

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

**IN RE: QUARRY HILL QUICK STOP
269 QUARRY HILL
BARRE, VT 05654**

DOCKET NO. 2021-001

BOARD DECISION AND ORDER

The Board of Liquor and Lottery (“Board”) held a contested case hearing (“Hearing”) on February 10, 2021 to consider allegations that Quarry Hill Quick Stop (“Licensee”) violated 7 V.S.A. §1003(a). Assistant Attorney General Jacob A. Humbert, Esq. appeared for the Department of Liquor and Lottery (“DLL”). Owner Cheryl McCarthy appeared on Licensee’s behalf. In its Notice of Hearing, DLL alleges that Licensee violated 7 V.S.A. § 1003(a) on January 24, 2021. The Notice of Hearing also references a prior violation of 7 V.S.A. § 1003(a), and a separate violation of Education Regulation No. 3(b), on December 7, 2020.¹ The applicable statute and regulation are as follows:

7 V.S.A. § 1003 (a): A person shall not sell or provide tobacco products, tobacco substitutes, or tobacco paraphernalia to any person under 21 years of age.

Education Regulation No. 3(b): Each licensee shall ensure that every employee who is involved in the preparation, sale, service or solicitation of alcoholic beverages or the sale of tobacco products or enforcing of alcohol and/or tobacco laws and regulations must complete a training program offered or approved by the Division of Liquor Control before the employee begins working in that capacity and at least once every two years thereafter. Each licensee shall maintain written documentation, signed by each employee trained of each training program

¹ These are the dates reflected on the Notice of Hearing, State’s Exhibit 1:

It is alleged that on January 24th, 2021 a tobacco product, in the form of (1) Black and Mild cigar, was sold to a minor at the licensed premise during the course of a minor compliance check. Furthermore, the minor was asked to produce identification in relation to the sale of that tobacco product, yet the sale was made regardless. It should also be noted that this is the second failure of a tobacco compliance check at this establishment within 6 months, with the last failure occurring on December 7th, 2020. During the December 7th, 2020 failed compliance check it is alleged that Cheryl McCarthy was selling tobacco products prior to receiving proper training as required by Education Regulation Reg. #3b.

The correct date of the prior violations is December 4, 2020 and the correct date of the current alleged violation is January 22, 2021.

conducted. A licensee may comply with this requirement by conducting its own training program on its premises, using all information and materials furnished by the Department of Liquor Control, or from a program approved by the department. A licensee who fails to comply with the requirements of this subsection shall be subject to a suspension of no less than one day of the license issued under this title or a penalty of \$100.

The Board considered all exhibits admitted into evidence (State's Exhibit 1: Notice of Hearing; State's Exhibit 2: December 8, 2020 Waiver Letter; and State's Exhibit 3: January 26, 2021 Waiver Letter/Licensee's Request for Hearing), the testimony of DLL Investigator Weiland Patrick Ross and Ms. McCarthy, and hereby issues the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Licensee holds a valid Tobacco license.
2. DLL served Licensee with the Notice of Hearing, State's Exhibit 1, on or after February 3, 2021.
3. Inv. Ross is an Investigator for the DLL Liquor Control Division Office of Compliance and Enforcement. He has served in that role since May 14, 2018. Inv. Ross has been a full-time, certified law enforcement officer (Level III) since May 2000.
4. Inv. Ross testified that he performs "tobacco compliance checks" within a territory that he describes as the "center part of the State" as part of his job duties. He performs approximately 10 such compliance checks per month. Licensee, located in Barre, is within his territory. He works alongside Vermonters under 21 years of age, so-called "tobacco minors," who are sent into tobacco-licensed establishments to attempt purchases of tobacco products.
5. On December 4, 2020, during one such tobacco compliance check, Licensee admits that it sold a tobacco product (a single cigar) to the tobacco minor. On that occasion, Ms. McCarthy also admitted to Inv. Ross that her certification of completion of DLL training for the sale of tobacco products or enforcing tobacco laws and regulations had lapsed. Inv. Ross subsequently provided Licensee with the following Waiver Letter, which we admitted as State's Exhibit 2:



State of Vermont
 Department of Liquor & Lottery
 Division of Liquor Control
 13 Green Mountain Drive
 Montpelier, VT 05602
 liquorcontrol.vermont.gov

Patrick Delaney, Commissioner

[phone] 802-828-2339
 [fax] 802-828-1031


December 8, 2020

I hereby waive my rights to a formal hearing in the matter of tobacco violation Title 7, V.S.A. 1003 (a) and Education Regulation 3b which occurred on **December 4, 2020** that allegedly occurred on the licensed premises of:

7998-001
 Scott & Cheryl McCarthy LLC
 d/b/a Quarry Hill Quick Stop
 296 Quarry Hill
 Barre VT 05654

I hereby indicate the option I have chosen with respect to the administrative action(s). This will not have any effect on or preclude any court action.

- Warning letter for violation Title 7, V.S.A. 1003 (a)
- \$100 Waiver fine for Violation of Education Regulation #3b
- I decline one of the above waivers and request a hearing before the Board of Liquor and Lottery

Signature: 
 Title: owner
 Date: 12/12

This form must be returned within 10 days of receipt.

If you have any questions, please contact us at 802-828-2339.



Liquor Control Board:
 Martin Manahan, Chair, Thomas Lauzon, Sam Guy, Ed Flanagan, Sabina Haskel, