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DISTRICT OF COLUMBIA
COURT OF APPEALS

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APPELLATE DIVISION

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10-AA-1298

DON PADOU and ABIGAIL PADOU, PETITIONERS,

v.

PRO-97-10

DISTRICT OF COLUMBIA ALCOHOLIC
BEVERAGE CONTROL BOARD, RESPONDENT.

Petition for Review of a Decision of the
District of Columbia Alcoholic Beverage Control Board

(Argued February 22, 2012 Decided March 20, 2012)

Before GLICKMAN and FISHER, *Associate Judges*, and BELSON, *Senior Judge*.

PER CURIAM: This petition for review arises from the denial of party status to protest an application for a liquor license before the District of Columbia Alcoholic Beverage Control Board ("the ABC" or "the Board"). Petitioners Don and Abigail Padou argue that: (1) the Board waived its ability to deny the Padous' protest group standing when it granted the group standing earlier in the proceedings; (2) the Board's notice of information on hearings sent to only a "designated representative" and not all protest group members is inadequate; (3) a designated representative may appear on behalf of all protest group members where the statute calls for five individuals who are members of a group to appear before the Board; and (4) the Board's requirement that five persons appear before it in order to qualify as a protest group constituted a "new rule" that the Board adopted in violation of the D.C. Administrative Procedure Act. We affirm.

I. Factual and Procedural Summary

On May 28, 2010, the ABC posted a public notice that AKA, Inc. had applied for alterations to its liquor license. The notice set forth all relevant details for protesting the application at an administrative review hearing. A roll call hearing on the petition was held on July 26, 2010, and a status hearing was held on September 8, 2010.

Petitioners Don and Abigail Padou filed a protest to the alteration of the license as a "Group of Five or More Individuals" on July 12, 2010, pursuant to D.C. Code § 25-601 (2) (2009 Supp.). The petition stated in part: "In the event that I cannot attend a hearing or other proceeding where my presence is required, I appoint Don Padou, Abigal Padou, *or* Lauren Wallace as my representative in this matter." The Padous, along with two other members of

their stated fifty-seven-member protest group, appeared at the July 26, 2010, hearing and were granted standing to protest. The notes of the hearing referred to Mr. Padou as the group's representative. On August 16, 2010, the Board sent the Padous a letter informing them of a September 8, 2010 status hearing on the petition. The letter also stated: "PLEASE NOTE YOU NEED TO BRING ONE (1) MORE PROTESTANT WITH YOU TO MAKE A GROUP OF FIVE OR MORE INDIVIDUALS," as Ms. Fletcher, the ABC agent, realized that she had mistakenly included a member of another group as part of the Padous' group, and therefore erroneously granted the Padous' group standing on July 26, 2010. As far as the record shows, the August 16, 2010, letter was not sent to any other members of the protest group.[1] Mr. Padou telephoned the Alcoholic Beverage Regulation Administration's (ABRA) general counsel on August 26, 2010, to discuss the necessity of bringing a fifth person to the status hearing, and argued that having a fifth person was not required. Mr. Padou was advised to prepare to present such an argument to the ABC at the September 8, 2010 meeting.

Mr. and Mrs. Padou appeared at the September 8, 2010 hearing; no other group members attended. Mr. Padou argued that as his group's designated representative, "[f]ifty-seven people showed up at the hearing through the representative, me." The Board voted unanimously to dismiss the Padous' group for lack of standing. The Padous filed a motion for reconsideration of the ABC's dismissal of their group's standing. The ABC denied the motion in a written order on October 20, 2010. The Padous filed a petition for review of the denial of the motion for reconsideration with this court on October 25, 2010.

On November 18, 2010, the Board held a hearing on AKA's application, and granted the license by order on February 16, 2011. The Padous do not challenge the grant of the license, and have not petitioned this court for review of the granting of the license. The Padous contend before this court that the ABC improperly denied them standing to protest. Before we reach the merits of their claim, however, we address whether we have jurisdiction to do so.

