

**CITY OF SAINT PAUL
BEFORE THE CITY COUNCIL**

In Re: Cigarette/Tobacco licenses held by
Zakariya Abukhudeer d/b/a The One Stop
Market LLC for the premises located at
1541 Maryland Avenue in Saint Paul.

RES 24-1403 Version: 1
OAH Docket No.: 23-6020-39016

**LICENSEE’S BRIEF IN SUPPORT
OF THE RECOMMENDATION BY
THE OFFICE OF ADMINISTRATIVE
HEARINGS, THE HONORABLE
SUZANNA TODNEM PRESIDING**

License ID #: 20190001624

**TO: THE HONORABLE MELVIN W. CARTER, III AND THE HONORABLE
CITY COUNCIL OF THE CITY OF SAINT PAUL, THE CITY OF SAINT PAUL
ATTORNEY, LYNDSEY M. OLSON AND ASSISTANT CITY ATTORNEY,
THERESE SKARDA, OFFICE OF THE SAINT PAUL CITY ATTORNEY, 300 &
400 CITY HALL, 15 WEST KELLOGG BLVD., SAINT PAUL, MINNESOTA
55102:**

INTRODUCTION

Before the City Council is a resolution regarding the adoption of the
recommendation by the Honorable Suzanna Todnem who presided over this adverse
action by the City of Saint Paul (“City”) against the Cigarette/Tobacco License Number
20190001624 (“License”) held by Zakariya Abukhudeer d/b/a The One Stop Market
LLC (“Licensee”) for the premises at 1541 Maryland Avenue in Saint Paul (“Licensed
Premises”).

There are no facts to support an upward departure. There are no substantial and
compelling reasons to support the revocation of the License. This case is not atypical. The
City’s ordinances do not support revocation. The law set forth by the Minnesota Supreme

Court and Court of Appeals was applied correctly by Judge Todnem. The revocation of the Licensee's License on this record will contradict Minnesota law. A revocation will be an arbitrary and capricious decision, subject to reversal by the Minnesota Court of Appeals.

Because of all these reasons, Judge Todnem's Recommendation that a fine of \$1,000.00 be imposed should be approved. The Findings of Fact, Conclusions of Law, and Recommendation dated June 12, 2024, should be adopted fully and without amendment.

FACTS/PROCEDURAL POSTURE

On March 24, 2021, the City served a Notice of Violation on Respondent alleging violations of license conditions and city ordinances by Licensee including:

1. Alleging Licensee failed to comply with his license condition requiring him to take reasonable steps to discourage loitering on January 18, 2021, when someone opened fire while standing in the crosswalk in the middle of Maryland Avenue at about 1:30 p.m. and hit a person doing laundry at the laundromat next door to Licensee's premises. The ALJ denied summary disposition, and the City withdrew this claim;
2. Alleging Licensee failed to maintain video in accordance with his license condition because the video's timestamp was off by six minutes on the copy turned over to the City. The ALJ denied summary disposition, and the City withdrew this claim;
3. Alleging multiple incidents of sales of flavored tobacco products on January 18, 2021. The ALJ denied summary disposition, and the City withdrew this claim;

4. Alleging a large volume of flavored tobacco products was observed by the City's Department of Safety and Inspections ("Department") inspector during an inspection on February 8, 2021. The ALJ granted summary disposition on this claim and found one violation of SPLC § 324.07(f) (offer flavored tobacco products for sale).
5. Alleging the Licensed Premises were being operated in a manner that violated several sections of SPLC sections 306 and 310 on January 18, 2021, and February 8, 2021. The ALJ denied summary disposition, and the City withdrew this claim.

See Ex. 5 (Notice of Violation and Request for Upward Departure to Revocation, Mar. 24, 2021) & Ex. 1 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION dated June 12, 2024 ("Recommendation").

Although not disclosed directly to Licensee by the City, during the briefing on the motion for summary disposition, it was revealed that the City had lost critical video evidence. This included video of the shooting incident and alleged sales of flavored tobacco products. After reviewing the available video and other evidence, the ALJ found that the "...violations on which the City relies for this violation are largely not found" Ex. 1 Summary Disposition Order, § III-D, p. 7. Because the City relied on inadmissible secondhand knowledge and hearsay, the ALJ gave "the evidence submitted appropriate weight in light of the concerns raised by [Licensee regarding the lost evidence]." *Id.*, §3-E, pp. 7-8. Based on Licensee's objections raised about the City's loss of critical evidence, the ALJ stated that it, "cannot assess evidence not in the record...." *Id.*, §3-E, p. 8.

