Circuit Court for Baltimore City
Case No. 24C15002297

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2647

September Term, 2015

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IAN PARRISH, *et al.*

v.

BOARD OF LIQUOR LICENSE COMMISSONERS FOR BALTIMORE CITY

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Berger,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Reed, J.

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Filed: June 29, 2018

In this appeal, Ian and Charles Parrish (collectively "Appellants") challenge the decision of the Circuit Court for Baltimore City, which affirmed a decision of the Board of Liquor License Commissioners for Baltimore City ("the Board") to nullify an application to transfer a liquor license. Appellants' application to transfer a liquor license was conditionally approved; however, when the transfer was not completed, as directed by what is currently MD. CODE ANN., ALCO. BEV. §12-1705, the transfer application was nullified and the liquor license was thereby considered expired. Appellants filed a Petition for Judicial Review in the Circuit Court for Baltimore City, where the decision was affirmed. They filed a timely appeal and present three questions for our review, which we rephrase for clarity:

1. Did the Board err in its interpretation of Article 2B §10-503(d)(4)?
2. Did the Board err in concluding that the license had expired pursuant to Article 2B §10-504(d)?
3. Did the Board err in failing to recuse Commissioner Moore from the proceedings?

We answer each question in the negative and affirm the decision of the circuit court.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellants Ian Parrish and Charles Parrish, applicants on behalf of Baltimore Eagle, LLC, applied for a transfer of ownership of a class BD-7 liquor license[1] to be operated at the same location as the previous owners: 2020/2022 North Charles Street, Baltimore, MD, 21201. The transfer application was conditionally approved on December 6, 2012, subject

[1] A class BD-7 liquor license holder may serve beer, wine, and liquor in a tavern.

to obtaining inspections, approvals, and permits from various governmental agencies necessary to open and operate the tavern.

After purchasing the property, Appellants closed the business and undertook extensive renovations necessary for the business to operate. By letter dated February 22, 2013, Appellants notified the Board that due to the necessary repairs the transfer could not be completed within 180 days. Thereafter, Appellants met with the Board over two dozen times over the next two years to apprise the Board of the status of the project. On March 12, 2015, the Board conducted a hearing regarding the pending transfer of the license. Appellant, Ian Parrish, testified that they had spent over $150,000 in repairs and advised the Board of the timeline of the various stages and hurdles to re-opening the business. Several witnesses testified both in support and opposition of Appellants' business, including members and presidents of community associations.

At the hearing, the Board informed Appellants that Article 2B §10-503(d)(4)[2] would be interpreted such that a license transfer must be completed within 180 days of approval, and if not, the application would be nullified. Given that the business had been closed for over two years, the Board also questioned whether the underlying license had expired. After some debate, the Board agreed to postpone a finding on that issue so that Appellants could submit a memorandum of law on the appropriate interpretation of §10-503(d)(4) –

[2] Article 2B was repealed effective July 1, 2016 and re-codified as the Alcoholic Beverages Article of the Maryland Annotated Code. The relevant provision now appears at §12-1705 of the Alcoholic Beverages Article. To prevent confusion, we use the prior versions of the applicable statutes.

whether the statute is mandatory or directory. The Board continued the hearing to April 9, 2015.

Appellants submitted the memorandum, arguing that the statute should be interpreted as directory, not mandatory, in light of the practice and policy of previous Boards. Appellants cited five cases from the prior liquor board and eight cases from the current Board, where the Board granted extensions to complete liquor license transfers beyond the 180-day deadline. The memorandum urged the Board to continue the practice of granting extensions when the applicants have shown efforts toward completing the transfer.

The April 9, 2015, hearing began with Appellants moving for Commissioner Moore to be recused, alleging that she made comments on social media regarding the pending matter. Commissioner Moore explained that she had not discussed the merits of the issues in front of the Board, and that her comments were limited to a separate policy issue not involved in Appellants' case. Later during the hearing, the Board admitted into evidence testimony by State Senator George Della, in an unrelated hearing, for the purpose of establishing the legislative history of §§10-503 and 10-504. This testimony included the fact that Senator Della sponsored the bill adding the 180-day rule to the statute and that, in his view, the 180-day transfer deadline was intended to be mandatory.

