2018 IL App (1st) 170914-U

FIFTH DIVISION
March 30, 2018

No. 1-17-0914

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

E CIGS LOOP, INC., and its President, MAXWELL DENIS TRAGE, Plaintiffs-Appellants, v. CITY OF CHICAGO, a Municipal Corporation; THE DEPARTMENT OF BUSINESS AFFAIRS AND CONSUMER PROTECTION; and MARIA GUERRA-LAPACEK, Commissioner, City of Chicago Department of Business Affairs and Consumer Protection, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 15 M1 450463 Honorable Rodolfo Garcia, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County upholding the Department of Business Affairs and Consumer Protection's denial of plaintiffs' application for a retail tobacco license.

¶ 2 Plaintiffs, E Cigs Loop, Inc. (a tobacco retailer) and its president Maxwell Trage (Trage)

(collectively plaintiffs) filed a complaint in the circuit court seeking review of the administrative decision of the City of Chicago Department of Business Affairs and Consumer Protection (Department). The Department found that Trage's application for a retail tobacco license was properly denied by the City of Chicago (City) where he was not a "proper person" to possess such a license as described in section 4-64-110(b) of the Chicago Municipal Code (Code) (Chicago Municipal Code § 4-64-110(b) (amend. Nov. 19, 2008)). The circuit court of Cook County affirmed the decision of the Department. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Plaintiffs have not argued that any of the factual findings upon which the order of the Department is based are against the manifest weight of the evidence. As a consequence, the factual recitation which follows is taken from the transcript containing the factual findings of the hearing commissioner who presided over the hearing regarding the denial of plaintiffs' application for a retail tobacco license.

¶ 5 In March 2015, plaintiffs operated a tobacco retail establishment in the 100 block of West Washington Street in Chicago. On March 27, 2015, City of Chicago investigator Thomas Ricobene (Ricobene) went to the establishment to investigate whether it was operating with a valid license. Ricobene, upon entering the store, observed customers inside and noticed a large number of e-cigarette products, as well as general merchandise for sale. Ricobene spoke with the owner's son (not identified by name in the record) who disclosed that they had recently moved into the premises and that the license they were utilizing was for another location. While Ricobene noticed a violation, he allowed plaintiffs 30 days to come into compliance with the Code by obtaining a new license for the current location. No citation was issued at that time.

¶ 6 Ricobene returned to the establishment on May 6, 2015, to investigate plaintiffs' compliance with obtaining a new license. He found the store open for business. As no new license had been procured, or even applied for, Ricobene issued a citation to plaintiffs for operating the establishment without the required license. He also issued a cease and desist order, which required the business to be closed due to the fact no application for a new license was on file. The cease and desist order directed law enforcement officials "to arrest any and all agents and employees of E-Cigs Loop, Inc. *** if found to be engaging in the business or occupation of the retail sale of vapor products without the required Tobacco Dealer, Retail type license properly displayed on said premises."

¶ 7 Sometime thereafter, Trage filed an application for a license for the establishment. On May 26, 2015, Michelle Murray (Murray), a City of Chicago revenue investigator visited the establishment to conduct an inspection with regard to the license application. When she entered the establishment she noticed that it was open for business. Murray informed Emily Dejanovich (Dejanovich), who identified herself as the owner of the establishment, that the business did not have the proper license and issued citations for operating without a license and for failing to display a license. Murray further issued a cease and desist order requiring plaintiffs to cease and desist conducting the business of selling tobacco products and accessories for which a license is required. Law enforcement officials were further directed to arrest those individuals found to be engaging in such business on the premises as long as the license had not been procured.

¶ 8 Murray returned to the establishment on June 3, 2015, and observed that it was open and conducting business. As a result, Murray cited the establishment for operating after a cease and desist order had been issued, for failure to have a valid tobacco license, and for failure to display a license.

