Circuit Court for Baltimore City
Case No. 24-C-18-002728

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2235

September Term, 2018

BING CHEN, *et al*

v.

BOARD OF LIQUOR LICENSE COMMISSIONERS FOR BALTIMORE CITY

Nazarian,
Leahy,
Harrell, Glenn T., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Harrell, J.

Filed: January 6, 2020

Appellants, Bing Chen, Jun Chen, and Chen's Liquors, Inc. (collectively referred to hereafter as "Chen" or "licensees"), argue that the Board of Liquor License Commissioners for Baltimore City ("the Board") acted improperly in its actions regarding a protest to the renewal of Appellants' liquor license in 2018. The Board initiated in March 2018 a protest of the renewal of the liquor license. The Board, in its notice to the licensees of the Board-initiated protest and hearing date, cited to three previous violations of the Md. Code's Alcoholic Beverages Article and the Rules and Regulations of the Board committed by Chen during the previous license year spanning April 2017-March 2018. During the hearing, the Board announced that it was following a new (hitherto unannounced) policy whereby, upon the occurrence of at least three separate violations in a single license year, the Board would initiate a protest of renewal against the offending licensees, irrespective of any other means by which a protest of renewal may be initiated. At the hearing, beyond the particularity of the three offenses laid out in the notice of Board-initiated protest of renewal, the Board allowed testimony and evidence from members of the public and government employees touching on issues that were not enumerated in the notice of protest of renewal. At the close of the evidence and by a vote of 2-1, the Board denied the renewal of Chen's liquor license, appearing to rely predominantly on the testimony of the public witnesses, more so than the identified three prior code violations.

Chen's complaints here are twofold. First, they argue that the Board erred in denying the request for renewal as the hearing and decision of the Board was beyond that permitted by statute. Citing Md. Code Ann., Al. Bev. § 12-1805, Chen contends that the

statutory language applicable in Baltimore City, which differs from the language applicable in virtually all other Maryland jurisdictions, limits protest of renewal hearings to only the things that were laid out specifically in the notice of protest of renewal by the Board. Second, Chen claims the Board was arbitrary and capricious in adopting its hitherto unannounced policy pertaining to Board-initiation of renewal protests.

The Board interprets the statutory scheme differently and claims that there is nothing in the text of the statute that limits the protest hearing to only those things that appear in the notice of protest of renewal. Further, the Board notes that the new policy was not arbitrary as the Board has ample discretion in when and why it revokes a license, and that the informal announcement of its new policy was proper.

We shall affirm the judgment of the circuit court.

FACTUAL BACKGROUND

Chen's business, enabled by the liquor license, was Chen's Liquor, Inc. t/a B&O Café, an establishment located at 1301-03 West Pratt Street in Baltimore. Chen obtained a liquor license that permitted her to serve beer, wine, and hard liquor at this location during the license year of 2017-18. During this inaugural year, Chen was found to have committed three violations of the Md. Code's Alcoholic Beverages Article and the Rules and Regulations of the Board.

The first violation occurred on 13 May 2017 when Chen failed to keep the tavern portion of her business open while the carry-out area was open and operating. The Board imposed on 20 July 2017 a fine of $625.00 for the violation. The second violation occurred

five days after the first, on 18 May 2017, and was for the same misconduct as the first violation. The Board imposed a fine for the second violation of $1,125.00 on 5 October 2017. The third adjudicated violation occurred on 19 December 2017, when Chen served alcohol to a person under the age of 21 years. For this violation, the Board imposed a fine of $625.00 on 1 March 2018. As is apparent, the Board elected not to suspend or revoke contemporaneously Chen's liquor license for any or all of these violations, imposing instead fines.

On 28 March 2018, the Board initiated a protest of renewal of Chen's license on the Board's initiative, pursuant to a statute of general application, Md. Code Ann, Al. Bev. § 4-406,[1] providing Chen with notice to appear for a hearing to consider whether the liquor license would be renewed. The notice stated "the Board brings this protest of renewal against the establishment in consideration of specific complaints that resulted in three (3) separate incidents that resulted in violations . . . ." The notice detailed the three violations committed by Chen during the previous license year.

