IN THE COURT OF APPEALS OF IOWA

No. 0-501 / 09-1663
Filed August 11, 2010

DIWAN LLC, d/b/a MART STOP and BRADY OIL, LLC d/b/a BRADY OIL,
Petitioners-Appellants,

vs.

IOWA DEPARTMENT OF COMMERCE ALCOHOLIC BEVERAGE DIVISION,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane III, Judge.

Licensees appeal revocation of alcoholic beverage permits. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, PLC, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and John R. Lundquist, Assistant Attorney General, Administrative Law Division, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer and Danilson, JJ.

EISENHAUER, J.

In December 2008, the City of Davenport (City) sought to revoke the alcoholic beverage permits and license of three licensees: Diwan LLC, d/b/a Mart Stop #1 (beer permit), Red River Steakhouse LLC, d/b/a/ Red River Steakhouse (liquor license), and Brady Oil LLC, d/b/a Brady Oil (beer permit). The City alleged revocation was appropriate due to: (1) a lack of "good moral character;" (2) a felony conviction; and (3) material misrepresentations on the applications.

At the request of the licensees, the cases were consolidated and a joint hearing was held in April 2008. The City did not appear at the hearing. After hearing, the administrative law judge (ALJ) ordered revocation of Diwan's permit and ordered Brady Oil and Red River Steakhouse to surrender their permit/license in thirty days. This ruling was upheld on appeal to the Administrator of the Alcoholic Beverages Division (Division) and on further appeal to the district court.

Diwan and Brady Oil appeal contending: (1) the agency erred in failing to dismiss the contested cases by default; (2) the agency exceeded its authority in denying their informal settlement agreement with the City; and (3) the agency erred in finding the licensees do not satisfy the good moral character requirement of Iowa Code section 123.3(26) (2007). We affirm.

I. Background Facts and Proceedings.

A. Diwan Applications.

In April 1998, Diwan applied to the Division for a "class C" beer permit for the Davenport Mart Stop #1 convenience store. The application stated brothers Ranbir and Jangbir Thakur each owned fifty-percent of Diwan. The brothers accurately answered "none" on the 1998 form's request for a listing of criminal convictions. In May 1998, the initial permit was granted to Diwan.

In July 1998, Jangbir pled guilty to a Missouri felony drug offense. The court sentenced Jangbir to ten months incarceration, but suspended execution of the sentence and placed him on two years of supervised probation with a community service requirement. In February 1999, Ranbir was arrested for selling alcohol to a minor. The charge was subsequently dismissed.

Diwan's March 1999 renewal application asked owners to disclose all *convictions* since the previous application. Accordingly, Ranbir was not required to report his *arrest* for selling alcohol to a minor. However, Jangbir did not disclose his Missouri felony conviction[1] on the March 1999 renewal and instead answered "none." Jangbir's felony conviction was not listed on any of Diwan's subsequent renewal applications. In April 2003, a Missouri Circuit Court set aside Jangbir's felony conviction and sentence.

Starting in 2000, the information requested by the Division on the criminal history section of renewal applications was expanded:

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[1] Under Missouri law, a suspended execution of sentence is a conviction. *See Yale v. City of Independence*, 846 S.W.2d 193, 195-96 (Mo. 1993).

> 6-1. List below all arrests, indictments, summonses, convictions and deferred judgments of ALL violations of any state, county, city, federal or foreign government . . . since the license was last issued. All information must be reported regardless of the disposition, even if dismissed or expunged. Include pending charges.

On Diwan's 2000, 2001, 2002, and 2004 renewal applications, Jangbir and Ranbir answered "no" in the criminal history section, while on Diwan's 2003 application, the section was left blank. In May 2000, Ranbir was arrested for criminal mischief and the charge was subsequently dismissed. Despite the renewal form's request for information on all arrests regardless of disposition, Ranbir did not disclose the arrest on Diwan's 2001 renewal application.

In January 2004, Jangbir was convicted of operating while intoxicated (OWI). Three months later, in March 2004, Jangbir failed to disclose this conviction on Diwan's 2004 renewal application.

In March 2005, Ranbir was convicted of two misdemeanors: simple assault and 5th degree criminal mischief. Ranbir disclosed both convictions on Diwan's 2005 renewal application, which also disclosed Jangbir's 2004 OWI conviction for the first time.

