

June 26, 2017

VIA E-FILING 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 All Licenses Held by Payne EZ Market, Inc., d/b/a
Payne EZ Market Located at 1132 Payne Avenue in St. Paul
OAH 82-6020-34223***

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, with the exception of the recording of the hearing, is also enclosed. If you would like a copy of the recording, please contact the Office of Administrative Hearings in writing, by telephone at (651) 361-7870, or by e-mail at kendra.mccausland@state.mn.us. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact my legal assistant Kendra McCausland at (651) 361-7870 or kendra.mccausland@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



BARBARA J. CASE
Administrative Law Judge

BJC:klm

Enclosure

cc: Therese Skarda
Benjamin Loetscher

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MN 55164-0620

CERTIFICATE OF SERVICE

In the Matter of All Licenses Held by Payne EZ Market, Inc., d/b/a Payne EZ Market Located at 1132 Payne Avenue in St. Paul	OAH Docket No.: 82-6020-34223
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Kendra McCausland, certifies that on June 26, 2017, she served the true and correct **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** by courier service, by placing it in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

VIA E-FILING ONLY

Shari Moore
City Clerk
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310 City Hall
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Saint Paul, MN 55102
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VIA EMAIL ONLY

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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF ST. PAUL

In the Matter of All Licenses Held by
Payne EZ Market, Inc., d/b/a Payne EZ
Market Located at 1132 Payne Avenue
in St. Paul

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

This matter came before Administrative Law Judge Barbara J. Case for a Hearing on May 11 and 12, 2017. The record closed on May 26, 2017, upon the filing of the parties' closing arguments.

Therese Skarda, Assistant City Attorney, appeared on behalf of the City of St. Paul (City). Benjamin Loetscher, Ferdinand F. Peters Law Firm, appeared on behalf of Respondent Payne EZ Market, Inc., d/b/a Payne EZ Market (Licensee).

STATEMENT OF ISSUE

Does the City have reasonable cause to revoke the tobacco license of Licensee?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge recommends that the revocation of Licensee's tobacco license be affirmed.

Based upon the evidence in the hearing record, the Judge makes the following:

FINDINGS OF FACT

1. In January of 2015, Mohamed Samir Abraham (Mr. Abraham or Licensee) was granted license # 20150000195 to sell tobacco and tobacco products by the Department of Safety and Inspections for the City of St. Paul ("City"). He operates Payne EZ Market, Inc. at 1132 Payne Avenue, St. Paul, Minnesota.¹ Mr. Abraham is the sole owner and licensee for the business.²

¹ Exhibits (Exs.) 1-1-1-5; Testimony (Test.) of Kristina Schweinler.

² Ex. 1-4.

2. St. Paul Police know the business's neighborhood to be plagued by gambling, narcotics transactions, and gang activity.³

3. A high number of complaints from community members about the Payne EZ Market prompted police to investigate the business.⁴

4. The investigation was extensive, involving at least 200-400 man-hours.⁵ The use of surveillance, undercover officers (UCs), and confidential reliable informants (CRIs) led to a number of recorded drug transactions nearby, though never inside, the business.⁶

- a. On October 30, 2015, UC DeSanto purchased soda and a single swisher sweets. She was followed out by a Nashaun Shakelton, who offered her marijuana. She returned inside to get change, and Shakelton told the cashier, Licensee, "hey Mohamed, she is good, she is gonna buy". The transaction occurred near an alley outside the business.⁷ UC DeSanto was wearing audio and video surveillance tools, but they did not function properly.⁸
- b. The following week, UC DeSanto returned to the business, asking for Shakelton. Licensee told her that he had just left, but a person behind the counter (Joe) stated that he could get DeSanto drugs instead. Soon after, Joe sold DeSanto marijuana outside the business.⁹
- c. On March 2, 2016, a CRI entered the store and asked Licensee how he could obtain marijuana. Licensee replied that the seller was not there, lamenting it to be the reason that he was not making any money. The CRI observed Licensee pull a green notebook from under the cash register, and tell him that it was a ledger in which he tallied payments from the seller. Licensee claimed to make \$300 a month from "rent".¹⁰
- d. A week later, the CRI returned to the business with a body camera, though it failed through user error. The CRI asked Licensee where she could buy drugs as she purchased a soda. Licensee looked toward a man standing in the store, and said that the CRI did not have to pay for the soda.¹¹ Licensee then told them to go outside,

³ Exs. 9-7, 35-1.

⁴ Ex. 26-1; Test. of Abby DeSanto; Test. of Thomas Tanghe.

⁵ Test. of T. Tanghe.

⁶ Test. of A. DeSanto; Test. of T. Tanghe.

⁷ Exs. 9-7 – 9-8; Test. of A. DeSanto.

⁸ Test. of T. Tanghe.

⁹ Ex. 10-5; Test. of A. DeSanto.

¹⁰ Ex. 11-5; Test. of T. Tanghe.

