

**CITY OF SALEM
BOARD OF HEALTH
MEETING MINUTES**

January 9, 2024

MEMBERS PRESENT: Jeremy Schiller, Chair, Via Zoom, Sara Moore, Geri Yuhas, Datanis Elias, P. Kirby

MEMBERS EXCUSED:

OTHERS PRESENT: David Greenbaum, Health Agent, Joyce Redford, Director, NS Tobacco Policy Program, James Wellock, Asst. City Solicitor, Via Zoom, Attorney William Iler, Amjad Chaudhry, Owner, Salem Food Store.

TOPIC

DISCUSSION/ACTION

1. Call to Order

7:00pm

**2. Approval of Minutes
(December 12, 2023)**

P. Kirby motioned to approve the minutes. S. Moore 2nd.

All in favor, Motion passed by a vote of 5 to 0.

3. Hearing Request – Salem Food Store 128 North Street for violations of Regulation #24 of City of Salem Board of Health Restricting the Sale and Use of Tobacco Products and Nicotine Delivery Products.

Attorney Matt Iler, representing the Salem Food Store appeared before the Board of Health to appeal the order issuing fines, suspensions, and possible revocation of this establishment's tobacco sales permits for multiple violations of Board of Health regulation #24. Attorney Iler informed the Board that there is a corresponding appeal in front of the appellate tax board where he is also raising the issue of suppression of evidence from the initial search regarding the backpack. That is something that is going to be out there, and he wanted this Board to know about that. On the issue of what is going on before the Board of Health, Attorney Iler inquired about the order letter issued regarding the possible suspension/ revocation of the permit to sell tobacco products, he stated that for clarification that is also in front of the appellate tax board. He suggested that to avoid any conflicting decisions it may behoove the Board of Health to defer to the appellate tax board until they render a decision. He does not know when that will take place, but he filed an appeal prior to receiving the Board of Health order. Attorney Iler then addressed the issue of the fines, he stated the way he views this and how he believes how the law supports him is that this was on inspection on December 6, 2023, essentially one incident, all at one time where several items were uncovered. The way the law looks at that, even though several violations were observed, for instance, G.L. Chapter 270, §6, state regulation 105 CMR 665.030, and another violation also under G.L. Chapter 270, §6. These are separate laws and regulations and the way the law looks at this is that this would be one offense, not multiple offenses under this same inspection. Attorney Iler suggested that it would an impossible result under the law that if every item seized was a separate offense. It is his position, and the law supports him that everything seized here is a single offense. His position is that instead of looking at this as a first, second, and third offense, it should be and must be looked at as single offense and under the law cited here this should be a first offense with a \$1000.00 fine.

J. Schiller asked Attorney Iler if he was disputing the violations and how they are seen by the Board.

Attorney Iler proceeded to inform Dr. Schiller that he would like to have his client

address the Board to explain what happened so the Board could understand the situation from his point of view.

J. Schiller further inquired of Attorney Iler if he was disputing the violations as well as how the violations are seen by the Board.

Attorney Iler replied that he would like the Board to hear from his client, but this company has been in business for a long time, he has worked there a long time, and the law has changed. He relies on information from his distributor, J. Polep, they supply almost all convenience stores across Massachusetts. They provide all food products, as well as all tobacco products, and they do not differentiate between towns. They may provide products that are allowed for sale in Lynn that are not allowed to be sold in Salem. The sales rep for J. Polep will come in and stock the shelves and leave items that his client was not aware were in violation of the rules, regulations, or bylaws in Salem. All these items were dropped off by J. Polep, so his client was not aware he was in violation of anything in Salem. His client thought nicotine products were different from tobacco products and did not understand that they fell under the tobacco laws. There were a lot of things found and seized, his client has an employee that handles most of the work around stocking the shelves and receiving deliveries, however he does not speak very good English and could not be at the hearing as he worked all night and was catching up on his sleep.

D. Greenbaum informed all in attendance that Assistant City Solicitor, James Wellock, was in attendance via zoom and asked that he speak to respond to some of the issues raised by Attorney Iler.

Assistant City Solicitor James Wellock heard a couple of things that were concerning; first, the petitioner was objecting to a single inspection yielding multiple violations. It has never been the case that when an inspection is done it yields just one violation. If multiple violations are present and observed, it can be treated as such. Also, being ignorant of the law is not an excuse; being unaware of the law or that the law has changed is not an excuse to violate the law. Also, the City does not need a warrant to enter a licensed establishment to conduct a compliance check. The business owner is a licensee, and the Board has the right to inspect those premises.

