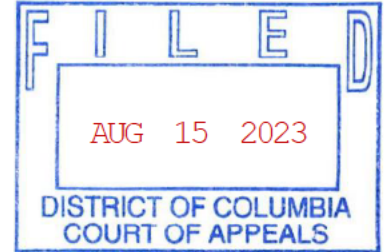


**DISTRICT OF COLUMBIA COURT OF APPEALS**

No. 20-AA-0214

JOHN G. UHAR, 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  
(19-PRO-33)

(Argued January 11, 2022)

Decided August 15, 2023)

Before BECKWITH and MCLEESE, *Associate Judges*, and GLICKMAN, *Senior Judge*.\*

**MEMORANDUM OPINION AND JUDGMENT**

PER CURIAM: Petitioner John G. Uhar challenges an order of the District of Columbia Alcoholic Beverage Control Board renewing a retail license for GF, LLC, trading as Il Canale. Although we are not persuaded by most of Mr. Uhar’s arguments, we conclude that we must vacate the Board’s order and remand for further proceedings with respect to one issue.

**I. Factual and Procedural Background**

Il Canale, which operates as a restaurant, applied to renew its license to serve alcoholic beverages. Mr. Uhar, who owned property abutting Il Canale, opposed renewal. The Board held an evidentiary hearing, and the evidence at the hearing included the following.

Investigators from the Alcoholic Beverage Regulation Administration (ABRA) monitored Il Canale on numerous occasions, and ABRA prepared a “protest report” indicating that ABRA investigators observed no noise, loitering, or other

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\* Judge Glickman was an Associate Judge at the time of oral argument. His status changed to Senior Judge on December 21, 2022.

ABRA violations. The protest report noted that ABRA records showed that Il Canale had received one warning for failing to ascertain the age of a patron and had been found to have committed several minor violations during the period from 2013 to 2019, for failing to file required reports, operating without a licensed manager present, and failing to have legible window lettering. An ABRA investigator also found no issues with trash storage or traffic.

A manager of Il Canale testified about the training employees receive and the procedures used to adhere to legal requirements. The owner of Il Canale also testified about the procedures used to meet legal requirements. The owner testified further about various incidents involving Mr. Uhar that the owner viewed as harassment by Mr. Uhar.

The owner of a hotel located next to Il Canale and a person who worked across the street from Il Canale testified in support of Il Canale's application.

Mr. Uhar attempted to introduce evidence that he contended showed that Il Canale lacked proper permits, had fraudulently provided incorrect information to the District of Columbia Department of Transportation (DDOT) when obtaining approval for a sidewalk cafe, and had exceeded the number of permissible umbrellas in its sidewalk cafe. As explained more fully infra, the Board excluded most of that evidence as irrelevant.

The Board granted license renewal. In presently relevant part, the Board concluded that the owner of Il Canale was "of good character and generally fit for the responsibilities of licensure." D.C. Code § 25-301(a)(1). The Board declined to consider Mr. Uhar's contention that Il Canale had obtained a permit from DDOT by fraud. According to the Board, "until the agency responsible for issuing the permit makes a final determination of illegality, or the person is convicted of a crime related to the issuance of the permit, the Board cannot review or override the coordinate agency's action." Rather, in the Board's view, "the correct action is for [Mr. Uhar] to file a complaint with the agency with jurisdiction and seek a remedy with that agency."

With respect to Mr. Uhar's arguments as to various other administrative violations, the Board concluded among other things that those violations were not so serious as to warrant denial of the renewal application.

## II. Analysis

We will uphold a decision by the Board if the decision is in accordance with the law and supported by substantial evidence. D.C. Code § 2-510(a)(3)(A), (E). We give considerable deference to the Board's interpretation of ambiguous statutory requirements that the Board administers. *Levelle, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1035-36 (D.C. 2007). We review the Board's evidentiary rulings for abuse of discretion. *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1386 (D.C. 1977). An agency decision must "state the basis of its ruling in sufficient detail and be fully and clearly explained, so as to allow for meaningful judicial review of and deference to the agency's decision." *DC Appleseed Ctr. for L. & Just., Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 214 A.3d 978, 985 (D.C. 2019) (internal quotation marks omitted).

### A. Procedural Objections

Mr. Uhar raises several objections to the procedures followed by the Board. First, Mr. Uhar objects to a ruling by the Board quashing certain of Mr. Uhar's witness subpoenas. The Board quashed the subpoenas because Mr. Uhar failed to list the subpoenaed witnesses on a required prehearing information form and did not show good cause for that failure. We uphold the ruling of the Board.