¶ 9 City of Chicago investigator Parrish Clay (Clay) went to the establishment on June 11, 2015, and found it was open and operating, with several employees behind the counter and one assisting a customer. After speaking with a man who identified himself as the owner's son, Clay requested the business license; however, the son produced a license for a different location. After speaking with his office, Clay did not issue any citations and allowed plaintiffs additional time to obtain a new retail tobacco license.

¶ 10 Clay returned on June 15, 2015, and found the business was still operating without a license and in violation of the previously issued cease and desist orders. Clay spoke with the owner and informed the owner that he had to close the business.[1] Clay then placed closure signs on the doors and windows and issued citations for operating after a cease and desist order had been issued, failure to display a license, and failure to obtain a license.

¶ 11 Plaintiffs offered no testimony or other evidence at the hearing. Instead, plaintiffs' counsel maintained that his clients were entitled to a judgment as a matter of law where the City's case was premised on pending citations for ordinance violations that had not yet been adjudicated. Plaintiffs' counsel argued that the Department's evidentiary hearing violated due process and was prejudicial to his clients. Plaintiffs asserted that the pending citations could only be adjudicated by the Department of Administrative Hearings.

¶ 12 The hearing commissioner ultimately concluded that the evidence presented by the City established that "the applicant is not a proper person to be entrusted with the sale of cigarettes under Section 4-64-110(b)" of the Code due to the fact that "[Trage] has ignored the law and continued to operate the *** premises in violation of cease & desist orders on May 26, 2015, June 3, 2015, June 11, 2015, and June 15, 2015." In so finding, the hearing commissioner found

[1] The owner Clay spoke with is not named in the record.

the investigators' testimony to be credible, reliable, and uncontradicted. The hearing commissioner thus concluded that the application for a new license was properly denied. The hearing commissioner issued no rulings regarding plaintiffs' pending citations on the Code violations. This finding was thereafter affirmed by the Department.

¶ 13 Plaintiffs then filed a complaint for administrative review before the circuit court, and the parties submitted briefs in support of their respective positions. After hearing argument in the matter, the circuit court denied plaintiffs' complaint and affirmed the Department's findings. This appeal followed.

¶ 14 ANALYSIS

¶ 15 Plaintiffs raise three issues for our review: (1) the phrase "proper person" (a) is unconstitutionally vague and (b) should not have been interpreted by the hearing commissioner to mean one who does not have any pending citations against them; (2) the hearing commissioner applied the wrong legal standard; and (3) its due process rights were violated by having to defend themselves in multiple venues concurrently against the same allegations.

¶ 16 Prior to addressing plaintiffs' claims on appeal, we observe that the ordinance governing the Department's license application review process contains no provision adopting the Administrative Review Law (735 ILCS 5/3-110 *et seq.* (West 2014)) for the purpose of reviewing its decisions. See Chicago Municipal Code § 2-25 *et seq.* (added Nov. 19, 2008). In fact, the ordinance states generally that when a license application is denied, "The mayor's determination shall be final and may be appealed in the manner provided by law." Chicago Municipal Code § 4-4-060(b) (added May 9, 2012). Thus, plaintiffs improperly brought a complaint for administrative review before the circuit court. In such instances, however, where the Administrative Review Law has not been expressly adopted, the writ of *certiorari* survives as

a means of judicial review (*Stratton v. Wenona Community Unit District No. 1*, 133 Ill. 2d 413, 427 (1990)) and plaintiffs' mislabeling of its complaint does not preclude our review (*The Homefinders, Inc. v. City of Evanston*, 65 Ill. 2d 115, 121 (1976) (" 'Labels have long since lost their significance in determining the legal sufficiency of a complaint in an ordinary action at law or in equity, and we see no reason why they should retain significance in actions to review the determinations of administrative agencies.' " (quoting *Nowicki v. Evanston Fair Housing Review Board*, 62 Ill. 2d 11, 15 (1975)))). As plaintiffs set forth numerous arguments on appeal that involve differing standards of review, we first turn to those standards of review generally applicable in cases involving a common law writ of *certiorari*.

