OAH 60-0900-37294

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty Order and License Suspension Issued to Kevin McCulloch and Mission Tavern, Inc., d/b/a Mission Tavern

FINAL ORDER

This matter is pending before Administrative Law Judge James E. LaFave

Lindsay K. Strauss and Megan J. McKenzie, Assistant Attorneys General, represent the Minnesota Department of Health (Department). Richard A. Dahl, Dahl Law Firm, P.A., represents Kevin McCulloch and Mission Tavern, Inc., d/b/a/ Mission Tavern (Respondents).

This matter came before the Administrative Law Judge on the Department's Motion for Summary Disposition. On April 15, 2021, The Administrative Law Judge issued a Recommendation on the Department's Motion for Summary Disposition (Recommendation).

Deputy Commissioner Margaret Kelly was appointed to serve as the Commissioner's decision maker. Following the April 15, 2021, Recommendation, Deputy Commissioner Kelly invited the parties to file arguments and exceptions. Both parties made timely filings.

On June 17, 2021, counsel for Deputy Commissioner Kelly informed the Administrative Law Judge that the Deputy Commissioner declined to take further action in this matter and considered the April 15, 2021, report to constitute the final agency action pursuant to Minn. Stat. § 14.62, subd. 2(a) (2020). The Department tendered the case back to the Administrative Law Judge for consideration of disciplinary action, in particular, the length of suspension to be applied.

On August 25, 2021, the Administrative Law Judge issued the First Post-Hearing Order. In response, the Department filed a Supplemental Memorandum on September 10, 2021, containing a chart with recent food and beverage licensing violations as well as a brief argument on the Department's position as to the penalty to be imposed.

The Administrative Law Judge issued a Second Post-Hearing Order on September 17, 2021, requesting that the Department file an additional memorandum providing greater specificity as to the licensing violations listed in its chart. Respondents filed a Response to the Department's Supplemental Memorandum of September 21,

2021. And the Department filed a Second Supplemental Memorandum Regarding License Suspension on September 24, 201.

On October 5, 2021, the Department filed the parties' augments and exceptions. The record before the Administrative Law Judge closed on that date.

FINDING OF FACT

The Administrative Law Judge adopts and incorporates all of the findings in the April 15, 2021, Recommendation.

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

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Health (Commissioner) have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 144.99, 144.991 (2020).

2. The Department fulfilled all procedural requirements of law and rule and this matter is properly before the Administrative Law Judge and the Commissioner.

3. The Administrative Law Judge incorporates the Memorandum included within the April 15, 2021, Recommendation.

4. The Department bears the burden of proof to establish its claims by a preponderance of the evidence.[1]

5. The Department is authorized to enforce any rule, order, stipulation, agreement, settlement, compliance agreement, license registration, certificate, and permit adopted or issued by the Department or under any law now in force or later enacted for the preservation of public health.[2]

6. Executive Order (EO) 20-99 was issued by Governor Walz on November 18, 2020, under the authority granted by Minn. Stat. § 12.21, subds. 3 (1) and (7) (iv) (2020). Minn. Stat. § 12.21, subd. 3(7) (iv) specifically authorizes the Governor to regulate the occupancy of facilities.

7. EO 20-99 prohibited bars and restaurants from providing on-premises food and beverage service and limited the number of people picking up food in the restaurant to five. EO 20-99 was approved by the Executive Council and filed with the Office of the Secretary of State. It therefore had the full force and effect of the law.

8. EO 20-99 is an "order" within the meaning of Minn. Stat. § 144.99, subd. 1.

[1] Minn. R. 1400.7300, subp. 5 (2021).
[2] Minn. Stat. § 144.99, subd. 1 (2020).

9. The Department established by a preponderance of the evidence that Mission Tavern violated EO 20-99.

10. The Department has authority under Minn. Stat. §§ 144.99, .991, to issue an Administrative Penalty Order (APO) requiring correction of violations, the imposition of a penalty in an amount up to $10,000 and suspension of the license.

11. On December 16, 2020, the Department issued Respondents a Nonforgivable APO and a license suspension.[3] The nonforgivable penalty was in the amount of $10,000.[4] There was no length stated in the license suspension.[5]

12. Respondents received the APO on December 16, 2020.[6]

13. The $10,000 administrative penalty is due and owing.

14. The Department's suspension of Mission Tavern's food and beverage license was proper.

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

ORDER

1. The Department's Motion for Summary Disposition is **GRANTED.**

2. Respondents motion to dismiss for lack of subject matter jurisdiction is **DENIED**.

3. Respondents' appeal of the suspension is **DISMISSED.**

4. A $7,500 administrative penalty is due and owing. $2,500 is stayed for one year pending Respondents' compliance with the terms of its license and Department rules.

[3] Declaration of Mark Peloquin (Peloquin Decl) at Exs. 26 and 27.
[4] *Id.* at Ex. 26.
[5] *Id.*
[6] *Id.* at Ex. 27.

5. Respondents' food and beverage license is suspended for 40 days. 20 days are stayed for one year pending Respondents' compliance with the terms of its license and Department rules.

Dated: January 4, 2022

JAMES E. LAFAVE
Administrative Law Judge

NOTICE

This is the Commissioner's Final Order under Minn. Stat. § 14.63 (2020). A party seeking judicial review of this Final Order must file a petition with the Minnesota Court of Appeals and serve it on all other parties either personally or by certified mail within 30 days of receiving this Order. Minn. Stat. § 14.63 (2020).

MEMORANDUM

I. Respondents' Response to the Department's Supplemental Filing

Respondents made a motion to dismiss for lack of subject matter jurisdiction and made a series of arguments in their response to the Department's first supplemental memorandum. The Department did not file a response to the motion to dismiss. The motion to dismiss will be analyzed then each of Respondents remaining arguments will be addressed in turn.

a. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Respondents argue the Department did not have jurisdiction to revoke Mission Tavern's license based on violations of executive orders issued by the Governor under the Minnesota Emergency Management Act of 1996. They note Minn. Stat. § 14.03, subd. 1 (2020), states: "[T]he Administrative Procedure Act provided in sections 14.57 to 14.69 do not apply to … (b) emergency powers in sections 12.31 to 12.37." They reason that this provision requires judicial review rather than an administrative proceeding.

The Respondents misread the law.

The Health Enforcement Consolidation Act of 1993[7] provides the legal basis by which the Department may enforce laws, rules, and orders pertaining to food and beverage establishments in Minnesota.[8] The Department is authorized to enforce any rule, order, stipulation, agreement, settlement, compliance agreement, license

[7] Minn. Stat. §§ 144.989 -.993 (2020).
[8] Minn. Stat. § 144.99, subd. 1.

registration, certificate, and permit adopted or issued by the Department or under any law now in force or later enacted for the preservation of public health.[9]

In response to the COVID pandemic, EO 20-99 prohibited on-premises service and limited the number of people in restaurants picking up food. It was an order enacted for the preservation of public health.

This matter did not involve a contested case hearing involving an executive order. Rather, the issue in this case was whether Respondents' violation of EO 20-99 was a violation of an "order" within the meaning of Minn. Stat. § 144.99, thereby allowing the Department to sanction their license.

Because Respondents violated EO 20-99, the Department was acting within its authority under Minn. Stat. § 144.99 when it issued the APO. Under the terms of Minn. Stat. § 14.991 Respondents timely requested an appeal. Jurisdiction before this tribune is therefore proper. Respondents' motion to dismiss is denied.

b. Enforcement of Executive Orders and Minn. Stat. § 144.99

Respondents argue that neither the Governor's Executive Orders nor the Minnesota Emergency Management Act of 1996 gives the Department the authority to revoke food and beverage licenses. The propriety of the Governor's Executive Orders, and the Department's authority to sanction licenses under Minn. Stat. § 144.99 were through discussed and analyzed in the Recommendation. The Memorandum that accompanied the Recommendation has been incorporated in this Order. Respondents' position was rejected. The supplemental briefing and argument on this issue do not provide a basis to revisit that conclusion.

c. Enforcement under Minn. Stat. § 144.99 is improper because Executive Order are no now in force

Respondents argue that the Department may not enforce EO 20-99 or EO 20-81 because EO 20-99 is not now in force and EO 20-81 has been revoked. They focus on the following language in Minn. Stat. § 144.99, subd. 1, allowing enforcement of "all rules, orders . . . adopted or issued by the department or under any other law now in force or later enacted for the preservation of public health . . . ." Respondents' argument is that the phrase "now in force or later enacted" refers to the time of the enforcement action, rather than to the time of the passage of Minn. Stat. § 144.99, subd. 1. The argument is illogical. Among other things, it would invite the government to sanction regulated parties retroactively for conduct that was not prohibited at the time it occurred. Moreover, it would negate the backward-looking purpose of a licensing sanction in situations such as the one in this case. It is not unlike a sidewalk snow removal requirement that applies through April 15. If a person subject to such a rule fails to remove the snow from the sidewalk on April 14 and the City sends them a ticket on April 20, the ticket is still valid, despite the expiration of the clean sidewalk rule on

[9] *Id.*

April 15. Respondents' argument that EO 20-99 and 20-81 are unenforceable is rejected.

d. The Department refused to engage in settlement negotiations

In its Supplemental Memorandum the Department stated: "it should be noted that Respondents' counsel in this case rejected [the Department's] attempt to settle this matter and refused to negotiate in good faith towards a resolution."[10] Respondents counter that they repeatedly called counsel for the Department to discuss settlement and they claim that the statement by the Department that Respondents is false. The Administrative Law Judge accepts Respondents' statement and notes that during the first prehearing conference in this matter, Respondents requested that the Department engage in mediation.[11]

The fact the Department failed to engage in settlement negotiations, however, does not mitigate the penalties to be imposed. The Department's alleged failure to engage in settlement negotiations is not a factor to be considered in determining a penalty.

e. The Department relied on hearsay evidence.

