UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2306

September Term, 2014

HWAN YONG, *et al.*

v.

BOARD OF LIQUOR LICENSE COMMISSIONERS FOR BALTIMORE CITY

Berger,
Nazarian,
Zarnoch, Robert A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: January 7, 2016

In 2014, Baltimore City police conducted an investigation which determined that appellant M&M Discount Liquors[1] had sold alcohol to an under-age purchaser. The police referred the incident to appellee, the Board of Liquor License Commissioners for Baltimore City (the "Board"), which issued a show-cause notice alleging a violation of Board rules. After a hearing held on July 24, 2014, the Board found that Licensee had committed the alleged violation, and subsequently fined Licensee $500. Licensee appealed the Board's decision to the Circuit Court for Baltimore City, which held a hearing on December 3, 2104, and affirmed the decision of the Board. Licensee then filed a timely appeal to this Court. Two questions are presented for our review:

I. Did the Liquor Board err in finding the licensee guilty of violating Liquor Board Rule 4.01(a)?

II. Did the Liquor Board deny the licensee a fair hearing by allowing the testimony of Julius Colon and City Council member Sharon Middleton?

For the reasons that follow, we affirm the decision of the circuit court.

BACKGROUND

The following description of events was recounted by Detective Olafeme Akinwande during his testimony at the hearing before the Board on July 24, 2014. On February 7, 2014, Detective Akinwande, Detective L.C. Greenhill, and Sergeant Detective Chris Leisher[2] of the Baltimore City Police Department conducted an

[1] Hwan Yong is the liquor licensee on behalf of Yong's Place, Inc. trading as M&M Discount Liquors. We will refer to Mr. Yong and M&M Discount Liquors collectively as "Licensee."

[2] Detective Leisher is referred to as Det. Lisha in the transcript of the hearing.

investigation in which a police cadet, Gregory McCoy, who was under the legal drinking age of 21, attempted to purchase alcohol from establishments in Baltimore City. McCoy entered M&M's Discount Liquors, located near Pimlico Race Course, to attempt to purchase alcohol. The other members of the investigative team waited nearby in a parked car.

Inside the liquor store, McCoy succeeded in purchasing a 375 ml. bottle of rum with a marked $20 bill and received change from the clerk. The store clerk did not ask McCoy to provide proof of his age. McCoy then exited the store holding the bagged bottle of alcohol and alerted the members of the investigating team. Immediately after reuniting with the other police officers, the investigatory team entered the store and advised the clerk that he had sold an alcoholic beverage to a person under the age of 21. The officers specifically indicated to the clerk that Cadet McCoy was the under-aged person, and while in the store, the cadet was photographed with the alcohol he purchased. Detective Greenhill retrieved the marked $20 bill from Licensee's register and returned the change and the alcohol to the store clerk. Later that day, after finding out about the underage-buy, Licensee fired the store clerk who had sold the alcohol to McCoy.

Licensee was referred to the Liquor Board for violation of Rule 4.01(a), which prohibits the sale of alcohol to a person under the age of 21. On July 7, 2014, the Board issued a show-cause notice instructing Licensee to appear for a suspension or revocation hearing on July 24, 2014. At the hearing, Det. Akinwande testified to the investigation described above and the events of February 7, 2014.

McCoy, who was participating in orientation at the Baltimore City Police Academy, did not attend the hearing; however, Det. Akinwande testified about McCoy's age and other aspects of the operation. Akinwande recounted that "police cadet Gregory McCoy conducted an underage alcohol buy investigation at M&M Discount Liquors, which is located at 5142 Park Heights Avenue." The following colloquy occurred between Akinwande, defense counsel, and the Board:

> [AKINWANDE]: I observed Cadet McCoy, who was under the age of --
>
> [DEFENSE]: Objection.
>
> [CHAIRMAN][3]: Overruled. Go ahead.
>
> [AKINWANDE]: -- entering the aforementioned location via the front door.

Although the transcript of the hearing did not record whether Det. Akinwande mentioned Cadet McCoy's age during the above exchange, Akinwande further testified that, after McCoy notified them of the alcohol violation, Akinwande and two other detectives entered M&M's Discount Liquors and advised the store clerk that the clerk "had just sold an alcoholic beverage to a person who was under the age of 21, which was Cadet McCoy."

