| | OAH 7-6020-21146-3 |
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STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF SAINT PAUL

| In the Matter of Proposed Adverse Action Against the Licenses Held by Andrew Kappas, Inc., d/b/a Gopher Bar. | **FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION** |
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This matter came on for hearing on March 30, 2010, before Administrative Law Judge Richard C. Luis, in Conference Room 40A of the City Hall/Courthouse Building, 15 West Kellogg Boulevard, St. Paul, MN. The OAH hearing record closed on May 12, 2010.

Virginia D. Palmer, Assistant City Attorney, appeared for the City of St. Paul's Department of Safety and Inspections (DSI).

Cheri L. Kappas, Bar Manager, appeared for Andrew Kappas, Inc., d/b/a Gopher Bar (Licensee), without counsel.

## STATEMENT OF ISSUES

1. On November 11, 2009, did the Licensee fail to maintain order and sobriety at its place of business in violation of St. Paul Legislative Code § 409.08(5)?

2. If so, is the $500 fine recommended by the DSI appropriate?

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. A corporation, Andrew Kappas, Inc., is the owner and license holder of the Gopher Bar. George Kappas is the President of Andrew Kappas, Inc., and his wife Cheri L. Kappas is the Vice-President. The Gopher Bar has an on-sale liquor license and a restaurant license.[1]

2. The Gopher Bar is located at 241 7th Street East in downtown St. Paul.

[1] Ex. 1; Testimony of Christine Rozek.

3. Officer Steven Pacolt has been a patrol officer with the St. Paul Police Department for approximately 12 years. For approximately 11 of those years, he has been assigned the "downtown beat." His shift typically starts at about 3:00 p.m. and ends at about 1:00 a.m. Officer Pacolt's duties include patrolling the downtown area and responding to calls from dispatch.[2]

4. At approximately 11:00 p.m. on Wednesday, November 11, 2009, Officer Pacolt was dispatched to the Gopher Bar to respond to a call alleging an assault. When he arrived at the Gopher Bar, Officer Pacolt found a man and a woman standing outside the front of the bar. The man, Michael Johnson, had scrapes on the left side of his face and a swollen lip. The woman, Stephanie Cox, had a scrape on her right knee.[3] Mr. Johnson told Officer Pacolt that the bartender at the Gopher Bar, Kevin King, had followed him outside the bar after an argument about paying the tab. According to Mr. Johnson, Mr. King yelled at him and then pushed him, which caused him to fall into Ms. Cox and to hit his face on a nearby fire hydrant.[4] Ms. Cox stated that she fell onto the pavement and sustained the scrape on her right knee when Mr. King pushed Mr. Johnson into her.[5]

5. Kevin King is employed as a bartender at the Gopher Bar. Mr. King was working at the bar the evening of November 11, 2009. Mr. King began his shift about 4:00 p.m. Prior to beginning his shift, Mr. King drank some beers and a couple "shots" with Mr. Johnson at the Gopher Bar. Mr. King consumed at least three or four beers and as many "shots" during the course of the evening.[6]

6. The Gopher Bar does not have any written workplace policies and in particular does not have any written policies prohibiting employees from drinking alcoholic beverages while on the job.[7] Mr. King believed that drinking alcoholic beverages while on the job was permissible so long as one did not consume "too much."[8]

7. After talking outside the bar with Mr. Johnson and Ms. Cox, Officer Pacolt went into the bar to talk to Mr. King. Mr. King denied assaulting Mr. Johnson. While Officer Pacolt discussed the matter with Mr. King, he observed that Mr. King appeared to be very intoxicated. Mr. King's eyes were glassy and he exuded a strong odor of alcoholic beverage.[9]

8. Officer Pacolt went back outside to talk further with Mr. Johnson and Ms. Cox. Mr. King followed him outside and began to yell and scream at Mr.

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[2] Testimony of Steven Pacolt.
[3] Ex. 2: Testimony of S. Pacolt.
[4] Testimony of S. Pacolt; Ex. 2.
[5] Testimony of S. Pacolt; Ex. 2.
[6] Testimony of Kevin King.
[7] Testimony of K. King.
[8] Testimony of K. King.
[9] Testimony of S. Pacolt.