J. Redford addressed the Board and advised them this inspection was conducted on December 6, 2023, in response to an anonymous complaint that this establishment was selling flavored products triggering the unannounced inspection. He explained the procedures she followed in conducting the inspection and addressed the issue of the backpack. She asked the clerk on duty if that was their backpack to which she was told, "no it belongs to the store." She asked the clerk to open the backpack, they did, exposing tobacco products that have been banned in Salem, and in MA since 2020. In the backpack were cigarettes with tax stamps from two other states, flavored chewing tobacco, mint Jewel pods that were 5% nicotine concentration. There were products that were flavored and concealed in cabinets, the backroom, in a sink covered by a plastic bag full of flavored product. Joyce further addressed the issue of flavored nicotine products and the responsibility of the licensee to keep up with the laws and changes to those laws, she reiterated that ignorance is not an excuse for violating the regulations. Joyce explained that based on her inspection she contacted the Department of Revenue (DOR) to see if they wanted to investigate some of what she found, and they did respond. DOR did seize some products, but Joyce left all products behind as she does not seize any products. She does inform the licensee that they cannot sell any banned products and they must be removed from the store.

Mr. Choudhry presented the Board an item lost that he follows when purchasing products. When the inspector came to the store the items she saw, the blunts wraps and nicotine pouches he did get from J. Polep. After the inspection, he contacted his sales rep who told him everything he received was legal to sell in

MA. They do not distribute based on town-by-town regulations. He stated that he is not ignoring the law, he was confused. The inspector was doing a job, he takes responsibility for the mistake, and he apologizes for the mistakes. He again stated he was not ignoring the law, he was just confused, and he asked the Board for another chance and for the Board to reconsider their decision.

J. Schiller stated he appreciated the time of the owner to come before the Board to discuss these matters, but he reiterated that being confused or ignorant of the law was not an excuse. These are state laws that have been incorporated into local regulations and the Board does not have much discretion in the application of the regulation.

P. Kirby addressed the letter provided by Mr. Choudhry, indicating it does not state what he thinks it does and the items listed are prohibited, and not legal for sale in MA.

J. Redford informed the Board that J. Polep is one of several large tobacco distributors in the state and they are acutely aware of the laws in MA. She also stated the fact that the menthol cigarettes were found with tax stamps from other states was not done out of ignorance but done out of intent. Additionally, state law requires that every retailer have a letter from the manufacturer stating that a product is not flavored and is approved for sale, this letter was missing from the establishment.

J. Schiller cautioned that it is not the Board's role to determine intent or ignorance, nor should they. The Board does not have discretion if the violations alleged have been shown to have occurred, which does not seem to be in dispute.

P. Kirby inquired how the actions of the Board of Health in Salem would interact with the actions of DOR tax appellate board.

D. Greenbaum advised the Board that the current matter before DOR is still under appeal and awaiting a decision, however, DOR has issued a 120-day suspension of state tobacco licenses to begin on February 1, 2024. J. Redford added, there is also a revocation of the e-cigarette license from a prior violation.

S. Moore asked about the possible revocation. J. Redford explained, the revocation would be for the third violation and the Board would not be taking any action on DOR violations, only on violations of Salem Board of Health regulations. She advised the Board that a requirement of the local tobacco permit is that the retailer have valid DOR tobacco permits, if the DOR permits are suspended the local permits would automatically be suspended as they cannot operate without both permits.

S. Moore clarified that the Board would only be acting on the local violations that occurred on December 6th and what is taking place with DOR would have no bearing on this process at this time. D. Greenbaum advised the Board that a decision on revocation can be postponed pending the outcome of the DOR proceedings.

J. Schiller recommended the Board make their own decision independent of the DOR.

Attorney Iler addressed the Board, he did some research and could not find anything under this statute, but he did find something under the harassment prevention law. This law requires you to have three separate acts of harassment before the court will issue the harassment prevention order. He provided the Board with a case where a defendant, harassed a person, forced her into a restroom, physically assaulted the victim, and threatened to stab her if she told anyone about the assault. This was an incident that involved several crimes, however the appeals court found that this did not constitute three or more acts of harassment, it only constituted one act of harassment because it is so close in time it is essentially the same offense.

S. Moore stated that she felt the harassment law was tantamount to comparing apples to oranges and that this was very different from the Board of Health regulation.

D. Greenbaum reiterated, the Board of Health regulation allows for fines to be stacked and issued in this manner.

Attorney Iler presented an additional case pertaining to the harassment prevention statute. In this case a rap song was presented to numerous different people at numerous different times, in this instance the court held that this did not constitute three or more separate offenses.

J. Schiller added that he believes what Dr. Moore stated was accurate, we were not talking about three different types of blunt wraps, we are talking about blunt wraps being one violation as well as other types of tobacco products for sale that are other also violations.

P. Kirby added, these are different categories of items, each category would be violation, not each item within the category.

Attorney Iler argued one of the reasons for the rules was to keep things consistent and uniform to avoid abuse. The rules are in place because if a government official decided they did not like someone, they could pile up the violations and throw the book at them and that is not the intention of this law. This should be viewed as a first violation, it is a single inspection, it is a single act or incident in time, and there is no way for a defendant to respond when this is viewed as three separate incidents. According to the order the fine is \$8000.00 where the rule only allows a fine of \$1000.00 for a first offense. He further argued that he did not believe that these violations should be charged as first offense, a second offense, and a third offense for the same inspection on the same date. The retailer does not have the opportunity to correct their mistakes.