Defense counsel then questioned Det. Akinwande about his personal observations on the day of the alcohol-buy. Akinwande stated that he observed McCoy enter the store with a marked $20 bill, while he and the other officers waited in a police vehicle parked on the same block. After several minutes, Akinwande saw McCoy leave the store with

[3] The Board chair was former circuit court judge Thomas Ward.

the alcohol in hand. Akinwande then returned to the store with McCoy and the other detectives to return the alcohol. After this testimony and upon learning that McCoy would not be testifying, defense counsel moved to strike as hearsay all of Det. Akinwande's testimony concerning McCoy, including the cadet's age and the fact that the store clerk had sold liquor to the cadet. The Liquor Board overruled the motion.

Subsequent to Akinwande's testimony, the Board heard testimony from Julius Colon, a Park Heights community member, and from Baltimore City Councilmember Sharon Middleton. Defense counsel objected to the testimony from both witnesses, arguing that it was not appropriate for the Board to hear from community representatives in a violation hearing. Chairman Ward agreed with defense counsel:

> I agree with you on the, any testimony that doesn't apply to your case, which I don't think any of their testimony does. . . . So I, and I'm sure my fellow commissioners are listening as a courtesy to the community representatives who are coming in and telling us the problems as they exist in the area wide period. But we're not applying these problems to your client at this time . . . on these charges.

Defense counsel then reiterated his motion and argued that the testimony would "take[] away from the propriety of the board's function." The Chairman again agreed: "With respect to your motion, . . . I instruct my fellow commissioners not to accept any testimony that doesn't apply directly to the facts of this case, with respect to punishment or . . . responsibility or lack of responsibility." With those instructions, the Board allowed Mr. Colon and Councilmember Middleton to testify.

Mr. Colon testified that on the block where Licensee is located, there has been constant crime, drug trafficking, and loitering. He noted that there were three liquor

stores on the block and that none of the liquor stores were addressing the problems with crime in the area. Councilmember Middleton stated that she was attending the Liquor Board hearings that day specifically because Licensee's liquor store had a negative history. In response to that statement, Chairman Ward declared that the Board could only consider violations over the past three years, and Executive Secretary for the Board, Michelle Bailey-Hedgepeth, informed the Board that Licensee had no violations on record during this period. The Chairman, however, said generally that the Board would recommend immediate closure for problematic liquor establishments and suggested that the City Council could pass tougher liquor laws.

After the Board's attorney rested, defense counsel called the Licensee, Mr. Yong, who testified that he was not present at the time of the alleged transaction and that he dismissed the store clerk the day of the incident. Mr. Yong also testified that he had been given a commendation by the Board during a prior year for not providing alcohol to a minor during a similar investigation. Neither the Board nor the Licensee introduced other evidence, such as statements by Cadet McCoy, his driver's license or his birth certificate, and no other evidence bolstered or contradicted Det. Akinwande's testimony.

At the conclusion of the hearing, the Board found that the Licensee violated Rule 4.01. Chairman Ward stated:

> Whether or not you've been violating or not violating the law all along is certainly not a mitigation of violating the law. It's very nice and I'm glad to hear it and our, our fine that I'm about to impose is very reasonable under the circumstances. Five hundred dollars, I find him responsible, $500 plus costs…

The Licensee appealed the ruling to the circuit court. After a hearing held on December 3, 2014, the court affirmed the decision of the Board. Licensee noted his appeal to this Court on December 22, 2014.

DISCUSSION

I. Decision of the Liquor Board

Licensee argues that the Board erred in accepting hearsay testimony and in finding that it violated Rule 4.01(a).[4] The Board responds that Det. Akinwande's testimony, although hearsay, was competent evidence and that its finding of a violation was supported by substantial evidence.

Our review of the Board's decision is the same as that of the circuit court:

> [T]he action of the local licensing board shall be presumed by the court to be proper and to best serve the public interest. The burden of proof shall be upon the petitioner to show that the decision complained of was against the public interest and that the local licensing board's discretion in rendering its decision was not honestly and fairly exercised, or that such decision was arbitrary, or procured by fraud, or unsupported by any substantial evidence, or was unreasonable, or that such decision was beyond the powers of the local licensing board, and was illegal. The case shall be heard by the court without the intervention of a jury.

