

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the Cigarette License
Held by Grand 7 Saloon, Inc., d/b/a
Grand 7 Saloon, for Premises Located at
315 West 7th Street, License I.D. No.
0016295

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

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde, acting as a hearing officer for the Saint Paul City Council, commencing at 1:30 p.m. on Tuesday, November 24, 1998, at the Saint Paul City Hall/Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota. The hearing was held pursuant to a Notice of Hearing dated October 30, 1998.

Virginia D. Palmer, Assistant St. Paul City Attorney, 400 City Hall, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102, appeared on behalf of the City's Office of License, Inspections and Environmental Protection (LIEP). Gerald C. Rummel, Rummel Law Firm, 2300 Firststar Center, 101 East 5th Street, St. Paul, Minnesota 55101, appeared on behalf of the Licensee, Grand 7 Saloon, Inc. The record closed on January 8, 1999, when the last authorized brief was filed.

NOTICE

This Report contains a recommendation and not a final decision. The final decision will be made by the Saint Paul City Council, which may affirm, reject, or modify the Findings and Conclusions contained herein. The council will consider the evidence in this case and the hearing examiner's recommended Findings of Fact and Conclusions, but will not consider any factual testimony not previously submitted to and considered by the hearing examiner. The respondent will have an opportunity to present oral or written arguments alleging error on the part of the hearing examiner in the application of the law or interpretation of the facts and may present argument related to the recommended adverse action. The council's decision as to what, if any, adverse action shall be taken will be by resolution under § 310.05 of the St. Paul Legislative Code. To ascertain when the council will consider this matter, the parties should contact the Saint Paul City Council, Room 310, St. Paul City Hall/Ramsey County Courthouse, 15 West Kellogg Boulevard, St. Paul, Minnesota 55102.

STATEMENT OF ISSUES

I.

It is illegal to sell tobacco products from vending machines except in facilities that cannot be entered at any time by persons younger than 18 years of age.^[1] The respondent was cited because it has a vending machine on its premises. Were persons younger than 18 years of age permitted to enter the respondent's premises?

II.

The City regulates the sale of tobacco. Among other things, it prohibits the sale of tobacco to anyone under the age of 18.^[2] Did the respondent sell tobacco products to a minor from a vending machine on its premises?

III.

At the hearing, respondent stated that its defense to the charges is that they are untrue. In its post-hearing brief, respondent raised other defenses. Can the additional defenses be considered by the Saint Paul City Council and the administrative law judge?

Based upon all of the files, records and proceedings herein, the administrative law judge (ALJ) makes the following:

FINDINGS OF FACT

1. The respondent licensee, Grand 7 Saloon, Inc., is a corporation doing business as Grand 7 Saloon at 315 West 7th Street, St. Paul, Minnesota. The corporation was acquired by William Heine in 1980, and he is still the owner. Respondent has a cigarette/tobacco license which is valid until March 31, 1999.^[3]

2. Kristina Schweinler is a Senior License Inspector for LIEP. She has been employed by the city for 16 years and is responsible, among other things, for the enforcement of laws relating to the sale of tobacco. Currently, LIEP is in the process of completing an annual compliance check of all 450 licensed tobacco vendors in the city. Under state law,^[4] the city must make an annual compliance check of tobacco licensees to monitor the sale of tobacco to minors.

3. Schweinler works with juveniles^[5] in determining if licensees are in compliance with applicable tobacco laws. Juveniles who participate in making compliance checks must be "over the age of 15, but under the age of 18. . . ." ^[6] The youths are provided by Youth Express, an organization that works with the city and others to provide jobs for juveniles. Juveniles working with Schweinler are paid \$10.00 hourly. Prior to making their first compliance check, the youths receive training and instruction relating to tobacco laws, fair inspections, and required procedures from LIEP staff and the University of Minnesota. During their training, they act out compliance checks using a uniform skit. When they are on duty, the youths have no money of their own and do not carry any identification or try to trick licensees. If asked their age, they are required to give their real birth date, nothing else.

4. On September 28, 1998, Schweinler conducted a tobacco compliance check of the respondent's establishment with Tyrone Lewis, a 15-year-old boy born January 5, 1983, who has worked with Youth Express for approximately five years.

5. On September 28, Schweinler and Lewis were assigned to do approximately 10 tobacco compliance checks. Respondent was the third or fourth establishment they checked that day. They arrived at approximately 4:00 p.m. Schweinler parked her car on Seventh Street and gave Tyrone \$5.00 to enter the respondent's establishment and purchase a package of cigarettes.

6. Tyrone entered the establishment alone using the front door. No one carded him when he entered or told him to leave; there were no signs stating that juveniles could not enter; and the respondent had no policy forbidding minors from entering. There were approximately 15 patrons in the saloon when Tyrone entered. They all knew one another and many had just returned from a golf tournament. There was only one employee on duty: The bartender, Robert Becker. It was Becker's third day on the job.