The ALJ denied the City's motion for summary disposition on all but one violation of offering for sale flavored tobacco products. The ALJ noted that "As applied to this case, the City's Motion is vague when it alleges [Licensee] 'sold and displayed prohibited flavored tobacco products.'" *Id.*, p. 1, FN 2. The only claim the City prevailed on was the vague allegations that SPLC § 324.07 was violated.

In finding for the City on only one violation, the ALJ held:

On February 8, 2021, a licensing inspector went to One Stop and observed prohibited flavored tobacco products. While some of the products referenced in the inspector's report may or may not have been prohibited flavored tobacco products, at least some were prohibited tobacco products.

Id., §III-C (ii), p. 7. The ALJ found that the evidence only supported a single violation and denied the City's request for a greater-than-double upward departure due to disputed facts. *Id.* §IV, p. 8. The ALJ then ordered that all remaining claims be tried at an evidentiary hearing. *Id.*

Three Administrative Law Judges, in two adverse actions, denied the City's requests for a greater-than-double upward departure. Next, the City moved to certify the Summary Disposition Order with its single violation so that this matter could be returned to the City Council and taken out of the hands of an impartial judicial officer. Licensee opposed the City's motion for certification. The ALJ denied the motion and an evidentiary hearing was set on the remaining alleged violations.

The City then voluntarily dismissed the remaining violations. The evidentiary hearing, however, still had to go forward to decide the City's request for a greater-than-double upward departure from the penalty matrix' presumed \$1,000.00 fine to revocation of Licensee's license. The ALJ framed the issue to be tried as:

Are there substantial and compelling reasons for an upward deviation from the presumptive penalty in the City's penalty matrix?

Ex. 1-- 7th Prehearing Order, ¶1, p. 1.

The City had the burden to show by a preponderance of the evidence that there were substantial and compelling reasons to justify a greater than double upward departure from the penalty matrix to support revocation. Minn. R. 1400.7300, subp. 5 (2023); SPLC § 310.05(m). The ALJ heard testimony from both party's witnesses and took evidence into the record. The hearing lasted most of the morning. The City failed to meet its burden. Recommendation, pp .6-8.

The ALJ held that the City had not shown substantial and compelling reasons to upwardly depart from the second appearance presumptive penalty. Id. Further, the ALJ found that the record failed to support *the most onerous sanction of license revocation*. Id.

The ALJ explained the City's position taken on revocation:

[T]he city argues that since it was granted an upward departure to box two in the first appearance, the starting penalty for the second appearance is the third box. The City argues that ignoring the

previous upward departure would render the consequences and severity of upwardly departing moot and would contravene its purposes. This argument is absurd and ignores the fact that the upward departure itself serves its purposes. Rather, the City is attempting to double-dip the upward departure and give it a reverberating effect not contemplated in the SPLC.

Id. p. 10.

After determining the presumptive penalty under the SPLC was a fine of \$1,000.00, the ALJ recognized that the City Council can still deviate from that penalty if it finds “Substantial and Compelling” reasons to depart. Id. The ALJ then explained that the record did not support the City’s contention that there were 20 different flavored tobacco products found. Id. It then explained further:

[I]t is unclear why the City believes each prohibited flavored tobacco product is a distinct, individual violation for determining that multiple violations occurred. The SPLC is clear that when there are multiple violations in a first appearance, the council “shall consider the presumptive penalty for each such violation type under the “1st Appearance” column.” That is, it looks at different types of violations to comprise multiple violations.

Id. The City did not have some of the evidence here because it lost the video recording.

The ALJ then discusses the seminal case *Midway University & Hamline LLC d/b/a Midway Amoco BP, 2021 WL 562416, (Amoco)* regarding departing from the penalty matrix’

presumptive penalties. The *Amoco* case borrowed its standard from the standard applied when substantial and compelling circumstances must be present to depart from the criminal sentencing guidelines.

