

March 1, 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 Tom Super USA, LLC d/b/a Super USA Located at 976 7th Street East in St. Paul*
OAH 5-6020-34016

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) 361-7881, or by e-mail at Sheena.Denny@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 Sheena Denny at (651) 361-7881 or Sheena.Denny@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



JIM MORTENSON
Administrative Law Judge

JRM:sd
Enclosure
cc: Therese Skarda
Paul Godfread

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 Tom Super USA, LLC d/b/a Super USA Located at 976 7th Street East in St. Paul	OAH Docket No.: 5-6020-34016
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Sheena Denny, certifies that on March 1, 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
City of St. Paul
310 City Hall
15 W Kellogg Blvd
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VIA E-MAIL 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 Tom Super, LLC d/b/a Super USA for the premises located at 976 – 7th Street East in Saint Paul

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

License ID #20090000182

This matter came on for hearing before Administrative Law Judge Jim Mortenson on January 26, 2017, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The record closed January 30, 2017.

Therese Skarda, Assistant St. Paul City Attorney, appeared for the City of St. Paul (City). Paul Godfread, Godfread Law Firm, appeared on behalf of Tom Super, LLC (Licensee).

Four witnesses testified at the hearing. Eric Huday, Licensing Manager; Sgt. Tom Tanghe and Officer Christopher Hansen, both of the Saint Paul Police Department, testified on behalf of the City. Towfik Hassen, owner of Tom Super, LLC, testified on behalf of Licensee. Thirty exhibits were admitted to the record.

STATEMENT OF ISSUES

1. Did Licensee violate license conditions when, on September 14, 2016, a glass drug pipe was sold by a store employee in the store?
2. Did Licensee violate Saint Paul Legislative Code § 324.07(a) and license conditions when, on September 23, 2016, three single cigarettes were sold by an employee in the store?
3. If both of the violations above occurred, should Licensee's City-granted licenses be revoked?

SUMMARY OF RECOMMENDATION

Licensee violated its license conditions when a glass drug pipe and three single cigarettes were sold by an employee in its store on September 14 and September 23, 2016, respectively. These violations have resulted in this, the third appearance of

Licensee before the city council within the last 18 months. The presumptive penalty for a third appearance is \$2,000 and a ten-day license suspension.

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

FINDINGS OF FACT

1. Towfik Hassen is the owner of Tom Super, LLC. In January 2009, Mr. Hassen purchased the gas station and convenience store located at 976 Seventh Street East, Saint Paul, Minnesota. The gas station and store are called Super USA and is the only gas station owned by Tom Super, LLC and Mr. Hassen. Mr. Hassen is the sole manager of the store.¹

2. The store is located in a neighborhood where the Saint Paul Police find illegal drug activity, gang activity, fights, and shootings. License enforcement is used to address these larger problems.²

3. Mr. Hassen has always cooperated with law enforcement at his store.³

4. In 2014, due to criminal activity in the neighborhood of the gas station during the summer, Licensee hired two St. Paul police officers for security. When working for Licensee, the off-duty police officers sat outside the store in their car and were paid every two hours in cash.⁴

5. The officers Licensee hired for the summer of 2015 asked Mr. Hassen about working for him in the summer of 2015. Mr. Hassen advised them he had to think about it. One of the officers then issued Licensee citations for employees selling loose cigarettes on April 22, May 5, and May 28, 2015.⁵

6. On May 15, 2015, Licensee paid a \$500 fine for individual cigarette sales that occurred on April 22, 2015, by a store clerk or clerks.⁶

7. On August 19, 2015, following a hearing and settlement before the undersigned Administrative Law Judge, the city council resolved to fine Licensee \$1,000 and impose a five day suspension of all of its licenses.⁷ The fine was paid on September 15, 2015.⁸ This adverse action resulted from sales of single cigarettes on May 5, 2015 and May 28, 2015.⁹

¹ Testimony (Test.) of Towfik Hassen. (Super USA is referred to interchangeably herein as the gas station or the store.)

² Test. of Tom Tanghe; Test. of T. Hassen; Exs. 5, 12.

³ Test. of T. Hassen.

⁴ *Id.* These individuals were identified at hearing only as Officers Abby and Jeff.

⁵ *Id.*; Exs. 8, 10.

⁶ Exs. 8, 9.

⁷ Exs. 1, 11.

⁸ Ex. 1.

⁹ Ex. 11.

