

April 26, 2016

VIA EMAIL ONLY

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Jason L. Gabbert
2410 Upland Ln N Unit H
Plymouth, MN 55447

Jason L. Gabbert
1450 E Bethany Home Rd, #17
Phoenix, AZ 85014

Re: *In the Matter of Jason L. Gabbert d/b/a Metro Tickets*
OAH 14-6020-32961

Dear Mr. Karls and Mr. Gabbert:

Enclosed and served upon you please find the **ORDER GRANTING PARTIAL SUMMARY DISPOSITION** in the above-entitled matter.

If you have any questions, please contact my legal assistant Denyse Johnson at (651) 361-7888, denyse.johnson@state.mn.us, or facsimile at (651) 539-0310.

Sincerely,



STEPHEN D. SWANSON
Administrative Law Judge

SDS:dj
Enclosure
cc: Docket Coordinator
Shari Moore

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF SAINT PAUL

In the Matter of the Peddler License Held by
Jason L. Gabbert, d./b/a Metro Tickets

**ORDER GRANTING PARTIAL
SUMMARY DISPOSITON**

This matter came before Administrative Law Judge Stephen D. Swanson pursuant to the city of Saint Paul's Notice of Motion and Motion for Partial Summary Disposition dated April 1, 2016. The period for the filing of a response to the Motion ended on April 18, 2016.

Geoffrey Karls, Assistant City Attorney, appeared for the City of Saint Paul (City). Jason L. Gabbert (Respondent) did not file a response to the Motion.

Based upon the Motion for Partial Summary Disposition and the contested case record:

IT IS HEREBY ORDERED THAT:

1. The City's Motion for Partial Summary Disposition is **GRANTED**.
2. The Administrative Law Judge recommends that the City **REVOKE** peddler license no. 020000789 held by Respondent.
3. The attached Memorandum is made a part of this Order.

Dated: April 26, 2016



STEPHEN D. SWANSON
Administrative Law Judge

NOTICE

This Order Granting Partial Summary Disposition 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 this Order. 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 West Kellogg Blvd., Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

MEMORANDUM

Procedural Background

The present contested case was commenced by the City's Notice of Pre-Hearing Conference dated November 3, 2015. The Notice advised Respondent that the City was contemplating taking adverse action against his peddler license based upon allegations that Respondent had engaged in the business of a peddler without a license by allowing other unlicensed persons to use his peddler license, in violation of provisions of the Saint Paul Legislative Code.

The parties appeared for a prehearing conference on December 3, 2015, and the Administrative Law Judge entered his First Prehearing Order on December 4, 2015, scheduling the matter for hearing on May 30, 2016.

By Amended Notice of Administrative Hearing dated January 20, 2016, the hearing date was changed to June 1, 2016, and the City placed the Respondent on notice that it would seek the revocation of the Respondent's peddler license on the ground that he was convicted of the felony offense of theft by swindle on January 23, 2015, in Ramsey County District Court.

Presently before the Administrative Law Judge is the City's Motion for Partial Summary Disposition dated April 1, 2016. That Motion seeks a recommendation for revocation of the Respondent's peddler license based upon his theft by swindle conviction. According to the City's Affidavit of Service, the Notice of Motion and Motion for Partial Summary Disposition was served upon the Respondent by U.S. Mail on April 1, 2015, at his last known address.

The last day for the service and filing of a response to the Motion by the Respondent was April 18, 2016.¹ The Respondent did not file a response.

¹ Minn. R. 1400.6100, subp. 2; 1400.6600 (2015).

Factual Background

The material facts, as they relate to the City's Motion for Partial Summary Disposition, are not in dispute, and may be stated as follows.

Respondent's current peddler license, No. 020000789, was issued by the City on July 28, 2010, and renewed periodically thereafter.²

By Criminal Complaint dated March 4, 2014, Respondent was charged in Ramsey County District Court with one felony count of theft by swindle, alleged to have occurred on or about October 20, 2013.³ The charge was based upon allegations that Respondent sold 50 tickets for a Minnesota Vikings NFL game to an individual for the price of \$2,150, reprinted the tickets, causing the original tickets to be voided, and refused to return the \$2,150 to the individual.⁴ Following a jury trial, Respondent was found guilty of the charge on November 5, 2014.⁵

Respondent made a motion for a new trial, and that motion was denied.⁶ Respondent appealed his conviction, and the conviction was affirmed by the Minnesota Court of Appeals in an unpublished opinion filed on January 19, 2016.⁷

Summary Disposition Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to disposition as a matter of law.⁸ The Office of Administrative Hearings follows the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.⁹

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. The resolution of a material fact will affect the result or outcome of the case.¹⁰ To successfully resist a motion for summary disposition, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.¹¹ The nonmoving party cannot rely exclusively on the averments in its pleading, but must

² Affidavit (Aff.) of Geoffrey Karls at ¶ 2 and Exhibit (Ex.) A.