[1] Md. Code Ann, Al. Bev. § 4-406 states:

(a) A protest against a license renewal may be made by:
  1) at least 10 signatories who are:
    i. Residents, commercial tenants who are not holders of or applicants for a license, or real estate owners; and
    ii. Located in the immediate vicinity of the licensed premises; or
  2) the local licensing board on its own initiative.

(b)
  1) If a protest against renewing a license is filed at least 30 days before the license expires, the local licensing board may not approve the renewal without holding a hearing.
  2) The local licensing board shall hear and determine the protest in the same manner as it hears and determines an original application.

The Board held the protest hearing on 19 April 2018. At the commencement of the hearing, the Board explained why it initiated the protest, a previously unannounced internal policy that "if there were licensees who had incurred three findings of guilty violations . . . during the license year, the previous license year, that they would come in for protests of renewal." Following this, the Board placed into the record findings related to the three violations on which the protest was initiated. The Board then opened the record to members of the community to testify.

One member of the community, Bif Browning, President of the Union Square Association (a community group representing an area across Pratt Street from the Chen establishment), testified[2] that Bing Chen had violated a memorandum of understanding ("MOU") with the Mt. Clare Community Council that she would install security cameras surveilling the exterior of the licensed premises and a kitchen.[3] Browning presented letters of opposition from each group. A member of the Baltimore Police Department, Sergeant Welton Simpson, Jr., testified that a number of 9-1-1 calls had been received from the vicinity of Chen's establishment and that trespassing and loitering outside the establishment were common occurrences. Sergeant Simpson provided also a hand-written call-for-services log and a statement of probable cause for an arrest that occurred at Chen's

[2] Mr. Browning claimed to represent also the Mt. Clare Community Council, another community group that claimed the area in which the Chen establishment was located.
[3] Bing Chen denied executing such an MOU or even being requested to do so. She acknowledged, however, being a member of the Mt. Clare Community Group, volunteering for certain of its projects and donating to its activities.

establishment. Mark Fosler, chief inspector for the Board, testified that 3-1-1 calls[4] were made complaining of loitering in the area.

Following the opposition's presentations, Bing Chen testified that she was untrained and ill-instructed by the prior owners of the licensed premises as it pertained to running properly a licensed establishment, resulting in an ignorance of the requirements that led to the first two violations. Chen's attorney before the Board then requested the Board to accept a proffer of testimony from a member of the community in attendance at the hearing, Teresa Holmes. The Board granted the request, and Chen's attorney stated:

> [Holmes] believes Ms. Chen works hard to keep the place clean and keep criminal activity out of it. She used to clean the bar . . . She told me out front before the hearing today that it would be a negative if the community lost the B&O Café because she and other—many other senior citizens stop by and get coffee there every morning, snacks, sodas, lottery tickets, lots of things other than alcoholic beverages. And that indeed I asked her—that many of those senior citizens also buy packaged goods there. And that she—there are just not enough options in the neighborhood to purchase retail products.

The Board voted ultimately (by a 2-1 majority) to deny renewal of Chen's liquor license. In the verbal explanations provided by the members of the Board for why they were voting for or against renewal, only passing references were made to the three violations mentioned in the notice of protest of renewal. The bulk of the reasoning for non-renewal focused on expressions of a lack of credibility in Bing Chen's testimony, a failure on her part to work successfully with the community associations, and concern that she could not operate the licensed business within the requirements of the law. Chen filed a

[4] 3-1-1 is a call number for "Non-Emergency and City Government Services" in Maryland.

petition for judicial review. The Circuit Court for Baltimore City affirmed the Board's decision on 16 August 2018.

QUESTION PRESENTED

Appellants present in their brief, the following question for review, which we have rephrased[5]:

I. Did the Board of Liquor License Commissioners for Baltimore City err in deciding not to renew Appellants' liquor license?
II. Did the Board of Liquor License Commissioners for Baltimore City properly initiate a protest of renewal under Md. Code Ann., Al. Bev. § 12-1805?