Md. Code (1957, 2011 Repl. Vol.), Art. 2B, § 16-101(e)(1)(i). Thus, our review of the decision of the Board is similar to our review of decisions of other administrative agencies—in short, if the Board's decision was supported by substantial evidence, and if

[4] Liquor Board Rule 4.01(a) states: "No licensee shall sell or furnish alcoholic beverages to any person under twenty-one (21) years of age or to any person with the knowledge that such person is purchasing or acquiring such beverages for consumption by any person under twenty-one (21) years of age."

it committed no error of law, we must affirm. *Paek v. Prince George's County Bd. of License Com'rs*, 381 Md. 583, 590 (2004).

The Licensee first argues that the Board's decision was not based on substantial evidence because the Board did not have direct evidence of Cadet McCoy's age and because Det. Akinwande did not explain the basis for his assertion that McCoy was under the age of twenty-one. We disagree.

Det. Akinwande testified to the events leading up to and after the sale of alcohol to McCoy. He was part of the team that organized the operation, and he personally observed McCoy enter the liquor store and exit with a bottle of hard liquor. Akinwande observed the marked $20 bill, and recounted that the same marked bill was recovered from the store register after the transaction. Based on his participation in the operation, Det. Akinwande did not have to personally observe the transaction in the store to know that Licensee had sold or furnished the alcohol. Given these facts, the Board could reasonably conclude that a sale took place.

The detective testified that McCoy was under the age of 21 when describing the aftermath of the sale. He recounted that he informed the store clerk that the clerk "had just sold an alcoholic beverage to a person who was under the age of 21, which was Cadet McCoy." It is important to note that the Licensee did not introduce any evidence that would have disputed McCoy's age or shown it to be over twenty-one. Licensee did not, when given the opportunity, cross-examine the Det. Akinwande about the basis for his knowledge of the McCoy's age. This is not surprising because McCoy was presumably chosen for the investigation precisely because he was under the age of 21. In

the words of the Appellee: "The entire investigation was predicated on underage alcohol sales, and the cadet was participating as the underage buyer. If the cadet had been of legal drinking age, it would have rendered the entire investigation futile." Finally, the Licensee testified that he fired the store clerk on the evening of the operation. Given the above testimony, a "reasoning mind" could conclude based on the evidence that McCoy was under 21 and, consequently, that Licensee sold or furnish alcohol to a person under age of 21. We hold that substantial evidence supported the Board's finding of a violation.

The Licensee also argues that, pursuant to the *Accardi* doctrine, the Board violated its own policy requiring cadets to appear in person for hearings on Rule 4.01(a) violations.[5] The *Accardi* doctrine, originally articulated by the Supreme Court in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and adopted by the Court of Appeals in *Pollock v. Patuxent Institution Bd. of Review*, 374 Md. 463 (2003), is a requirement that "an administrative agency [must] generally follow its own procedures or regulations." *Pollack*, 374 Md. at 467 n.1. On appeal, a court may reverse a decision of an administrative adjudicator if it failed to abide by its procedures. *See id.*

However, in this case, Licensee fails to provide a citation to or documentation of any preexisting Board policy that specified that, in the words of Licensee, "the Liquor

[5] The parties dispute whether a subpoena was actually issued for Cadet McCoy. At one point during the hearing, Executive Secretary Bailey-Hedgepeth stated that McCoy was served with a subpoena. However, in its brief, the Board asserts that this statement was erroneous and that no subpoena was issued for McCoy. Nevertheless, both parties acknowledge that Licensee was under the impression that the Board had issued a subpoena for McCoy to appear at the hearing.

Board would not go forward with a Rule 4.01(a) violation hearing without the live testimony of the Cadet." Nevertheless, even if we assume that such a policy did exist, Licensee at most describes an informal rule and not a regulation or procedure. The Board was free to deviate from a policy that did not "carry the force of law." *Cf. McClure v. Montgomery County Planning Bd. of Maryland-Nat. Capital Park & Planning Comm'n*, 220 Md. App. 369, 386 (2014) (declining to impose *Accardi* doctrine when planning board's decision contradicted guidance document and not a regulation).

Further, as the Board notes, Licensee could have requested a subpoena for McCoy, but failed to do so. *See* Article 2B § 16-410(e) (acknowledging that a party may request subpoenas and that the Board may charge fees for the production and service of summonses and hearing notices). Thus, "he has effectively waived his right to complain about" McCoy's failure to appear at the hearing. *See Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 418 (1997) (Citations omitted) (holding that where a party forgoes his or her right to subpoena a witness, that party may not object to that witness's absence).