³ *Id.* at ¶ 4 and Ex. C.

⁴ *Id.*

⁵ *Id.* at ¶ 6 and Ex. E.

⁶ *Id.* at ¶ 7 and Ex. F.

⁷ *Id.*

⁸ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); Minn. R. 1400.5500K (2015); Minn. R. Civ. P. 56.03.

⁹ See Minn. R. 1400.6600.

¹⁰ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau, Inc. v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

¹¹ *Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

come forward with specific facts showing that there is a genuine issue for trial.¹² When considering a motion for summary disposition, the facts must be viewed in the light most favorable to the nonmoving party,¹³ and all doubts and factual inferences must be resolved against the moving party.¹⁴ If reasonable minds could differ as to the import of the evidence, disposition as a matter of law should not be granted.¹⁵

Discussion

Regarding Respondent's conviction for theft by swindle, there is no genuine issue of material fact to be resolved at a hearing. The question presented is whether the City is entitled, as a matter of law, to relief in this case in the form of a recommendation by the Administrative Law Judge that Respondent's peddler license be revoked.

Section 310.05(a) of the Saint Paul Legislative Code provides, in part, that adverse action against a license issued by the City includes revocation of the license.¹⁶ Section 310.05(m) is entitled "[p]resumptive penalties for certain violations," and provides, in pertinent part, as follows:

The purpose of this section 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, and shall apply to all license types These penalties are presumed to be appropriate for every case; however the council may deviate therefrom in an individual case where the council finds and determines that there exist substantial and compelling reasons making it more appropriate to do so. When deviating from these standards, the council shall provide written reasons that specify why the penalty selected was more appropriate.¹⁷

This provision is followed by a penalty grid that establishes 13 types of violations, and indicates the presumptive penalty for each type based upon the number of previous appearances before the city council.¹⁸ As noted by the City in its Motion,¹⁹ a licensee's felony conviction for theft by swindle unrelated to the licensed activity is not included among the 13 types of violations.²⁰ The closest listed violation is the "[c]ommission of a felony on the premises by a licensee or employee," which for the first appearance carries a \$2,000 fine, and for the second appearance carries a license revocation sanction.²¹ The penalty grid is not directly applicable to the present case.

¹² See, e.g., *DHL, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

¹³ *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

¹⁴ See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994); *Thiele* at 583; *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971).

¹⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51, 106 S. Ct. 2505, 2511 (1986).

¹⁶ *Karls Aff.* at ¶ 10 and Ex. I at 1.

¹⁷ *Id.* at 3.

¹⁸ *Id.*

¹⁹ Memorandum of Law in Support of City's Motion for Partial Summary Disposition at 5.

²⁰ *Karls Aff.* at ¶ 10 and Ex. I at 3.

²¹ *Id.*

Section 310.06 authorizes the city council to take adverse action, including license revocation, for 14 listed reasons, including the following:

The licensee or applicant (or any person whose conduct may by law be imputed to the licensee or applicant) has engaged in or permitted a pattern or practice of conduct of failure to comply with laws reasonably related to the licensed activity or from which an inference of lack of fitness or good character may be drawn.²²

The City argues that Respondent's conviction for the crime of theft by swindle warrants the revocation of his peddler license. The Administrative Law Judge agrees. As the Minnesota Court of Appeals noted in its unpublished opinion affirming Respondent's conviction, the "essence of a swindle is defrauding another person by an intentional misrepresentation or scheme."²³

The citizens of St. Paul have a right to rely on the honesty, fitness, and good character of peddlers licensed by the City. Here, Respondent engaged in a scheme involving the sale of 50 tickets to a Vikings game for cash. He then reprinted the tickets, causing them to be voided and defrauding the buyer out of the money paid for the tickets. The sale of the tickets, while perhaps not technically undertaken under Respondent's peddler license, is certainly akin to legitimate activities undertaken by peddlers.

Respondent's crime was grounded on fraud and dishonesty, and supports the drawing of an inference under Section 310.06 that he lacks the fitness and good character required of peddlers licensed by the City and rightfully demanded by City residents. Respondent's fraudulent and dishonest scheme, coupled with his conviction for the crime of theft by swindle, provides a substantial and compelling reason for the City Council to revoke his peddler license.

Conclusion

There are no genuine issues of material fact regarding Respondent's conviction for felony theft by swindle, and the City is entitled, as a matter of law, to the entry of partial summary disposition with a recommendation to the City Council that Respondent's peddler license be revoked.

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²² Karls Aff. at ¶ 11 and Ex. J at 1.

²³ *Id.* at ¶ 7 and Ex. F at 3, quoting *State v. Flicek*, 657 N.W.2d 592, 598 (Minn. App. 2003).