¹¹ Exs. 12-9 – 12-10; Test. of T. Tanghe.

saying “they watch our cameras.” After leaving the business, the CRI purchased marijuana from the man who had been standing inside of the store. Officers had observed the business’s cameras three times in recent weeks for other investigations.¹²

- e. On March 17, 2016, the same CRI and suspect conducted another marijuana transaction outside the business.¹³

5. A search warrant was executed on the business on April 14, 2016. Based upon the results of the investigation of nearby drug transactions and a Supplemental Nutritional Assistance Program (SNAP) benefits investigation, Ramsey County District Court Judge Starr found probable cause and signed the warrant.¹⁴ As a result of the search, officers found marijuana, two Electronic Benefit Transfer (EBT) cards, various drug paraphernalia, and two green notebooks.¹⁵ The green notebooks did not have conclusive evidence of the “rent” scheme described to a CRI on March 2, 2016.¹⁶

6. On November 22, 2016, Licensee was convicted of finance transaction card fraud – trafficking SNAP benefits.¹⁷ Should Licensee complete his probation, the felony will be reduced to a misdemeanor as part of the stay of imposition.¹⁸

7. Licensee has had one adverse action taken against his tobacco license before. On May 29, 2015, the City Council imposed a matrix penalty of \$500 for the sale of a single cigarette to a CRI, in violation of City Ordinance § 324.07(a). Licensee paid the penalty in full.¹⁹ The adverse action may not be considered an appearance under Licensee’s current matrix evaluation as it occurred more than twelve months before the current violation.²⁰

8. On December 22, 2016, the City served Licensee with an initial Notice of Violation. It stated that the City intended to impose a \$1,000 penalty as Licensee was convicted of the SNAP benefits trafficking. The Notice cited codes applicable to liquor licenses as basis for the penalty.²¹

9. Less than a week later, the City Attorney’s Office received a request from the Licensee’s attorney for a public hearing.²²

¹² Exs. 13-5 – 13-6.

¹³ Ex. 26-4.

¹⁴ Exs. 4-5, 4-6.

¹⁵ Exs. 25-40, 25-57, 25-60, 41-1; Test. of T. Tanghe.

¹⁶ Ex. 41-1; Test. of T. Tanghe.

¹⁷ Ex. 22-3; Test. of T. Tanghe.

¹⁸ Ex. 22-1; See Minn. Stat. § 609.135 (2016); Test of T. Tanghe.

¹⁹ Exs. 2, 3.

²⁰ See St. Paul Legislative Code §310.05(v)(1); Test. of K. Schweinler.

²¹ Ex. 8-1.

²² Ex. 1-1; Test. of K. Schweinler.

10. The City amended the Notice on February 10, 2017. The First Amended Notice of Violation stated that the City sought revocation of all licenses instead of a fine, though it continued to use an inapplicable City Code as the basis for the revocation.²³ The Department of Safety and Inspections determined that a harsher penalty was necessary after considering police reports indicating drug transactions occurring around the business.²⁴

11. As he had obtained new counsel, Licensee again requested an administrative hearing on February 20, 2017. His counsel's letter to the City Attorney's Office stated Mr. Abraham's desire to dispute the adverse action and the facts presented in the First Amended Notice of Violation.²⁵

12. In its Second Amended Notice of Violation, dated March 17, 2017, the City stated that it was deviating from the matrix penalty set out in St. Paul Legislative Code § 310.05(m), which calls for a \$2,000 penalty for the first occurrence of the commission of a felony on the premises. In addition to the drug-related activity around the business and the prior single-cigarette sale penalty, the City cited Licensee's convictions between 2005 and 2009 as a basis for the deviation. During the period, Licensee was convicted of misdemeanor violation of a domestic abuse no-contact order, misdemeanor domestic assault, gross misdemeanor violation of an order for protection, and misdemeanor criminal damage to property.²⁶

Community Impact

13. When the police interviewed businesses surrounding Licensee's business, they uniformly received complaints about activities going on around the perimeter of Licensee's business. These activities included loitering and playing dice.²⁷

14. During the hearing in this matter, three members of the public testified regarding the Licensee's business. They came to the hearing in response to a flyer that was disseminated by the police. The flyer invited the community to speak at the hearing if they had anything negative to say about Licensee's business.²⁸ Two community members believed Licensee's business had a negative impact on the surrounding area. One business owner, and the only one who had actually spoken with Licensee, believed that Licensee's business was a positive addition to the neighborhood. This business owner found Licensee's friendly demeanor and attentiveness to be exactly what the community needs. He also positively compared the hours the business is open and the

²³ Ex. 15-2.

²⁴ Test. of K. Schweinler.

²⁵ Ex. 16; Test. of K. Schweinler.

²⁶ Ex. 24-1.