Johnson and to loudly deny that he had done anything wrong. Officer Pacolt told Mr. King to settle down, and requested that all of the parties go back inside the bar so that he could gather everyone's information. Once inside the bar, Mr. King continued to yell and to behave erratically. Officer Pacolt directed Mr. King to wait on the opposite side of the bar while he gathered information from Mr. Johnson and Ms. Cox. Mr. King went to the opposite side of the bar for a short time, but soon returned to the table where Officer Pacolt was sitting with Mr. Johnson and Ms. Cox. Mr. King sat down next to Mr. Johnson and continued to yell at him and to deny that he did anything wrong. Officer Pacolt advised Mr. King to be quiet and return to the opposite side of the bar because he was interfering with the investigation. When Mr. King remained seated and continued to yell at Mr. Johnson, Officer Pacolt placed him in handcuffs out of concern for the safety of everyone in the bar. While handcuffed, Mr. King became more agitated and continued to yell and swear and declare that he did not care if he went to jail. Eventually, Officer Pacolt placed Mr. King under arrest for obstruction of legal process and misdemeanor assault. He called for another squad to come to the bar and transport Mr. King to jail.[10]

9. St. Paul Police Officer Giampolo arrived at the Gopher Bar and placed Mr. King in the back of his squad car. Mr. King continued to yell and attempted to kick out the screen in the squad car. Officer Giampolo sprayed Mr. King with mace and then transported him to jail.[11]

10. Mr. King was subsequently charged with 5th degree misdemeanor assault, obstructing legal process, and disorderly conduct. On January 21, 2010, he pled to one count of disorderly conduct and the other charges were dismissed.[12]

11. On February 2, 2010, the City's Department of Safety and Inspection (DSI) issued to the Licensee a Notice of Violation. The Notice informed the Licensee that the bartender's conduct on the evening of November 11, 2009, violated St. Paul Legislative Code § 409.08(5), which requires licensees to maintain order and sobriety at their places of business. The DSI informed the Licensee further that it would recommend a $500 penalty be assessed against the Licensee based on the penalty matrix at § 310.05(m)(2) of the Legislative Code. Finally, the letter informed the Licensee of its right to request a hearing before an Administrative Law Judge to contest the violation.[13]

12. On February 12, 2010, the Licensee requested a hearing.[14] On February 25, 2010, the City issued a Notice of Administrative Hearing, scheduling the hearing to take place on March 30, 2010. The hearing took place as scheduled.

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[10] Testimony of S. Pacolt; Exs. 2 and 6.
[11] Id.
[12] Testimony of S. Pacolt and K. King; Ex. 3
[13] Ex. 4.
[14] Ex. 5.

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

## CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City Council have authority to hear this matter pursuant to Minn. Stat. § 14.55 and St. Paul Legislative Code § 310.05(c).

2. The hearing in this matter was conducted in accordance with the applicable portions of the procedures set forth in section 310.05 of the St. Paul Legislative Code.

3. The City gave proper notice of the hearing in this matter and has fulfilled all procedural requirements.

4. The City has the burden of proving by a preponderance of the evidence that adverse action is warranted against the licenses held by Andrew Kappas, Inc., d/b/a Gopher Bar.

5. The St. Paul City Council may take adverse action against any or all licenses or permits, licensee or applicant for a license, on the basis that the licensee or applicant has failed to comply with any condition set forth in the license or has violated any of the provisions of any statute, ordinance or regulation reasonably related to the licensed activity.[15]

6. The St. Paul Legislative Code requires licensees to "maintain order and sobriety" in their places of business.[16]

7. The City demonstrated by a preponderance of the evidence that on November 11, 2009, the Licensee failed to maintain order and sobriety at the Gopher Bar in violation of § 409.08(5) of the St. Paul Legislative Code.

8. Section 310.05(m) of the St. Paul Legislative Code contains a penalty matrix applicable to all license types, "except that in the case of a violation involving a liquor license § 409.26 shall apply where a specific violation is listed." The penalty matrix in § 310.05(m) sets out presumptive penalties for violations of conditions placed on a license and violation of provisions of the legislative code relating to the licensed activity. These penalties are presumed to be appropriate for every case; however, the Council may deviate from the presumptive penalty 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

[15] St. Paul Legislative Code § 310.06 (b)(5) & (b)(6)(a).
[16] St. Paul Legislative Code § 409.08(5).

provide written reasons that specify why the penalty selected was more appropriate.[17]

9. Pursuant to § 310.05(m) of the St. Paul Legislative Code, the violation in this case is the Licensee's "first appearance," for which a $500 fine is the presumptive penalty.[18]

10. The City has failed to demonstrate substantial or compelling reasons to deviate from the presumed $500 fine provided for in the penalty matrix.[19]

Based on the Conclusions, and for the reasons explained in the Memorandum attached hereto, the Administrative Law Judge makes the following:

## RECOMMENDATION

**IT IS RECOMMENDED** that the St. Paul City Council assess a fine of $500 against the licenses held by Andrew Kappas, Inc., d/b/a Gopher Bar.

