

February 13, 2023

VIA EFILING ONLY

Shari Moore
City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

Re: *In the Matter of the Cigarette/Tobacco License Held by MJ Market Inc. for the Premises Located at 922 Thomas Avenue in Saint Paul*
OAH 65-6020-38532

Dear City Clerk Moore:

Enclosed and served upon you is the Administrative Law Judge's **ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION** in the above-entitled matter. The official record, along with a copy of the recording of the oral argument, is also enclosed. The Office of Administrative Hearings' file in this matter is now closed.

If you have any questions, please contact me at (651) 361-7857, nichole.helmuelle@state.mn.us, or via facsimile at (651) 539-0310.

Sincerely,



NICHOLE HELMUELLER
Legal Assistant

Enclosure

cc: Docket Coordinator
Therese Skarda
Craig J. Beuning



OAH-0001

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
PO BOX 64620
600 NORTH ROBERT STREET
ST. PAUL, MN 55164-0620

CERTIFICATE OF SERVICE

In the Matter of the Cigarette/Tobacco License Held by MJ Market Inc. for the Premises Located at 922 Thomas Avenue in Saint Paul	OAH Docket No.: 65-6020-38532
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On February 13, 2023, a true and correct copy of the **ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION** was served by United States mail, unless otherwise indicated below, addressed to the following:

VIA EFILING ONLY

Shari Moore
City Clerk
City of St. Paul
310 City Hall
15 W Kellogg Blvd
Saint Paul, MN 55102
cityclerk@ci.stpaul.mn.us

VIA EMAIL ONLY

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

In the Matter of the Cigarette/Tobacco
License Held by Majid Nitaishoon, d/b/a MJ
Market, Inc. for the Premises Located at 922
Thomas Avenue in Saint Paul

**ORDER ON CROSS MOTIONS FOR
SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Ann C. O'Reilly for oral argument on November 15, 2022.

Therese Skarda, Assistant City Attorney, appeared on behalf of the City of St. Paul (City). Craig Beuning, HKB Law, P.A., appeared on behalf of Majid Nitaishoon and MJ Market, Inc. (Licensee).

On October 25, 2022, the City served and filed a Motion for Summary Disposition. Licensee responded to the Motion on November 7, 2022, and the City filed a Reply Brief on November 14, 2022. Oral argument on the City's Motion occurred on November 15, 2022. At the oral argument, Licensee stipulated to the material facts and asserted that summary disposition should be granted in its favor. Accordingly, based upon the agreement of counsel, the Administrative Law Judge granted Licensee leave to file a cross motion for summary disposition.¹

On December 9, 2022, Licensee served and filed its Cross Motion for Summary Disposition. The City responded to the Cross Motion on January 6, 2023, and Licensee filed its Reply Brief on January 11, 2023. The motion record closed with the filing of the last brief on January 11, 2023.

Based on the record, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The City's Motion for Summary Disposition is **DENIED**.
2. Licensee's Cross Motion for Summary Disposition is **GRANTED**.
3. This matter shall be referred to the St. Paul City Council for final disposition pursuant to St. Paul Legislative Code (SPLC) § 310.05.

¹ See Order Granting Leave to File Cross Motion for Summary Disposition (Nov. 22, 2022).



RECOMMENDATION

Based upon an application of the law to the undisputed facts, the Administrative Law Judge recommends that the City Council find Licensee MJ Market, Inc. in violation of SPLC § 324.07(j); impose the presumptive penalty for a first violation and first appearance under SPLC § 324.10(b); and suspend MJ Market's tobacco shop license for 10 days.

Dated: February 10, 2023



ANN C. O'REILLY
Administrative Law Judge

NOTICE

This Report is a recommendation not a final decision. Pursuant to St. Paul Legislative Code § 310.05, the St. Paul City Council (Council) shall consider the evidence contained in the hearing record and the Administrative Law Judge's findings of fact, conclusions of law, and recommendations (Report). The Council shall not consider any factual testimony not previously submitted to and considered by the Administrative Law Judge. After receipt of the Administrative Law Judge's Report, the Council shall provide the Licensee 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 facts, and to present argument related to the recommended adverse action, if any. Upon conclusion of that Council hearing, and after considering the record, the Administrative Law Judge's Report, and such additional arguments presented at the Council hearing, the Council shall determine what, if any, adverse action shall be taken. The Council's action shall be made by resolution. The Council may accept, reject, or modify the Administrative Law Judge's findings, conclusions, or recommendations. Parties should contact the St. Paul City Clerk, 310 City Hall, 15 W. Kellogg Blvd., Saint Paul, MN 55102, to ascertain the procedure for filing exceptions or presenting arguments.