B. Brady Oil Applications.

In 2005, Brady Oil LLC, submitted its initial application for a class "C" beer permit for a Davenport store. In 2005, Ranbir was a part owner of Brady Oil. On the initial application, Ranbir listed his 2005 simple assault conviction. Ranbir did not report his 2005 criminal mischief conviction and his 1999/2000 arrests for criminal mischief and sale to a minor on the initial application nor on Brady Oil's 2006 and 2007 renewal applications. In 2007, Ranbir notified the Division he had

purchased the interests of the other owners and was now the sole owner of Brady Oil.

C. Red River Steakhouse Application.

Ranbir was a part owner of Red River Steakhouse, LLC, which was issued a liquor license in July 2007. Ranbir admits he "did not report any of his violations of the law on the application form." Red River voluntarily surrendered its liquor license in January 2009 and is not a party to this judicial review of agency action.

D. Tax Liens.

On November 7, 2007, the Iowa Department of Revenue (Revenue) filed three notices of a $140,602.11 tax lien: (1) against Diwan; (2) against Jangbir; and (3) against Ranbir. In January 2008, Jangbir transferred his Diwan ownership interest to Ranbir. In March 2008, Revenue removed Jangbir as a responsible party for Diwan.

At the time of administrative law hearing, Ranbir was attempting to negotiate a settlement of the delinquent tax obligations.[2] Ranbir testified he paid $16,000 toward the delinquency and Mart Stop #1 and Brady Oil are paying their current sales tax obligations.

II. Standard of Review.

The Iowa Administrative Procedure Act, chapter 17A, "governs the standards under which we review the district court's decisions on judicial review of agency action." *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 589

[2] Diwan also has a $33,606 tax lien for Mart Stop #3.

(2004). Under the Act, we may only interfere with the agency "decision if it is erroneous under one of the grounds enumerated in the statute, and a party's substantial rights have been prejudiced." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). In reviewing the district court's decision, we apply the standards of chapter 17A to determine whether our conclusions are the same as those reached by the district court. *Auen*, 679 N.W.2d at 589.

The licensees do not claim error in the agency's findings of fact. Rather, they assert error in the agency's application of law to the facts and in the agency's interpretation of the applicable statutes. Because factual determinations are within the discretion of the agency, we "allocate some degree of discretion" in considering the agency's application of law to facts, "but not the breadth of discretion given to the findings of facts. *Meyer*, 710 N.W.2d at 219. We will reverse the agency's application of the law to the facts if we determine its application was "irrational, illogical, or wholly unjustifiable." *Id*. at 218.

"If the legislature has not clearly vested the interpretation of the statute at issue with the agency, we are free to substitute our judgment de novo for the agency's interpretation . . . ." *Auen*, 679 N.W.2d at 589–90. "If, however, the legislature has clearly vested the interpretation of the statute at issue with the agency," we will reverse only when the agency's interpretation is based on an "irrational, illogical, or wholly unjustifiable interpretation of the statute at issue." *Id*. at 590.

III. Dismissal of Contested Case by Default.

The City did not appear for the April 8, 2008 contested case hearing. At the start of the hearing, the ALJ granted the licensees' motion to strike the City's resistance to summary judgment as untimely. The licensees then moved for a grant of their summary judgment motion and moved for a default and dismissal. The ALJ reserved ruling and the licensees presented testimony.

Subsequently, the ALJ denied summary judgment, ruling:

> 185 IAC 10.22(1) provides that if a party to a contested case fails to appear or participate in a contested case hearing after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and render a decision in absence of the party. The undersigned was authorized to proceed with the hearing.
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> In hearings before the Alcoholic Beverages Division, the burden of going forward with the evidence is on the state or local authority; the burden of proving compliance with the statute is on the licensee. . . . In this case the [City] had filed a detailed Amended Complaint, and the licensees had filed an Answer. The licensees also elected to present testimony and evidence, in addition to the previously filed Motion for Summary Judgment, Statement of Disputed Facts, Memorandum of Authorities, and Appendix filed on March 12, 2008.

On appeal, the licensees argue the ALJ should have granted their motion for default and dismissed the case. Relying on *City of Sioux City v. GME, Ltd.*, 584 N.W.2d 322 (Iowa 1998), the licensees claim: (1) "To allow a party to merely file a petition and prevail by doing nothing more would drastically alter our adversarial system of justice"; and (2) "[T]he treatment of the licensees in this case is diametrically opposed with the past practice and precedent of the Division."

In *GME*, the City of Sioux City challenged the authority of the Division to promulgate a rule permitting entry of a default judgment against a party failing to appear at a contested case hearing after receiving proper notice. *GME, Ltd.*, 584 N.W.2d at 323. The *GME* court concluded the agency's rule was within its statutory authority. *Id*.

We find no merit in the licensees' arguments and agree with and adopt the district court's resolution of this issue.

> The Iowa Administrative Code provides that "[i]f a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer *may*, if no adjournment is granted, enter a default decision *or* proceed with the hearing and render a decision in the absence of the party." Iowa Admin. Code r. 185–10.22(1) (emphasis added). Therefore, the rule permits, but does not require, an entry of default upon a party's failure to appear. In this case the ALJ determined . . . that the alternative was more appropriate and proceeded with the hearing as authorized by the rule.
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> . . . The Court finds *GME* not controlling. The *GME* decision is devoid of any information as to the contents of the administrative record before the Division at the time of hearing. . . . [Here the] ALJ decided the case "based on the Amended Complaint and Answer, the licensees' Motion for Summary Judgment and documents in support thereof, the documents that were officially noticed at the request of the licensee, and the testimony and exhibits submitted by the licensee." . . . [The ALJ] therefore correctly relied upon Ranbir's testimony and the pleadings and motions on file to enter her ruling ordering revocation and suspension . . . . The Court finds the ALJ's decision was not unreasonable nor without precedent under Iowa law.

IV. Informal Settlement Agreement.

In November 2008, after the ALJ's ruling but prior to the Administrator's final order, the licensees notified the Administrator that the City and the licensees were willing to reach an informal settlement that did not involve a revocation. In January 2009, the Administrator upheld the ALJ's decision. The licensees argue

the agency's decision must be reversed because "the Division has not adopted rules [for informal settlement] as required by section 17A.10 and because it acted arbitrarily in refusing to accept the parties' informal settlement."

In Iowa Code section 123.4, the legislature directs the Division "to administer and enforce the laws . . . concerning beer, wine, and alcoholic liquor." In the section entitled, "Powers," the Division's Administrator is authorized to "grant and issue" beer permits and liquor licenses as well as the power to "suspend or revoke all such permits and licenses for cause under this chapter." *Id*. § 123.20(5). Local authorities, such as the City, are authorized to "either approve or disapprove the issuance" of the permits and licenses and to note its decision on the application before forwarding the application to the Division. *Id*. § 123.32(2). Final authority on issuance or denial, however, rests with the Division. *Id*. § 123.32(5). Further, under both Iowa Code chapters 17A and 123, the Administrator retains the right to review an ALJ proposed decision on his/her own motion and determine how best to uniformly administer agency policy. *Id.* §§ 17A.15, 123.32(8), 123.39(1)(a).

We find no merit in the licensees' arguments and agree with and adopt the district court's resolution of this issue:

> While it is true that the Iowa Administrative Procedures Act encourages informal settlements, it explicitly provides that "[t]his subsection shall not be construed to require either party to such a controversy to utilize the informal procedures or to settle the controversy pursuant to those informal procedures." [Iowa Code] § 17A.10(1). Because the Division has been vested with the preeminent authority to regulate the sale and issuance of liquor licenses and/or beer permits, it retained the right to order that the licenses at issue be revoked and/or surrendered notwithstanding the proposed settlement. *See id*. § 123.39(1)(a). Parties to a

> contested case cannot limit the statutory authority of an agency by agreement. *Crescent Chevrolet v. Iowa Dept. of Job Serv.*, 429 N.W.2d 148, 150 (Iowa 1988). The lack of informal settlement procedures is of no consequence. This Court finds no error in the agency's failure to accept [the licensees'] informal settlement.

V. Good Moral Character.

Under Iowa law, "class C" beer permit holders must be "persons of good moral character." Iowa Code § 123.129(2). "Persons of good moral character" are "any person who meets *all* of the following requirements":

> a. The person has such financial standing and good reputation *as will satisfy the administrator* that the person will comply with this chapter and all laws, ordinances, and regulations applicable to the person's operations under this chapter. . . .
>
> . . . .
>
> d. The person has not been convicted of a felony. . . .

Id. § 123.3(26) (emphasis added). The language "as will satisfy the administrator" indicates the Division Administrator has broad discretion in determining who is a person of "good moral character." The agency is specifically authorized to revoke a permit "for any of the following causes":

> (1) Misrepresentation of any material fact in the application for the license or permit.
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> (2) Violation of any of the provisions of this chapter.
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> . . . .
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> (4) An event which would have resulted in disqualification from receiving the license or permit when originally issued.

