DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-AA-270

HOPEFUL, INC., PETITIONER,

v.

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

Petition for Review of an Order
of the District of Columbia Alcoholic Beverage Control Board
(ORDER NO. 2019-076)

(Submitted March 2, 2020 Decided May 6, 2020)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and FISHER and BECKWITH, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner Hopeful, Inc. ("Hopeful") challenges the District of Columbia Alcoholic Beverage Control Board's ("Board") decision to cancel its liquor license. We affirm.

I. Background

Hopeful was, until February 13, 2019, the holder of a liquor license being held in safekeeping by the Board. Lisa Drazin, the president of Hopeful, purchased the license from another entity and the Board approved the transfer on April 22, 2013. Although the license was associated with 2006 18th Street, N.W., Drazin intended to use it at another property, which was located at 1815 Columbia Road, N.W. Lisa Drazin is also the trustee of the Bernice J Drazin Trust, which owns the Columbia Road property.

The Board immediately placed the license in safekeeping at Drazin's request while she sought a tenant to lease the Columbia Road property and use the license. During a fact-finding hearing on May 1, 2014, Drazin told the Board that she expected to lease the property within a year. However, she had not come to an agreement with a tenant by the time of subsequent fact-finding hearings on

October 7, 2015, and September 27, 2017. At the September 2017 hearing, she claimed that she was "currently in negotiations with a tenant" but that she now planned to demolish and rebuild the Columbia Road property.

On October 31, 2018, the Board issued a "NOTICE OF SAFEKEEPING HEARING AND PROPOSED ORDER" (capitalization in original) that called for Hopeful to appear for a "safekeeping hearing" that would "be held as a contested case pursuant to 23 DCMR § 1600.3(e)." The purpose of the hearing would be "to demonstrate whether [Hopeful's] license qualifies for an additional period of safekeeping or should be deemed abandoned and cancelled pursuant to D.C. Official Code § 25-791." The notice included proposed findings of fact and conclusions of law "[b]ased on information previously obtained by the Board."

A hearing was held on January 9, 2019. Drazin was given an opportunity to testify on Hopeful's behalf, present witnesses, and later submit supplemental documents. Two witnesses testified on Hopeful's behalf, fifteen exhibits were introduced, and an attorney presented a closing statement. At that hearing, Drazin indicated that she did not have a tenant ready to take over the Columbia Road property, nor had she made arrangements to transfer the license to that location or use it at the original 18th Street property.

In its February 13, 2019 order, the Board reviewed this procedural history and noted that the Columbia Road property, which has been owned by Drazin's family since 1987, had been vacant since 2011. Because of the prolonged vacancy and the age of the building, the Board found that the property had suffered some wear and tear, including a leaking roof and low-pressure water and gas lines that need to be upgraded. The Board also noted that the property is located in a historic district, meaning that Drazin's latest proposal for the construction of a six-story building would need approval from the Historic Preservation Review Board ("HPRB"). Hopeful would also need to obtain a new demolition permit, as its old one had expired, and a construction permit, which "requires approval of a number of trades, including energy, mechanical, and plumbing."

The Board's order also summarized the evidence submitted on Hopeful's behalf. John Sage, an architect, represented that "he could submit the required materials for the [construction] permit within approximately 60 days." If the permits were approved, Sage believed that a contractor "could complete the construction of the building in about 12 to 18 months." However, Sage also admitted that he had not entered into a written contract to provide these services, that his services did not include submitting documentation to the HPRB, and that

no bids on the construction project had been submitted at that time. Citing HPRB meeting minutes, the Board found that it was significant that Sage's services did not include submitting documents to secure HPRB approval, as the HPRB had previously rejected Hopeful's proposal for new construction at the Columbia Road property in 2016 when, "in a 5-0 vote, [it] found the Licensee's 'concept incompatible with the character of the Kalorama Triangle Historic District and inconsistent with the purposes of the preservation act.'" The Board also noted that documents submitted after the hearing indicated that Hopeful had decided not to hire Sage to provide the services he testified about.