At the conclusion of the hearing, the Board voted unanimously that: (1) Article 2B §10-503(d)(4) is a mandatory provision and that because the license was not transferred within 180 days after the Board approved the transfer, the transfer application was nullified, (2) that as a result of the nullification of the transfer application, the liquor license had

expired due to non-use under Article 2B §10-504(d), and (3) Commissioner Peterson-Moore would not be recused from the proceedings.

Appellants filed a Petition for Judicial Review of the Board's decision with the Circuit Court for Baltimore City. On December 22, 2015, the court affirmed the decision of the Board. Appellants timely filed this appeal.

## DISCUSSION

### A. Parties' Contentions

Appellants argue that Article 2B §10-503(d)(4) should be interpreted as directory, not mandatory, because the statute states: "A transfer of any license shall be completed not more than 180 days after the Board approves the transfer."[3] Despite the use of the word "shall," Appellants contend that "from [the statute's] inception . . . all prior and the then current Liquor Board applied a directory construction." Specifically, Appellants cite advice of counsel dated April 12, 2006, in which the Assistant Attorney General advised the Board to apply the rule in a directory manner.[4] Further citing the advice of counsel, Appellants argue that the statute should also be interpreted as directory because there is no sanction specified for non-compliance. *See Woodfield v. West River Improvement Ass'n, Inc.*, 395 Md. 377 (2006).

[3] The statute now reads: A transfer of a license shall be completed on or before 180 days after the Board approves the transfer. §12-1705.

[4] The advice of counsel was written by Assistant Attorney General Gerald Langbaum.

Appellants also contend that the only issue before the Board was the validity of the pending transfer application, not the validity of the liquor license itself. Assuming the statute requires mandatory construction, Appellants insist that the only result would be nullification of the transfer application, not the license. Appellants maintain that nullification of the liquor license would require a factual determination of how long the premises has remained closed or ceased active alcoholic beverage business operations per Article 2B §10-504(d).[5] Appellants conclude that since "no facts were made regarding this issue," the Board "exceeded its authority" in finding that the license had expired.

Lastly, Appellants argue that Commissioner Moore's failure to recuse herself requires a remand before an impartial Board. Appellants contend that Commissioner Moore's impropriety was evidenced by, among other things, her status as past president and current member of the Charles Village Civic Association, which opposed the transfer, and her social media activity. Appellants suggest that Commissioner Moore's participation "has so tainted the proceedings that a reasonable observer could not conclude that she avoided the appearance of impropriety." *Regan v. Bd. Of Chiropractic Examiners*, 335 Md. 397 (1999).

Conversely, the Board argues that §10-503(d)(4) is unambiguous and dictates a mandatory, not directive, deadline of 180 days. The Board urges this Court to begin and end our interpretation of the statute with its plain language and find that the word "shall" is mandatory. The Board asserts that "nothing in the language of the transfer provision or

[5] Now codified at §12-2202(a) of the Alcoholic Beverages Article.

any related provision of Article 2B" suggests that the 180-day deadline is merely directory. Rather, the Board argues, "[w]hen the Legislature commands that something be done, using words such as 'shall' or 'must' . . . the obligation to comply with the statute or rule is mandatory." *State v. Green*, 367 Md. 61, 82 (2001). Even if past Boards allowed uncompleted transfers to extend beyond 180 days, the Board argues that "these informal accommodations do not supersede the clear language of the statute."

The Board contends that the underlying liquor license also expired by operation of law after the transfer application was nullified. Noting that a liquor license expires 180 days after a license holder closes the business or ceases active alcohol business operations, the Board argues that the license expiration was automatic. Art. 2B §10-504(d)(2).