STANDARD OF REVIEW

Our review of a decision of the Board is governed by Md. Code Ann., Al. Bev. § 4-905, which states that "[o]n the hearing of a petition under this subtitle, the court shall presume that the action of the local licensing board was proper and best served the public interest." Further, the petitioner has the burden of proof to show that the decision by the Board was "against public interest" and "not honestly and fairly arrived at; arbitrary; procured by fraud; unsupported by substantial evidence; unreasonable; beyond the powers of the board; or illegal." *Id.* We consider also whether the Board's decision is supported by substantial evidence, such that we may not substitute our judgment on the evidence for that of the Board. *Blackburn v. Board of Liquor License Commissioners for Baltimore*

[5] Appellant's questions were stated thusly:
1. Did the Liquor Board err in refusing to renew the 2018 liquor license?
2. Did the Liquor Board act arbitrarily and capriciously in initiating the protest of renewal?

City, 130 Md. App. 614, 623–24 (2000). The Board's interpretation of statutory language in the area of its regulation is given "considerable weight," although we are not obliged to defer to an interpretation that we conclude is erroneous as a matter of law. *Board of Liquor License Commissioners for Baltimore City v. Kougl*, 451 Md. 507, 514 (2017).

DISCUSSION

The lead-off argument by Chen regarding the Board's error in refusing to renew the liquor license was that the Board opened the protest hearing to matters beyond the three violations identified in the notice of protest of renewal. Her contention is that Md. Code Ann., Al. Bev. § 12-1805—titled "[l]imitations on protest" and applicable only in Baltimore City—contains language that limits the Board in Baltimore City to only consider the "specific complaints" alleged in the initiation of the protest of renewal. Thus, by hearing and considering other complaints from members of the community the Board violated the statute. Implicit in this claim is that the Board was arbitrary and capricious in refusing to renew the license when its consideration was limited to the three violations alleged in the notice of protest of renewal. Because the Board fined Chen previously for those violations, imposing non-renewal of the license based on no new admissible information was arbitrary and capricious. Finally, Chen notes that the licensees were on notice to defend at the protest hearing only the three violations itemized in the notice of protest of renewal. Lack of advance notice of the matters raised thereafter by the community members raised the question as to whether the licensees received proper due process. In the face of this, we hold nonetheless that the decision of the Board was proper.

Md. Code Ann., Al. Bev. § 12-1805 (applicable only in Baltimore City, as we noted *supra*) states:

> To hear and determine a protest filed against a license renewal, the Board:
> 1) shall consider only issues with respect to a specific complaint as to the operation of the licensed premises; and
> 2) may not consider zoning issues.

In contrast, Md. Code, Ann. Al. Bev. § 4-406(b)(2), which is applicable to every other jurisdiction in Maryland,[6] specifies that a local board "hear and determine the protest in the same manner as it hears and determines an original application." In those jurisdictions, a local board may consider in the context of a renewal protest:

1) the public need and desire for the license;
2) the number and location of existing license holders;
3) the potential effect on existing license holders of the license for which application is made;
4) the potential commonality or uniqueness of the services and products to be offered by the business of the applicant;
5) the impact of the license for which application is made on the health, safety, and welfare of the community, including issues relating to crime, traffic, parking, or convenience; and
6) any other factor that the local licensing board considers necessary.

[6] Charles County is the only other county to which this section of the Maryland code does not apply without variation. Its limits on protests, however, are related to procedure rather than substance. Md. Code, Ann. Al. Bev. § 18-1804, titled "protests" and applicable only to Charles County states:

> Basis of protest; oath required
> a) A protest of a license renewal shall:
> 1) specify the basis on which the protest is made; and
> 2) be filed under oath.
> Denial of protest without hearing
> b) The Board without a hearing may approve a license renewal that is under protest if the Board finds that the basis of the protest lacks substance.

Md. Code, Ann. Al. Bev. § 4-210(a).