It appears to be undisputed that Mr. Uhar was repeatedly informed that he needed to identify any witnesses he sought to call on an identification form to be submitted at least seven days before the hearing; that Mr. Uhar was informed that failure to identify a witness on that form would mean that the witness would not be permitted to testify unless good cause was shown; that Mr. Uhar acknowledged that he read and remembered those instructions; and that Mr. Uhar did not list the witnesses at issue on his identification form. Mr. Uhar argues, however, that he had good cause for his failure, because he was told by agency personnel that he did not have to serve his subpoena requests on opposing counsel. As the Board explained, however, the advice Mr. Uhar received about how to serve subpoena requests was not at issue. Rather, Mr. Uhar's subpoenas were quashed because Mr. Uhar failed to list the witnesses at issue on his prehearing identification form, which deprived II Canale of fair prehearing notice of who would be testifying at the hearing. We see no abuse of discretion in the Board's conclusion that Mr. Uhar failed to establish good cause for not listing the witnesses at issue on the prehearing identification form.

Second, Mr. Uhar argues that ABRA failed to comply with the requirements of D.C. Code § 25-209 (ABRA community-resource officer shall provide information to citizens about application and protest procedures). To the contrary, the record indicates that ABRA provided assistance to Mr. Uhar as requested and that the Board repeatedly explained the relevant procedures to Mr. Uhar. We see no basis for reversal on this ground.

Third, Mr. Uhar argues that the Board failed to prepare and make available to the public “a check sheet documenting the licensee’s compliance” with Title 25 of the D.C. Code and regulations promulgated under that Title. D.C. Code § 25-315(b)(2). Although Mr. Uhar initially requested that such a check sheet be prepared, it does not appear that Mr. Uhar ever raised the issue again with the Board or objected to the failure to provide a check sheet. We therefore conclude that this issue was not properly raised before the Board, and we decline to consider the issue. *See, e.g., Conrad v. D.C. Alcoholic Beverage Control Bd.*, 287 A.3d 635, 642 (D.C. 2023) (“Parties challenging agency action generally must raise their claims first before the agency, because consideration of a claim raised for the first time on petition for review deprives the administrative agency of its right to consider the matter, make a ruling, and state the reasons for its action. In the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative agency at the appropriate time.”) (citation, brackets, and internal quotation marks omitted); *Thorne v. United States*, 582 A.2d 964, 965 (D.C. 1990) (“A party who neglects to seek a ruling on [a] motion fails to preserve the issue for appeal.”). In any event, the Board argues that the check sheet need not be in any particular format and that the ABRA protest report contained the information required to be in the check sheet. Mr. Uhar has not responded to those arguments, and we see no prejudice to Mr. Uhar arising from the absence of a document specifically designated as a check sheet.

### **B. Consideration of ABRA’s Protest Report**

Mr. Uhar argues that the Board erred by considering ABRA’s protest report as evidence at the hearing. *See* 23 D.C.M.R. § 1709.1 (ABRA investigator’s report “shall be considered part of the Board’s protest hearing record”). Mr. Uhar did not object before the Board to consideration of the report by the Board, and we therefore decline to address the issue. *Conrad*, 287 A.3d at 642.

### **C. Alleged Inconsistency in Board Decisions**

For the first time at oral argument, Mr. Uhar argued that the Board's decision in the present case was inconsistent with the Board's decision in *In re Mehyar, LLC*, ABRA-117535 (D.C. Alcoholic Beverage Control Bd. May 12, 2021). We generally do not consider issues raised for the first time at oral argument. *See, e.g., Jung v. Jung*, 844 A.2d 1099, 1112 n.9 (D.C. 2004) ("We usually do not consider claims raised for the first time during oral argument because of the unfairness to the opponent, who has not had an opportunity to consider and present a response."). In any event, we see no inconsistency between the Board's decision in this case and the Board's decision in *Mehyar*, which issued a cease-and-desist order to parties who the Board found (1) were selling alcohol without a proper license; (2) impermissibly allowed a third party to host an unsupervised event; and (3) were operating in a manner that disregarded public safety during the COVID-19 pandemic. *Mehyar*, ABRA-117535, at 1-10.

### **D. Alleged Misconduct by Il Canale With Respect to Other Agencies**

Finally, Mr. Uhar challenges the Board's handling of Mr. Uhar's argument that Il Canale had engaged in misconduct with respect to other administrative agencies that established that the owner of Il Canale lacked the requisite good character. We agree with Mr. Uhar in part, and we therefore vacate the Board's order and remand for further proceedings.

