

STATE OF VERMONT
DEPARTMENT OF LIQUOR AND LOTTERY
DIVISION OF LIQUOR CONTROL
BOARD OF LIQUOR AND LOTTERY

**IN RE: VITALITY MART
150 SOUTH MAIN STREET
WATERBURY, VERMONT**

DOCKET #2018-040

BOARD DECISION AND ORDER

The Board of Liquor and Lottery (“Board”) held proceedings on December 12, 2018 in Montpelier to consider sanctions against Vitality Mart’s (“Licensee”) tobacco license for an alleged violation of General Regulation No. 36 said to have occurred continuously from May 1, 2018 to November 9, 2018. Jacob A. Humbert, Esq., Assistant Attorney General, represented the Department of Liquor and Lottery (“DLL”). Yao Alate, Licensee’s owner, appeared on behalf of Licensee. The Board rules as follows:

A. Alleged Violation

1. DLL asserts that Licensee violated (on multiple occasions) General Regulation No. 36, which states as follows:

All licensees shall control the conduct of all individuals on their licensed premises. All licensees must ensure the safety of individuals entering, leaving, or remaining on the licensed premises. **No licensee shall permit or suffer any disturbances, brawls, fighting or illegal activity upon the licensed premises;** nor shall a licensee permit or suffer such premises to be conducted in such a manner as to render such premises or the streets, sidewalks, parking lots or highways adjacent thereto a public nuisance.

(Emphasis added).

2. DLL alleges that Licensee permitted illegal activity to occur on the licensed premises, namely the sale of tobacco without a valid license for doing so. These activities are prohibited by statutes, 7 V.S.A. §1002a(1) and (e), which read as follows:

(a)(1) No person shall engage in the retail sale of tobacco products, tobacco substitutes, or tobacco paraphernalia in his or her place of business without a tobacco license obtained from the Division of Liquor Control.

(e) A person who sells tobacco products, tobacco substitutes, or tobacco paraphernalia without obtaining a tobacco license and a tobacco substitute endorsement, as applicable, in violation of this section shall be guilty of a misdemeanor and fined not more than \$200.00 for the first offense and not more than \$500.00 for each subsequent offense.

B. Evidence Admitted

1. DLL Exhibit 1: Administrative Ticket.
2. DLL Exhibit 2: Licensee's enforcement history.
3. DLL Exhibit 3: Licensee's 2018 tobacco license renewal.
4. Licensee's Exhibit 1: Licensee's canceled checks (routing numbers and account numbers were redacted)

C. Findings of Fact

1. Licensee holds a Second Class liquor license and, at times, held a valid tobacco license.
2. Michael Welch, DLL investigator, testified. He participated in a tobacco compliance that took place on November 8, 2018. Licensee passed the test.
3. When Inv. Welch attempted to electronically upload information regarding the successful compliance check into licensee's record on his DLL smartphone application, he could not find a valid license.
4. Licensee indicated that the application had been sent to "the town," specifically Waterbury.
5. On November 9, 2018, Inv. Welch traveled to DLL's Montpelier office to further review Licensee's tobacco license history. Inv. Welch learned that no renewal had been submitted to DLL. Consequently, he confirmed that there was no valid license in place.

6. Inv. Welch also learned that no application had been sent to the Waterbury town offices.
7. Inv. Welch obtained license renewal paperwork from DLL and personally drove to Licensee's establishment. Once there, Inv. Welch helped Licensee complete the renewal application.
8. Inv. Welch then personally delivered the completed renewal application to DLL in Montpelier.
9. Inv. Welch also served Licensee with a notice of violation for violating General Regulation No. 36. Rather than the standard fine for such violations, \$260.00, Inv. Welch exercised his direction to impose a warning.
10. Licensee appealed the warning.
11. Although Licensee's tobacco license is now valid, from May 1, 2018 to November 9, 2018, Licensee did not have a valid tobacco license and likely stocked tobacco inventory and sold tobacco products during this time period.
12. DLL Director of Compliance and Enforcement Skyler Genest also testified. He testified that Licensee had violated General Regulation No. 36 in May 2016. Licensee, with Mr. Alate operating under a different business name at the same location, failed to timely submit a tobacco application. When this was called to his attention, he refused to stop selling tobacco products notwithstanding his lack of a license. Director (then Investigator) Genest seized Licensee's tobacco after an undercover buy operation revealed that Mr. Alate's business was still selling tobacco.
13. A Second Class License applicant need not pay an additional fee for a tobacco license, but a separate application or renewal form must be completed annually and submitted to DLL. Licensee was aware of this requirement.
14. Licensee's submission of cancelled checks do not establish that he had properly and timely submitted a Tobacco license application to DLL for the 2018-2019 license period.