The Board also maintains that Commissioner Moore should not have been recused from the proceedings because her online comments do not show any evidence of bias or impartiality. In fact, the Board contends that Commissioner Moore only discussed the "200-foot rule" which had no bearings on the issues in this case.[6] Any other reason presented by Appellants that Commissioner Moore should have been recused, the Board asserts, is waived because Appellants failed to raise them before the Board at the hearing. Alternatively, the Board argues that if it did err in failing to recuse Commissioner Moore, the error was harmless.

[6] The "200-foot rule" limited those who could appear before the Board to persons living or operating a business within 200 feet of the subject premises.

**B. Standard of Review**

By statute, the action of a local liquor board is presumed to be proper and places the burden of proof upon the licensee to show that the decision complained of was arbitrary, fraudulent, unsupported by substantial evidence, illegal, or against the public interest. Art. 2B §16-101(e)(1)(i).[7] "In liquor board cases, as in other judicial reviews of administrative agencies, [this Court] examine[s] the decision of the board, not the circuit court." *Woodburn's Beverage, Inc.* v. *Bd. of License Comm'rs for Calvert Cty.*, 216 Md. App. 543, 553-54 (2014) (citing *Dakrish LLC v. Raich*, 209 Md. App. 119, 141 (2010)). We thus review the Board's factual findings for substantial evidence and its conclusions of law *de novo*. *Id*. at 554; *see also, Prigel Family Creamery*, 206 Md. App. 264, 248 (2012) ("[we] determine whether the agency's decision is in accordance with the law or whether it is arbitrary, illegal, and capricious.").

This Court, may however, substitute our judgement for that of the Board, but only on questions of law. *See Blackburn v. Bd. of Liquor License Comm'rs for Balt. City*, 130 Md. App. 614, 624 (2000) ("Of course, the reviewing court may substitute its judgment for that of the Board on questions of law."). In deciding whether to substitute its judgment on a question of law, a court should accord a degree of deference to the position of the administrative agency. *See Md. Aviation Admin. v. Noland*, 386 Md. 556, 572 (2005) ("Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.").

[7] The statute now appears at §4-905 of the Alcoholic Beverages Article.

## C. Analysis

### 1. Statutory Interpretation of §10-503(d)(4)

Appellants' case hinges on whether we interpret Art. 2B §10-503(d)(4) as mandatory or directory. As questions of statutory interpretation are questions of law, we review the issue *de novo*. Appellants' main argument is that we should interpret the statute as directory, rather than mandatory, because that has been the common practice of the Board. The Board, on the other hand, suggests that we adhere to the plain language of the statute and find it to be mandatory. We agree that the use of the word "shall" is directory. After all, we are bound by the language of the statute, case law, and legislative intent. Nevertheless, we urge the Board to interpret the language of the statute uniformly across all cases instead of those in which it deems the directory nature applies or where it does not, which we believe the Board did in this case.

Statutory interpretation begins by reviewing the plain language of the statute "viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute." *Koste v. Town of Oxford*, 431 Md. 14, 26 (2013) (citations omitted). "If statutory language is unambiguous when construed according to its ordinary and everyday meaning, then we give effect to the statute as it is written." *Kushell v. Dep't of Natural Res.*, 385 Md. 563, 577 (2005).

As noted above, Art. 2B §10-503(d)(4) states that "[a] transfer of any license *shall* be completed not more than 180 days after the Board approves the transfer." (emphasis added). The plain language makes it clear that the statute is mandatory. Maryland courts have consistently held that the use of "shall" in a statute means that the requirements set