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[1] The petition presented to the Board listed the group's representatives – "Don Padou, Abigail Padou, or Lauren Wallace" – in the disjunctive, from which it would follow that the ABC could serve notice on any or all of them. The ABC's notes from the meeting, however, refer only to Don Padou as representing the group. The ABC's orders, starting on September 15, 2010, list the designated representatives in the conjunctive, indicating that the Padous and Ms. Wallace were at some later point considered designated representatives. It is unclear whether Lauren Wallace was present at any of the meetings, but she certainly was not present at the July 26, 2010, meeting at which party status was mistakenly conferred.

II. Jurisdiction

The government urges us to rule that we do not have jurisdiction over the Padous' appeal because it was an appeal from a non-final, interlocutory order, rather than from the Board's final disposition of the application for the liquor license. "There is a body of case law holding that a court may elect not to resolve a difficult jurisdictional issue but, instead, may put that issue aside and rule on the merits when the merits are clearly against the party who invokes the court's jurisdiction." *Harrison v. Children's Nat'l Med. Ctr.*, 678 A.2d 572, 575 (D.C. 1996). *See also Stevens v. Quick*, 678 A.2d 28, 31 (D.C. 1996) ("'[W]hen the merits of a case are clearly against the party seeking to invoke the court's jurisdiction, [and] the jurisdictional question is especially difficult and far-reaching, . . . we may rule on the merits without reaching' the jurisdictional question.") (quoting *Adams v. Vance*, 187 U.S. App. D.C. 41, 45 n.7, 570 F.2d 950, 954 n.7 (1978) (omission *Stevens*)). While it is unclear whether the Padous can take an immediate appeal from the denial of party status, the decision on the merits is clearly against the Padous, and so we reach the merits without determining the jurisdictional issue.

III. Analysis

A. Standard of Review

"Under the general limited review that we undertake of any agency decision, 'we must affirm unless we conclude that the agency's ruling was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Office of the People's Counsel v. Public Serv. Comm'n of the District of Columbia*, 955 A.2d 169, 173 (D.C. 2008) (citation omitted). "The law is also well settled that 'an agency's interpretation of its own regulations or of the statute which it administers is generally entitled to great deference from this court.'" *Takahashi v. District of Columbia Dep't of Human Servs.*, 952 A.2d 869, 874 (D.C. 2008) (citations omitted).

B. The Board's Decision to Re-examine the Padous' Standing was Not Erroneous

The Padous argue that after the Board granted their protest group standing on July 26, 2010, the Board "waived" its authority to re-examine whether the group had a sufficient number of members to qualify for standing. It is well-settled that standing is a jurisdictional matter, jurisdiction is not waivable, and that the issue of standing can be raised at any time during a proceeding and may be raised by the adjudicating body *sua sponte*. *Riverside Hosp. v. District of Columbia Dep't of Health*, 944 A.2d 1098, 1103-04 (D.C. 2008); *Speyer v. Barry*, 588 A.2d 1147, 1159-60 (D.C. 1991). Therefore, the Padous' argument that the

Board waived denial of standing after granting the Padous standing on July 26, 2010, fails.

C. Providing Notice to Only Mr. Padou Constituted Sufficient Notice

The Padous argue that the Board did not provide sufficient notice to the protest group to inform them that they would lose their standing because it provided notice only to Mr. Padou, the designated representative. The Padous argue that the Board did not tell them that Mr. Padou was responsible for notifying the other members of the protest group, and it was unreasonable for the Board to assume Mr. Padou had the resources to notify the members of his protest group of further meetings, even though he was the group's designated representative (a position he undertook voluntarily).[2]

It is beyond doubt that the Padous had actual notice that if their group lacked five members, they would be denied standing. D.C. Code § 25-601 (2) states that "[a] group of no fewer than 5 residents or property owners of the District sharing common grounds for their protest" may protest alcoholic beverage licenses. The corollary to § 25-601 (2), 23 DCMR § 1605.4 (2008), states "[t]he Board may require protestants to appear before the Board for the purpose of determining that a sufficient number of individuals exist to have standing pursuant to D.C. Official Code § 25-601."