The Licensee next argues that the Board erred in admitting hearsay testimony from Det. Akinwande and that, because hearsay constituted the only evidence before the Board, he was denied a fair hearing. Although the Board is not subject to the requirements of the Maryland Administrative Procedure Act, Maryland Code (1984, 2014 Repl. Vol.), State Government Article § 10-201, *et seq*. ("APA"), as a quasi-administrative agency, the APA provides guidance concerning the propriety of evidentiary rulings by the Board. *See Dakrish, LLC v. Raich*, 209 Md. App. 119, 137 (2012). Section 10-213 states, in pertinent part:

> (b) The presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence.
>
> (c) Evidence may not be excluded solely on the basis that it is hearsay.

Indeed, that section of the APA codified the common law rule generally applicable to administrative agencies, articulated by the Court of Appeals in *Redding v. Bd. of County Com'rs for Prince George's County*, 263 Md. 94, 110-11 (1971) ("[Hearsay] evidence is admissible before an administrative body in contested cases and, indeed, if credible and of sufficient probative force, may be the sole basis for the decision of the administrative body"). From this rule, "'[i]t follows, therefore, that hearsay evidence that is [generally] inadmissible in a judicial proceeding is not necessarily inadmissible in an administrative proceeding[,]' so long as the hearsay's admission into evidence observes the basic rules of fundamental fairness." *Para v. 1691 Ltd. P'ship*, 211 Md. App. 335, 381-82, *cert. denied,* 434 Md. 314 (2013) (Citations and emphasis omitted).

Stated differently, whether hearsay evidence is admissible is a function of its competency. The "competency calculus" comprises three considerations: "the evidence's probative value, reliability, and fairness of its utilization[.]" *Travers*, 115 Md. App. at 413. As we stated in *Para v. 1691 Ltd. Partnership*:

> This calculus is applied in a two-step process. First, one must consider the hearsay's reliability and probative value. Once the offered hearsay is deemed sufficiently reliable and probative, one must then consider whether the hearsay's admission contravenes due process. Therefore, "[h]earsay evidence is admissible before an administrative forum in contested cases and, if such evidence is credible and sufficiently probative, 'it may be the sole basis for the decision of the administrative body[,]'" as long as the relaxed rules are not misapplied in an arbitrary or oppressive manner, depriving the party of his or her right to a fair hearing.

211 Md. App. at 381-82 (Internal citations and emphasis omitted). Thus, hearsay is generally admissible in administrative proceedings and may provide the sole basis for the Board's decision if the hearsay is reliable, probative, and does not contravene due process.

There were no indications at the hearing that Det. Akinwande's testimony was unreliable, and, on appeal, Licensee does not dispute that the testimony was probative and reliable. Licensee had ample opportunity to question Det. Akinwande about "when, where, and how the hearsay statements were made[,]" *Travers*, 115 Md. App. at 416, but chose to focus on other aspects of the operation during cross-examination.

Licensee instead relies upon *Kade v. Charles H. Hickey Sch.*, 80 Md. App. 721 (1989), and *Johnson v. Criminal Injuries Comp. Bd.*, 145 Md. App. 96 (2002), to argue that he was not afforded a fair hearing because he could not cross-examine Cadet McCoy. These cases are inapposite because the hearsay in each was not sufficiently reliable and, in *Kade*, the record contained other testimony that contradicted the hearsay at issue. In *Kade*, this Court found the hearsay to be unreliable because the statements were not sworn, did not reflect the circumstances under which they were prepared, and were not dated or verified. 80 Md. App. at 726. Further, there was no indication as to whether the declarants were competent witnesses and "[n]o reason was given as to why the declarants were unavailable." *Id.* In *Johnson*, a hearing examiner denied the Johnson's claim for compensation based upon the speculative hearsay statement of a police officer that Johnson was a drug dealer and that he was probably shot while involved in a drug

transaction. This Court affirmed the circuit court's reversal of the agency's determination because neither the court nor the agency had any way to judge "the credibility of the source" of the information.