Dated: June 10, 2010

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

Reported: Digitally recorded[20],
No transcript prepared

[17] St. Paul Legislative Code § 310.05(m). The Licensee has not been charged with a specific violation of § 409.26.
[18] Ex. 1; St. Paul Legislative Code § 310.05(m).
[19] At the close of the hearing, the City Attorney argued that the evidence presented demonstrated the Licensee had committed additional violations of statute, ordinance or regulation beyond those alleged in the Notice of Hearing and that these additional violations justify imposing a fine greater than the presumed $500 penalty. Principles of procedural due process require reasonable notice of charges. None of these alleged additional violations, such as serving an obviously intoxicated person, were identified in the City's Notice of Hearing. Moreover, none were proven by a preponderance of the evidence and the City did not provide written reasons to support an upward departure from the penalty matrix. For all these reasons, the alleged additional violations may not form the basis for deviating from the presumed $500 penalty.
[20] There exists a 25 minute (approx.) gap in the digital recording. The parties stipulated that Cheri Kappas's written summary of the testimony during that gap was an accurate account of the testimony offered in that time period, and Ms. Kappas's summary has been added to the record as part of Joint Exhibit 14.

## NOTICE

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Section 310.05 of the St. Paul Legislative Code, the City Council's final decision shall not be made until this Report has been made available to the parties to the proceeding and the Licensee has been provided 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 the interpretation of the facts and an opportunity to present argument relating to any recommended adverse action. The Licensee and any interested parties should contact Shari Moore, Saint Paul City Clerk, 290 City Hall, 15 West Kellogg Boulevard, St. Paul, MN 55102, to learn the procedure for presenting argument.

## MEMORANDUM

The record established that on November 11, 2009, the Licensee's bartender on duty, Kevin King, was intoxicated and disorderly. St. Paul Police Officer Steven Pacolt testified that Mr. King's eyes were glassy and that he smelled strongly of an alcoholic beverage. Mr. King himself admitted that he consumed about four beers and four shots during the course of the evening. Officer Pacolt also testified that when he arrived to investigate the alleged assault, Mr. King became increasingly belligerent and agitated, yelled, and refused to comply with Officer Pacolt's requests to calm down and to move away from the alleged victim. Mr. King's behavior was so unruly and disruptive to Officer Pacolt's investigation, that the officer eventually handcuffed him and placed him under arrest. While in the back of the squad car, Mr. King continued his disruptive behavior and attempted to kick out the squad's screen, which caused St. Paul Police Officer Giampolo to spray Mr. King with mace before transporting him to jail.

Officer Pacolt has been with the St. Paul Police Department for approximately 12 years. He testified credibly to the events that occurred at the Gopher Bar on November 11, 2009. In contrast, Mr. King was vague and not forthcoming about the events of that evening, offering only a blanket denial to the allegations concerning his behavior that night. According to Mr. King, he was not intoxicated, he did not assault Mr. Johnson, he did not yell or behave unruly, and he did nothing to warrant being sprayed with mace by Officer Giampolo. Mr. King maintains further that he only pled guilty to the disorderly conduct charge to resolve the matter as quickly as possible. The Administrative Law Judge finds Mr. King's testimony to be not credible.

The manager of the bar, Cheri Kappas, argued that Officer Pacolt is biased against the Gopher Bar and that this bias motivated him to arrest Mr. King. Ms. Kappas noted that about three weeks prior to the incident at issue in this case, Officer Pacolt arrested a frequent patron of the Gopher Bar for being

drunk outside the bar and had him transported to the Ramsey County Detox Center. Ms. Kappas believes both arrests by Officer Pacolt were unwarranted and reflect Officer Pacolt's personal animosity toward her establishment. Ms. Kappas asserted further that the fact the City dismissed Mr. King's assault charge demonstrates that there was no basis for the allegation or arrest.

The Administrative Law Judge finds Ms. Kappas's arguments unpersuasive and unavailing. Officer Pacolt did not go to the Gopher Bar the evening of November 11th on his own initiative to check its compliance with license regulations. He was sent there by dispatch in response to Mr. Johnson's call to the Police Department reporting the assault. In addition, the fact that Officer Pacolt transported a frequent patron of the Gopher to Detox a few weeks earlier does not demonstrate bias or animosity on his part. Finally, the City routinely dismisses charges when negotiating plea agreements and the fact that it did so in Mr. King's case cannot be read as an indication that the assault charge was baseless. In the end, Mr. King pled guilty to disorderly conduct. His plea of guilty and Officer Pacolt's testimony and report regarding his conduct on November 11, 2009, are more than sufficient to establish the license violation in this case.

The City has shown by a preponderance of the evidence that on November 11, 2009, the Licensee failed to maintain order and sobriety at the Gopher Bar in violation of St. Paul Legislative Code § 409.08(5). The penalty matrix in § 310.05(m) governs the disposition of this case. A $500 fine is the presumptive penalty and the Administrative Law Judge recommends that the City Council impose a $500 fine against the Licensee in this case.

**R.C.L**.