The letters from the Board to the Padous made clear that five individuals were required to be present before the Board in order to demonstrate that they had standing as a protest group. The July 19, 2010, letter to the Padous stated "If you are a member of a group of five (5) or more protestants, there must be at least five (5) representatives from your group present at the roll call hearing . . . if less than five (5) protestants appear at the roll call hearing, standing will not be granted." The Padous appeared at the hearing with only four members – a fact which they conceded at oral argument – and were granted standing by mistake on July 26, 2010. In a letter to the Padous dated August 16, 2010, the Board made clear that another person was required to be present to grant the group standing, stating: "PLEASE NOTE YOU NEED TO BRING ONE (1) MORE PROTESTANT WITH YOU

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[2] The Padous can make this claim only insofar as the notice relates to them and the protection of their interests that would not be considered in the ABC proceedings; they do not have standing to challenge notice to other parties, such as Lauren Wallace. *See York Apartments Tenant's Ass'n v. District of Columbia Zoning Comm'n*, 856 A.2d 1079, 1084 (D.C. 2004) ("[A] plaintiff may assert only its own legal rights, may not attempt to litigate generalized grievances, and may assert only interests that fall within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question.") (citations omitted).

TO MAKE A GROUP OF 5 OR MORE INDIVIDUALS." Further, Mr. Padou telephoned ABRA's general counsel, arguing that "it was not necessary for a fifth protestant to appear in person at the status hearing," evidencing that he understood the Board's request, but did not agree with it. Thus, considering the July 19 letter and the August 16 letter together, in addition to Mr. Padou's telephone conversation with ABRA's general counsel, it is clear that the Padous had actual notice – in addition to the statute – that if five persons did not appear before the Board, their protest group would be denied standing.

The Padous further argue that the Board erred in concluding that designated representatives can receive notice on behalf of the persons they represent, pursuant to 23 DCMR § 1706.5 (2008). There, it is provided that "[a]ny party appearing or having the right to appear before the Board in any proceeding shall have the right to representation by an attorney or designated representative of his or her choice." Further, under 23 DCMR § 1703.2 (2008), "[a]ny papers required to be served upon a party may be served upon the party or the party's designated representative."[3] Thus the Board's interpretation of its regulation allowing service on a designated representative to constitute sufficient notice on the group was proper, and not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

D. Appearance by a Designated Representative Is Insufficient to Demonstrate Standing Under 23 DCMR § 1605.4

The Padous argue that 23 DCMR § 1706.5 – which provides that "[a]ny party appearing or having the right to appear before the Board in any proceeding shall have the right to representation by an attorney or designated representative of his or her choice" – means that a designated representative is sufficient to meet the standing requirement under 23 DCMR § 1605.4. We cannot agree.

23 DCMR § 1605.4 provides that "[t]he Board may require protestants to appear before the Board for the purpose of determining that a sufficient number of individuals exists to have standing pursuant to D.C. Official Code § 25-601." Section 1605.4 is corollary to D.C. Code § 25-601 (2), which provides: "[a] group of no fewer than 5 residents or property owners of the District sharing common grounds for their protest" may protest the issuance or renewal of a license before the Board. Because the purpose of this regulation is to enable the Board to determine that a sufficient number of persons exists to gain standing as a five-

[3] The Padous' argument that "[i]f designated representatives took onto themselves all the obligations and duties that the Board says are theirs, designated representatives would be practicing law without a license"is plainly without merit.

person group, we cannot agree that allowing a designated representative to appear for all group members satisfies the statute. Therefore, this argument of petitioners also fails.

E. Requiring Five Persons to Appear Before the Board Is Not a New Rule

The Padous argue that requiring five persons to appear before the Board to demonstrate standing is a new rule, and allege that their case is the first time the Board required five persons to appear before it to demonstrate that a sufficient group existed to confer standing. The language of 23 DCMR § 1605.4 is clear: "[t]he Board *may* require protestants to appear before the Board for the purpose of determining that a sufficient number of individuals exist to have standing pursuant to D.C. Official Code § 25-601" (emphasis added). It cannot reasonably be contended that the Board's decision to require five protestants to appear in person before the Board constitutes a new rule. Rather, it is a matter of the Board exercising its authority and responsibility under the statute to require protestants to establish that there are actually five or more residents or property owners who protest as a group.

Conclusion

Accordingly, for the foregoing reasons, it is

ORDERED and ADJUDGED that the decision on appeal herein is affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

Julio A. Castillo
Clerk of the Court

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