As the ALJ acknowledged, the presumptive sentence should only be exceeded if the enhanced penalty is deemed to be “more appropriate, reasonable or equitable than the presumptive [penalty].” Recommendation, p. 11 *citing Dillion v. State*, 781 N.W.2d 588, 595 (Minn. Ct. App. 2010). The presumptive penalty should be imposed unless “‘substantial and compelling circumstances’ based on aggravating factors warrant an upward departure.” *Id.* To properly impose a penalty that is an upward departure from the presumptive penalty under the sentencing guidelines, there must be specific factual basis. *Id. citing SPLC § 310.05(m)(ii)*.

“Substantial and compelling circumstances” are “factual circumstances that distinguish the case, making it atypical.” *Id. citing Dillion*, 781 N.W. 2d. at 595. Similarly, the SPLC requires the City Council to provide written reasons that specify why the penalty selected was more appropriate.

The Minnesota Supreme Court has also held that “generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length.” *Id. citing State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981). In this case, that would be a \$2,000.00 fine. The ALJ quoted the Supreme Court further: “Only in cases of ‘severe aggravating circumstances’ may the district court impose a greater-than-double departure from the presumptive sentence. Such cases, we have stated, are ‘extremely rare’” *Id. citing State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005) (*citing State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999)).

Because the City sought revocation, it is more than a doubling of the presumed penalty. That means this case must have not only aggravating facts that are rarely found in a routine licensing violation case, but they must be severely aggravating. Cases that support a greater than double deviation from the penalty matrix are exceedingly rare.

The facts of the Amoco case, an exceedingly rare case with severe aggravating factors, must be laid out to understand this distinction. The gas station in *Amoco* was selling drug kits and single cigarettes and, in two months, had over 100 police calls. There was also:

- gunfire;
- shots fired from the gas station parking lot into neighboring buildings on multiple occasions;
- neighbors who feared for their safety;
- large disruptive crowds repeatedly gathering in the early morning hours dancing and smoking marijuana;
- drug deals in the parking lot
- physical fights resulting in assaults; and
- ultimately a homicide.

Id. In this case, we have a single violation consisting of offering flavored tobacco products for sale.

The City argued for upward departure because of the number of times the violations were committed, the number of times license conditions were violated, the Licensee's prior knowledge, the seriousness of the violations that affect public health and safety, and the timing and frequency of the violations. The ALJ found that this second appearance contained only one violation, and upward departure had already been granted for the first appearance violations.

The ALJ further acknowledged that the City argued that upward departure was appropriate because of Licensee’s alleged willful disregard for the SPLC and knowledge that flavored tobacco products were prohibited. *Id.* p. 13. But when the Department inspector inspected the Licensed Premises on February 8, 2021, there were no hidden flavored tobacco products, no repeat of the other violations found in the first appearance, and even Mr. Hudak stated that it is not easy to know if a particular product is prohibited or not. *Id.* The ALJ then found that the record does not support a claim that Licensee willfully disregarded the SPLC. *Id.* The ALJ recommended that a \$1,000.00 penalty be imposed.

ARGUMENTS

I. THE AMENDMENTS PROPOSED TO THE RECOMMENDATION ARE ARBITRARY AND CAPRICIOUS.

The ALJ’s recommended penalty is based on the evidence presented and a correct interpretation of the law. A decision may be deemed arbitrary and capricious only if: (1) it relied on factors not intended by the ordinance; (2) entirely failed to consider an important aspect of the issue; (3) offered an explanation that conflicts with the evidence; or (4) it is so implausible that it could not be explained as a difference in view or the result of the city’s expertise.

Rostamkhani v. City of St. Paul, 645 N.W.2d 479, 484 (Minn. Ct. App. 2002) citing *Minnegasco v. Minn. Pub. Utils. Comm’n*, 529 N.W.2d 413, 418 (Minn.App.1995), *rev’d on other grounds*, 549 N.W.2d 904 (1996).

In this case, the proposed amendments to the ALJ’s Recommendation include a finding that “at least 15 flavored tobacco products” were found at the Licensed Premises. Ex. 9 Proposed Amendments, p. 1. The evidence does not support this, and the facts asserted to support it were

refuted in part because of the lost video recording. Further, as the ALJ acknowledged, even Mr. Hudak recognized that a banned flavored tobacco product can be challenging to identify. This amendment is unsupported by the record.

