AG

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14-AA-3

LMW, LLC, PETITIONER,

v.

DISTRICT OF COLUMBIA ALCOHOLIC BEVERAGE CONTROL BOARD, RESPONDENT.

Petition for Review of an Order
of the District of Columbia Alcoholic Beverage Control Board
(CMP-603-12)

(Submitted June 4, 2015 Decided June 22, 0215)

Before FISHER and BECKWITH, *Associate Judges*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Petitioner LMW, LLC, owns a bar named Little Miss Whiskey's Golden Dollar located at 1104 H Street in Northeast Washington, D.C. In its voluntary agreement with Advisory Neighborhood Commission 6A, LMW agreed "not to promote or participate in bar or pub 'crawls' or any other event of this nature." The bar was fined $500 for participating in an October 18, 2012, event, called the "H Street Zombie Takeover," that the Board found was a "pub crawl." We affirm.

"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." *Panutat, LLC v. District of Columbia Alcoholic Beverage Control Bd.*, 75 A.3d 269, 272 (D.C. 2013) (internal quotation marks omitted). We review questions of law *de novo*, but usually accord deference to an agency's interpretation of its own regulations or the statute it administers. *Id.* "Unless the Board has committed an error of law, this court will overturn its decision only if it is unsupported by substantial evidence." *Id.* (internal quotation marks omitted).

First, the Board acknowledges that it failed to serve LMW with an investigative report within 90 days of LMW's violation, as required by D.C. Code § 25-832 (a) (2012 Repl.). Petitioner contends that the time limit in that statute is mandatory, and that the Board therefore lacked authority to proceed with the enforcement action against LMW. However, "this [c]ourt presumes that a statute is directory rather than mandatory if . . . it 'imposes a time limit within which a public official must act but does not specify the consequences of noncompliance.'" *Holzsager v. District of Columbia Alcoholic Beverage Control Bd.*, 979 A.2d 52, 61 (D.C. 2009) (quoting *Teamsters Local Union 1714 v. Pub. Emp. Relations Bd.*, 579 A.2d 706, 710 (D.C. 1990) (internal alterations omitted)). D.C. Code § 25-832 (a) is one such statute, and there is no additional language that overcomes the presumption that the law's provisions are not mandatory. *See id.* (statute directing Board to approve or deny application within 15 days was directory because it "contain[ed] no additional language that indicates that the deadline it imposes is mandatory").

Even if a statute is directory, "delay coupled with actual prejudice . . . may overcome the presumption that statutory time limits on agency action are non-binding." *Id.* at 61 n.11 (internal quotation marks and alterations omitted). In this case, however, the Board served the report on LMW only 36 days after the statutory period expired, and petitioner has not alleged that the delay caused any prejudice. We therefore conclude that the Board could lawfully bring the enforcement action in this case despite the late service of its report.

Second, petitioner contends that the regulations defining a "pub crawl" are void for vagueness. However, "[t]he 'void-for-vagueness' doctrine requires only that statutes and regulations be sufficiently definite so that ordinary people can understand what conduct is prohibited." *Gary Inv. Corp. v. District of Columbia Dep't of Health*, 896 A.2d 193, 196 (D.C. 2006) (internal emphasis omitted). The Board's regulations define a "pub crawl" as "an organized group of establishments within walking distance which offer discounted alcoholic drinks during a specified time period." 23 DCMR § 712.1 (2008). That provision is not void for vagueness because it clearly describes the conduct that constitutes a "pub crawl."[1]

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[1] Petitioner also argues that the regulations are vague because 23 DCMR §§ 712.1 and 712.10 conflict. However, § 712.10 merely states that Board approval is not necessary for some pub crawls. We agree with the Board's conclusion that § 712.10 does not change the definition of a "pub crawl" found in § 712.1.

Third, petitioner argues that it did not participate in a "pub crawl" because evidence at the hearing showed that the event only had 50 to 60 participants. It is true, under 23 DCMR § 712.10, that Board approval is not required for a "pub crawl" with fewer than 200 participants. However, the language of that regulation, which states that "Board approval shall not be required for a '[p]ub [c]rawl' containing less than 200 participants," presupposes that there can be a "pub crawl" involving fewer people. 23 DCMR § 712.10.

As we have noted, the Board need not approve a "pub crawl" involving fewer than 200 people. *Id.* However, LMW's agreement prohibited it from participating in *any* "bar or pub 'crawls,'" not just large ones. Thus, we agree with the Board's conclusion that, so long as the event met the definition of a "pub crawl" found in the regulations, petitioner could not participate, no matter how few people were involved.

Fourth, petitioner contends that the Board lacked substantial evidence to conclude that its restaurant sold discounted alcohol, and therefore the event was not a "pub crawl" according to 23 DCMR § 712.1. "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Payne v. District of Columbia Dep't of Emp't Servs.*, 99 A.3d 665, 671 (D.C. 2014) (internal quotation marks omitted). At the hearing, investigators testified that, as part of the "H Street Zombie Takeover," they purchased a coupon book from the event's organizers. They then presented some of the coupons from that book to LMW to obtain two types of drinks advertised as "specials"—$3 Stroh's beers and a free shot of Bulleit Bourbon. The event's sponsors also advertised $4 DAB tallboy beers as another "special" that participants could buy from LMW's bar. We are therefore satisfied that there was substantial evidence supporting the Board's determination that LMW offered discounted alcoholic drinks.

Petitioner points to testimony from Mark Thorp, the owner of LMW's bar, who said that the prices were called "specials" but the two beers were actually sold at their normal prices. He also testified that the free liquor was given out by the manufacturer, not the restaurant. However, we affirm an agency's findings of fact that are supported by substantial evidence "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Ferreira v. District of*

Columbia Dep't of Emp't Servs., 667 A.2d 310, 312 (D.C. 1995). We cannot second-guess the Board's decision to find Mr. Thorp's testimony unpersuasive.[2]

In sum, the order of the Board is affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

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[2] Petitioner filed a citation of supplemental authority with this court on April 23, 2015, raising an entirely new issue under the Omnibus Alcoholic Beverage Regulation Amendment Act of 2012, D.C. Law 19-310 (May 1, 2013). That act went into effect on May 1, 2013. 60 D.C. Reg. 10583 (2013). Petitioner argues that the act explicitly outlines what types of provisions in voluntary agreements (now called "settlement agreements") are enforceable, and that a limitation on participation in a "pub crawl" is not one of them. *See* D.C. Code § 25-446.01 (2014 Supp.). We doubt the vitality of that argument. The section of the statute outlining enforceable provisions of settlement agreements states that "[a] settlement agreement enforceable by the Board under this subchapter *may* include" any of the ten listed provisions. *Id.* (emphasis added). The "may" is permissive, not restrictive, especially when read in conjunction with D.C. Code § 25-446 (a)(2), which provides that "[e]xcept as provided in § 25-446.02, all provisions of a settlement agreement approved by the Board shall be enforceable . . . by the Board." Provisions regarding "pub crawls" are not barred by § 25-446.02.

In any event, we decline to consider the argument because petitioner failed to raise it before the Board (or in its briefs on appeal). *See Sims v. District of Columbia*, 933 A.2d 305, 309-10 (D.C. 2007) (describing long-standing principle that this court will consider claims not presented to the agency only under "exceptional circumstances," where "manifest injustice" would otherwise result). The statute went into effect seven months before the Board's decision on December 11, 2013, and petitioner has neither alleged that manifest injustice will result nor provided a reason for why it did not raise this argument earlier.

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