MEMORANDUM

I. Undisputed Facts

Majid Nitaishoon is the owner of MJ Market, Inc. (MJ Market), which is operated out of a building located at 922 Thomas Avenue, St. Paul, Minnesota (the Property).² The Property is owned by Abdul Tel.³

MJ Market, Inc., is a corporation first registered with the Minnesota Secretary of State on June 11, 2021.⁴ Its registered address for service of process is the Property located at 922 Thomas Avenue.⁵ MJ Market is also the name holder for the assumed name Thomas Deli according to a Certificate of Assumed Name filed with the Minnesota Secretary of State's Office by Majid Nitaishoon.⁶

On June 14, 2021, Nitaishoon, acting as the owner of MJ Market, applied for a tobacco shop license in the name of MJ Market for a business he intended to operate on the Property.⁷ As part of the license application, Nitaishoon affirmed that MJ Market would not sell flavored tobacco products or e-cigarette "juice" other than mint, wintergreen, and menthol.⁸ On June 28, 2021, Nitaishoon also signed an acknowledgement of receiving a copy of the St. Paul tobacco ordinances, SPLC §§ 324.295 and 65.535.⁹

The City issued MJ Market a tobacco shop license on June 28, 2021.¹⁰ Two days later, on June 30, 2021, Nitaishoon entered into a commercial lease for the Property.¹¹ Previously, the Property was leased to Mobarek Hamaz, who operated a business on the premises under a cigarette/tobacco license issued to MHH Global, Inc., d/b/a Thomas Grocery.¹² Hamaz's lease for the Property was rescinded on June 11, 2021, with rescission being effective on June 30, 2021.¹³

On August 3, 2021, the City conducted a youth tobacco compliance check at the business operated on the Property.¹⁴ The Notice of Violation alleged that the clerk at the "Thomas Grocery" sold a pack of cigarettes to a female under the age of 21. MHH Global, Inc., d/b/a Thomas Grocery, as the licensee, was cited for violation of Minn. Stat. §§ 461.12, subd. 5, 609.685, and SPLC § 324.07(g).¹⁵

² Ex. 5.

³ Ex. 5 at 14.

⁴ Ex. 5 at 9.

⁵ *Id.*

⁶ Ex. 5 at 10.

⁷ Ex. 5.

⁸ Ex. 5 at 8.

⁹ Ex. 7 at 1.

¹⁰ Ex. 6.

¹¹ Ex. 5 at 15-28.

¹² Ex. 3.

¹³ Ex. 5 at 14.

¹⁴ Ex. 3.

¹⁵ Ex. 3.



The Notice of Violation advised MHH Global, Inc., that, as licensee, it could contest the violation and receive a hearing or admit the violation and pay a \$300 penalty.¹⁶ On or about October 6, 2021, a \$300 penalty was paid, and the City deemed the violation admitted.¹⁷

On or around August 26, and September 1, 2021, the City mailed a Notice of Public Hearing to all tobacco license holders in the City, including Licensee, advising them of a public hearing regarding changes to SPLC Chapter 324, the City's tobacco ordinance.¹⁸ The amendments to Chapter 324 included increased penalties for repeat violations of underage tobacco sales and the sale, display, or possession of flavored cigarette products.¹⁹ The effective date of the amendments to Chapter 324 was December 11, 2021.²⁰

On May 6, 2022, St. Paul Department of Safety and Inspection (DSI) inspector Joseph Voyda conducted an inspection in response to a complaint that flavored tobacco products were being sold at the Property.²¹ When he arrived at the store, inspector Voyda observed the following tobacco products for sale in the store behind the counter:²²

- 2 boxes of Dutch - Sweet Fusion cigarettos
- 2 Cartons of American Spirits – Black cigarettes
- 1 box of individual singles of Black & Mild Casino wood tip cigars
- 31 varieties of vape pens

The City contends, and Licensee stipulates for purposes of its Cross Motion, that these products are “flavored tobacco products,” which the SPLC prohibits Licensee from selling.²³

On June 10, 2022, the City issued a Notice of Violation and Request for Revocation of the Cigarette/Tobacco License to MJ Market, for the premises located at 922 Thomas Avenue.²⁴ The Notice of Violation asserted that Licensee violated SPLC § 324.07(j) and referenced SPLC § 324.10(b)(2) as the basis for the imposition of “presumptive penalties,” including the revocation of MJ Market's tobacco shop license.²⁵

¹⁶ *Id.* at 3.

¹⁷ Ex. 4-1.

¹⁸ Exs. 9, 10.

¹⁹ Ex. 10.

²⁰ *Id.*

²¹ Ex. 1. For purposes of its Cross Motion for Summary Disposition, Licensee is not contesting the factual basis for the June 10, 2022 Notice of Violation. See Digital Recording of Oral Argument (Nov. 15, 2022).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*



On June 22, 2022, Licensee timely sent the City a request for hearing, disputing the violations and proposed penalty.²⁶ A Notice of Prehearing Telephone Conference was issued on August 1, 2022, thereby commencing this administrative action.²⁷

II. Standard of Review

Summary disposition is the administrative law equivalent of summary judgment.²⁸ A motion for summary disposition may be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.²⁹ The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition of contested case matters.³⁰

The function of the administrative law judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine factual issues exist.³¹ In other words, the administrative law judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.³²

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.³³ A fact is material if its resolution will affect the outcome of the case.³⁴ If the moving party meets the initial burden, then the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.³⁵ A genuine issue is not a "sham or frivolous" one, and it cannot rely on mere allegations or denials.³⁶ Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.³⁷

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.³⁸ Thus, summary disposition is only proper when no factual issues need to be resolved.³⁹

²⁶ Ex. 8.

²⁷ Notice of Prehearing Telephone Conference (Aug. 1, 2022).

²⁸ *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); see also Minn. R. 1400.5500(K) (2021).

²⁹ *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).

³⁰ Minn. R. 1400.6600 (2021).

³¹ *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).

³² *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

³³ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

³⁴ *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

³⁵ *Thiele*, 425 N.W.2d at 583.

³⁶ *Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

³⁷ See Minn. R. Civ. P. 56.05.

³⁸ *Sauter*, 70 N.W.2d at 353.

³⁹ *Id.*



III. Legal Analysis

Both parties assert that summary disposition is warranted in this case. The City contends that: (1) Licensee's sale or display of flavored cigarettes is uncontroverted; (2) a prior violation (on August 3, 2021) was established by the payment of the fine without an appearance; and (3) an application of the law, including the presumptive penalty matrix contained in the tobacco ordinance, mandates the revocation of MJ Market's tobacco shop license. Licensee, on the other hand, argues that the penalty matrix contained in SPLC § 324.10(b) is ambiguous and must be interpreted to mean that only violations of the same type or kind can be aggravated, especially when the result is as severe as license revocation.

The City requires a license for the retail sale of any tobacco product.⁴⁰ The City issues two types of tobacco licenses: a tobacco shop license and a tobacco products shop license.⁴¹ Any tobacco license issued under SPLC Chapter 324 shall be issued "to the person, firm, or corporation that operates the principal business at that address."⁴²

SPLC § 324.07(j) states that "[n]o person may sell, offer for sale, or otherwise distribute any flavored products, unless excepted under [SPLC] section 324.07(l)." Section 324.07(l) exempts holders of tobacco products shop licenses from this regulation.⁴³

Licensee holds a tobacco shop license, not a tobacco products shop license. Therefore, Licensee is prohibited from selling, offering for sale, or distributing flavored tobacco products.

"Flavored product" is a defined term under SPLC § 324.03(5). For purposes of the cross motions for summary disposition only, Licensee does not dispute that the products observed for sale at its store on May 6, 2022, were "flavored products."⁴⁴

SPLC § 324.10 sets forth the presumptive penalties for violations of the tobacco ordinance (SPLC Chapter 324). These presumptive penalties are set out in a penalty matrix as follows:

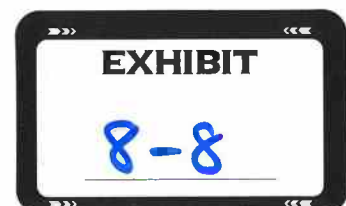
⁴⁰ SPLC § 324.01(a). This provision requires a license to sell any "licensed product." "Licensed product" includes any tobacco, tobacco-related device, electronic delivery device, or nicotine or lobelia delivery product. SPLC § 324.03(6).

⁴¹ SPLC § 324.03(15), (16), (17).

⁴² SPLC § 324.01(c).

⁴³ SPLC § 324.07(j) and (l).

⁴⁴ See Digital Recording of Oral Argument (Nov. 15, 2022).



Type of Violation	Appearance			
	1 st	2 nd	3 rd	4 th
(1) Sale to a person under 21 years of age	\$500 fine	\$1,000 fine	\$2,000 fine and 7-day suspension	Revocation
(2) Display, possession, or multiple incidents of sales of: • Single cigarettes; • Menthol tobacco products; or • Flavored tobacco products	10-day suspension	Revocation		

SPLC § 324.01(c) provides that a licensee making a first or second appearance before the council may elect to pay the fine to the DSI without a hearing. Payment of the recommended fine is considered a waiver of the hearing and an “appearance” for the purpose of determining the presumptive penalties for subsequent violations.⁴⁵ Further:

A second violation within twenty-four (24) months shall be treated as a second appearance, a third within twenty[-]four (24) months treated as a third appearance, and a fourth within twenty[-] four (24) months treated as a fourth appearance for the purpose of determining the presumptive penalty.⁴⁶

Chapter 324 of the code does not specify whether “violation” means a violation of the same code provision, a violation of any provision of the tobacco ordinance, or a violation of any other law or code related to the license.

With respect to the presumption, section 324.10(a) provides that:

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 which make it appropriate to do so, except, the council may not deviate below statewide minimum penalties for licensees. When deviating from

⁴⁵ SPLC § 324.10(c).

⁴⁶ SPLC § 324.10(d).



these standards, the council shall provide written reasons that specify why the penalty selected was more appropriate. Where no penalty is listed below, the presumptive penalty under Saint Paul Legislative Code Section 310 [sic] [shall apply].⁴⁷

SPLC Chapter 310, entitled "Uniform License Procedures," addresses licensing violations in general and has its own presumptive penalty matrix for licensing violations. Under SPLC § 310.05(m), a first appearance for a violation of any provision of the SPLC relating to licensed activity has a presumptive \$500 fine and a second appearance has a presumptive \$1,000 penalty.

Unlike with the penalty matrix in section 324.10, the penalty matrix in the general licensing chapter, section 310.05, provides a definition of "violation" to mean "either one of those violations listed in paragraph m or a violation of section 409.26(b)."⁴⁸ In addition, section 310.05(m)(iv) states:

Upon a second, third, or fourth appearance before the council *by a particular licensee*, the council shall impose the presumptive penalty for the violation or violations giving rise to the subsequent appearance without regard to the particular violation or violations that were the subject of the first or prior appearance.⁴⁹

In other words, the penalty matrix in SPLC § 310.05(m) expressly provides that violations of different kinds can result in increased penalties when a particular licensee makes a second, third, or fourth appearance before the council.

Based upon the undisputed facts in this case, the sale or the offer to sell flavored tobacco that occurred on May 6, 2022, was Licensee's first violation and is, thus, its first "appearance" before the City council. The prior violation involving the sale of tobacco to an underage person on August 3, 2021, was issued to a different license holder – MHH Global, Inc., a company owned and operated by Hamza Mobarak. There is no evidence presented that MHH Global or Mobarak have any connection to MJ Market or its owner Majid Nataishoon.

While Licensee MJ Market could well have been operating the store at the time of the August 3, 2021 violation, the fact remains that a different licensee was cited for that violation. It is unknown who paid the \$300 fine for that violation. Regardless, the payment of the fine for the August 3, 2021 violation resulted in an appearance by MHH Global. It was not a citation issued to *this* Licensee, MJ Market.

⁴⁷ The last sentence in SPLC § 324.10(a) is incomplete in the code.

⁴⁸ SPLC § 310.05(m)(iv)(6).

⁴⁹ Emphasis added.



Pursuant to SPLC § 324.01(c), a tobacco shop license is issued to “a person, firm or corporation” that operates a business at an address. The license is not issued to the premises and does not run with the property.⁵⁰

Here, Licensee MJ Market is making its first appearance on a tobacco violation that occurred on May 6, 2022. It cannot be held responsible for a prior citation that was issued to an entirely different licensee. This is not a case where the two licensed entities have a common owner and are merely changing a corporate name to avoid enhanced penalties. Based upon the evidence presented, MHH Global and MJ Market are two different entities owned by two different individuals.

Thus, while the parties have requested a decision as to whether a violation means a violation of the tobacco ordinance generally or the violation of the same provision of that ordinance, such issue is not reached in this case due to the different licensees cited for the violations.

Licensee MJ Market does not dispute the fact that it offered flavored tobacco products for sale in its store on May 6, 2022. Because this was Licensee's first citation and, thus, first appearance, the matrix in SPLC § 324.10(b) provides for a presumptive penalty of a 10-day suspension of Licensee's license. Accordingly, the Administrative Law Judge recommends that the City Council impose a 10-day suspension of MJ Market's tobacco shop license.

Finally, the City argues in its response to Licensee's Cross Motion that even if the May 6, 2022 violation is considered a first appearance and first violation by Licensee, the City has grounds for an upward departure to revoke the license. This argument is without merit. SPLC § 324.10(a) specifically states that the penalties in the matrix “are presumed to be appropriate for every case.” The provision goes on to state that “[w]hen deviating from these standards, the council shall provide written reasons that specify why the penalty selected was more appropriate.”⁵¹ The Notice of Violation cites only to the matrix and alleges that this was Licensee's “second violation” in 24 months.⁵² The Notice does not state that the City is seeking an upward departure for a first appearance nor does it assert any bases for an upward departure.⁵³ Because the City has not provided notice to Licensee of an upward departure, it should be precluded from justifying such a departure at this time.

IV. Conclusion

An application of the law to the undisputed facts warrants a finding that Licensee violated SPLC § 324.07(j) on May 6, 2022, and that the presumptive penalty matrix in Section 324.10 applies. Because this is Licensee's first appearance and first violation of

⁵⁰ A revocation of a license for an individual or business operating at a particular property can result in the denial of future license applications submitted by individuals or businesses who intend to operate at that same property. See SPLC § 324.01(d).

⁵¹ SPLC § 324.10(a).

⁵² Ex. 1.

⁵³ *Id.*



the tobacco ordinance, the presumptive penalty of a 10-day suspension is appropriate. Licensee's Cross Motion for Summary Disposition is, therefore, **GRANTED**. The Administrative Law Judge recommends that the City Council find Licensee in violation of SPLC § 324.07(j); impose the presumptive penalty for a first appearance and first violation; and suspend MJ Market's tobacco shop license for 10 days.

Given that the question of what constitutes a prior "violation" and "appearance" in SPLC § 324.10 is likely to arise again, it is recommended that the City consider amending Chapter 324 to make clear: (1) whether any prior violation of the SPLC justifies aggravation of a tobacco penalty; (2) whether a different kind of tobacco violation is considered an "appearance" for aggravation purposes; and (3) whether the prior violation must be of the same type before it counts as a second appearance for enhancement purposes. In other words: does a prior violation for underage sale of tobacco serve as a first "appearance" and prior "violation" if the same licensee is later cited for selling flavored products (a different type of violation) and vice versa? These questions cannot be answered based upon the plain language of the code. A vague code is subject to inconsistent enforcement. Consequently, clarification of these terms is recommended for SLPC Chapter 324. At the same time, the City may also wish to amend Section 324.10(a) to complete the last sentence of that provision.

A.C.O.