With this evidence in mind, the Board declined to further extend safekeeping of the license because "the Licensee has failed to demonstrate reasonable cause or reasonable progress on returning to operation to merit extension of the licensee's safekeeping in accordance with the safekeeping law." It explained that there was "a lack of adequate, diligent, or reasonable progress to reconstruct or rebuild the proposed new location for the license at 1815 Columbia Rd., N.W." and noted that "[d]uring a hearing in 2014, the Licensee indicated that she expected to lease the property within a year, but as of 2019 no tenant has executed a lease or been identified." The Board also stated that Drazin "indicated in 2017 that she planned to demolish and rebuild the property," but in the intervening time, she had failed to acquire the required permits, enter into contracts for crucial services, or secure approval from the HPRB. Hopeful also had "no intent to rebuild or reconstruct the 18th Street property," the property that was actually listed on the license. The Board thus deemed the license abandoned and ordered its cancelation pursuant to D.C. Code § 25-791. The Board denied Hopeful's motion for reconsideration in a second order issued on February 27, 2019.

Petitioner now claims that the Board erred for the following four reasons: (1) the Board improperly canceled Hopeful's license because the hearing was a fact-finding hearing, at which licenses cannot be canceled; (2) the Board acted arbitrarily and capriciously in issuing proposed findings of fact and conclusions of law before the hearing started, thereby revealing its bias against Hopeful; (3) the Board's conclusion that Hopeful had failed to make reasonable progress in returning the license to use was not supported by substantial evidence; and (4) the Board acted arbitrarily and capriciously in canceling Hopeful's license because the Board has held other licenses in safekeeping for even longer.

II. Analysis

This court will set aside an agency's ruling if it is "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if it is "[u]nsupported by substantial evidence in the record." D.C. Code § 2-510(a)(3) (2016 Repl.). To withstand scrutiny, "(1) the decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." *Powell v. District of Columbia Hous. Auth.*, 818 A.2d 188, 196 (D.C. 2003). "[S]ubstantial evidence is relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Williams v. District of Columbia Hous. Auth.*, 213 A.3d 1275, 1280 (D.C. 2019).

As the Board explained in colloquial terms, "[t]he safekeeping law found in Title 25 of the D.C. Official Code makes all liquor licenses issued by the Board subject to a 'Use It or Lose It' policy." A licensee is required to surrender its liquor license to the Board for safekeeping if the license's use "is discontinued for any reason." D.C. Code § 25-791(a) (2012 Repl. & 2019 Supp.) (code section in effect as of Feb. 13, 2019).[1] The Board, in turn, is required to "hold the license until the licensee resumes business at the licensed establishment or the license is transferred to a new owner." *Id.* However, "[i]f the licensee has not initiated proceedings to resume operations or to transfer the license within 60 days after suspension, the Board may deem this license abandoned after giving notice to the licensee." *Id.* "The Board may extend the period of safekeeping beyond 60 days for reasonable cause, such as fire, flood, other natural disaster; rebuilding or reconstruction; or to complete the sale of the establishment." D.C. Code § 25-791(b). "Licenses in safekeeping beyond 60 days, as extended by the Board, shall be reviewed by the Board every 6 months to ensure that the licensee is making reasonable progress on returning to operation." D.C. Code § 25-791(c).

Hopeful surrendered the license for safekeeping immediately upon purchasing it in April 2013. Since that time, there have been multiple fact-finding hearings at which Hopeful has given testimony on the intended use of its license, including on May 1, 2014, October 7, 2015, and September 27, 2017. The license has never been used by Hopeful at either the 18th Street or Columbia Road location, but has instead been held in safekeeping the entire time.