In contrast to the cases he relies upon, the Board here relied upon a credible source with first-hand knowledge of the alleged violation, Det. Akinwande. The Licensee here did not produce testimony that called into question the reliability of the hearsay evidence. We conclude that Det. Akinwande's testimony was "credible and sufficiently probative" and that the Board did not misapply the evidentiary rules "in an arbitrary or oppressive manner, depriving the party of his or her right to a fair hearing." *Travers*, 115 Md. App. at 412 (citing *Comm'n on Med. Discipline v. Stillman*, 291 Md. 390, 422 (1981)).

We are satisfied that Det. Akinwande testimony provided substantial evidence for the Board to find a violation in this case and did not deprive Licensee of a fair hearing. As an aside, however, we believe that the Board could avoid such challenges in the future by placing underage, undercover witnesses on the stand. To this end, the Board could use its subpoena power in Article 2B § 16-410(b)(1) to ensure relevant witnesses and documents appear before it at the enforcement hearing.[6]

[6] Article 2B § 16-410(b)(1) states: "For the purpose of all hearings and inquires which the board is authorized to hold and make, the board may issue subpoenas for witnesses, and administer to them oaths or affirmations."

II. Testimony of Community Members

In its second contention, Licensee argues that the Board denied him a fair hearing by allowing Julius Colon and Councilmember Sharon Middleton to testify, even though neither witness had information relevant to the enforcement proceeding before the Board.

In an enforcement proceeding, a liquor board must conduct a fair hearing and comply with all other laws, including due process. *Bd. of License Comm'rs For Prince George's County v. Glob. Exp. Money Orders, Inc.*, 168 Md. App. 339, 350 (2006). We presume that the members of the Board carry out their duties in an impartial manner. *See State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 568 (2014) (quoting *Coddington v. Helbig*, 195 Md. 330, 337 (1950)) (noting that courts assume the competency of administrative officials unless their exercise of discretion is fraudulent or corrupt).

Licensee argues that he was not afforded a fair hearing, due to the presence of the community members' testimony and as revealed by the Chairman's own statements—especially his suggestion to Councilmember Middleton that the City should pass tougher laws on liquor licensed establishments and his declaration that "licenses are a privilege, not a right". On the contrary, Chairman Ward specifically acknowledged that the Board's considerations were restricted to the evidence of the violation in the hearing.

Chairman Ward stated that the Board would not "accept any testimony that doesn't apply directly to the facts of this case," and indicated that the Board was only listening to the witnesses "as a matter of courtesy." Chairman Ward fulfilled this assurance and, during the community members' testimony, demonstrated that the Board's

deliberations were confined to the issue at hand. For example, when Mr. Colon described the area in which the Licensee operates as a high crime area, the Chairman responded by mentioning steps that could be taken to alleviate these issues, but concluded that "this case here has absolutely nothing to do with that." Similarly, when Councilmember Middleton asked the Board to consider the "negative history" of the liquor store, Chairman Ward responded that the Board could only consider offenses within a three-year review period and stated that "as before me right now . . . there's no evidence of any prior offense." Although the Liquor Board allowed the community witnesses to testify, it did not take into account any of their irrelevant testimony, and did not demonstrate partiality.

Licensee also asserts that members of the Board without judicial experience may be more easily swayed by certain, prejudicial testimony. Licensee's assertion is, however, directly controverted by the presumption that all Board members are competent. *See State Ctr., LLC*, 438 Md. at 568. With no evidence to the contrary and in view of the stern warning given by Chairman Ward, we may presume that the lay members of the Board were not influenced by the community members' testimony.

It has not escaped our notice that the Board imposed a relatively small fine on the Licensee. Even though the Board could have imposed a harsher punishment, the Board subjected the Licensee to only a $500 fine. In sum, neither the statements nor the actions by the members of the Board demonstrate bias. We are satisfied that the Licensee was afforded a fair hearing.

We do, however, acknowledge Licensee's concerns that the testimony of community witnesses—who do not possess direct knowledge of the alleged violation—in an enforcement hearing might create the appearance of bias on the part of the Board. We agree that a witness should be called only if he or she can testify to evidence relevant to the particular alleged violation at issue in the proceeding. Such a procedure could be accomplished by asking a few preliminary questions of the witnesses to determine their intentions and knowledge. While in this case, we are satisfied that Licensee suffered no prejudice, we note that, under a different scenario and without the Board's careful disclaimers, calling witnesses that have no relevant testimony might create the appearance of impropriety.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.