8. Since 2015, Licensee has invested over \$20,000 to paint and improve Super USA. Sixteen security cameras, no trespassing signs, and new lighting have been installed. Parking has been improved and the property cleaned up. Mr. Hassen now has access to live streaming of the security cameras on his phone.¹⁰

9. Following the citations in 2015, Licensee put policies in place prohibiting employees from buying and selling items at the store, except for store goods. Licensee does not purchase or sell glass pipes.¹¹

10. Licensee holds Saint Paul City License No. 20090000182, which includes an alarm permit, permission to sell cigarettes and tobacco, permission to sell groceries, and permission to operate as a gas station. In 2015, conditions were added to the license which require, among other things:

- a. The sale of tobacco products at this store shall comply with Chapter 324 of the City of Saint Paul Legislative Code and shall be limited to packaged cigarettes, cigars, smokeless tobacco, lighters, and cigarette paper intended for use as a wrapper cover for tobacco products.
- b. None of the following items shall be sold at the store: Diluents and adulterants; separation gins and sifters; hypodermic syringes or needles; metal, wooden, acrylic, glass, stone, plastic or ceramic pipes; permanent screen, hashish heads or punctured metal bowls; water pipes; carburetion tubes and devices; smoking and carburetion masks; roach clips; miniature cocaine spoon, and cocaine vials; chamber pipes; carburetor pipes; electric pipes; air-driven pipes; chillums; bongos; and ice pipes or chillers.
- c. No drug paraphernalia shall be sold.
- d. The sales of blunts and single cigarettes is prohibited at this store, and tobacco products must be sold in the original packaging as per Section 324.07 of the Saint Paul Legislative Code.¹²

11. On August 12, 2016, Licensee passed a tobacco compliance check.¹³

12. In September 2016, Mr. Hassen did not work at the gas station because his spouse was pregnant, needed his assistance, and their child was born on September 26, 2016. Since September 2016, Mr. Hassen opens the gas station in the morning and usually works there for eight hours per day.¹⁴

¹⁰ Test. of T. Hassen; Exhibits (Exs.) 21-24, 28-30.

¹¹ Test. of T. Hassen.

¹² Ex. 2.

¹³ Ex. 1.

¹⁴ Test. of T. Hassen.

13. At approximately 1:00 p.m. on September 14, 2016, Saint Paul Police, using a confidential reliable informant (CRI), purchased a glass pipe from a clerk at the store for \$5.¹⁵

14. At approximately 10:00 a.m. on September 23, 2016, Saint Paul Police, using another CRI, attempted to purchase a drug pipe from a clerk in the store. This did not succeed, but the CRI was able to purchase three cigarettes.¹⁶

15. On September 26, 2016, notice of the September 14, 2016 violation was sent to Mr. Hassen by the Assistant City Attorney. The notice informed Mr. Hassen that the licensing office would recommend to the city council that a \$500 matrix penalty be imposed for the violation.¹⁷

16. The store clerk involved in the September 14 violation also caused the September 23 violation.¹⁸ Another clerk had also been working at the store.¹⁹ When Mr. Hassen learned of the September 14 violation he went to his security cameras to determine which clerk was responsible. Because two of the security cameras in the store had been removed, and Mr. Hassen could not determine who removed them, he fired both clerks.²⁰

17. On October 14, 2016, Mr. Hassen faxed a letter to City Hall, requesting a public hearing.²¹ On October 17, 2016, Mr. Hassan was sent a Notice of Council Hearing for November 16, 2016. The Notice advised Mr. Hassen a resolution was being presented to the city council. According to the Notice the matter was “uncontested . . . concerning the fact you sold an ‘Oil burner’ to a Confidential Reliable Informant (“CRI”) during a Saint Paul Police controlled buy at the licensed premises on September 14, 2016 (CN #16-187-483).” The Notice stated that a \$500 matrix penalty would be recommended by the licensing office pursuant to Saint Paul Legislative Code § 310.05(m)(1).²²

18. An Amended Notice, dated October 21, 2016, was sent to Mr. Hassen on that date, providing notice of recommendations of adverse action for both the September 14, 2016 violation, and the September 23, 2016 violation. The Notice informed Mr. Hassen that the prior recommendation of a \$500 fine was in error, and that the recommended fine should have been for a \$2,000 fine and ten-day license suspension because the violation was the third since May 2015. The Notice also informed Mr. Hassen that because the September 23, 2016 violation was the fourth violation within twenty four months the recommendation would be for revocation of licenses. Finally, the Notice advised Mr. Hassen that the costs of any administrative hearing may be requested to be

¹⁵ Exs. 5, 6; Test. of T. Tanghe; Test. of Christopher Hansen.

