

July 27, 2022

VIA EFILING ONLY

Shari Moore
City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

Re: *In the Matter of the Cigarette/Tobacco License Held by Bright Star Inc. d/b/a Tom and Joe's Market for the Premises Located at 684 Western Avenue in St. Paul*
OAH 82-6020-38293

Dear City Clerk Moore:

Enclosed and served upon you is the Administrative Law Judge's **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** in the above-entitled matter. The official record, along with a copy of the recording of the hearing, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7857, nichole.helmuelle@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



NICHOLE HELMUELLER
Legal Assistant

Enclosure

cc: Docket Coordinator
Stephen Earnest
Derek Thooft

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the Cigarette/Tobacco -
Product Shop License held by Bright Star
Inc. d/b/a/ Tom and Joe's Market for the
premises located at 684 Western Avenue
in St. Paul
License No. 20190003653

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

This matter came before Administrative Law Judge Barbara Case for a hearing on July 13 and 15, 2022. The record closed on July 15, 2022.

Stephen Earnest, Assistant City Attorney, appeared on behalf of the City of St. Paul (City). Derek Thooft, Thooft Law, LLC, appeared on behalf of Bright Star, Inc.(Licensee) d/b/a Tom and Joe's Market (Licensed Premises).

STATEMENT OF THE ISSUES

Does the City have reasonable cause to revoke Licensee's tobacco license number 20190003653?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge finds that the City has reasonable cause to take adverse action against Licensee's license and respectfully recommends that the revocation of Licensee's cigarette/tobacco license be affirmed.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Husham Alko Al Furajiji is the owner of Licensee,¹ which operates a convenience store located at 684 Western Avenue North, Saint Paul. Licensee holds a city-issued cigarette/tobacco license.² Under that license, a licensee may not sell flavored tobacco products or other flavored products.³

¹ City's Exhibits (Exs.) 1-4.

² Testimony (Test.) of Eric Hudak.

³ St. Paul Legislative Code § 324.07(j).

2. Flavored tobacco products are items such as menthol cigarettes and flavored products are items such as CBD gummy candies and Delta-8 vaping products.⁴ Selling flavored tobacco products and flavored products requires a tobacco shop license; such licenses are issued only to shops that sell almost exclusively tobacco products, and that do not allow people under 21 years of age to enter.⁵

3. License holders receive education from the City regarding what they are permitted to sell, and are advised of changes to tobacco related laws through City provided mailings, outreach from city inspectors during inspections and other education programs promoted in conjunction with the Nonsmokers League.⁶ When ordinances change, the City mails the new ordinances to license holders.⁷

4. Licensee has had only one other adverse action. That previous adverse action involved a failed youth tobacco compliance test on or about March 16, 2020. Therefore, the event addressed in this report is deemed a “First Violation.”⁸

5. On January 6, 2022, Department Inspector Kaozouapang Yang and an Inspector from the Minnesota Department of Revenue (MDR), conducted a complaint inspection at Tom and Joe’s Market. The complaint alleged that flavored tobacco products were being sold out of a jacket in the store.⁹

6. After introducing herself to the store clerk, Inspector Yang began her inspection. Behind the cash register counter, she found flavored tobacco products concealed in a couch which had a place for storage under the cushion.¹⁰ She also found flavored tobacco products in the drawers beneath the cash register counter.¹¹ She found more than 20 packs of menthol cigarettes hidden in a jacket hanging on the wall, and some of those packages did not have Minnesota tax stamps affixed to them.¹²

7. There was a large amount of flavored product, such as Delta-8, Delta-10 and CBD in the form of vaping cartridges and pens on display throughout the store. These products, known as “flavored products,” are also not legal to sell under Licensee’s license. Most of the products that were hidden were flavored tobacco products such as menthol cigarettes.¹³

8. Mr. Furajiji does not dispute that the flavored tobacco products and flavored products were in his store.¹⁴

⁴ Test. of E. Hudak.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; City’s Ex. 4 (Licensing history).

⁹ Test. of K Kaozouapang Yang; Ex. 2.

¹⁰ Test. of K. Yang; Test. of E. Hudak; Ex.2; Ex. 5-1.

¹¹ Ex. 2; Ex. 5-1.

¹² Test. of K. Yang; Ex. 2; Ex. 5-28-31.

¹³ Test. of E. Hudak; Ex. 2.

¹⁴ Test. of Husham Furajiji.

9. The City provided notice of the violation and recommended penalty by letter dated March 22, 2022.¹⁵ The City imposed an upward departure from the presumed penalty for possessing or selling flavored products because of the amount of product that was found in Licensee's store, and because of the blatant and intentional nature of the violations and Licensee's disregard for the ordinances.¹⁶

10. By letter dated April 4, 2022, Licensee requested a contested case hearing in this matter.¹⁷

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The City and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.55, 461.12 (2020), and Saint Paul Legislative Code §§ 310.05-.06, 324.01-324.10.