Chen argues that the limitation to "specific complaint[s]" means that the Board was only to consider evidence regarding the three violations that were the basis for the notice of protest. Rather than adhering to this supposed limitation, the Board "open[ed] the hearing up to any issue that anyone want[ed] to raise." Considering the available legislative history of this section of the Maryland code, we reject Chen's interpretation of § 12-1805.

The Court of Appeals has noted that the extensive and detailed nature of the statute related to alcoholic beverages limits what may be implied beyond the text of the statutory scheme. *Board of Liquor v. Hollywood*, 344 Md. 2, 13 (1996). The Court stated that:

> Rather than providing broad general guidelines, the General Assembly has chosen to closely control by statute even the more detailed aspects of the alcoholic beverages industry. This close regulation is perhaps partly due to the fact that, unlike other regulated areas, there is not a single agency that administers the alcoholic beverages law, but rather numerous local boards that are charged with its enforcement. Regardless of the reason for its enactment, the result of such a comprehensive statutory scheme is that the authority of administering agencies necessarily is more circumscribed than the typical administrative body. The Liquor Board thus differs fundamentally from those agencies to which the legislature more generously delegates the particulars of a regulatory scheme.

Thus, the plain language of the statute (and its place in the statutory scheme) determines most often how the General Assembly intended to limit a protest proceeding in Baltimore City. "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).

Md. Code Ann., Al. Bev. § 12-1805 was considered most recently in a code recodification exercise during the 2016 session of the General Assembly. The code recodification process endeavors ordinarily only to clarify or modernize archaic language, in this instance the provisions of former Md. Code, Art. 2B governing alcoholic beverage regulation. According to the revisor's note, new § 12-1805, effective 1 July 2016, "is new language derived without substantive change from former Md. Code Ann., Art. 2B § 10-301(a)(1)(v)," with any new language being "added for clarity," solely. Art. 2B, § 10-301(a)(1)(v), stated:

> If the protest has been filed it shall be heard and determined as in the case of original applications, except in Baltimore City it shall be heard and determined not as in the case of original application in regard to zoning but only a specific complaint as to the operation of the licensee's establishments.

There is no further elaboration in the legislative history as to why the 2016 code recodification changed the 2011 code. Thus, we conclude that the revisions were conducted without the intention of changing the substantive impact of the statute.

Looking further into the legislative past, the original precursor change occurred in 1969 Md. Laws, Chap. 724, stating:

> If such a protest has been filed it shall be heard and determined as in the case of original applications, EXCEPT IN BALTIMORE CITY IT SHALL BE HEARD AND DETERMINED NOT AS IN THE CASE OF ORIGINAL APPLICATION *in regard to zoning but only on a specific complaint as to the operation of said licensee(s) establishments*.[7]

Md. Code Ann., Art. 2B § 68(a) (1969). Prior to this, Baltimore City was subject to the same general provisions that governed all Maryland jurisdictions. This enactment occurred

[7] Formatting found in the original.

prior to 1975 when the Legislature became more mindful and consistent in maintaining documentation of legislative history, such as drafters' notes and committee bill files. Thus, it is not unexpected that we could find no documentary record as to why the Legislature made this change. Considering the plain language of these three iterations of the code (and their place in the context of the statutory scheme of alcoholic beverage regulation across the State) lends some clarity to our analysis of the legislative intent.

Linked intrinsically from the 1969 change through the modern code is the language of two individual sections of Md. Code Ann., Al. Bev. § 12-1805. Both the prohibition on hearing protests regarding zoning issues and the limitation that the Board only consider issues related to specific complaints as to the operation of the licensed establishment appear in each version. It excludes only zoning-related complaints as the basis for a protest, as might be the case otherwise in consideration of an original application or a protest elsewhere in the State. Although the meaning of "specific complaint" could be interpreted in a number of ways were it considered in the abstract, the consistent coupling with the limitation on zoning protests relieves any thoughts of ambiguity in the statute. The intention of the Legislature, it appears to us, was to prevent the Board in Baltimore City from considering zoning issues in protest matters, but not to foreclose consideration of any other reason for protest in the same manner as would be the case in other jurisdictions ("as in the case of original application"). Thus, all non-zoning specific complaints in Baltimore City are to be treated as in the case of an original application.