7. Tyrone proceeded to the back of the barroom where a cigarette machine, in plain view, was located. He attempted to purchase a package of cigarettes using his \$5.00 bill, but the machine would not accept it. Consequently, Lewis walked over to the end of the bar and obtained change from the bartender. Lewis did not tell Becker that he needed change to buy cigarettes and Becker asked him no questions. Becker gave Lewis five \$1 bills, which Lewis used to buy a package of Camel cigarettes from the vending machine. When selling cigarettes, Becker allegedly had been told to check the purchaser's identification and to activate the vending machine if proper identification was shown to him. However, Becker did not ask Lewis for his birth date or any identification.

8. After Lewis purchased the cigarettes, he promptly left the bar and joined Schweinler in her car. Schweinler completed a tobacco compliance check form, then returned to the saloon to identify the bartender.

9. After Schweinler entered the saloon, she walked to the rear of the bar near the cigarette machine and waited for Becker. When Becker walked over to her, Schweinler told him that he had just sold tobacco products to a minor and she asked him for identification, which he provided. Customers became aware of the reasons for Schweinler's presence and were angry about it. At least one of them falsely stated that Tyrone had snuck in through an open service door in the rear of the saloon, and Becker added that he didn't push the remote to enable Lewis to buy cigarettes from the machine. Two patrons said they would say that Tyrone pushed the machine's remote activation button, which was located on the back bar. The customers were quite hostile and stood in front of Schweinler and yelled at her while she was attempting to leave.

10. On October 6, 1998, the St. Paul City Attorney's Office issued a Notice of Violation to the respondent. The Notice stated that on September 28, 1998, an employee illegally sold cigarettes to a minor under the age of 18 years in violation of state law^[7] and the St. Paul Legislative Code.^[8] The Notice stated that since this was the respondent's first violation, LIEP would be recommending a \$200 fine. On October 19, 1998, the respondent filed notice of its appeal.

11. On October 30, 1998, the Assistant City Attorney, Virginia D. Palmer, issued a Notice of Hearing, and on November 2, 1998, the Notice of Hearing was served on respondent's counsel. In addition to the charges contained in the Notice of Violation, the Notice of Hearing included an additional charge stating

Additionally, the cigarette vending machine from which the cigarette sale was made was located in an open, accessible area within the licensed premises. The establishment is not posted to restrict entry to minors. Accordingly, the licensee is also in violation of Minn. Stat. § 461.18, subd. 2.

At the hearing, respondent did not object to the additional charge, and when asked to state its defenses to the charges in this matter, the respondent stated only that they are untrue.

12. On September 28, 1998, the saloon did not have signs at the front door informing persons under 18 years of age that they were not allowed to enter, and no employees checked the identification and age of patrons as they entered. Also, a rear entry service door near the cigarette machine was propped open, creating unobstructed access to the saloon. The saloon had no policy prohibiting minors from entering.

13. The cigarette machine in the saloon had a black and white sign 27 inches long and 6 inches high^[9] which stated that a photo I.D. was required for anyone under age 27. The sign also stated, "This is NOT a self-service, coin-operated vending machine." In somewhat smaller type, the sign warned persons under age 18 of the consequences of trying to obtain cigarettes. The sign also said:

This storage kiosk is equipped with a lock-out device and can be accessed only after showing proof of legal age to an authorized employee of this establishment. Please help us keep our children safe.

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

CONCLUSIONS

1. The Administrative Law Judge and the Saint Paul City Council have authority to consider the charges against the respondent and the penalty, if any, that should be paid the city pursuant to Sec. 310.05 of the St. Paul Legislative Code.

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

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

4. LIEP has the burden of proof to establish, by a preponderance of the evidence, that the respondent violated state law and the St. Paul Legislative Code.^[10]

5. Under Sec. 324.11(b), the presumptive penalty for the first illegal sale of tobacco is a \$200 fine.

6. For purposes of Sec. 324.11(a) of the Saint Paul Legislative Code, there are no substantial or compelling reasons for deviating from the presumptive penalty in this case.

7. Because the respondent's violations involve the sale of tobacco to a minor, under Sec. 310.05(k)(vii) of the Saint Paul Legislative Code the respondent should be required to pay all the costs of this proceeding.

8. Respondent violated Minn. Stat. § 609.685 and Sec. 324.07 of the Saint Paul Legislative Code on September 28, 1998, when it sold tobacco to a minor under 18 years of age from a cigarette vending machine.

9. Respondent violated Minn. Stat. § 461.18, subd. 2, on September 28, 1998, by selling tobacco products from a vending machine on premises that could be entered at any time by persons under 18 years of age.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Saint Paul City Council order respondent to pay a \$200 fine and the costs of this proceeding.

Dated this ____ day of January, 1999

JON L. LUNDE
Administrative Law Judge

Reported: Taped, two tapes

MEMORANDUM

I.

This proceeding primarily involves credibility issues. The respondent called four witnesses to testify: The owner, the bartender, and two patrons, Gregory Lendway and Terrance Brennan. All but the owner had been in the saloon when Tyrone's purchase was made. The testimony of the three who were present is unpersuasive and cannot be credited.