We first address Hopeful's claim that its license was unlawfully canceled after the wrong kind of hearing. District of Columbia Municipal Regulations

[1] As of the date of this opinion, D.C. Code § 25-791 has been amended. We quote from the statute as it existed at the time of the hearing.

provide that certain kinds of hearings "held before the Board," including safekeeping hearings, "shall be considered to be contested cases." 23 DCMR § 1600.3(e). On the other hand, fact-finding hearings "shall not be considered to be contested cases." 23 DCMR § 1600.4(a). More importantly, "[a] licensee shall not . . . have its license suspended or revoked at a fact-finding hearing." 23 DCMR § 1616.2.

Hopeful bases its argument on the fact that the transcript reporting the January 9 proceeding labels the meeting as a "contested fact-finding hearing." We conclude that the use of this hybrid label does not alter the substance of what happened. The Board provided ample notice of the nature and purpose of the hearing. The "NOTICE OF SAFEKEEPING HEARING AND PROPOSED ORDER" informed Hopeful that, "[b]ased on information previously obtained by the Board, the Board proposes CANCELLING the license based on the following proposed order."[2]

The notice explicitly informed Hopeful that "[t]he safekeeping hearing shall be held as a contested case pursuant to 23 DCMR § 1600.3(e)" and "[t]he hearing shall rely on the procedures provided by the D.C. Administrative Procedures Act." Summarizing Hopeful's rights, the notice stated that:

> Under D.C. Official Code § 2-509(b), the Licensee may personally appear at the hearing, and may be represented by legal counsel. At the scheduled hearing, the Licensee has the right to produce witnesses and evidence on his or her behalf and to cross-examine witnesses. The Licensee may also examine evidence produced and have subpoenas issued on his or her behalf to require the production of witnesses and evidence.

Petitioner exercised these rights at the hearing, which lasted almost two hours. It appeared with counsel, produced the testimony of two witnesses, introduced fifteen exhibits, and presented a closing statement. These procedures met the APA requirements for a contested case. *See generally* D.C. Code § 2-509 (2016 Repl.).

Petitioner has also failed to demonstrate that the Board prejudged the merits by issuing proposed findings of fact and conclusions of law prior to the hearing. As the Chairperson commented at the outset of the hearing, "[o]ver the many

[2] Capitalization in original.

years, the Board has had multiple Fact-Finding Hearings to hear from Ms. Drazin and ascertain her progress in returning the license to operation or transferring the license to one who will operate it." When considering Hopeful's renewed request to extend the period of safekeeping, the Board was not required to ignore what it had learned from these prior proceedings. *See* 23 DCMR § 1616.2 (discussing use of "information provided at a fact-finding hearing" to initiate an enforcement action).

Furthermore, the proposed findings and conclusions demonstrate that Hopeful received ample notice of the key questions in advance of the hearing. We discern no indication of "bias" in informing Hopeful of the Board's concerns; if anything, providing such details gave Hopeful a better opportunity to rebut the allegations, if they were untrue, or to rectify the issues the Board identified, if they were indeed true. Perhaps if the final order merely repeated the proposed order verbatim, Hopeful could demonstrate that the case was indeed "prejudged." But the final order incorporates testimony and evidence presented by Drazin and Hopeful at the hearing and includes numerous findings and conclusions that are substantially different from the proposed findings and conclusions. It is true that proposed findings and conclusions are not explicitly required under the circumstances. However, they also are not forbidden. What is required is "reasonable notice" of "the time, place, and issues involved." D.C. Code § 2-509(a). Utilizing proposed findings of fact and conclusions of law to provide that notice does not, without more, signal inappropriate activity on the Board's part.

Having addressed these procedural arguments, we turn to Hopeful's two substantive claims. Hopeful asserts that the Board's decision was not supported by substantial evidence. In doing so, Hopeful argues that the Board improperly "relied on statements included on the Property Information Verification System 2.0 (PIVS) on the DCRA website" to "reach the incorrect conclusion that the Property failed to conform with HPRB requirements which prevented further permit approvals." We first note that it is unclear whether any PIVS information had any impact on the Board's decision and whether any information reviewed was actually inaccurate.[3] But more importantly, there was ample support for the Board's

[3] Respondent disputes that the Board relied on records available in PIVS and states that the Board instead reviewed documents from the HPRB itself. Petitioner has not pointed to any part of the record indicating that information from PIVS impacted the Board's decision, nor has it provided argument demonstrating that any PIVS information relied upon was incorrect.

decision regardless of whether, as petitioner alleges, "information from PIVS may be inaccurate or false and should not be relied upon."

