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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-049

OCTOBER TERM, 2016

In re Fuad Ndibalema SNF Freshstart, LLC d/b/a Samosaman Natural Foods	}	APPEALED FROM:
	}	
	}	Board of Health

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

Licensee, doing business as Samosaman Natural Foods, appeals a decision by the Vermont Board of Health to suspend his fair stand license for one year. 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 program monitors regulatory compliance in food service establishments to reduce the risk of food-borne illnesses.

Samosaman had held licenses since 2000, which allowed him to operate multiple food stands at farmer's markets. In August 2015, the Department filed notice of its intent to revoke his food stand and food producing licenses based on him: (1) producing food from an unapproved source, (2) operating a fair stand without a license, and (3) failing to provide an accurate weekly inventory of food he processed. The Board previously suspended Samosaman's licenses for thirty days in July 2013 and for six weeks in June 2014 for similar violations. The Department sought revocation rather than suspension of Samosaman's licenses because of his continuing violations of program regulations despite prior suspensions.

Following an October 23, 2015 hearing, the Board voted two to one, with one member abstaining, to revoke Samosaman's food stand and food producer's licenses, effective that day, based on findings that he produced food without a license and failed to provide accurate weekly reporting.[1] Samosaman sought reconsideration of the order the following day, and the Board subsequently invited the parties to file proposed findings within twenty days from the date the hearing transcript became available to aid the Board in reaching a final decision. The Board directed the parties to address whether the fact that two of the Board members had participated in the October 23 hearing by telephone violated quorum requirements or the Vermont Administrative Procedures Act (APA).

On December 10, 2015, after receiving further submissions from the parties, the Board determined that the participation by telephone of two Board members satisfied quorum requirements and did not violate the APA. Further, the Board concluded, by a four to zero vote, that the Department had proven each of its three alleged violations. The Board first voted two to

[1] The Board later ruled that this first vote was insufficient to support revocation because under Vermont law abstention does not constitute concurrence with the majority decision. See In re Reynolds, 170 Vt. 352 (2000).

one, with one member abstaining, to revoke Samosaman's fair stand license,[2] but after concluding that there was no quorum for revocation,[3] voted three to zero to suspend his license for one year.

On appeal, Samosaman argues that we should reverse the Board's decision because two of the four members who ultimately voted on the matter were not present at the hearing, and the Board improperly considered hearsay testimony.

On the first point, Samosaman questions whether the Board erred in ruling that two of its members could participate by telephone at the October 23 hearing without violating the APA. We find no basis to invalidate the hearing. Nothing in the APA suggests that decision makers cannot participate by telephone in contested cases. Indeed, concluding as such would be difficult to reconcile with the APA provision stating that in a contested case when "a majority of the officials of the agency who are to render the final decision have not heard the case or read the record," no adverse decision shall be made until the parties (1) are served with a proposed decision "prepared by the person who conducted the hearing or one who has read the record," and (2) have had an opportunity "to file exceptions and present briefs and oral argument to the officials who are to render the decision." 3 V.S.A. § 811. Moreover, this Court has concluded that due process requires only "that members not present when testimony is taken [] review the testimony before participating in the decision." Lewandowski v. Vt. State Colleges, 142 Vt. 446, 452-53 (1983). Thus, "[e]ven for administrative adjudicative bodies that hear evidence and make findings of fact, a member can participate without offending the requirements of due process of law or general statutory requirements by voting after reviewing a transcript of the testimony and other evidence or listening to a recording of the hearing and reviewing other evidence." In re Rumsey, 2012 VT 74, ¶ 22, 192 Vt. 290. Here, the Board members who participated by telephone not only had an opportunity to review the transcript before the December 10 meeting when the Board voted, but also heard the testimony in the October 23 hearing live, by telephone. This was allowed by the rules.[4]

Samosaman also challenges the Board's decision to consider hearsay testimony from a Department health inspector, who stated that when she went for a routine inspection on February 5, 2015 to the only place where Samosaman had a license to produce food, the owners of the establishment told her that Samosaman had not used their kitchen since November 2014. In allowing the hearsay testimony, the hearing officer cited 3 V.S.A. § 810(1), which provides that evidence not allowed by the Rules of Evidence may be admitted in contested cases "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules . . . if it is of a type commonly relied upon by reasonably prudent [persons] in the conduct of their affairs." Samosaman did not dispute the health inspector's testimony by cross-examining the witness or presenting contrary evidence; nor does he dispute the accuracy of the testimony on appeal. In concluding that Samosaman produced food from an unapproved source, the Board relied upon the hearsay testimony, as well as the fact that Samosaman offered multiple, varying, and not-credible explanations concerning where he produced the food during the spring and summer of 2015—

[2] Samosaman's food producer's license had expired in October 2015.

[3] There were two vacancies on the Board at the time of the hearing, leaving only five members. Four of those five participated in the hearing.

[4] Samosaman suggests that the two individuals who participated by telephone were not present for the deliberation. We see nothing in the record that suggests that all four members of the Board who voted at the December 10 meeting did not deliberate together.

during a period when he was licensed to produce the food at only the one kitchen. The Board determined that it was reasonable to rely on the hearsay statements from the owners of the establishment where Samosaman was licensed to produce food to explain why Samosaman was not present when the health inspector went to the establishment to conduct her inspection.

We reject Samosaman's challenge to the Board's consideration of the hearsay testimony. We have stated that § 810(1) "recognizes the need of agencies to consider any evidence which may illuminate the case." In re Central Vt. Pub. Serv. Corp., 141 Vt. 284, 292 (1982). Even if the Board's admission of the hearsay testimony did not satisfy the requirements of § 810(1), since the Department could have sought to subpoena the witness who told the health inspector that Samosaman had not been producing food in the only kitchen in which he had authorization to produce the food, we conclude on this record that any error was harmless. The Board heard evidence and made findings that when the Department questioned how Samosaman could have prepared samosas to sell at a market in April 2015 since he did not have an approved location for preparing them, Samosaman did not deny that he had ceased producing samosas in the approved kitchen, but instead claimed to have a box of 375 frozen samosas left over from the period when he was producing them in the approved kitchen. He said this despite the fact that his weekly inventory reports for the proceeding two months reported an inventory of just twelve samosas in the freezer. In that same email exchange, Samosaman also reported that he was moving his equipment out of a different kitchen that had not been licensed.

In addition, the evidence supported the Board's findings that at various times in the summer of 2015 Samosaman sold or was preparing to sell large quantities of pre-made samosas at fairs and farmer's markets that he claimed to have made on site at those markets—a claim the Board expressly rejected in light of contrary evidence on this point. In the proceedings below, Samosaman did not testify that he did, in fact, produce all of his samosas at the approved kitchen throughout the period in question; instead, he offered alternate and sometimes conflicting explanations of where he was producing the food during this period—explanations the Board did not find credible. Even on appeal, Samosaman does not challenge the truth of the hearsay testimony. Given this record, if the hearsay testimony was inadmissible, its admission was harmless. See V.R.E. 103(a) ("Error may not be predicated upon ruling which admits or excludes evidence unless a substantial right of the party is affected . . . .").

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice