

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE CITY OF MINNEAPOLIS

In the Matter of All Licenses Held by the  
Hard Times Café, for Premises Located at  
1821 Riverside Avenue, Minneapolis,  
License No. 159-27511.

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

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick, acting as a hearing officer for the Minneapolis City Council, commencing at 9:30 a.m. on Wednesday, December 29, 1999, at the Office of Administrative Hearings. A second day of hearings was conducted on March 28, 2000 at Minneapolis City Hall. The hearing was held pursuant to a Notice of Complaint and Notice of Hearing dated February 23, 2000.

Timothy S. Skarda and Carol Bachun, Assistant Minneapolis City Attorneys, 333 South 7<sup>th</sup> Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the Division of Licenses and Consumer Services of the City of Minneapolis. (the City). Robert Dildine, Attorney at Law, 620 16<sup>th</sup> Avenue South, Minneapolis, Minnesota 55454-1104, appeared on behalf of the Licensee (hereinafter "the Hard Times Café" or "Licensee"). The record closed on April 14, 2000, with the receipt of the parties' post-hearing briefs.

**NOTICE**

This Report contains a recommendation and not a final decision. The final decision will be made by the Minneapolis City Council, which may affirm, reject, or modify the Findings and Conclusions contained herein. The Council will consider the evidence in this case and these recommended Findings of Fact and Conclusions, but will not consider any factual testimony not previously submitted to and considered by the Administrative Law Judge. The Licensee will have an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or interpretation of the facts and may present argument related to the recommendation. The Council's decision as to what, if any, adverse action shall be taken will be by resolution under Chapter 4, Section 17 of the Minneapolis City Charter. To ascertain when the Council will consider this matter, the parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis Minnesota 55415-1382, telephone number (612) 673-3136.

**STATEMENT OF ISSUE**

The issue in this matter is whether the sale of controlled substances on and near the premises of the Licensee's business constitutes good cause for adverse action against its existing business licenses and denial of license renewal applications.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge (ALJ) makes the following:

### **FINDINGS OF FACT**

1. The Hard Times Café has been continuously licensed by the City of Minneapolis since 1993. Currently, the Hard Times Café holds licenses to operate a restaurant, sell tobacco products, and provide live entertainment. The Hard Times Café also holds a seasonal short-term food permit that allows the sale of food at temporary locations away from the business premises.

2. The Hard Times Café is organized as a worker-owned cooperative. Decisions are made by majority vote of the members, much like a partnership. Members are those persons actively working at the Hard Times Café who have worked there six months. During day-to-day operations, the Hard Times Café is managed by those members working that particular shift. The persons identified as officers of the cooperative hold those positions for the purpose of completing and signing forms and have no actual authority greater than other members. The members hold no equity position. Each is paid a salary and there are no profits to distribute to the members.

3. The business premises are located at 1821 Riverside Avenue, in the Cedar-Riverside neighborhood. The West Bank of the Minneapolis campus of the University of Minnesota extends to within one block of the business premises. Augsburg College is located one-half mile further east on Riverside Avenue. The intersection of Cedar and Riverside Avenues is one-half block west of the Hard Times Café. The 400 Bar is located on that intersection. The premises of the Hard Times Café are on the street level of a building that also houses the Viking Bar, the Lucky Dragon Buffet, and apartments on the second floor. The Hard Times Café rented an apartment on the second floor to use as a business office and employee lounge. To the west of the building is a parking lot owned and operated by the Minneapolis Community Development Agency (MCDA).

4. Upon entering the Hard Times Café, one encounters an area, approximately seven feet wide, between the service counter on the right and the seating area on the left. The seating area is separated by a low wall, approximately four feet high, equipped as a table with stools on the side away from the service counter. The area above the wall is open, affording a limited view of the seating area. Several tables are up against the wall on the service counter side. The seating area also contains tables, chairs, and benches. A wall to the immediate left of the main entry completely obscures the bench and table on the other side. Several tables are located to the immediate right of the main entry.

5. At the end of the service counter opposite to the main entry, a doorway leads to a patio area in the rear. A staircase runs up from the patio area to the second floor apartment. The area behind the service counter opens into the kitchen area. The service counter contains an espresso machine and other equipment that partially obscures the view of the seating area by employees working at that counter. Pay telephones and restrooms are located at the rear of the seating area.

6. The Hard Times Café does not provide "sit-down" dining service. Patrons enter, order coffee or food at the service counter, and then receive their orders or await preparation of their food. Except at the busiest times, there would be one employee working at the service counter and another employee working in the kitchen. When business is brisk, two employees work the service counter.

7. In the Spring of 1993, problems arose from crowds loitering in front of the Hard Times Café. Due to the location of a bus stop, persons awaiting buses would be interacting with customers at the Hard Times Café and problems had developed. To address these problems, the bus stop was moved to another block and conditions were placed on the operation of the business. The Hard Times Café operating hours were changed from "open all hours" to closing for three hours per night (from approximately 2:00 a.m. to 5:00 a.m.).<sup>[1]</sup>

8. A Licenses and Consumer Services Technical Advisory Committee (TAC) was formed of representatives of the Hard Times Café, other local business associations, neighborhood groups, property owners and the City. The TAC consulted with the Hard Times Café to meet the security concerns of the area. Security lighting was added and litter removed.

9. In 1995, The City received complaints about the operating practices of the Hard Times Café. Those complaints were similar to those 1993 and regarded loitering, litter, and graffiti. The Hard Times Café worked with the TAC to resolve the problems that had arisen. The parking lot behind the building was fenced. A window was installed in the building to overlook the parking lot. The alley was walled off to prevent traffic behind the building. A low, wide, brick wall fronting Riverside Avenue and owned by the MCDA was removed. That wall had been used as a bench by many people loitering on the sidewalk in the area. The Hard Times Café resumed having employees pick up litter in the area around the business premises. The Hard Times Café resumed operating at "all hours" by agreement with the City.

10. In recent years, workers at the Hard Times Café began to allow customers to leave personal items behind the counter or on the patio out back. Among the items left were games, tools, and backpacks from longtime customers. The most frequent items left on the patio were bicycles. Parking bicycles on the patio came in response to the increase in parking tickets issued by the MPD for bicycles illegally parked in front of the Hard Times Café.

11. In order to discourage use of the pay telephones for calling pagers, the Hard Times Café had them converted to rotary-dial telephones. However, a few people were allowed to use the Hard Times Café's private telephone in the kitchen. That telephone has touch-tone service.

12. The Hard Times Café submitted an application for renewal of its food license on March 17, 1999.<sup>[2]</sup> Christopher W. Nickel-Felton was identified as President. Angela M. Takata was identified as Treasurer. The Vice President was identified as Martin D. Johnson.

13. In the Spring of 1999, Officer Kevin Bakken of the SAFE Unit of the Minneapolis Police Department (MPD) began working in the Cedar-Riverside area. Officer Bakken received a number of complaints from neighboring businesses in the area of loitering, drug dealing, and other conduct outside the Hard Times Café. Similar complaints had been received by the beat officers of the MPD in area and the MPD Community Response Team (CRT). Based on this information, Sergeant Miller organized an undercover operation by the MPD to target the illicit activity occurring in the vicinity of the Hard Times Café. Officer Metcalf of the CRT was assigned to the operation.

14. On October 8, 1999, Officer Metcalf began visiting the Hard Times Café. She did not wear a uniform, but rather baggy jeans, a flannel shirt, a bandana on her head, and carried a backpack. She would typically arrive between 4:00 and 5:00 p.m. and stay until about 8:00 p.m. Officer Metcalf did not observe any suspicious conduct on the first day, but she did note that two juveniles (JV1 and JV2) appeared to be loitering outside on the sidewalk.

15. On October 12, 1999, Officer Metcalf returned to the Hard Times Café. She noted that people who did not appear to be employees went behind the service counter and into the kitchen, returning after a few minutes. She also saw JV1 and JV2 loitering near the front door of the Hard Times Café.

16. On October 15, 1999, Officer Metcalf sat outside the Hard Times Café on the sidewalk. There were a number of people there. She was soon approached by "Dave" who asked her if she smoked. Officer Metcalf answered "yes" and "Dave" said he knew where to get good "weed" (meaning marijuana). She never saw "Dave" again after that day. Officer Metcalf entered the Hard Times Café and sat along the bar. She was approached by an intoxicated male who asked if Officer Metcalf "liked to get high."

17. On October 19, 1999, Officer Metcalf went to the Hard Times Café and observed nothing suspicious.

18. On October 25, 1999, Officer Metcalf went to the Hard Times Café and observed nothing suspicious. She did discuss with several other patrons an upcoming "Free Mumia" rally.

19. On November 10, 1999, Officer Metcalf went to the Hard Times Café. For the first time, she saw Harold Lynwood, known by the nickname "Easy." She was sitting in her usual place near the picture window and Easy told Officer Metcalf that he used to be an employee of the Hard Times Café and he used to sell "herb" over the counter. Easy told Officer Metcalf to come back tomorrow and he could sell her some good weed. Officer Metcalf then saw a few people who came in the Hard Times Café and look around, talk to someone, particularly near the pay telephones in the rear of the premises and leave without making a purchase of coffee or food.

20. Officer Metcalf returned to the Hard Times Café on November 11, 1999, at about 5:00 p.m. Persons were engaged in similar conduct to the previous day, entering,

looking around, meeting someone, and leaving. Justin Heinzeroth, going by the nickname "Havoc" approached Officer Metcalf at her table. Havoc asked whether she was looking for "weed." She answered "yes" and they negotiated a purchase of marijuana. Havoc left and a few minutes later came back to the table with Jackson Kenney, who sold the marijuana to Officer Metcalf for twenty dollars. She was seated at the table that was obscured from the view of anyone at the service counter.

21. On November 16, 1999, Officer Metcalf returned to the Hard Times Café. JV1 and others were walking in, meeting people, and going back near the pay telephones. In some instances there appeared to be exchanges of things passed from one person to another (hereinafter referred to as "hand-to-hand exchanges"). Officer Metcalf took this conduct to be sales of controlled substances. Easy spoke to her, asking Officer Metcalf to go out with him on a date. Easy offered to provide a number of controlled substances or narcotics, apparently in an attempt to convince Officer Metcalf to go out with him.

22. Officer Metcalf returned to the Hard Times Café on November 23, 1999. She saw Jackson Kenney and went outside to talk to him. Officer Metcalf reminded Kenney that she had bought marijuana from him before. He asked if she was interested in buying more. They went back inside the Hard Times Café and sat at a table. Kenney made two trips between their table and a table occupied by Mitch Anderson. After a short conversation Kenney returned and said that Mitch had already sold his marijuana and was waiting for the customer to arrive. Kenney said he had some marijuana available for \$35. Kenney and Officer Metcalf left the Hard Times Café and went behind the Viking Bar. That was the location where Officer Metcalf purchased the marijuana from Kenney.

23. On December 2, 1999, Officer Metcalf returned to the Hard Times Café at about 4:00 p.m. When she arrived, Kenney greeted her and asked if she wanted to buy some marijuana. JV1 approached her and sold her marijuana for \$10.00. The transactions took place close to the pay telephones. JV1 also said that he could get cocaine for her. Officer Metcalf noted that Mitch Anderson went behind the counter.

24. On December 6, 1999, Officer Metcalf returned to the Hard Times Café. She met with Patrick Mahoney and JV3. Officer Metcalf asked Mahoney why Anderson went behind the counter and Mahoney said Anderson was an employee and one of the few who were allowed to go there. JV3 later told Officer Metcalf that he bought marijuana from Jake Houle and Anderson.

25. On December 16, 1999, Officer Metcalf returned to the Hard Times Café at about 4:00 p.m. She noted the same sort of conduct caused her to believe that sales of controlled substances were occurring. She met with Kenney, who said he could get her one-half ounce of marijuana. Officer Metcalf declined because JV1 approached her and aggressively marketed both marijuana and cocaine. From her location in the Hard Times Café, she could hear JV1 asking other patrons if they wanted to buy "weed." Officer Metcalf purchased marijuana from JV1, near the picture window, about six feet from the service counter.

26. On December 23, 1999, Officer Metcalf returned to the Hard Times Café at about 4:00 p.m. She saw JV2 and another juvenile, JR, near the entrance of the Hard Times Café exchanging money and bags of marijuana. JR told Officer Metcalf that they bought the marijuana from Houle and Anderson. Officer Metcalf bought marijuana from two of the juveniles and noted that Houle appeared to be watching the transaction.<sup>[3]</sup>

27. Officer Metcalf returned to the Hard Times Café on December 27, 1999. She was approached separately by JV1, JV2, and a juvenile known as "Tony", each asking whether she wanted to buy marijuana. Others in the Hard Times Café were approaching patrons in the same fashion that Officer Metcalf had seen before on the premises.

28. On December 28, 1999, Officer Metcalf returned to the Hard Times Café at about 4:15 p.m. Officer Egge accompanied her, but remained outside the Hard Times Café. Officer Metcalf saw JV1 and another male near the pay telephones. JV1 passed a bag, appearing to contain marijuana to the other male and JV1 received money. The other male then went to the counter and sat with JV2. JV1 came over to Officer Metcalf and asked if she wanted some weed. JV1 wanted Officer Metcalf to come with him to his apartment for a party. She declined. Officer Metcalf met Marty Johnson that night and he tried to sell her marijuana. Johnson and Officer Metcalf then left and went to the Viking Bar.

29. While at the Viking Bar, Johnson told Officer Metcalf that Anderson sold "really good weed." They left to go back to the Hard Times Café and met Patrick Mahoney. Johnson told Mahoney that he should "help her score." Mahoney opened the door to 1823 Riverside Avenue and they went up to the apartment above the Hard Times Café. In the apartment, Officer Metcalf saw Johnson and another male. Mahoney went to the refrigerator and took out marijuana. He sold Officer Metcalf marijuana for \$10.00.

30. On January 1, 2000, Officer Metcalf and Officer Lanasa were performing surveillance outside the Hard Times Café. The officers witnessed the sort of hand-to-hand exchanges that involved passing money and receiving small bags. The officers perceived the activity to be drug transactions. Those transactions were occurring on the sidewalk outside the front door of the Hard Times Café, and further down the block.

31. On January 4, 2000, Officer Metcalf and Officer Egge witnessed similar conduct to that three days earlier involving JV1, JV2, and others.

32. Officer Metcalf and Sergeant Miller conducted surveillance of the Hard Times Café on January 6, 2000. They observed persons near the window of the apartment above the Hard Times Café smoking something in a pipe, passing it back and forth. From their experience, the officers concluded that the pipe contained a controlled substance. No other suspicious conduct was observed at that time.

33. On January 11, 2000, Officer Metcalf returned to the Hard Times Café in the afternoon. She observed Kenney and Anderson walk behind the service counter.

Officer Metcalf observed more of the hand-to-hand exchanges that she had seen on previous visits. JV1 approached Officer Metcalf and told her that he had just returned from Chicago with some "really good weed." When she declined to buy the marijuana, JV1 offered to sell her a handgun.

34. Officer Metcalf returned to the Hard Times Café on the afternoon of January 12, 2000. She observed Anderson and Joseph Terry coming and going several times from the premises. Officer Metcalf saw Anderson go behind the service counter and into the kitchen. She introduced herself to Terry and he indicated that he could sell Officer Metcalf crack cocaine.

35. On January 13, 2000, Officer Metcalf and Officer Goodmanson went to the Hard Times Café, at about 6:00 p.m. They met Terry and indicated that they were ready to buy the crack cocaine. Terry met with Easy and another male. Neither officer could see if anything was exchanged during these brief conversations. Terry came back and tossed a bag, appearing to the officers to contain cocaine, onto the table. Officer Goodmanson began negotiating over the price and refused to pay what Terry was asking for the cocaine. Terry picked up the bag and returned to the table with the unidentified male. Terry made several trips back and forth carrying counteroffers. The price was ultimately agreed upon and the sale concluded.

36. Later in the evening, Terry indicated that he could get powder cocaine for Officer Metcalf. Havoc approached the officers later in the evening and offered to sell them hallucinogenic mushrooms. Officer Goodmanson purchased the mushrooms.

37. Johnson approached the officers and suggested they have a beer together. They went next door to the Viking Bar and ordered beer. The bartender asked for identification and the officers indicated that they did not have any.<sup>[4]</sup> The bartender refused to serve them and Johnson suggested going back to his apartment for beer. They returned to the Hard Times Café, went behind the service counter, through the kitchen to a back staircase, and up to the apartment above the premises. They sat in the apartment's kitchen and the officers noted that several other people were coming up and down from the apartment to the Hard Times Café. Houle was one of people in that group. The group was watching a movie on the VCR in the living room. Some people in that group were smoking marijuana. The officers left at about 9:30 p.m. when they were invited to join the group smoking marijuana.

38. Later that evening, someone fired shots from Riverside Avenue that broke the picture window of the Hard Times Café.

39. On January 14, 2000, Officer Metcalf and Officer Goodmanson arrived at the Hard Times Café at 7:00 p.m. Johnson met them and Officer Metcalf asked if she could buy some marijuana from Anderson. Johnson talked to Anderson at the area near the pay telephones and then Johnson and the officers went up to the apartment above the premises. Johnson sold them marijuana in the apartment.

40. At about 2:00 p.m. on January 26, 2000, the MPD executed search warrants for the premises of the Hard Times Café and the apartment above. Patrons at the Hard Times Café were also searched. Officers seized a marijuana pipe and small amount of marijuana from one patron, and an open bottle of vodka from another patron. The records of the Hard Times Café were seized, along with an open bottle of gin found behind the service counter, and a small amount of marijuana.<sup>[5]</sup> In the apartment, additional business records were seized, along with a bong,<sup>[6]</sup> a marijuana pipe, two scales, and a small amount of marijuana. A press release issued by MPD at the time of the search recounted the results of the undercover operation and noted the involvement of "the apparent co-owner of the Hard Times Café, Martin Duane Johnson...."<sup>[7]</sup>

41. Rebecca Caulfield, Environmental Health Specialist for the Minneapolis Environmental Health Department, performed a health inspection of the premises immediately after the police search. A number of violations of the Minneapolis Food and Beverage Code were cited. Of those violations, many of the cleanliness violations were the direct result of the disorder left behind by the police search and prevention of the employees from cleaning the premises. One of the citations was for selling food from an unapproved source. The "food" identified was marijuana.<sup>[8]</sup> The Hard Times Café was not selling marijuana.

42. Johnson, Kenney, Mahoney, Heinzeroth ("Havoc"), Terry, JV1, and JV2 were charged with violations of the controlled substance statutes from evidence gained through the undercover operation.

43. The Hard Times Café held a member meeting after the premises were searched and the business closed. The members adopted changes to the practices of the business to address concerns about public safety and illegal conduct. Customers and former members were no longer allowed to go behind the counter or store any personal property on the premises. Only employees could use the telephone in the kitchen. The probation period for workers seeking to become members was extended from six months to eighteen months. Every person identified from police reports as being involved in drug transactions was banned from the Hard Times Café. Johnson was terminated from employment with the Hard Times Café. Rental of the apartment above the Hard Times Café was discontinued. New mirrors were installed to enable observation of the blind spots in the seating area. A door policy was instituted to restrict entry. To enter the premises, patrons exchange a dollar for a voucher that can be used for purchases in the Hard Times Café. An incident log has been instituted to record events occurring in the Hard Times Café and communicate any problems to all shifts.

44. On January 31, 2000, the Hard Times Café entered into an agreement with its landlord to prohibit the presence of controlled substances and alcoholic beverages on the premises.<sup>[9]</sup> The agreement also prohibited persons loitering without making food purchases and prohibited allowing a nuisance condition to exist on the premises.

45. Houle resigned from employment with the Hard Times Café after the police search of the premises, but returned temporarily to fill in for a sick worker.

46. The Hard Times Café reopened after the premises were restored and the standards of the health inspection were met. Angela Takata, Treasurer of Hard Times Café, submitted an application for renewal of its food license to the City on April 15, 2000.<sup>[10]</sup> Christopher Wesley Nickel-Felton was identified as the President of the Hard Times Café. The Vice President was identified as Jeffery John Hoelscher.

47. On February 23, 2000, the Minneapolis City Attorney's Office issued a Notice of Complaint to the Hard Times Café. The Notice recounted the results of the undercover investigation and search of the premises and alleged that such conduct constituted good cause for taking adverse action against the business licenses of the Hard Times Café. "Adverse action" was described in the Notice of Complaint as "revocation, suspension, fines, and other penalties or conditions."

48. Numerous customers of the Hard Times Café and residents of the Cedar-Riverside neighborhood testified in favor of the Hard Times Café remaining in business in its current location. Representatives of neighboring businesses testified that the Hard Times Café has a positive influence on the area. No resident or business owner testified that the business practices of the Hard Times Café were the cause of problems in the neighborhood. Several witnesses identified specific instances where the staff of the Hard Times Café provided essential services to persons in need.<sup>[11]</sup> Several witnesses pointed out that the Hard Times Café is one of the few venues available in the area for people who do not or cannot socialize in bars.

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

### CONCLUSIONS

1. The Administrative Law Judge and the Minneapolis City Council have authority to consider the charges against the Licensee and the adverse action, if any, that should be imposed by the City pursuant to Chapter 4, Section 16 of the Minneapolis City Charter.

2. The City has complied with all relevant substantive and procedural legal requirements.

3. The Licensee received adequate and timely notice of the hearing and of the charges against it.

4. Under the Minneapolis Code of Ordinances, Title 10, Article II, Chapter 188.350, states: "Any license granted under this chapter may be revoked by the mayor or the city council as in the city charter provided."

5. The Minneapolis City Charter, Chapter 4, Section 16 states:

**Section 16. Licenses May Be Revoked.** Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such a license for a violation of the provisions of any law, ordinance or regulation relating to the exercise of any right

granted by such license, the city council may revoke such license in addition to the penalties provided by law or by ordinance for any such violation.

6. The City has the burden of proof to establish, by a preponderance of the evidence that good cause exists for taking adverse action against the business licenses held by the Licensee.<sup>[12]</sup>

7. The City has demonstrated that good cause exists for taking adverse action against the business licenses held by the Licensee.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: That the Minneapolis City Council take adverse action against the licenses held by the Hard Times Café.

Dated this 28th day of April, 2000

S/ Steve M. Mihalchick  
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STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Taped, eight tapes. No transcript prepared.

### **MEMORANDUM**

The fundamental facts of this matter are not significantly in dispute. The MPD conducted an undercover operation from October 8, 1999 through January 26, 2000. The undercover operation succeeded in identifying a number of persons who were selling marijuana, cocaine, and hallucinogenic mushrooms. Some of these sales took place on the premises of the Hard Times Café. One of the sellers, Martin Johnson, was an employee of the Hard Times Café. The operation concluded with the execution of a search warrant at the business and an apartment upstairs. The search revealed small amounts of marijuana, found in an employee locker and in the apartment. The search did not reveal evidence of involvement by the business in the selling of controlled substances.

The only employee shown to be involved in drug sales was Martin Johnson.<sup>[13]</sup> Johnson was engaged in selling marijuana and acted as a contact for other persons engaged in drug trafficking. The City asserts that Johnson's involvement supports revocation of the Hard Times Café's business license since he was listed as Vice President of the business.