forth by the statute are mandatory. *See, e.g., Johnson v. State*, 282 Md. 314, 321 (1978) (Stating that use of the word "shall" in a statute "denotes an imperative obligation inconsistent with the exercise of discretion."); *Moss v. Director*, 279 Md. 561, 564-65 (1977) ("It is now a familiar principle of statutory construction in this State that the use of the word 'shall' is presumed mandatory unless its context would indicate otherwise . . ."); *G&M Ross Enterprises, Inc. v. Bd. of License Comm'rs of Howard Cty.*, 111 Md. App. 540, 543 (1995) (explaining that "use of the word 'shall' is ordinarily presumed to be mandatory."); *Robinson v. Pleet*, 76 Md. App. 173, 182 (1988) ("Unless the context indicates otherwise, 'shall' and 'must' will be construed synonymously to foreclose discretion" and "impose a positive absolute duty.") (citations omitted). Similarly, "shall" is mandatory in this instance.

Furthermore, the purpose of the statute leads us to the same conclusion. This Court has previously recognized that the purpose of adding the 180-day transfer deadline "was to combat the practice of some license holders of applying and getting approval for license transfers but not actually transferring the license." *Yim, LLC v. Tuzeer*, 213 Md. App. 1, 32 (2013). Therefore, the purpose of the statute is to ensure license transfers actually take place, and its plain language states that they must occur within 180 days of transfer approval. In this case the transfer was not completed.

To further support their argument, Appellants bring our attention to *Woodfield v. West River Improvement Ass'n Inc.*, 395 Md. 377, 910 A.2d 452 (2006). When the case

was before this Court, we held that "shall" in §16-101(e)(3) of Article 2B was directory.[8] Specifically, we stated that "given the statutory history of §16-101, and the absence of any sanction for failing to meet its decisional deadline, the 90 day determination requirement is directory, not mandatory." *Woodfield v. West River Improvement Ass'n Inc.*, 165 Md. App. 700, 716, 886 A.2d 944 (2005). Although the Court of Appeals declined to "decide the issue precisely on [a mandatory/directory] basis," it reached a similar conclusion. *Woodfield*, 365 Md. at 388. The Court held that because the Legislature amended §16-101 to delete the sanction for non-compliance, it was clear that "the Legislature did not intend for noncompliance . . . to produce any automatic result." *Id*. at 391. Appellants argue that because there is also no sanction for non-compliance with §10-503(d)(4), we must find the same to be true in this case.

The case s*ub judice* is distinguishable from *Woodfield* for those two very reasons: legislative intent and sanctions. First, unlike the statute in *Woodfield*, §10-503(d)(4) was added to facilitate compliance with the liquor license process. As Appellants point out in their brief, "§10-503(d)(4) was initially enacted in 2000 . . . in conjunction with Article 2B §10-504(d) which implements a system of voiding liquor licenses that are not in use." By not transferring the liquor license within 180 days after approval, the application became

[8] Article 2B §16-101(e)(3) states:

> Unless extended by the court for good cause, the local licensing board's decision made under subsection (1) of this section shall be affirmed, modified, or reversed by the court within 90 days after the record has been filed in the court by the local licensing board.

null. Therefore, it appears to be the Legislature's intent to punish or otherwise sanction liquor license applicants who do not comply with the rules. This was not the case in *Woodfield*, where the sanction was removed from the statute.

We also note briefly that although it does appear to have been the practice of the Board to allow additional time to complete liquor license transfers beyond 180 days, we are not persuaded to order its continuance. "Maryland courts have made clear that an administrative practice contrary to the unambiguous language of a statute cannot be given effect." *Woodburn's*, 216 Md. App. at 558 (citing *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 66-67(1973)). Regardless, Appellants were allowed more time to complete their transfer because more than two years had passed between the conditional approval and the first status hearing. Therefore, we find that the Board did not err.

**2. Subsequent "death" of the liquor license**

Appellants contend that even if the language of §10-503(d)(4) is mandatory, the Board erred in concluding that the "license [was] dead" at the conclusion of the April 9, 2015 hearing. Appellants reason that the only issue before the Board was the status of the transfer application and that the Board would have to make a separate determination as to the status of the license itself. However, the record supports a conclusion that the status of the underlying liquor license was properly pending before the Board.