¹⁶ Exs. 12, 13; Test. of T. Tanghe; Test. of C. Hansen.

¹⁷ Ex. 7.

¹⁸ Test. T. Hassen; Exs. 6, 13.

¹⁹ Test. of T. Hassen.

²⁰ *Id.* (Mr. Hassen had not yet learned of the September 24 violation.).

²¹ Ex. 25; Test. of Eric Hudak.

²² Ex. 26.

imposed on Licensee, pursuant to Saint Paul Legislative Code § 310.05(k). The Notice did state why costs would be sought.²³

19. On October 24, 2016, Licensee provided notice to the City's Department of Safety and Inspections (DSI) that he wanted to contest the proposed adverse action and facts in an administrative hearing.²⁴

20. Licensee's annual gross revenues are approximately \$1.2 million. 40 percent is in tobacco sales, 40 percent is in the sale of groceries and other goods, and 20 percent is in gasoline sales.²⁵

21. Mr. Hassen has never sold drug pipes or single cigarettes at the store.²⁶

Based upon these Findings of Fact and for the reasons explained in the Memorandum below, 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 St. Paul Legislative Code §§ 310.05, .06.

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

3. Pursuant to the conditions included in the licenses issued to Licensee by the City of Saint Paul, glass pipes and other drug paraphernalia must not be sold at the store. Further, Licensee must comply with Saint Paul Legislative Code and not sell single cigarettes at the store.²⁷

4. Licensee violated its license conditions when one of its employees sold a glass drug pipe in the store on September 14, 2016.

5. Licensee violated Saint Paul Legislative Code § 324.07(a) and its license conditions when one of its employees sold single cigarettes in the store on September 24, 2016.

6. Saint Paul Legislative Code § 310.05(m) provides a matrix of penalties for first, second, third and fourth appearances before the city council on license violations. The matrix penalties are presumed to be appropriate for every case, but the code also notes that the city council may deviate in an individual case where the council finds

²³ Ex. 16.

²⁴ Ex. 17; Test. of E. Hudak.

²⁵ Test. of T. Hassen

²⁶ *Id.*

²⁷ Ex. 2; "No person shall sell a cigarette outside its original packaging containing health warnings satisfying the requirements of federal law. No cigarettes shall be sold in packages of fewer than twenty (20) cigarettes." Saint Paul Legislative Code § 324.07(a).

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.²⁸

7. This matter is Licensee's third appearance before the city council, pursuant to Saint Paul Legislative Code § 310.05(m).

8. While there are two violations constituting this third appearance, these two violations do not constitute a substantial and compelling reason to deviate from the presumptive penalty for a third appearance.

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

RECOMMENDATIONS

IT IS HEREBY RECOMMENDED:

1. That the City of Saint Paul find Licensee violated the conditions of its license when, on September 14, 2016, a glass drug pipe was sold in Licensee's store by a store employee;

2. That the City of Saint Paul find Licensee violated the conditions of its license when, on September 23, 2016, single cigarettes were sold in Licensee's store by a store employee; and

3. That the City of St. Paul **ASSESS** Licensee a \$2,000.00 fine and **SUSPEND** its licenses for ten days.

Dated: March 1, 2017



JIM MORTENSON
Administrative Law Judge

Digitally recorded; no transcript prepared

²⁸ St. Paul Legislative Code § 310.05(m).

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 Shari Moore, City Clerk, City of Saint Paul, 170 City Hall, 15 W. Kellogg Blvd., Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

MEMORANDUM

ARGUMENTS OF PARTIES

DSI is recommending Licensee's licenses to operate a gas station and convenience store, including tobacco products, be revoked. DSI is further recommending Licensee be assessed costs for the administrative hearing. DSI argues that it does not take adverse actions against licensees lightly and follows strict and detailed procedures. In this case, City Police were used to investigate concerns about violations of license conditions and city ordinances concerning the sale of drug paraphernalia and loose cigarettes. DSI argues that the evidence demonstrates these violations have been "going on for quite a while" and the business owner, Mr. Hassen, is "not on top of" his business. DSI argues that the City is not picking on Mr. Hassen, but rather Mr. Hassen is not taking control of his business. This is demonstrated, according to DSI, by the controlled purchases of a glass drug pipe and three loose cigarettes in September 2016.