¶ 17 The common-law writ of *certiorari* provides a means for review of actions taken by a court or other tribunal exercising quasi-judicial functions, where no other means of review is available. *Portman v. Department of Human Services*, 393 Ill. App. 3d 1084, 1087 (2009). Although traditionally review by common law writ of *certiorari* was very limited, "[t]he distinction between administrative review and a review pursuant to the common law writ of *certiorari* have all but disappeared in our state." *Village of Hillside v. John Sexton Sand & Gravel Corp.*, 113 Ill. App. 3d 807, 817 (1983); *Dubin v. Personnel Board of the City of Chicago*, 128 Ill. 2d 490, 498 (1989). Thus, "the nature and extent of judicial review is virtually the same under both methods." *Dubin*, 128 Ill. 2d at 498. On appeal from a circuit court's decision, we review the determination of the administrative agency, not that of the circuit court. *Landers v. Chicago Housing Authority*, 404 Ill. App. 3d 568, 571 (2010).

¶ 18 In an appeal from an administrative decision, "[t]he applicable standard of review depends upon whether the question presented is one of fact, one of law, or a mixed question of fact and law." (Internal quotation marks omitted.) *Cinkus v. Village of Stickney Municipal*

Officers Electoral Board, 228 Ill. 2d 200, 210 (2008). On questions of fact, the agency's findings are deemed *prima facie* true and correct and will not be reversed unless they are against the manifest weight of the evidence. *Id.* In making this determination, this court will not weigh the evidence or substitute its judgment for that of the agency. *Id.* An administrative agency's factual determinations are against the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Id.* In contrast, an agency's decision on a purely legal issue is entitled to no deference by this court and is reviewed under the *de novo* standard. *Id.* Finally, where there is a mixed question of law and fact, we review the agency's determination under the clearly erroneous standard. Mixed questions are those "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." (Internal quotation marks omitted.) *Id.* at 211. Under the clearly erroneous standard, we reverse only where we are left with the "definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Id.*

¶ 19 "Proper Person"

¶ 20 Plaintiffs first argue that the phrase "proper person" as stated in the ordinance is unconstitutionally vague. See Chicago Municipal Code § 4-64-110(b) (amended Nov. 19, 2008). Plaintiffs maintain that the ordinance is unconstitutional because the definition of "proper person" is left to the subjective interpretation of City officials, without reasonable notice to prospective applicants as to how the term would be applied in a license application matter.

¶ 21 In response, defendants maintain that plaintiffs' constitutional argument is forfeited, as it was not raised before the hearing commissioner or the circuit court. A party should assert a constitutional challenge to a statute on the record before the administrative tribunal because

administrative review is confined to the proof offered before the agency. *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 396 (2002). As a general rule, issues or defenses not raised before the administrative agency will not be considered for the first time on administrative review. *Id.* at 396-97; *Smoke N Stuff v. City of Chicago*, 2015 IL App (1st) 140936, ¶ 25; see 735 ILCS 5/3-110 (West 2014). A party's right to question the validity of a statute is, therefore, subject to forfeiture. *Carpetland U.S.A., Inc.*, 201 Ill. 2d at 397. It is also true that an administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278 (1998). "Nonetheless, it is advisable to assert a constitutional challenge on the record before the administrative tribunal, because administrative review is confined to the proof offered before the agency. Such a practice serves the purpose of avoiding piecemeal litigation and, more importantly, allowing opposing parties a full opportunity to present evidence to refute the constitutional challenge." *Id.* at 278-79. While we recognize that forfeiture is a limitation on the parties rather than on this court's jurisdiction, and that the doctrine of forfeiture may be relaxed when necessary to maintain a uniform body of precedent, or where the interests of justice so require, this, however, is not such a case. See *Carpetland U.S.A., Inc.*, 201 Ill. 2d at 397.