Assistant Solicitor Wellock disagreed with Attorney Iler's interpretation of the regulation. This is not a 209A restraining order, this is an inspection, there were multiple violations observed and they are not in dispute. He and Attorney Iler debated if there was case law that showed 209A case law is also applicable in cases of this nature. Attorney Wellock asked if Attorney Iler had found case law that 209A applied here and that a court had ruled that an inspection that had revealed multiple violations should be treated as one violation.

Attorney Iler argued that the rule stated first offense, that a first offense could mean a single incident. Additionally, common sense would say that one incident could be a first with a 1000 fine, second with a 2000 and a potential 7-day suspension, and third offense with 5000 and a 30-day suspension all at the same time, it leaves the businesses open to abuse by a government agent.

P. Kirby stated he clearly remembered the efforts that the Board made in updating these regulations over the years and specifically including the ability to stack penalties, which very much was the intent, for instances of this nature.

D. Greenbaum added that many public health regulations allow for this. If he conducts a restaurant inspection and finds multiple egregious violations, they can all be cited, and fines can be issued for each violation. J. Schiller added this seems more analogous than the harassment prevention laws.

J. Harvey, City Council Liaison stated OSHA levies fines in the fashion. If OSHA comes to a job site and observes multiple violations, they will issue fines for each individual violation.

S. Moore stated that the Board updated these regulations recently and, in the past, did make the violations stackable in the regulation. You can feel how you feel about the regulation but that is how it is written.

D. Greenbaum advised Attorney Iler that if he wished to appeal the decision of the Board that appeal would be to Superior Court.

Discussion took place regarding what the Board would be deciding. D.

Greenbaum advised the Board they would be deciding on the three fines and 37 days of suspension.

J. Redford stated that Salem is not the first municipality to stack fines for violations of this type. She further explained that the regulations state the penalties for first, second, third, and subsequent offenses, as well as egregious

violations. Violations of this kind show an overall picture of the establishment and these penalties have been enforced in other municipalities in our collaborative and across the state.

Attorney Iler asked J. Redford if all municipalities enforced their regulations in the same way. She stated that she could only speak for the 16 communities she represents and that they all have the same language.

Further discussion took place regarding stacking violations and Joyce gave an example of another municipality locally that this has happened recently. All violations found here reflect state law.

P. Kirby motioned to deny this appeal and uphold the three violations, \$8000.00 fine and 37-day suspension for Salem Food Store, 128 North Street. D. Elias 2nd.

All in favor, Motion passed by a vote of 5 to 0.

4. Reorganization of the Board

J. Schiller discussed the reorganization of the Board. He has been Chair for about 5 years and he believes it is good for the Board to have a change in leadership so he will be taking a step back, he will remain on the Board but not be Chair. He has nominated Dr. Sara Moore to be Chair. He asked if other members had other nominations or wanted to discuss the nomination further.

P. Kirby stated that Dr. Schiller had done an incredible job over the last five years, particularly during the pandemic, and he agreed that it was good to rotate the Chair position among the members of the Board.

J. Schiller motioned to nominate Dr. Sara Moore as Chair of the Board of Health. D. Elias 2nd.

All in favor, Motion passed by a vote of 5-0

5. Public Health Announcements /Reports/Updates

D. Greenbaum advised the Board that he was working on the FY25 budget, there are no major asks in the budget for next year but if anything comes up, he will notify the Board. He updated the Board regarding the ARPA funding provided by the Affordable Housing Trust Fund to hire a temporary Code Enforcement Officer. We have received some applications and will be conducting interviews this week. He hopes this staff member will be able to significantly increase the number of pre-rental inspections conducted by the department. He updated the Board on the PHE grant and staffing around this grant.

6. Administrative Report

Copy available at BOH office.

7. Council Liaison Updates

J. Schiller welcomed new City Council Liaison John Harvey to the Board meeting. Councillor Harvey gave a brief introduction and told the Board about himself and his background.

The Board members introduced themselves to Councillor Harvey.

8. New Business/Scheduling of Future Agenda Items

Discussion took place regarding the cannabinoid regulations that are scheduled to be on the February agenda.

9. Items that could not be anticipated prior to the posting of the agenda.

Councillor Harvey asked what involvement the Board of Health has with the homeless encampment. D. Greenbaum and Councillor Harvey agreed to discuss the encampment later.

MEETING ADJOURNED:

P. Kirby motioned to adjourn. G. Yuhas 2nd.

Motion passed by a vote of 5 to 0.

Meeting Adjourned: 8:12 PM

Next regularly scheduled meeting is Tuesday, February 13, 2024, at 7:00pm at City Hall Annex, 98 Washington Street, 1st Floor, Salem, MA

Respectfully submitted,

David Greenbaum
Health Agent