The Hard Times Café asserts that Johnson's activities do not support sanctioning its license since Johnson lacked any authority to direct the actions of the business. The

title of Vice President, the Licensee asserts, was nothing more than a title. The evidence in the record supports the Licensee's position on this issue. Johnson was a member, so long as he continued to work his assigned shifts. The title of Vice President carried no actual authority over the day-to-day business of the Hard Times Café. There is no evidence in the record to indicate that Johnson was in any way authorized by the Hard Times Café members to conduct drug trafficking.

The City maintains that the lack of evidence of involvement by the Hard Times Café is no impediment to discipline of its license since:

The evidence that employees did not observe drug activity has only three possible explanations: (1.) The employees are not being candid about their observations to protect their livelihood; (2.) The employees ignored activities, thereby, encouraging the activities; or (3.) The employees were so unskilled and poorly trained that they could not recognize transactions taking place in plain view.<sup>[14]</sup>

The testimony of the employees was credible that the layout of the premises makes observation of the activities in the seating area difficult, at best. Much of the conduct described as "narcotics-related activity" is indistinguishable from persons having normal conversations. Movement by particular persons in and out of the premises is easily observable from the seating area by a person looking for that conduct. The same activity may go entirely unnoticed by a single employee who is taking orders for food, filling those orders, ringing up sales on the cash register, making change, and otherwise performing tasks required to keep the business operating. Employees, other than Johnson, testified that when they see suspicious conduct or are informed that a patron is attempting to sell controlled substances, the offending person is ejected from the premises.<sup>[15]</sup>

The City's assertion that the drug-related activity was obvious is undercut by the testimony of Shirley Bennett. Bennett was seated in the adjacent table when Officers Metcalf and Goodmanson purchased cocaine in the Hard Times Café on January 13, 2000. Bennett credibly testified that she did not observe that transaction. Of course, she wasn't looking for it. Like most of the patrons there, she came to relax, talk with people, and have a cup of coffee.

Officer Metcalf made six visits to the Hard Times Café from October 8, 1999 to November 10, 1999. The extent of the drug trafficking activity observed on the premises of the Hard Times Café during those visits was Officer Metcalf being asked once if she wanted to purchase marijuana. The evidence generated by the undercover investigation shows that any drug trafficking in the vicinity over that period was **not** obvious.

The City asserts that there is a heightened obligation on the Hard Times Café due to its location in the Cedar-Riverside neighborhood as follows:

Yet, given the character of the neighborhood and the nature of the Cafe's business, the management and staff took no special precautions to prevent drug activity on the premises. It should be apparent to the most naive observer that if drug activity is rampant in the neighborhood and the

Cafe encourages people to linger on the premises that the Cafe would act as a haven for the undesirable element in the neighborhood.<sup>[16]</sup>

The Hard Times Café is a vegetarian restaurant and coffeehouse. There is nothing in the nature of its business to require special precautions.<sup>[17]</sup> Many long-time patrons of the Hard Times Café testified in this matter. They indicated that drug activity has been present in the Cedar-Riverside neighborhood since the 1960's. Officer Bakken testified in this proceeding that drug trafficking ebbs and flows with the aggressiveness of the policing directed at a particular location.<sup>[18]</sup>

The City maintains that the patrons and employees of the Hard Times Café are not credible or are very naïve in assessing whether drug transactions are being conducted on the premises. Those witnesses testified to the frequency with which they encountered explicit offers for the sale of drugs on the sidewalks in the Cedar-Riverside neighborhood.<sup>[19]</sup> These people have garnered more first-hand experience than most as to what drug transactions look like, just by walking through their neighborhood. The testimony of many of these witnesses, that much of the conduct assessed to be drug transactions by undercover police officers was unrelated to any sale of controlled substances, was credible.

Even though it has not been demonstrated that the Hard Times Café was involved in narcotics trafficking because it engaged in it or tolerated it, it has been demonstrated that narcotics trafficking did occur on its premises. Every business is responsible for illegal activity on its premises and must take steps to prevent that activity. The Hard Times Café failed to do so and is subject, therefore, to discipline.