DSI argues that the number of violations are determinative for purposes of presumptive penalties under Saint Paul Legislative Code § 310.05(m). The two violations considered here, according to DSI, are the third and fourth violations for purposes of calculating the presumptive penalties. Thus, according to DSI, the presumptive penalty to apply is revocation of Licensee's licenses. Further, DSI has requested Licensee be assessed the cost of the hearing, pursuant to Saint Paul Legislative Code § 310.05(k). DSI requests costs be assessed because of the repetitive nature of the violations and because of the amount of city resources used to control the behavior at Licensee's location.

Licensee argues that revocation of its licenses is unfair. According to Licensee, Mr. Hassen was provided notice of two violations at one time, following the initial notice that he would be fined \$500. Mr. Hassen argues that he has been cooperative with police and has helped the neighborhood where the store is located. Mr. Hassen argues that he took swift action to fire the employee involved with selling prohibited items, and that he has not been involved in, nor permitted, the sale of glass pipes and loose cigarettes. All of the prohibited activity at the store has been done without his knowledge, according to Ms. Hassen.

Licensee also argues that DSI is unfairly construing prior violations, and that when he has paid fines in the past he was not acknowledging the facts alleged. Licensee also argues that the business has the support of the community.²⁹ Licensee argues that DSI's calculation of the presumed penalty is confusing and that the different notices sent by the City demonstrates that City staff were confused. Thus, according to Licensee, to say that Mr. Hassen "should have known better" when even the City was confused is unfair. Licensee argues that an increase from a \$500 fine to a \$2000 fine with a short suspension is all that should be required under the penalty matrix. Revocation is a surprise, in this case, and will destroy the business, according to Licensee. Further, Mr. Hassen argues that he has worked with the police in the past and that if police officers knew of complaints involving the store they should have reached out to him. The police and licensing staff made no attempt to do so. Thus, according to Licensee, revocation is unfair and unwarranted.

DECISION

In general, Licensee is correct that the presumed penalty sought by DSI is in error. DSI based its final calculation for a penalty on violations, not appearances before the council. DSI did not argue that there were substantial and compelling reasons to deviate from a presumptive penalty. Further, DSI did not demonstrate that there were more than two recent violations or that Mr. Hassen had any knowledge about them prior to the citation for the September 14, 2016 violation. The evidence shows that following two appearances in 2015 Licensee took significant steps to improve the business property and security. There is no evidence of licensing violations occurring until Mr. Hassen was absent from the day-to-day operations of the business in September 2016 due to his wife's pregnancy and the birth of their daughter. Finally, there is no basis to impose costs for the hearing on Licensee.

LEGAL REQUIREMENTS

Presumptive Penalties

Licensee has been cited for violating conditions appended to City licenses as well as Saint Paul Legislative Code. To be sure, the licensing conditions also prohibit certain code violations.³⁰ When a licensee, or person who owns a company that is a licensee, fails to comply with license conditions or violates the law, including city ordinances, reasonably related to the licensed activity, there is a basis for adverse action by the city council.³¹ There is no dispute that the two violations in this case occurred. The dispute in this matter is over what the penalty should be for the violations. This requires an examination of Saint Paul Legislative Code § 310.05. Specifically, paragraphs k (Imposition of costs) and m (Presumptive penalties for certain violations). Paragraph m will be examined first.

²⁹ See, e.g., Ex. 20.

³⁰ Ex. 2.

³¹ St. Paul Legislative Code § 310.06(a), (b)(5), (b)(6).

In general, the stated purpose of paragraph m “is to establish a standard by which the city council determines the amount of fines, the length of license suspensions and the propriety of revocations[.]”³² There are 13 types of violations addressed by paragraph m. For all 13 there are four levels of increasing penalty severity. For licensing violations of the sort in this case, presumptive penalties start at a \$500 fine.³³ Then the penalty moves to a \$1000 fine, a \$2,000 fine with a ten-day suspension, and then revocation.³⁴ These increasing levels of severity are measured based on the number of appearances, not the number of violations.³⁵ Appearances are based on a licensee appearing before the city council, or payment of a fine without appearing before the council.³⁶

Appearances are also ranked based on when they occurred in relation to other appearances. Following a first appearance, a second appearance occurs based on a violation within twelve months of the date of the first appearance before the city council.³⁷ A third appearance is based on a violation occurring within 18 months of the second appearance before the council.³⁸ When there are “multiple new violations, the ending date to be used shall be the date of the violation last in time.”³⁹ In short, the Saint Paul Legislative Code bases presumptive penalties based on which appearance is occurring, not on the number of violations.⁴⁰ Multiple violations may be grounds for deviation from the presumptive penalties in the council’s discretion.⁴¹ Deviations from presumptive penalties are based on “substantial and compelling reasons making it more appropriate to do so.”⁴²