The expiration of liquor licenses is governed by §10-504(d) of Article 2B. Specifically, §10-504(d)(2) states:

> 180 days after the holder of any license issued under the provisions of this article has closed the business or ceased active alcoholic beverages business operations of the business for which the license is held, the license shall expire unless:
>
> (i) An application for approval of a transfer to another location or an application for assignment to another person pursuant to §10-503(d) of this subtitle has been approved or is then pending . . .

At the March 12, 2015 hearing, the Board stated:

> This license is effectively dead. And if you can give us something that revives, that shows that it would be revived, we would –we need to see it. And I think that the Chairman has said, he's going to give your attorney an opportunity to present legal memorandum that supports a finding the license is not dead. But that's really the issue here.

Appellants' transfer application was approved on December 6, 2012. Therefore, they had 180 days after that date, to open the business and continue alcoholic beverage operations before the license expired. Appellants made over two dozen visits to the Board apprising them of the construction on the business. Appellants further testified that the business has been closed and the record is silent to whether Appellants filed an exception for hardship, per the statute, that would have revived the license. Subsequently, the liquor license automatically expired after 180 days lapsed after the transfer application was approved. Therefore, there was substantial evidence before the Board for it to conclude that the license had expired. As we ruled in *Board of Liquor License Comm'rs for Baltimore City v. Austin,* 232 Md. App. 361 (2017), unless an exception for hardship has been filed with the Board within the 180 day period, the Board may properly find the license to be dead. In fact, the Board requested that Appellants submit documentation that would revive the

dead license. We thus find that as a matter of law, the Board did not err, and the liquor license was properly pending before the Board.

### 3. Failure to recuse Board Commissioner

Appellants' last argument is that the Board erred by refusing to recuse Commissioner Moore from the proceedings. Appellants allege that because Commissioner Moore was actively involved, and had been the past president, of the Charles Village Civic Association (one of the protestants of the license), it not only explained her behavior during the hearing but should have prompted her recusal.[9] They also ask us to consider subsequent comments she made on an online blog where she discusses a matter that was pending before her as commissioner. Appellants claim those comments demonstrate "an actual bias at worst and an appearance of impropriety at best." The Board responds that Commissioner Moore's conduct did not show any evidence of bias or impartiality. We find that the Board's decision not to recuse Commissioner Moore was not in error.

The standard when considering a request for recusal is an objective one: "whether a reasonable member of the public knowing all the circumstances would be led to the conclusion that the judge's impartiality might reasonably be questioned." *In re Turney*, 311 Md. 246, 253 (1987). At the April 9, 2015 hearing, after asking whether she wanted to recuse herself, Commissioner Moore testified as follows:

[9] During the March 12, 2015 hearing, Appellants describe a "violent eruption" by Commissioner Moore. Kelly Cross, president of the Old Goucher Community Association, testified in support of Appellants' efforts to complete the reconstruction and the liquor license transfer. In explaining the boundaries of his community association, Commissioner Moore stated that he was wrong and that Cross would make her "more than angry" if he tried to dispute it.

> I did not discuss the case at all. I simply talked about the 180 – about the 200-foot rule, and that that was the first decision, administration order, that Chairman Ward issued when we first became Commissioners, and that opened an opportunity for communities to participate in hearing liquor license matters that affect – that they could affect them. That's all I said. I didn't get involved in any discussion about Charles Village, or Goucher, or any issues regarding the Parrishes, or the Eagle Bar.
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> ***
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> And so because I have no bias, I have no preconceived notions about this case. I don't prefer one party over another.

Commissioner Moore's passionate behavior during the hearing may have been some evidence to support her recusal. However, because the Board voted unanimously in deciding this case, the outcome would have been the same even if Commissioner Moore had been recused. The Board based its decision on objective legal interpretation – the failure to transfer the license within 180 days. Commissioner Moore's recusal would not have affected that decision.

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