¶ 22 Plaintiffs next argue that the hearing commissioner's interpretation of "proper person" so as to include the meaning "having pending citations" falls outside both the clear language and intended reach of the Code. Relying on the language of section 4-4-320 of the Code (Chicago Municipal Code § 4-4-320 (amended Dec. 9, 2015)), plaintiffs maintain that the mere fact a citation has been issued is not the equivalent of an adjudication of a violation so as to properly deny the issuance of a retail tobacco license.

¶ 23 Municipal ordinances are interpreted using the same rules of statutory interpretation as

statutes, and are reviewed *de novo. Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 850 (2007). The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. *Id.* The best indication of legislative intent is the plain and ordinary meaning of the statutory language, and when that language is clear, its meaning should be given effect without resort to other tools of interpretation. *Id.* Since all provisions of a statutory enactment are viewed as a whole, words and phrases should not be construed in isolation, but should be interpreted in light of other relevant provisions of the statute. *Crittenden v. Cook County Commission on Human Rights*, 2012 IL App (1st) 112437, ¶ 81. "Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous." (Internal quotation marks omitted.) *Id.* (quoting *In re Detention of Lieberman*, 201 Ill. 2d 300, 308 (2002)). However, "[i]t is a cardinal rule of statutory construction that we cannot rewrite a statute, and depart from its plain language, by reading into it exceptions, limitations or conditions not expressed by the legislature." (Internal quotation marks omitted.) *Id.* (quoting *People ex rel. Birkett v. Dockery*, 235 Ill. 2d 73, 81 (2009)).

¶ 24 We first turn to address plaintiffs' argument that section 4-4-320 of the Code precluded a denial of the license application on the basis that there were pending citations against the business. Section 4-4-320 is part of title 4, entitled "General License Requirements." See Chicago Municipal Code § 4-4-005 *et seq.* (amended Dec. 9, 2015). Section 4-4-320 provides, in pertinent part:

> "(a) The commissioner, for good and sufficient cause, may deny an application for any license issued under this Title 4 if:
>
> (1) during the 5-year period prior to the date of the application, the applicant admitted guilt or liability or was found guilty or liable in judicial or administrative

proceedings of committing or attempting to commit a willful violation, or two or more violations which do not include a willful violation, of the Illinois Wage Payment and Collection Act, 820 ILCS 115/1, or any other federal or state law regulating the payment of wages;

(2) during the 5-year period prior to the date of the application, the applicant admitted guilt or liability or was found guilty or liable in a judicial or administrative proceeding of committing or attempting to commit a violation of the Fair Debt Collection Practices Act, 15 USC § 1692, or the Collection Agency Act, 225 ILCS 425/1, or any other federal or state law regulating the collection of debt;

(3) during the 24-month period prior to the date of the application, the applicant admitted guilt or liability or was found guilty or liable in judicial or administrative proceedings of committing three or more violations of Chapter 1-24 of this Code; or

(4) during the 5-year period prior to the date of the application, one or more determinations of disqualification from participation in the federal Supplemental Nutrition Assistance Program (SNAP) was imposed upon the applicant, where such determination or determinations imposed the sanction of permanent disqualification or disqualification for an aggregate of at least 12 months, whether consecutive or nonconsecutive." Chicago Municipal Code § 4-4-320(a) (amended Dec. 9, 2015).

¶ 25 We observe, however, that the Department did not deny plaintiffs' application for a retail tobacco license on any basis set forth in section 4-4-320. Instead, the Department denied the application under a specific provision expressly related to issuance of a retail tobacco license, that being section 4-64-110(b) of the Code. Chicago Municipal Code § 4-64-110(b) (amended Nov. 19, 2008). Accordingly, we find any reliance on section 4-4-320 of the Code to support

plaintiffs' argument on appeal that the license application was improperly denied to be misplaced.