#### **1. Background**

At the evidentiary hearing, Mr. Uhar contended primarily that Il Canale's owner lacked good character. Mr. Uhar attempted to prove lack of good character through evidence of Il Canale's alleged misconduct in front of various other administrative agencies. Mr. Uhar subpoenaed some witnesses who he hoped would provide evidence on the topic, but as previously noted Mr. Uhar did not provide proper notice of his intent to call those witnesses. The Board therefore declined to enforce subpoenas for those witnesses, and we have upheld that ruling.

Mr. Uhar attempted to establish misconduct by Il Canale in two other ways. First, Mr. Uhar cross-examined the owner of Il Canale on that topic, eliciting acknowledgments that the owner of Il Canale had received a "violation" from the D.C. Fire Department and also had been issued four "stop work" orders. These incidents apparently involved the use of umbrellas and heaters at an outdoor part of the restaurant, as well an issue with the windows at the restaurant. The owner

testified there were no longer heaters and umbrellas at the restaurant and that he had no outstanding violations pending.

Second, Mr. Uhar attempted to introduce exhibits that he claimed supported the conclusion that the owner of Il Canale had committed misconduct in matters before other administrative agencies. Specifically, Mr. Uhar sought to introduce documents and photos that Mr. Uhar claimed showed that (1) Il Canale had started to build a rooftop summer garden without obtaining proper approvals from the D.C. Department of Consumer and Regulatory Affairs (DCRA); (2) the owner of Il Canale made false statements to DCRA in getting approval for a sidewalk café and failed to get necessary approvals from the U.S. Commission on Fine Arts (CFA); (3) Il Canale increased its occupancy or use of space without getting approval from DCRA as required by D.C. Code § 25-762(a); and (4) through counsel, Il Canale made false statements to the Board, DDOT, and DCRA about the expansion of Il Canale. The Board, however, declined to admit most of that evidence, ruling that it was irrelevant, because the Board could not look behind the decisions of other agencies. The Board did admit (1) a 2013 letter from a lawyer representing Il Canale to the Board about Il Canale's request to expand its activities; (2) a letter from CFA stating that Il Canale had withdrawn a permit application relating to a sidewalk café; and (3) DDOT's 2015 permit for a sidewalk café.

As previously noted, the Board in its written decision ruled in the alternative that Mr. Uhar's allegations about "violations of the District's fire, construction, health and public space rules" were not sufficiently serious as to warrant denial of Il Canale's application. We owe deference to the Board's conclusion on that point. *Levelle*, 924 A.2d at 1035-36. We see no reason to reverse the Board's conclusion. Moreover, in light of the Board's alternative ruling on the merits based on Mr. Uhar's allegations, any error in excluding the exhibits relating to such alleged violations was not prejudicial to Mr. Uhar.

We reach a different conclusion, however, with respect to Mr. Uhar's allegation that Il Canale made fraudulent misstatements in agency proceedings. The Board did not suggest that such conduct would be insufficiently serious, even if established, to warrant denial of Il Canale's application. To the contrary, the Board said that "obtaining a permit or license from the government using fraud or other illicit means may support a finding that a person lacks sufficient character and fitness to hold a liquor license." Nor did the Board suggest that Mr. Uhar had failed to present adequate support for his claim. Rather, the Board refused to consider Mr. Uhar's allegation, because the Board interpreted prior decisions of this court to

preclude such consideration. We disagree with the Board's interpretation of this court's prior decisions.

This court has on a number of occasions addressed issues arising from the potentially overlapping responsibilities of different agencies. Our cases establish three presently relevant principles.

First, we have held that the agencies generally may not “review[] the decisions of coordinate administrative departments and act[] in effect as a court of appeals” to determine that a different agency's action was erroneous. *Craig v. D.C. Alcoholic Beverage Control Bd.*, 721 A.2d 584, 589 (D.C. 1998); *see also Kopff v. D.C. Alcoholic Beverage Control Bd.*, 413 A.2d 152, 154 (D.C. 1980) (where party claimed that applicant for liquor license had erroneously been granted occupancy permit, “[t]he correct avenue for pursuing any alleged violation of the Safety or Building Codes is a complaint to the appropriate governmental entity involved”; “The Board has neither the jurisdiction nor the expertise to review compliance with safety requirements in such a manner.”).