²⁷ Ex. 25-14, 15.third

²⁸ Test. of T. Tanghe. One member of the public pointed out that the flyer was not neutral but instead specifically invited those that had something negative to say to testify.

manner in which it is open to other surrounding businesses who keep their premises locked to the public.²⁹

CONCLUSIONS OF LAW

1. The City and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.40, 340A.415 (2016), and St. Paul Legislative Code §§ 310.05, .06.

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

3. St. Paul Legislative Code § 310.05(m) provides a matrix of penalties for first, second, third and fourth appearances before the council. St. Paul Legislative Code § 310.06 states grounds for adverse license actions. Sections 310.06 (b) (6) (a) and (c) and 310.06 (b) (8) and (b) (10) are specifically identified in the Second Amended Notice.

4. Code section 310.05 is a lengthy section. It sets forth hearing procedures and, in section (m), provides a matrix of penalties for first, second, third and fourth license violations. Part (m) (5) relates to “commission of a crime other than a felony on the premises by a licensee or employee.” For a first violation, the matrix penalty is a \$500 fine. For a second violation, the penalty is a \$1,500 fine. For a third violation, the penalty is a 5-day suspension. For a fourth violation, the penalty is revocation of the license.³⁰ Part (m) (6) relates to “commission of a felony on the premises by a licensee or employee.” For a first violation, the matrix penalty is a \$2,000 fine. For a second violation the penalty is revocation.³¹

5. Code section 310.05 (m) provides that the matrix penalties are presumed to be 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.³²

6. Code section 310.05 (m) permits the Counsel to impose penalties different than suggested by the matrix when substantial and compelling reasons make it more appropriate to do so.

7. The City has complied with the notice requirements of Code section 310.05 (m).

²⁹ Public hearing portion of record.

³⁰ St. Paul Legislative Code § 310.05 (m).

³¹ *Id.*

³² *Id.* and Ex. 10.

8. The City has shown substantial and compelling reasons to revoke Licensee's tobacco products license for reasons identified in St. Paul Legislative Code §§ 310.06 (b) (6) (a) and (c) and 310.06 (b) (8).

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

That the City revoke the Licensee's license to sell tobacco.

Dated: June 26, 2017



BARBARA J. CASE
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The St. 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 St. 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 Shari Moore, City Clerk, City of St. Paul, 170 City Hall, 15 W. Kellogg Blvd., St. Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

MEMORANDUM

Licensee has operated a convenience store on Payne Avenue on the eastside of St. Paul for approximately two and one-half years. In that time he has committed two license violations. The first was the sale of a single cigarette by one of his employees. Licensee paid the fine for that violation, took corrective action to prevent subsequent violations,³³ and has not had a similar tobacco violation since. Licensee's second license violation, the trafficking of SNAP benefits, occurred more than a year after his first violation. Therefore, under the matrix used by the City, the current hearing is Licensee's "First Appearance" and the presumptive penalty is a \$2000 fine. However

³³ Ex. 102. On March 8, 2017, Licensee received a Certificate of Appreciation for passing a tobacco compliance check.

the City seeks to deviate from the presumptive penalty on the basis that “there exist substantial and compelling reasons making it more appropriate to do so.”

The City argues that there is sufficient evidence that Licensee is tolerating and perhaps promoting drug trafficking outside of his store to support the revocation of his tobacco license. Licensee argues that he inherited problems that are endemic to the neighborhood but that he is not the cause of the problems. He points to other business that generate more police calls than does his business.

Licensee’s arguments are valid, however, Licensee provided no evidence to counter the City’s case that he, at the least, tolerated criminal activity directly outside of his store. Though apparently insufficient to support criminal charges, there is some evidence that Licensee fostered some of the criminal activity that occurred near his store by facilitating contacts and by creating a hospitable space for the transactions. For example, he made change for a drug exchange and allowed contacts to be made to facilitate drug transactions. The evidence that Licensee was tolerating, if not fostering, illegal activity is further supported by the fact that Licensee sold items that are considered to be paraphernalia for the drug trade, such as small balls of steel wool and individual plastic bags. At the same time, Licensee did not reveal a real interest in being a purveyor of food items because over-ripe food and moldy cheese were on display in his store.³⁴

The City’s matrix allows a Licensee reasonable leeway which implicitly acknowledges that Licensees may not be able to control every act committed in their establishment. However, the City also allows itself leeway with the provision that in an individual case it may be appropriate to deviate from the matrix penalty. While there was some slight evidence that Licensee’s business is a neighborhood asset, the by far greater weight of the evidence indicated that the business does not positively influence the neighborhood. Licensee could have remained on the lowest applicable matrix penalty had he paid the fine levied when he received the first notice. It was Licensee’s right to proceed to a hearing. It is also the City’s right, having been required to bring all its evidence to bear, to seek a more severe sanction in order to address the issues it has before having to go through another involved and expensive hearing. The sanction sought by the City is reasonable given the impact on the community of the activity the City proved was occurring around the business.

B. J. C.

³⁴ Ex. 25-57, 58.