Imposition Of Costs

St. Paul Legislative Code § 310.05(k) provides, in its entirety:

The council may impose upon any licensee or license applicant some or all of the costs of a contested case hearing before an independent hearing examiner. The costs of a contested case hearing include, but are not limited to, the cost of the administrative law judge or independent hearing examiner, stenographic and recording costs, copying costs, city staff and attorney time for which adequate records have been kept, rental of rooms and equipment necessary for the hearing, and the costs of expert witnesses. The council may impose all or part of such costs in any given case if (i) the position, claim or defense of the licensee or applicant was frivolous, arbitrary or capricious, made in bad faith, or made for the purpose

³² St. Paul Legislative Code § 310.05 (m).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ St. Paul Legislative Code § 310.05 (m)(i)(A).

³⁷ St. Paul Legislative Code § 310.05(m)(v)(1), (4).

³⁸ *Id.*

³⁹ *Id.* at (4).

⁴⁰ St. Paul Legislative Code § 310.05(m).

⁴¹ *Id.*

⁴² *Id.*

of delay or harassment; (ii) the nature of the violation was serious, or involved violence or the threat of violence by the licensee or employees thereof, or involved the sale of drugs by the licensee or employees thereof, and/or the circumstances under which the violation occurred were aggravated and serious; (iii) the violation created a serious danger to the public health, safety or welfare; (iv) the violation involved unreasonable risk of harm to vulnerable persons, or to persons for whose safety the licensee or applicant is or was responsible; (v) the applicant or licensee was sufficiently in control of the situation and therefore could have reasonably avoided the violation, such as but not limited to, the nonpayment of a required fee or the failure to renew required insurance policies; (vi) the violation is covered by the matrix in section 409.26 of the Legislative Code [concerning liquor sales]; or (vii) the violation involved the sale of cigarettes to a minor.

ANALYSIS

All of the witnesses in this case testified credibly. It is clear that the two violations involved in this case - the sale of a glass drug pipe and the sale of three loose cigarettes by a clerk employed by Licensee - are violations of the license conditions. The cigarette sale is also a violation of City Legislative Code. These two violations have led to the third appearance of Licensee before the city council and the resulting presumptive penalty is a \$2,000 fine and a ten-day suspension of the license.

DSI's argument that Licensee should be subjected to revocation of its licenses is without merit. On September 7, 2011, Licensee made an appearance, paying a \$500 fine for a cigarette sales violation.⁴³ No additional violations occurred within 24 months of that date, so that violation and appearance are not part of the calculation in this case. The next violation occurred in April 2015, and an appearance was made on May 15, 2015, when Licensee paid a fine. This was, for purposes here, Licensee's first appearance pursuant to Saint Paul Legislative Code § 310.05(m). Violations on May 5 and May 28, 2015, resulted in Licensee's second appearance when those two violations were challenged and settled with Licensee appearing before the city council on August 19, 2015. For computational purposes, the third appearance happened nearly 13 months after the second appearance, September 23, 2016 - "the date of the violation last in time" of the two recent violations that are the subject of this matter.⁴⁴ While the third appearance has not actually occurred yet, because Licensee has not yet appeared before the city council, this calculation simply serves to assist in calculating the presumptive penalty.

The presumptive penalty for a third appearance on a licensing violation is a \$2000 fine and a ten-day license suspension.⁴⁵ "The occurrence of multiple violations shall be grounds for departure from [presumptive] penalties in the council's discretion."⁴⁶ Deviation

⁴³ Ex. 1.

⁴⁴ See Saint Paul Legislative Code § 310.05(m)(v)(4).

⁴⁵ Saint Paul Legislative Code § 310.05(m).

⁴⁶ *Id.* at (m)(ii).

is appropriate where “there exist substantial and compelling reasons making it more appropriate to do so.”⁴⁷ DSI argued that a presumptive penalty was appropriate. On this point, the Judge agrees. Based on the facts of this case, there are no substantial and compelling reasons to deviate up or down from the presumptive penalty, even considering that there were two violations. The violations were relatively minor, although related to broader neighborhood concerns and violations that occurred in 2015. DSI’s arguments that there were substantial problems occurring which came to the attention of police is unsupported. The only thing the evidence shows is that a CRI claimed prohibited items could be obtained at the store.⁴⁸ A glass pipe and loose cigarettes were obtained on two different occasions in September 2016, when the business owner was not present. Since Licensee’s second appearance in 2015, Licensee had no violations until September 2016, the property had been improved, and policies had been put in place intending to prevent the behavior that occurred. Further, following Licensee’s last appearance (its second appearance) it could reasonably presume any new violation would result in a \$2000 fine and ten-day suspension. If that penalty comes to pass in this case, Licensee can reasonably expect revocation if another licensing violation occurs before May 15, 2017 – 24 months from the May 15, 2015 appearance.⁴⁹