CONCLUSIONS OF LAW

1. The Board is established as the paramount authority in the administration of Vermont's liquor statutes and regulations. *See Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. When passing upon the question whether a license shall be revoked or suspended for the violation of a liquor/tobacco statute or regulation, the Board sits as a tribunal with a judicial function to perform and has statutory authority under Title 7 to suspend or revoke any license for violating the provisions of Title 7 or any regulation. *See In Re: Wakefield*, 107 Vt. 180, 190 (1935).
3. DLL must prove the alleged violations by a preponderance of the evidence, which is the usual standard of proof in state administrative adjudications. *See Huddleston v. University of Vermont*, 719 A.2d 415 (1998); 3 V.S.A. §§ 801-849; *In re Muzzy*, 141 Vt. 463, 472, 449 A.2d 970, 974 (1982). This standard compels DLL to prove that, more likely than not, a violation occurred. If any violations are found, then the Board has concluded that DLL has met its burden.
4. Licensee is subject to this Board's jurisdiction.
5. The sole issue for the Board's consideration is whether Licensee violated General Regulation No. 36 for selling tobacco without a license. This Board concludes that selling tobacco without a valid license from May 1, 2018 to November 9, 2018 is a violation of law, is therefore illegal and falls within the ambit of General Regulation No. 36. Licensee violated General Regulation No. 36.
6. The Board commends Investigator Welch for his efforts to resolve this matter expeditiously and fairly. He went above and beyond to help this Licensee renew its license. Nothing required Inv. Welch to personally deliver and then file a tobacco license renewal application. This is evidence of DLL's good faith efforts to foster a positive relationship between it and licensees.

7. From our perspective, however, this Licensee previously violated the same regulation and previously refused to follow the law. The Licensee's violation here was significant. He sold tobacco without a license to do so. A warning, the only sanction recommended by DLL, is simply too lenient of a sanction.
8. We are not bound by the Investigator's decision to issue a warning. A Licensee is free to challenge any alleged violations and is entitled to an evidentiary hearing regarding them. If a Licensee elects to pursue a hearing, it does so with the risk that the Board may impose a steeper penalty than that which was appealed. Such is an appropriate outcome here.
9. Under 7 V.S.A. §210(b)(i), "[a]s an alternative to and in lieu of the authority to suspend or revoke any permit or license, the Board of Liquor and Lottery shall also have the power to impose an administrative penalty of up to \$2,500.00 per violation against a [...] holder of a first, second or third class license for a violation of the conditions under which the license was issued or of this title or of any rule or regulation adopted by the board. The administrative penalty may be imposed after a hearing before the board [.]". Although the Board could impose of a fine of up to \$2,500.00 in this instances, we will impose the traditional penalty for this violation, \$260.00.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Board hereby **FINES** Licensee the sum of \$260.00 with payment to be made within 45 days of this decision.

DATED at Montpelier, Vermont this 9th day of January 2019.

VERMONT BOARD OF LIQUOR AND LOTTERY



Liquor Control Board Chair

RIGHT TO APPEAL

Within 30 days after copies of this Order have been mailed, either party may appeal to the Vermont Supreme Court by filing a Notice of Appeal with the Department of Liquor and Lottery and paying the requisite filing fee. *See* 3 V.S.A. § 815(a); V.R.A.P. 4 and 13(a).