¶ 26 Turning to the language of the ordinance under which the Department denied plaintiffs' license application, it reads as follows:

> "(b) Investigation required. The commissioner of business affairs and consumer protection shall cause an investigation to be made of the character and the reputation of the applicant, or whether said applicant is a proper person to be entrusted with the sale of cigarettes, and of whether the premises named in said application comply with the provisions of the Code applicable to said business, including the requirement as to location." *Id.*

¶ 27 Plaintiffs assert that the hearing commissioner erred when he interpreted "proper person" as one who does not have any pending citations. Plaintiffs misinterpret the hearing commissioner's findings. The hearing commissioner found that plaintiffs' application for a tobacco license was properly denied, "where the applicant has ignored the law and continued to operate the applicant premises in violation of cease & desist orders on May 26, 2015, June 3, 2015, June 11, 2015, and June 15, 2015." While the testimony at the evidentiary hearing included evidence of the citations issued to plaintiffs, the language of the order demonstrates that the hearing commissioner did not base his finding that plaintiffs were not eligible for a license on the fact the citations were issued. Instead, the hearing commissioner expressly premised his affirmation of the denial of the license on the fact plaintiffs "ignored the law and continued to operate" the establishment in violation of the cease and desist orders issued by Department investigators. Cease and desist orders are distinct from citations. As part of its enforcement powers, where a person conducts any business without first obtaining the proper license, the

commissioner of the Department has the authority "to order such person to discontinue such activity, and may order such business to be closed" until such a license is obtained. Chicago Municipal Code § 2-25-100 (added Nov. 19, 2008).

¶ 28 The evidence here demonstrates that plaintiffs moved their tobacco retail business to another location without first obtaining a new license as required by section 4-4-170 of the Code. Chicago Municipal Code § 4-4-170 (added May 9, 2012) ("If, prior to the expiration of the license period, any person licensed to engage in a business at a particular place seeks to change the location of such place of business, such licensee shall obtain a new license before conducting the business at the new location."). When investigator Ricobene visited the establishment in May 6, 2015, he found it open and operating without the appropriate license and issued a cease and desist order. The order required the business to close until the proper license had been obtained. Later that month, Department investigator Murray found the business open and operating in spite of the cease and desist order and issued yet another cease and desist order, which also required the business to be closed until the proper license was obtained. Plaintiffs continued selling tobacco products in this establishment thereafter, despite numerous visits from Department investigators and numerous cease and desist orders. The evidence at the hearing established plaintiffs' complete disregard of the Department's cease and desist orders and therefore the hearing commissioner correctly concluded that plaintiffs did not meet the "proper person" standard and affirmed the denial of the tobacco license. We cannot say that we are left with the definite and firm conviction that a mistake has been committed by the Department. See *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 391-95 (2001). Accordingly, the Department's determination was not clearly erroneous.

¶ 29 Wrong Legal Standard

¶ 30 Plaintiffs further contend that the hearing commissioner improperly found that their license should be revoked under section 4-4-280 of the Code when in fact the matter involved the denial of an application for a new license under section 4-4-060 of the Code. Whether an administrative body has applied the proper legal standard is an issue of law we review *de novo*. *International Union of Operating Engineers, Local 148, AFL-CIO v. Illinois Department of Employment Security*, 215 Ill. 2d 37, 62 (2005).

¶ 31 Section 4-4-280 of the Code provides that, "[t]he mayor shall have the power to fine a licensee, and to suspend or revoke any license issued under the provisions of this Code for good and sufficient cause or if he determines that the licensee shall have violated any of the provisions of this Code or any of the statutes of the state." Chicago Municipal Code § 4-4-280 (added May 9, 2012). Section 4-4-280 further sets forth the procedures of how a license is revoked. *Id.*