Second, we have recognized that, in some circumstances, the relevant statutory provisions may indicate that a given agency did not have the responsibility to independently determine an issue that falls within the expertise or purview of a different agency. *See Dupont Circle Citizens Ass'n v. D.C. Alcoholic Beverage Control Bd.*, 766 A.2d 59, 62 (D.C. 2001) (Board reasonably interpreted applicable statutory provision to not require Board to determine independently whether applicant for liquor license was operating as non-profit organization).

Third, we have held that an agency is not necessarily freed from its responsibility to decide an issue statutorily committed to the agency simply because that issue also touches on the authority of a different agency. *See, e.g., Barry Farm Tenants & Allies Ass'n v. D.C. Zoning Comm'n*, 182 A.3d 1214, 1228-29 (D.C. 2018) (although Zoning Commission did not have authority to order or administer relocation services, Commission nevertheless was required to consider what relocation services were going to be provided in order to fulfill statutory obligation to assess potential adverse effects of planned unit development); *Friends of McMillan Park v. D.C. Zoning Comm'n*, 149 A.3d 1027, 1036-37 (D.C. 2016) (although Zoning Commission did not have authority to prepare environmental-impact statement relating to planned unit development, Commission nevertheless was statutorily required to consider environmental impacts when deciding whether to approve planned unit development); *Levy v. D.C. Bd. of Zoning Adjustment*, 570 A.2d 739, 750-51 (D.C. 1990) (although Board of Zoning

Adjustment (BZA) lacked authority to approve traffic-related proposals submitted as part of request for special exception from zoning requirements, BZA nevertheless was required to consider likely impact on traffic of granting special exception).

The Board appears to have interpreted our cases as flatly foreclosing the Board from considering a claim that an applicant demonstrated bad character in connection with proceedings before another agency. At oral argument in this court, however, counsel for the Board appears to have acknowledged that such a flat rule would be overbroad. For example, counsel for the Board appeared to agree that the Board would be required to address and resolve a claim that an applicant lacked good character because the applicant bribed District of Columbia officials in connection with an unrelated administrative proceeding before a different agency. We agree that, at least ordinarily, the Board's statutory duty to determine whether an applicant was "of good character and generally fit for the responsibilities of licensure," D.C. Code § 25-301(a)(1), would require the Board to consider such claims.

We acknowledge, however, that there are potential limitations on the obligations of the Board in such cases. For example, the Board certainly would lack authority to explicitly invalidate a decision of another agency. *E.g.*, *Craig*, 721 A.2d at 589. For another example, the Board might well have the authority to decline to look behind a specific prior determination by another agency that the applicant before the Board had in fact not engaged in the alleged conduct reflecting lack of good character. *See Friends of McMillan Park*, 149 A.3d at 1037 n.5 (expressing no view as to "whether, and if so in what circumstances, the Commission may appropriately defer to the prior conclusions of other expert agencies").

Before this court, the counsel for the Board suggested a possible narrowing principle: the Board can permissibly decline to consider alleged misconduct before a different administrative agency if accepting the claim of misconduct would necessarily invalidate the prior action of that agency. The Board's decision, however, neither adopted that principle nor applied it to Mr. Uhar's claim. We therefore are not in a position to affirm the Board's decision on that ground. *See, e.g.*, *Newell-Brinkley v. Walton*, 84 A.3d 53, 59 (D.C. 2014) ("This court generally cannot uphold an agency decision on grounds other than those actually relied upon by the agency.") (internal quotation marks omitted); *see also, e.g.*, *DC Appleseed Ctr. for L. & Just., Inc. v. D.C. Dep't of Ins., Sec., & Banking*, 214 A.3d 978, 995 (D.C. 2019) ("When a party asks us to affirm an agency's decision for a reason not relied on by the agency, we thus ordinarily remand the case for the agency's consideration in the first instance of the reason advanced by the party seeking affirmance.") (internal quotation marks omitted).



The Board also argues in this court that Mr. Uhar failed to present adequate evidence to support a claim that Il Canale engaged in fraudulent conduct. The Board's decision did not rest on that conclusion, however, and we are unable to affirm the Board on that alternative rationale. *Newell-Brinkley*, 84 A.3d at 59; *DC Appleseed*, 214 A.3d at 995.

For the foregoing reasons, we vacate the Board's order and remand for further proceedings with respect to Mr. Uhar's claim that Il Canale's owner lacked good character because Il Canale made fraudulent misstatements in administrative proceedings.

*So ordered.*

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO  
Clerk of the Court

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Presiding Administrative Law Judge

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