Although the current version of the code omits the prior language from its 1969 and 2011 predecessors referring to an original application, this omission is non-substantive. As

the revisor's note for § 12-1805 states, the "new language [was] derived without substantive changed." Thus, the removal of this language was deemed as surplusage and its omission has no impact on the limitations of what may be considered by the Board in license renewal protests.

The Board is limited only to the statutory limitations placed on it when considering original applications (save zoning matters), which are specified in Md. Code Ann., Al. Bev. § 4-210. This gives the Board the leeway to consider at the hearing "the impact of the license . . . on the health, safety, and welfare of the community, including issues relating to crime, traffic, parking, or convenience," among other things. *Id.* Examining the record before us as to what testimony and other evidence the Board considered in denying the renewal of Chen's license, the Board had a proper basis on which to deny renewal. The evidence concerned prevalent incidents of loitering, trespassing, and general discontent within the immediate community around the licensed premises about its operation, which bore on the "health, safety, and welfare of the community." Considering this, in addition to the previous violations, was not an error and was not arbitrary and capricious.[8]

Regarding whether the notice of protest provided to Chen was proper, we hold that this challenge is not properly before us to decide. Although Chen complains here that they were only on notice of defending against the three violations present in the notice of protest of renewal, this objection was not raised clearly prior to or at the hearing. To the contrary,

[8] As the Board was able to, and did, consider specific complaints beyond the three previous violations listed in the notice of renewal protest, we do not consider further Chen's argument that the Board was arbitrary and capricious in denying renewal based *only* on the violations.

Chen produced evidence defending against the claims raised by the neighbors, e.g., testimony that related to the establishment's handling of criminal activity in or adjacent to the business. Although it is beyond purview that the Board is required to provide procedural due process rights to the parties appearing before them, *see Maryland State Board of Pharmacy v. Spencer*, 150 Md. App. 138, 149 (2003) (quoting *Maryland State Police v. Zeigler*, 330 Md. 540, 559 (1993)), a "failure to object to the introduction of [evidence] at the administrative hearing constitutes a waiver of [the] right to argue the admissibility of the evidence." *Motor Vehicle Admin. v. Weller*, 390 Md. 115, 128 (2005) (citing *Cicala v. Disability Rev. Bd. for Prince George's Co.*, 288 Md. 254, 263 (1980)). This Court has held that failure to raise "adequacy of the notice" at an administrative hearing fails to preserve the issue for judicial review. *Bray v. Aberdeen Police Dept.*, 190 Md. App. 414, 432 (citing *Mayor of Ocean City v. Johnson*, 57 Md. App. 502, 516–17 (1984)).

As an alternative argument, Chen contends that, even if the decision of the Board was proper otherwise, the Board was arbitrary and capricious in initiating the protest of renewal.[9] Chen claims this for two reasons, both related to the Board's hitherto unannounced internal policy. First, Chen states that "the only appropriate standard [for initiation of a protest of renewal] that should be utilized by the [] Board is a reasoned and comprehensive review of the Licensee's past conduct and history over the applicable period." Second, Chen claims that the Board's failure to announce its new policy prior to

[9] There was no § 4-406(a)(1) "petition" filed with the Board in this case.

the hearing was itself arbitrary and capricious because administrative agencies are required to provide notice and explanation for any changes in policy. The Board disagrees, stating that, not only is the policy proper, but it was within its authority to announce and enforce a new policy without prior notice. We, somewhat reluctantly, agree with the Board.

Chen's view that the policy itself is arbitrary and capricious arises from their interpretation that the policy limits the Board to initiate protests of renewal *only* when there have been at least three violations in a calendar year, irrespective of the relative severity or innocuousness of those violations. This, as Chen sees it, would preclude the Board from initiating a protest where less than three violations occur, regardless of the severe nature of the violation(s), so long as it/they are isolated (e.g., a single incident of sex trafficking), but require a protest any time there are three minor violations. This interpretation is unpersuasive. The Board's policy does not limit it to only initiating protests when there are three violations. Rather it *requires* that it initiate a protest when there have been three violations, but does not impinge on the Board's discretion to do so when the Board determines the nature or quantity of less than three violation(s) warrants a protest. The Board, under this new policy, established a floor of sorts, but not a ceiling. The policy is not arbitrary or capricious.

