arguments for the first time on appeal: (1) the security plan did not require a report for the improperly poured drink, as it was not a security incident but purely a medical one; (2) no deference is owed to the Board's interpretation that the security plan required such, because the plan is not a regulation, but rather, "essentially a contract"; and (3) even if a report was required, the security plan only compels them to "make" a report, not to retain or produce it.

"Our cases make clear that only in exceptional circumstances will this court entertain claims not raised at the administrative level." *Hisler v. D.C. Dep't of Emp. Servs.*, 950 A.2d 738, 744 (D.C. 2008) (citing *Hill v. D.C. Dep't of Emp. Servs.*, 717 A.2d 909, 912 (D.C. 1998)). We find no exceptional circumstances to entertain these argument raised for the first time in this court.

Petitioner argues that the only evidence for finding a violation was the adverse inference that they did not make the report due to their failure to produce it and that an adverse inference is insufficient evidence to support a charge.

It is within an administrative board's discretion to draw an adverse inference. In *Citizens Comm. for the District of Columbia Video Lottery Terminal Initiative v. D.C. Bd. of Elections & Ethics*, 860 A.2d 813, 817 (D.C. 2004), this court stated that "the law permits a trier of fact to draw unfavorable inferences about testimony against the party best equipped to call the witness but who fails to do so." Similarly here, petitioner was best equipped to prove compliance by providing an incident report or security log but failed to show it to ABRA or the Board. The Board was permitted to evaluate this as circumstantial evidence and draw an adverse inference against petitioner that the report did not exist.

The Board's decision to sustain the charge was based on substantial evidence such that their conclusions of law followed rationally from the findings. *See Walsh*, 826 A.2d at 378. The Notice petitioner received included that the charge from November 11, 2018, was for violation of their security plan, specified ABRA's claim that an incident report was not prepared despite the security plan's requirements, and notified petitioner of their right to provide evidence to counter this claim. Investigator Puente testified that he asked the owner for the report days after the incident but was not provided one. The Board also made a credibility determination that although the owner claimed he prepared an incident report, his testimony was untrustworthy. When this evidence is viewed in conjunction with the adverse inference, the Board had substantial evidence upon which to find a violation.

Turning next to the lack of security personnel on August 17, 2018, petitioner argues there was not substantial evidence to support the charge for violation of the security plan because the Board's interpretation that security personnel were required at the time of the incident was arbitrary and capricious. Deference is owed to the Board's interpretation, unless it was "plainly erroneous or inconsistent with the regulation." *Walsh*, 826 A.2d at 378. The Board's interpretation is not plainly erroneous or inconsistent with D.C. Code § 25-823(c) because the regulation makes clear that once a licensee is required to have a security plan, they must be in compliance with it "during all times that [the establishment] is in operation." D.C. Code § 25-836 clarifies that the purpose of a security plan is for an establishment to have procedures for controlling crowds, permitting patrons to enter the establishment, stationing security personnel inside and in front of the establishment, and ensuring that only persons 21 years or older are served or consume alcohol. The Board interpreted the security plan to apply when there was alcohol being served during a live music event at Green Island on August 17 and supported their interpretation by finding that the language of the security plan

contained no exception for "restaurant time." It was reasonable for the Board to conclude that the security plan was violated.

For the foregoing reasons, the Board's decision is *affirmed*.

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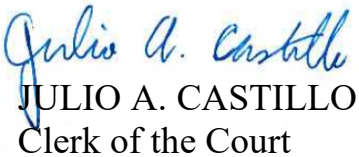

JULIO A. CASTILLO
Clerk of the Court

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