¶ 32 While it is true that the hearing commissioner referenced section 4-4-280 of the Code and cited it in his findings, when the order is read in its totality, it is clear that the hearing commissioner was aware that he was reviewing the denial of a tobacco license application and not the revocation of such a license. First, plaintiff Trage is referred to as "applicant" throughout the order. Second, the order makes multiple references to the "tobacco license denial." Third, and most importantly, the hearing commissioner based its affirmation of the denial of the tobacco license on section 4-64-110 of the Code, the section of the Code involving how to obtain a tobacco license. See Chicago Municipal Code § 4-64-110 (amended Nov. 19, 2008). Specifically, section 4-64-110(b) sets forth, in pertinent part, that "[t]he commissioner of business affairs and consumer protection shall cause an investigation to be made of the character and reputation of *the applicant*." (Emphasis added.) *Id.* Thus, while the hearing

commissioner's order did incorrectly reference section 4-4-280 of the Code, it is evident from the language of the order and the hearing commissioner's express findings that he was aware he was denying an application for a tobacco license and he applied the appropriate legal standard.

¶ 33 Due Process

¶ 34 Lastly, plaintiffs argue that their due process rights were violated when the City improperly utilized the Department hearing to adjudicate the pending citations (despite a record revealing otherwise). Plaintiffs assert that two errors occurred, 1) the Department should not have affirmed the denial of the tobacco license on the basis of the alleged ordinance violations when those alleged ordinance violations had yet to be adjudicated, and 2) the Department should not have proceeded to an evidentiary hearing on the alleged ordinance violations when the Department had actual knowledge that the identical violations were still pending in another City department. Plaintiffs maintain that due process required the Department to have stayed the proceedings until the alleged ordinance violations were adjudicated at the Department of Administrative Hearings. Whether plaintiffs were provided with the necessary due process is a question of law, which this court reviews *de novo*. *Wisam 1, Inc. v. Illinois Liquor Control Commission*, 2014 IL 116173, ¶ 24.

¶ 35 Due process is "a flexible concept and requires only such procedural protections as fundamental principles of justice and the particular situation demand." *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 92 (1992). Thus, "[i]n administrative matters, due process is satisfied when the party is provided an opportunity to be heard in an orderly proceeding which is adapted to the nature and circumstances of the dispute." *Obasi v. Department of Professional Regulation*, 266 Ill. App. 3d 693, 702 (1994). A fair hearing includes the right to be heard, the right to cross-examine adverse witnesses, and impartiality in

ruling on the evidence. *Abrahamson*, 153 Ill. 2d at 95. Nevertheless, the process due in an administrative setting does not necessarily require a proceeding akin to a judicial proceeding, and not all judicial procedures are appropriate in administrative proceedings. *Wisam 1, Inc.*, 2014 IL 116173, ¶ 27. Administrative proceedings are less formal and technical than judicial proceedings. *Id.*

¶ 36 We reject plaintiffs' contentions that they were denied due process. As discussed above, the Department did not base its denial of the tobacco license application on the citations that were pending before the Department of Administrative Hearings. In fact, the denial was based on plaintiffs' disregard of the numerous cease and desist orders the Department issued over the course of several months. It therefore follows that plaintiffs' due process rights were not violated as the citations were not adjudicated at the evidentiary hearing and the hearing commissioner's findings were not premised on the fact plaintiffs had been issued the citations. Thus, we hold that plaintiffs were not denied due process.

¶ 37 As for plaintiffs' argument that the hearing commissioner should have stayed the license application proceedings pending the outcome of the citations in the Department of Administrative Hearings, we find this argument to be forfeited. See *Smoke N Stuff*, 2015 IL App (1st) 140936, ¶ 25. The record discloses plaintiffs first raised this argument before the circuit court. This was not the appropriate venue to raise such a claim for the first time. See *Cinkus*, 228 Ill. 2d at 212. Plaintiffs therefore are procedurally defaulted from arguing that the hearing commissioner should have stayed the license application proceedings.

¶ 38 In sum, we conclude that none of the arguments raised by plaintiffs on appeal warrant the reversal of the Department's determination. Accordingly, the judgment of the circuit court of Cook County upholding the Department's denial of plaintiffs' application for a retail tobacco

license is affirmed.

¶ 39 CONCLUSION

¶ 40 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 41 Affirmed.