Chen claims further that the Board was arbitrary and capricious in failing to explain properly or announce its change in policy before initiating its protest. Citing *Jiminez-Cedillo v. Sessions*, 885 F.3d 292 (4th Cir. 2018), a case from the United States Court of Appeals for the 4th Circuit, Chen requests not only that we find the Board's action arbitrary

and capricious, but that we direct the Board to state its reasoning for the new policy and to undertake rulemaking procedures to implement it. We shall not acquiesce to these requests.

Although the 4th Circuit appears correct in its holding in *Jiminez* (based on the record before it), that case is not binding on us here. In *Jiminez*, the 4th Circuit determined the United States Board of Immigration Appeals acted arbitrarily when it ordered a party removed from the United States for committing a crime of moral turpitude, e.g. sexual solicitation of a minor. Previously, the Board of Immigration Appeals had required proof of knowledge of a victim's age by the perpetrator in order to find that a sexual offense against a child was a crime of moral turpitude. But, as sexual solicitation of a minor in Maryland does not require such knowledge, the Board of Immigration Appeals found the perpetrator committed a crime of moral turpitude despite not making a finding of scienter regarding the victim's age. Due to this change in policy, along with the Board of Immigration Appeals' failure to provide an explanation for said change, the 4th Circuit reversed and remanded.

The case before us is distinguishable from *Jiminez*. In *Jiminez*, the Court determined that the agency had taken a prior position that was different clearly from the newly announced policy. Here there is no conflict between a previous stance by the Board and its "unannounced" policy. Prior to the hearing, the Board had not taken a stance on standards for initiating a protest, merely adhering to the statutory powers and limitations found in the Alcoholic Beverages Code.[10] The previously unannounced policy unveiled at

[10] Specifically, the powers and limitations found in Md. Code, Ann. Al. Bev. § 4-406 and Md. Code Ann., Al. Bev. § 12-1805.

the hearing was not a new policy that conflicted with a prior position, but rather one possible threshold for when the Board would exercise its power to initiate a protest.

In Maryland, "the general rule is that agencies have discretion to announce new policies or standards in an adjudicatory proceeding." *Frederick Classical Charter School, Inc. v. Frederick County Board of Educ.*, 454 Md. 330, 331 (2017). Further, administrative agencies are "'not precluded from announcing new principles in . . . adjudicative proceeding[s] and that the choice between rulemaking and adjudication lies in the first instance with the [agency's] discretion.'" *Id.* (quoting *Consumer Protection Division Office of Attorney General v. Consumer Public Co.*, 304 Md. 731, 753–54 (1985)). The Board, however, does not have unlimited discretion in determining when adjudication, rather than rulemaking, is the proper procedure. The Court of Appeals has required that "when a policy of general application, embodied in or represented by a rule, is changed to a different policy of general application, the change must be accomplished by rulemaking." *CBS Inc. v. Comptroller of the Treasury*, 319 Md. 687, 696 (1990). We will overturn the decision by the Board to proceed with adjudication, rather than rulemaking, only if the decision is arbitrary and capricious. *Maryland Ins. Comm'r v. Century Acceptance Corp.*, 424 Md. 1, 25 (2011). Only when an agency "changes a position clearly established in its own prior precedent [must] it '[] supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'" *Frederick*, 454 Md. at 331.

Here, the Board is not changing policy, but providing a clarification as to one scenario when it will initiate a protest of renewal. The Board has discretion to determine

when initiating a protest is proper and is not changing its procedure by requiring a protest under one particular standard. This is a policy announcement properly made at an adjudication and the Board is not obliged to engage the rulemaking process. Moreover, Chen has offered no evidence that, prior to this announcement, the Board would not initiate protests on the grounds of three violations in a single license year.

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