The request for the imposition of costs in this case is unfounded. Licensee’s defense was perfectly justified and not frivolous, not in bad faith, nor for the purpose of delay. Licensee has not demonstrated a reluctance or refusal to work cooperatively with DSI or the police department. The violations did not involve the sale of illegal drugs and the circumstances under which the violations occurred were not aggravated and serious. Both violations were based on controlled buys by the police department, and no one was at risk of harm. The violations, if they had involved an authentic buyer, may have contributed to illegal activity in the neighborhood, but there is no basis to say they created a serious danger to the public health, safety, or welfare, or that it involved unreasonable risk of harm to vulnerable persons. DSI did argue that Mr. Hassen should have been “on top of” his business, but the argument is unavailing for purposes of imposing costs of the hearing. Mr. Hassen had in place policies preventing employees from engaging in the kind of activity that led to the violations here, and enforced those policies. He installed cameras and, subsequent to these violations, added a live feed to his phone. He was out assisting his wife during the last month of her pregnancy and for the first week of their child’s birth, and one or two employees took advantage of this. Mr. Hassen discovered his security cameras had been tampered with and he fired both employees who may have done so, one of which he learned was the employee who participated in the controlled buys. Thus, Mr. Hassen was not in sufficient control of the situation such that he could have avoided it at the time. Finally, the violations did not involve liquor sales or the sale of cigarettes to a minor. Because none of the factors for the imposition of costs are present in this case, it is recommended that DSI’s request for the imposition of costs be denied.

⁴⁷ *Id.* at (m).

⁴⁸ Exs. 5, 12.

⁴⁹ Saint Paul Legislative Code § 310.05(m)(v)(4).

CONCLUSION

DSI's issuance of the first notice of violation concerning the sale of a glass pipe on September 14, 2016, which informed Licensee of a recommended fine of \$500, demonstrates how the City's Legislative Code on presumptive penalties can be confusing. The code is not so confusing that it leads to the result in DSI's subsequent amendment asserting that the first violation was a presumed \$2,000 fine and the second violation was a presumed license revocation. The ordinance is clear that presumptive penalties are based on appearances, not violations.

Further, this case is troubling because Licensee's owner, Mr. Hassen, has worked cooperatively with the City in the past to deal with bad behavior of his employees and with criminal activity in the neighborhood. Despite his cooperation, no one approached Mr. Hassen to assist with the investigation into the activities of his employees. Indeed, the local police had information about possible licensing violations, which related to larger issues in the neighborhood concerning drug use, and rather than seeking the cooperation of a heretofore cooperative business owner, they conducted multiple stings. The officers involved did not even know Mr. Hassen.⁵⁰ Mr. Hassen was not in the store when either violation occurred. In fact, the same employee was involved in both illegal sales. The police also did not know this. Mr. Hassen pointed it out at hearing based on his review of the video recordings of the stings. Indeed, Mr. Hassen had fired two employees once he learned of the first violation.

It is also noted that the appearance of impropriety is strong where City police officers work off-duty for cash for a business they are involved in protecting and monitoring for illegal activity when on-duty. This raises the specter that there is incentive to both over and under enforce. While no evidence for either scenario is substantially present in this case, the facts inform the city council to be cognizant of the complicating impact such activity may have on its duties to protect and serve the citizens of Saint Paul in a fair and impartial manner.

Finally, Mr. Hassen is on notice that he must continue to do much more to ensure his employees are not violating the terms of the business's licenses. His improvements to the business property should not go unnoticed. A thriving business that serves the neighborhood is likely to be more of an asset to the community than an empty lot or boarded-up building. Nevertheless, if Mr. Hassen is unable to manage the business with trustworthy employees, he may find himself subjected to a fourth appearance and a presumptive penalty of license revocation. At this time, however, the presumptive penalty of a \$2,000 fine and a ten-day suspension of the licenses is recommended as appropriate. The costs of the administrative hearing should not be imposed upon Licensee.

J. R. M.

⁵⁰ Test. of T. Tanghe; Test. of C. Hansen.