2. The City has complied with all relevant procedural requirements of ordinance and rule.

3. Saint Paul Legislative Code § 310.06(b)(6)(a) provides that when a licensee has violated any provision of the Code or of any statute, ordinance, or regulation reasonably related to the licensed activity, the City may take adverse action against the license.

4. Code § 310.10(b)(2), provides the penalties for the "display, possession or multiple incidents of sales of . . . menthol tobacco, products or flavored tobacco products." The presumptive penalty for a first appearance is a 10-day suspension and for the second appearance the penalty is revocation.

5. Code § 310.10(a) provides that the penalties are presumed appropriate for every case, but also notes that the City Council may deviate in an individual case where the Council finds substantial and compelling reasons making it more appropriate to do so. If the Council deviates, it must provide written reasons why the penalty selected was more appropriate.

6. The City has complied with the notice requirements of Code § 310.10(a).

7. The City stated in the Notice of Violation and Request for Upward Departure for Revocation that "the amount of flavored tobacco products found on the licensed premises and the blatant, intentional nature of the violations and the total disregard for the ordinances constituted a substantial and compelling reason to upwardly depart from the presumed penalty in this case."

¹⁵ Ex. 1.

¹⁶ *Id.*

¹⁷ Ex. 8.

8. The City has reasonable cause to take adverse action against Licensee's cigarette/tobacco license. The City has also shown substantial and compelling reasons for the implementation of an upward departure from the presumed penalty, and for the revocation of Licensee's cigarette/tobacco license.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the revocation of Licensee's cigarette/tobacco license be **AFFIRMED**.

Dated: July 27, 2022

A handwritten signature in black ink, reading "Barbara Case", written over a horizontal line.

BARBARA J. CASE
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared.

NOTICE

This Report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions of Law, and Recommendation. Pursuant to Saint Paul Legislative Code § 310.05(c-1), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact the St. Paul City Clerk, 310 City Hall, 15 W. Kellogg Blvd., Saint Paul, MN 55102, to ascertain the procedure for filing exceptions or presenting arguments.

MEMORANDUM

This case concerns the possession and sale of flavored tobacco products in Licensee's store in violation of its cigarette/tobacco license. That license only permits Licensee to sell unflavored tobacco products. In violation of the ordinances, Licensee possessed flavored tobacco, which was concealed, and displayed numerous flavored products throughout the store. The City determined it would revoke Licensee's license.¹⁸

The City presented two witnesses at the hearing in this matter. Inspector Yang testified that she found a substantial amount of hidden flavored tobacco products, as well as numerous flavored products on display, during her inspection of the store. Licensing Manager Eric Hudak testified regarding licensing of tobacco and flavored products and the reason for the upward departure as to the penalty in this case. Both testified in a straightforward and credible manner. In fact, while Licensee disagrees with the penalty in this matter, he does not dispute the findings in the Inspector's report with regard to the products found in the store.¹⁹

Licensee argues that his license should not be revoked because the store supports himself, his family and members of his extended family. He also argued that there was no evidence that the products were being sold, as the inspector did not purchase any products and observed no sales being made. He further argued that the ordinances regarding what products may be sold are confusing and change frequently. He also disputes that the flavored tobacco was hidden but rather stated that Licensee was in the process returning products to the vendor. He also said that Licensee stored flavored product under the couch cushion because it is necessary to use every possible space for storage in the small store.²⁰

Mr. Furajji's testimony regarding whether the flavored tobacco products were being sold in the store was not credible. It is contrary to reason to believe that flavored products were hidden in the couch and the jacket because they were being returned to the vendor. Furthermore, the complaint that led to the investigation alleged that products were being sold out of the jacket and the products were still there sometime

¹⁸ Ex. 1.

¹⁹ Test. of H. Furajji.

²⁰ Test. of H. Furajji.

after the complaint was received. Licensee had ample time to have returned the products if that had been his intention. If they were being returned, they would most likely have been packaged up and held in Licensee's storage room. It is reasonable to conclude that these flavored tobacco items were concealed because Licensee was selling them in violation of the terms of his license.

The City has a substantial reason to upwardly depart to revocation because of Licensee's intentional illegal conduct, as evidenced by his concealment of the violative products. That is, Licensee's conduct evidences an intention to violate the terms of his license, rather than an inadvertent or unintentional selling of a violative product. Furthermore, the upward departure is warranted by the substantial amount of flavored tobacco products found concealed in Licensee's store since each product constitutes a separate violation.

Conclusion

The City has met its burden to show that it may take adverse action against Licensee's cigarette/tobacco license based on the Licensee's possession of flavored tobacco products. Furthermore, the City has established a basis for departing upward from the presumptive penalty. Therefore, the City Council should **AFFIRM** the revocation of Licensee's license.

B. J. C.