Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-125

OCTOBER TERM, 2017

In re Fuad Ndibalema/SNF Fresh Start, LLC	}	APPEALED FROM:
	}	
	}	Vermont Board of Health
	}	

In the above-entitled cause, the Clerk will enter:

Applicant appeals a decision by the Vermont Board of Health denying his food stand license application. We affirm.

The Vermont Department of Health's Food and Lodging Program is responsible for licensing and oversight of facilities that serve food to the public. See 18 V.S.A. § 4351(a). The Board of Health hears appeals of any acts, decisions, or orders of the Commissioner of Health, including licensing decisions. 18 V.S.A. § 128. Hearings by the Board are governed by the Vermont Administrative Procedure Act (APA), 3 V.S.A. §§ 801-849. Id. A party may appeal a decision of the Board to this Court within thirty days after entry of judgment. 18 V.S.A. § 128(b); V.R.A.P. 4.

Applicant, doing business as Samosaman, had held licenses since 2000 that permitted him to operate multiple food stands at farmer's markets in Vermont. In August 2015, the Department sought to revoke applicant's food stand and food producing licenses on the grounds that he produced food from an unapproved source, operated a fair stand without a license, and failed to provide an accurate weekly inventory of food he processed. The Board had previously suspended applicant's licenses for thirty days in July 2013 and for six weeks in June 2014 due to similar violations. The Board voted in December 2015 to revoke applicant's licenses for one year, until October 23, 2016. A three-Justice panel of this Court affirmed the Board's decision. See In re Fuad Ndibalema SNF Freshstart, LLC, No. 2016-049, 2016 WL 5921035 (Vt. Oct. 7, 2016) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo16-049.pdf **[**https://perma.cc/AS4F-N48U]**.**

Applicant filed a new application for a temporary food stand license on October 26, 2016. The Department of Health denied the application in a letter dated November 8, 2016. The reasons stated for the denial were applicant's prior violations and alleged new violations and his unwillingness to comply with the relevant regulations and orders. The Department asked the Board of Health to approve the denial at its next meeting. The Board treated the matter as a contested case and held a hearing on December 6, 2016, which applicant attended. Both the Department and applicant presented evidence at the hearing. On December 16, 2016, the Department submitted a motion to reopen evidence along with proposed findings of fact and conclusions of law. The Board agreed to reopen the evidence and held a second day of hearing on December 19, 2016. The Department and applicant each presented further evidence and made closing arguments.

The Board affirmed the denial of the license in a written decision entered on January 5, 2017. The Board ruled that the Department acted within its discretion in denying the license. It separately concluded, based on applicant's history and the evidence presented, that applicant had not established that he would be able to serve food to the public from "sanitary and healthful" premises if the license were granted. Accordingly, the Board concluded that to the extent it has the discretion to deny a license application, it would do so in this case.

On February 15, 2017, applicant filed a document entitled "Applicant's Proposed Findings of Facts, Memorandum [of] Authorities, and Conclusions of Law" with the hearing officer. The Board received the same document on February 16, 2017. In the document, applicant requested that the Board reverse its January 2017 decision and grant him the license. Applicant also challenged the Board's findings in previous cases and asked for an application dated May 1, 2015, to be "renewed and granted." The February 15 document had not been presented at the December hearing. It did not contain a request to reopen the evidence. The Department of Health filed a response arguing that the Board should not consider applicant's February 15 filing because it was filed more than thirty days after the Board's entry of judgment. The Department also argued that applicant was barred from attempting to relitigate issues that had previously been decided in earlier cases.

The Board held a hearing on March 16, 2017, concerning applicant's February 15 filing. The Board voted to deny the requests made by applicant in that document because it was untimely filed, and the Board explained its reasoning in a written decision on March 27, 2017. This appeal followed.

On appeal, applicant argues that the Board's January 2017 decision should be reversed because the Board violated the APA by failing to consider his proposed findings. He also challenges various evidence introduced at the December hearings, as well as the Board's findings and conclusions in its January 2017 decision.

We first address applicant's challenge to the January decision. As noted above, an individual who is aggrieved by a decision of the Board must file a notice of appeal with the Board within thirty days of the entry of judgment. In order to obtain review of the Board's January decision, applicant was required to file a notice of appeal by February 6, 2017. Applicant did not file a timely notice of appeal or ask for an extension of time in which to file a notice of appeal. See V.R.A.P. 4(a), (d). Nor did applicant's February 15 filing extend the time for him to appeal the judgment. V.R.A.P. 4(b). Assuming that an applicant may file a motion under V.R.C.P. 52(b), 59, or 60 to amend a judgment in an APA contested case, such a motion would have to be filed within ten days in order to toll the appeal period. V.R.C.P. 52(b), 59(b); V.R.A.P. 4(b)(7). Applicant's proposed findings were filed forty days after the judgment was entered. We therefore lack jurisdiction to review the Board's January 2017 decision.

We also agree that the Board was not obligated to reopen the evidence and consider applicant's proposed findings. Section 812 of the APA requires that the Board issue a "final decision" in a contested case in writing or on the record. It goes on to state that "[i]f, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding." 3 V.S.A. § 812(a). The Board has not promulgated rules under the APA that require or permit proposed findings of fact. The Board did not invite applicant to provide proposed findings, nor did applicant request to file such a document prior to the issuance of the January 2017 decision. As the Department argues, the language of the statute implies that proposed findings must be submitted before the final decision is issued in order to be addressed in that decision. The Board's January decision was final because it was considered by a majority—

five out of seven members—of the Board, and it conclusively resolved all outstanding issues on the merits. See 3 V.S.A. § 811 (requiring no final decision be made until case has been heard by majority of those who will render the final decision); State v. CNA Ins. Cos., 172 Vt. 318, 322 (2001) (explaining that final judgment is one that disposes of all matters that should or could properly be settled in proceeding).

Applicant also appears to argue that the March 27, 2017, decision was invalid because two of the Board members who participated in that decision did not participate in the December 2016 hearings and therefore were unfamiliar with the record. See 3 V.S.A. § 811 (providing that when majority of officials of agency who are to render final decision have not heard case or read record, decision shall not be made until proposal for decision is served upon parties and party who is adversely affected has opportunity to object and present briefs and oral argument). We find this argument to be without merit. Assuming without deciding that § 811 applied to the March decision, which was procedural in nature, the Board complied with the rule. Four of the members who participated in the January decision also participated in the March decision. This constitutes a majority of the seven-member Board. The Board was therefore not required to serve the parties with a proposed version of its March decision before entering that decision.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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Karen R. Carroll, Associate Justice