It is undisputed that the Columbia Road property is located in a historic district and that the HPRB had not approved the planned construction at the time of the hearing. Even if this obstacle did not exist, there was no tenant for the building, which had been unoccupied for years.[4] Hopeful also did not have a construction permit, which "requires approval of a number of trades, including energy, mechanical, and plumbing," or even a current demolition permit, which was also necessary for its proposed plan of action. Even if Hopeful had abandoned its plans for demolition and new construction, it still could not demonstrate that it had rectified problems with the property's gas line (an issue that had existed since at least 2005), water line, or leaking roof. Moreover, the current address on the license remains the 18th Street location, even though "the Licensee has no intent to rebuild or reconstruct" that property. The record supports the Board's factual findings on these issues, which in turn support the conclusion that Hopeful was not making reasonable progress toward placing the license in use.

To resist this conclusion, petitioner lists the number of permits and approvals it had obtained or had taken steps to acquire. However, petitioner does not rebut the evidence that it had not obtained the other permits listed in the Board's order. This is crucial, as "[w]e must uphold the Board's decision so long as it is supported by substantial evidence, even though there may also be substantial evidence to support a contrary decision." *Upper Georgia Ave. Planning Comm. v. Alcoholic Beverage Control Bd.*, 500 A.2d 987, 992 (D.C. 1985). Hopeful's argument is, at best, that there was substantial evidence to support a contrary decision; it does not demonstrate a lack of substantial evidence to support the decision that was made.

Given the well-documented and long-standing obstacles to putting the license into use and the extensive history of non-use, the Board did not believe that Hopeful would actually obtain the crucial permits that it had not yet obtained. Simply put, even if Hopeful had taken the steps petitioner highlights in its brief at

[4] Hopeful argues in its reply brief that this is untrue because it has produced a list of prospective tenants. However, identifying *potential* tenants does not change the fact that Hopeful has not contracted with an *actual* tenant.

some point in the almost six years that the license had been in safekeeping,[5] that did not preclude the Board from finding that the prolonged failure to overcome the remaining obstacles demonstrated a lack of reasonable progress toward putting the license into use.

Petitioner's final argument is that the Board should not have canceled Hopeful's license when other licenses had been held in safekeeping for even longer. We disagree. An assessment of reasonable progress is a fact-intensive inquiry not readily susceptible to standard measures. The length of time a license has been in safekeeping is just one of many relevant factors the Board must balance. As the Board explained, it "made its determination based on the unique factual circumstances of this case." Petitioner has the burden of demonstrating error, *Cohen v. Rental Housing Comm'n*, 496 A.2d 603, 605 (D.C. 1985), but has not shown that the Board acted arbitrarily or capriciously in the case before us.

III. Conclusion

The order of the Alcoholic Beverage Control Board is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

[5] Drazin had repeatedly assured the Board at prior hearings that she was close to placing the license in use, and she argued again in this hearing (and argues on appeal) that she was well-positioned to surmount any remaining obstacles. However, Hopeful had not been able to use the license, it changed plans for using the license multiple times over that period, and it did not adhere to timelines that it had presented to the Board. That history clearly was a factor in the Board's evaluation of whether Hopeful was making reasonable progress, and we cannot say the Board clearly erred in being skeptical of Drazin's assurances. "A hearing examiner's decisions are especially weighty when they involve credibility determinations." *George Hyman Constr. Co. v. District of Columbia Dep't of Emp't Servs.*, 498 A.2d 563, 566 (D.C. 1985). We defer to the fact-finder on the issue of whether Drazin's assurances were credible.

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