Respondents argue that the Department relied on hearsay evidence to prove the violations of EO 20-99. As a result, they assert any claim for monetary penalties, or a suspension should be denied. The argument is without merit.

The appeal in this case utilized the rules and procedures set forth in Minn. R. 1400.8510 - .8612 (2021).[12] Minn. R. 1400.8607, subp. 1, states in relevant part:

> The administrative law judge shall admit all evidence that logically tends to prove or disprove an important fact, ***including hearsay***, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct or their serious affairs.[13]

The Department submitted declarations and exhibits to supports its claims. The Administrative Law Judge found them credible and used them to support the findings of fact in the Recommendation. The evidence was, therefore, found to be admissible hearsay under the rules. The Respondents claim that any penalty should be denied because the Department's claims were supported by hearsay evidence is rejected.

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[10] Department of Health's Supplemental Memorandum Regarding License Suspension at 2 (Sept. 10, 2021).
[11] *See* Prehearing Conference Digital Recording (Jan. 21, 2021) (On file with the Minn. Office of Admin. Hearings).
[12] Minn. Stat. § 144.991, subd. 5 (2020).
[13] Emphasis added.

II. Penalty

One of the purposes of the Minnesota Administrative Procedure Act is "to increase the fairness of agencies in the conduct of their contested case proceedings."[14] Consistency in administering penalties is one way to increase fairness and public confidence in furtherance of that legislative goal.

To-date, 18 cases have been brought by the Department involving violations of EO 20-99, not including this case.[15] Two were not appealed, three have appeals pending and the remaining cases were settled.[16] For all of the cases that settled, the suspension were originally listed for 60 days and the APO's, when issued, listed fines ranging from $5,000 to $10,000.[17]

The settlement terms for the 11 establishments that agreed to suspensions varied from four days of the suspension served with 56 days stayed and $500 of the penalty paid with $4,500 stayed to 30 days of the suspension served and 30 days stayed with $5,000 of the penalty paid with $5,000 stayed.[18] Two establishments served suspension of 30 days and one served 24 days.[19] The remaining agreed to suspensions were 17 days or less.[20]

> The settlement terms agreed upon by [the Department] depended on a variety of factors, including how quickly the establishment came into compliance, after contact from [the Department] or law enforcement; with willfulness of the violations; the strength of the evidence against the establishment; whether the establishment violated a cease and desist order and/or a court order; history of prior Executive Order violations; and any penalties or restitution collected by other state agencies.[21]

The Department argues Respondents' conduct was more serious than any other establishment that were allowed to keep their license.[22] The Department notes that Respondents violated two cease and desist orders[23] and had a significant history of Executive Order violations.[24] The Department also points out that Respondents had a COVID-19 outbreak associated with it prior to being issued cease and desist orders.[25] The Department argues that the Respondents' 60-day suspension be upheld.

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[14] Minn. Stat. § 14.001(5) (2020).
[15] Department of Health's Second Supplemental Memorandum Regarding License Suspension at Ex. 2 (Sept. 24, 2021).
[16] *Id.*
[17] Department of Health's Supplemental Memorandum Regarding License Suspension at Ex. 1.
[18] Department of Health's Second Supplemental Memorandum Regarding License Suspension at Ex. 2.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1-2.
[22] *Id.* at 2.
[23] *See* Peloquin Decl. at Exs. 15 and 25.
[24] Department of Health's Second Supplemental Memorandum Regarding License Suspension at 2.
[25] *See* Peloquin Decl. at Exs. 7-14, 15 and 25.

Respondents did not specifically address the nature of the penalties that may be imposed. They submitted no argument regarding the possible length of the suspension or the amount of the fine.

The evidence against Respondents was strong and persuasive. Violating multiple cease-and-desist orders and the history of Executive Order violations makes Respondents conduct more severe than other cases before the Department and justifies a stiffer penalty. A license suspension of 40 days with 20 days stayed and a fine of $7,500 with $2,500 stayed is therefore appropriate.

J. E. L.