Id. § 123.39(1)(b)(1), (2), (4).

The ALJ ruled Diwan misrepresented a material fact when it did not disclose Jangbir's "felony conviction on the 1999 renewal application . . . or on any subsequent renewal application." The misrepresentation was "obviously

material" because the conviction made Diwan and Jangbir "statutorily ineligible to hold a liquor license or beer permit."

Regarding Ranbir's failure to disclose his arrest for criminal mischief on Diwan's 2001 renewal and Jangbir's untimely reporting of his 2004 OWI conviction, the ALJ stated:

> The division has repeatedly found that misrepresentation of criminal history is grounds for license denial, regardless of whether the license would have been denied with timely disclosure of the criminal history. The sale of alcoholic beverages is a highly regulated industry that is subject to many forms of corruption. The division must rely on the information provided on applications to investigate the applicant's eligibility for licensure and to monitor . . . ongoing eligibility. Full and honest disclosure is essential to the regulatory process. . . .
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> Applicants must not be allowed to self-select what information will be disclosed on the application. Omission of arrests and convictions that occurred since the last license was issued undermines the ability of the local authority and the division to evaluate applicant eligibility for the license and therefore constitutes a material misrepresentation, even if the information, properly and honestly disclosed, would not have disqualified the applicant.
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> . . . [Diwan's] material misrepresentations of criminal history on multiple license applications are inconsistent with the good moral character required . . . .

The ALJ also discussed the Brady Oil and Red River submissions.

> The evidence further established that [Brady Oil and Ranbir] failed to disclose [Ranbir's] two arrests and his criminal mischief conviction on the initial application for [a] Beer Permit . . . . This also constituted a material misrepresentation on an application.
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> In addition, the licensees have admitted in their Answer that [Red River] did not disclose any criminal history for [Ranbir] on the application . . . . This was a material misrepresentation.

In discussing the statutory financial standing mandate, the ALJ ruled:

> . . . Both [Diwan and Ranbir] have substantial outstanding tax liens with the Iowa Department of Revenue. One of these tax liens is for more than $140,000 and relates directly to Mart Stop #1.

> The substantial tax liens significantly diminish the financial standing and consequently further negate the good moral character of both [Diwan and Ranbir]. Although [Diwan and Ranbir] are attempting to reach a compromise and repayment agreement with the Department of Revenue, they had not done so as of the date of the hearing.

The licensees argue the agency's interpretation of Iowa Code section 123.3(26) is "irrational, illogical or wholly unjustifiable" because (1) the agency "takes too narrow a view of the financial standing requirement"; (2) licensees do not "fail to satisfy the definition of good moral character because he or she made material misrepresentations"; and (3) "[t]he misrepresentations with respect to the criminal history on some, but not all, of the applications do not rise to the level of being material."

In resolving the licensees' claims of error concerning material misrepresentation, we agree with the ALJ that a licensee who fails to disclose information specifically requested by the Division jeopardizes the legitimacy and safety of the licensing procedures. The agency, in determining "good moral character," is authorized to assess the licensees' "good reputation." The administrative rules provide:

> In evaluating an applicant's "good reputation," the . . . administrator may consider such factors as, *but not limited to*, the following: . . . permittee convictions for violations of laws relating to operating a motor vehicle while under the influence of drugs or alcohol . . . . permittee misdemeanor convictions . . . .

Iowa Admin. Code r. 185-4.2(4)(b) (emphasis added). Accordingly, Jangbir's OWI conviction and Ranbir's two misdemeanor convictions are specifically identified as relevant factors in determining "good reputation." Further, the language "*but not limited to*" authorizes consideration of any other factors the

agency deems appropriate, including multiple misrepresentations on multiple submissions as relevant in determining the "good reputation" component of "good moral character." We agree with the district court and "find no error with the agency's well-reasoned analysis."

In resolving the licensees' financial standing argument, we note the administrative rules provide:

> In evaluating an applicant's "financial standing," the . . . administrator may consider the following: An applicant's "financial standing" may include, but is not limited to . . . a record of prompt payment of local or state taxes due . . . .

Iowa Admin. Code r. 185-4.2(4)(a).

The agency's consideration of tax liens is specifically authorized by administrative rule and its resulting conclusion on the basis of the outstanding liens is not "irrational, illogical or wholly unjustifiable."

AFFIRMED.