The first reason that their testimony cannot be credited is that they each had a reason to be untruthful. Becker's reason would be the desire to avoid disciplinary action or other sanctions; Lendway's reason stems from the fact that Becker was a good friend

of his wife's and that he was a regular at the saloon who operated a pull-tab business there; and Brennen because he is a regular patron and works for the company that owns the cigarette machine in the saloon.

Also, Lendway's testimony was unpersuasive, inconsistent and weak. When describing the events that transpired he first said that he saw Tyrone reach over from the end of the bar to get to the remote button to activate the cigarette machine. He then testified that the remote was next to the cash register but that Tyrone reached it from the end of the bar. The remote, however, would not have been reachable from the end of the bar if it was by the cash register. Furthermore, a patron like Tyrone would not have been able to reach the remote which was located six to seven and ½ feet from the patrons' side of the bar and it is unlikely that Tyrone prostrated himself across the bar to get to the remote.

When describing the atmosphere in the saloon after Schweinler entered, Lendway said there was a "big skirmish". Then he said the patrons were just "razzing her" and that he couldn't tell if they were hostile or just being funny. Lendway also said that there were six remotes in the establishment but that he didn't know what the cigarette machine remote looked like.

Brennen's testimony was equally weak and unpersuasive. He testified that Tyrone reached around two patrons sitting at the bar and stretched across the bar to get to the remote. That is not plausible because it would have been necessary for Tyrone to reach a distance of six or seven feet or more.

On the other hand, the testimony presented by Schweinler and Tyrone was consistent and persuasive. Neither of them had a reason to fabricate their testimony. For them, this was simply a routine compliance visit. The patrons, on the other hand, were angry about the compliance visit and threatened to testify untruthfully. The testimony of respondent's witnesses simply cannot be credited. If Becker honestly didn't press the remote button, the ALJ is persuaded that the remote device was off and the cigarette machine was usable. Becker should have monitored Tyrone's actions and prevented a sale to him.

II.

In its post-hearing brief, respondent asserted defenses not previously raised. The first defense is that the Notice of Hearing does not state the adverse action proposed for respondent's violation of Minn. Stat. § 461.18. Respondent's position apparently is that the alleged violation of Minn. Stat. § 461.18 must be dismissed because it wasn't listed in the Notice of Violation.

The Saint Paul Legislative Code does not preclude the city from adding new charges against a licensee in the Notice of Hearing. It only requires notice of the place, days and time of the hearing; the issues involved; and the grounds for adverse action.^[11] The Notice of Hearing contained all that information.

Because the code does not prohibit the amendment of a Notice of Violation, if the Notice of Hearing is otherwise proper as to form, content and execution, the ALJ is persuaded that the Notice of Hearing may include charges not set forth in the Notice of Violation when the new charges relate to the same event, transaction, or occurrence

and the licensee receives notice of the new charge and an opportunity to defend, as respondent had here.

Assuming it were true that the Notice of Hearing cannot include an additional charge, that issue cannot be considered because it was not raised at the hearing. Although no pleadings are required of a respondent in cases like this, respondent cannot raise issues not articulated when asked to state its defenses at the commencement of the hearing. Furthermore, respondent must do more than merely raise legal issues. Here, respondent presented no authority or theory supporting its apparent view that the charges in the Notice of Violation cannot be amended. Respondent also failed to show that it was prejudiced by the amendment. Since an additional fine was not proposed by LIEP, respondent can hardly claim prejudice.

Respondent raised another issue not identified at the time of the hearing. In its brief, respondent alleged that the city had agreed, in another case,^[12] not to enforce Section 461.18 pending a judicial determination as to its applicability to the type of cigarette machine used by respondent. This argument must be rejected because it relates to facts not in the record. Only evidence in the record can be considered in reaching a decision. This principle, relating to the exclusiveness of the record, has been observed to be fundamental to a fair hearing^[13] and is reflected in the Saint Paul Legislative Code Sec. 310.05(c-1).

^[1] Minn. Stat. § 461.18, subd. 2, adopted by Laws 1997c.227 § 6.

^[2] St. Paul Legislative Code, Sec. 324.07.

^[3] City Ex. 2.

^[4] Minn. Stat. § 461.12, subd. 5.

^[5] *Id.*

^[6] Minn. Stat. § 461.12, subd. 5. Because Tyrone was 15 years of age at the time of the compliance check, an argument could be made that he was too young to participate in compliance checks because he was not “over” age 15. See, e.g., “Over”, 67 C.J.S. 918. This issue was not raised or briefed by the parties and cannot, therefore, be considered by the ALJ.

^[7] Minn. Stat. § 609.685.

^[8] Section 324.07.

^[9] Ex. A.

^[10] *In re Kaldahl*, 418 N.W.2d 532, 535 (Minn. Ct. App. 1988).

^[11] Saint Paul Legislative Code Sec. 310.05(b).

^[12] *DVM, Inc. v. State of Minnesota and City of Saint Paul* (Ramsey County Court File No. C8-988801).

^[13] *F. Cooper, State Administrative Law* 430-31 (1965). This principle is reflected in the Saint Paul Legislative Code Sec. 310.05(c-1).