The Hard Times Café described the measures taken in response to the information received after the MPD search of their business premises. The City asserts that such measures are irrelevant to whether "good cause" exists to revoke the business license of the Hard Times Café. Good cause to act against the license of a business most clearly exists when the business is aware of the conduct (or such awareness can be imputed by the obviousness of the conduct) and the business neglects to remedy the situation. Moreover, the corrective measures are relevant to the sanctions to be imposed by the Council.

As discussed above, the drug transactions that occurred were not obvious to the employees of the Hard Times Café, except for Marty Johnson, who participated in them. No one from the MPD (or any other agency of the City) ever informed the Hard Times Café that drug trafficking was suspected on its business premises.

The measures taken by the Hard Times Café include restrictions on access to the counter and the kitchen telephone. An incident log is available to communicate problems between shifts. Patron access during the late night hours is controlled by use of vouchers. New mirrors were installed to eliminate "blind spots" in the seating area. The probation period for workers seeking to become members was tripled. Patrons and the employee identified in police reports as being involved in drug transactions were banned from the premises. The Hard Times Café terminated its lease of the apartment above.

The City has demonstrated by a preponderance of the evidence that good cause exists to take adverse action against the business licenses of the Hard Times Café. The record in this matter indicates that the Hard Times Café was not directly involved in drug trafficking and that significant corrective action has already been taken by the Hard Times Café. The sanctions and conditions to be imposed, if any, are up to the Minneapolis City Council.

S.M.M.

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<sup>[1]</sup> Exhibit 14.

<sup>[2]</sup> Exhibit 12.

<sup>[3]</sup> Houle denies that. He wears very thick glasses and suffers from a degenerative eye disease, but he does not claim that he cannot see. Nonetheless, it is very difficult to tell where he is looking. So it cannot be found that he was observing the transaction.

<sup>[4]</sup> Both officers might appear to be women in their early twenties. Their refusal to provide identification was part of their undercover protocol.

<sup>[5]</sup> The Notice of Complaint indicates that the small amount of marijuana was found in an employee locker, but the police report prepared subsequent to the search is silent regarding where this marijuana was found. Since there was no testimony from the police officers who conducted the search, a more accurate description of the circumstances of the marijuana's discovery is not possible. The parties agreed at the hearing that the usual police procedure is to weigh marijuana where significant amounts are discovered.

<sup>[6]</sup> A water-pipe used for smoking marijuana.

<sup>[7]</sup> Exhibit 18.

<sup>[8]</sup> Exhibit 37, at 2.

<sup>[9]</sup> Exhibit 23.

<sup>[10]</sup> Exhibit 13.

<sup>[11]</sup> Such as temporarily sheltering persons made homeless by the recent Dania Hall fire.

<sup>[12]</sup> *In re Kaldahl*, 418 N.W.2d 532, 535 (Minn. Ct. App. 1988).

<sup>[13]</sup> There were statements received by the undercover police officers that implicated Jake Houle, but these statements are unreliable hearsay. Those statements do not support a finding that Houle was involved in drug trafficking.

<sup>[14]</sup> City Brief, at 4-5.

<sup>[15]</sup> Even Johnson's statement to police on January 26, 2000 indicates that he ejected persons selling controlled substances from the premises. See Exhibit 11. Of course, in that same statement he denied selling marijuana to anyone; a statement contradicted by his conduct in selling marijuana to Officer Metcalf on January 14, 2000.

<sup>[16]</sup> City Brief, at 5.

<sup>[17]</sup> By contrast, bars and adult-oriented entertainment are types of business that warrant special precautions by their nature.

<sup>[18]</sup> When questioned by the police regarding his drug trafficking, Heinzeroth ("Havoc") indicated that the Viking Bar and 400 Bar were the preferred locations for obtaining marijuana. Exhibit 9, Case Supplement, at 4.

<sup>[19]</sup> Some witnesses indicated that many of these offers occurred in front of the MPD safety substation, two blocks away from the Hard Times Café.