The next proposed amendment simply appears to be a rewording of the controlling law, but it concludes with multiple violations occurring. *Id.* p. 2. 5 violations were brought. The City voluntarily dismissed 4 of those 5. That means a single violation was all that was at issue. When this case began, the City had 5 violations alleged and sought revocation. After it voluntarily dismissed 4 of the 5 violations, it still sought revocation. The alleged violations that were dismissed were the more egregious ones. It simply defies logic that revocation would still apply as a greater than double deviation upward from the presumptive penalty when 4/5 of the alleged violations were voluntarily abandoned.

The remaining amendments on this page are conclusory with no factual basis stated as required. “At a minimum, however, a municipal body must have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion.” *Uniprop Manufactured Hous., Inc. v. City of Lakeville*, 474 N.W.2d 375, 378 (Minn. Ct. App. 1991). The conclusory amendments on page 2 should not be adopted.

The next major amendment addressed is the City’s absurd argument that multiple flavored tobacco products each consist of a separate violation. Ex. 9 p. 4. The city alleged one violation for the flavored tobacco products found on February 8, 2021. The SPLC Penalty matrix does not support counting each product separately to constitute multiple violations. It would be the same as arguing the sale of one pack of menthol cigarettes constitutes 20 violations because there are 20 cigarettes in the pack. This is not what is intended by the SPLC.

Under criminal law, the factors to be evaluated in determining whether multiple violations constitute a single incident is unity of time, place, and criminal objective. *Bangert v. State*, 282 N.W.2d 540, 546 (Minn.1979). Whether violations result from a single incident depends on the circumstances of each case. *State v. Reiland*, 274 Minn. 121, 123, 142 N.W.2d 635, 637 (1966). The state has the burden of proving the facts that establish the divisibility of a defendant's course of conduct. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn.1983). The same reasoning applies. There was one incident where flavored tobacco products were offered for sale. There was one violation.

These same amendments on page 4 also consider the first appearance before the City Council. Licensee has already been penalized for that conduct. No same or similar conduct occurred. When a licensee makes a second appearance before the City Council in an adverse action alleging a license violation, “the council shall impose the presumptive penalty for the violation or violations giving rise to the subsequent appearance without regard to the particular violation or violations that were the subject of the first or prior appearance.” *Id. at (m)(iv)*. Because the City’s Code precludes considering the violations in the Licensee’s first appearance, this amendment to the Recommendation will violate the City’s own Legislative Code. This amendment would be contrary to law.

The City sought revocation of Licensee’s License, a greater-than-double upward departure from the presumptive penalty of a \$1,000.00 fine contained in the City’s penalty matrix in effect at the time. *See* SPLC §310.05 m (1-29-2021). The City has enacted a new penalty matrix that may authorize revocation under these circumstances

now, but that law did not exist in February 2021. See SPLC §310.05 m (2024). it is not retroactive to the dates of the events alleged. Yet the proposed amendments include basing the decision on the enactment of the new penalty matrix. The law did not exist at the time of the inspection, and Licensee cannot be held liable under it, and it should not be considered or used as a basis to amend the Recommendation.

The proposed amendments also include a finding as follows: twice in then proposal:

“The danger that the possession and sale of these prohibited flavored tobacco products caused the minors under age 21.”

Id pp. 5 &n 8. At no time during the proceedings was there any finding that any harm was “caused” to a minor. There were no allegations of underage sales. There was no evidence of anything that “caused” any harm to anyone, let alone a minor. This amendment is inappropriate and unsupported by the record.

A single violation is not an atypical case supporting an upward departure from the penalty matrix. There are no substantial or compelling factors to support an upward departure. The record, here, does not contain any severely aggravating circumstances that will warrant a greater than double upward departure from the presumed penalty. The ALJ’s recommended penalty of a \$1,000.00 fine should be adopted.

CONCLUSION

Based on the record here, there is no basis to deviate from the presumptive penalty in the Legislative Code. Thus, the proposed amendments should all be rejected, and the ALJ's Recommendation should be adopted without amendment.

Dated: October 2, 2024

Respectfully submitted,

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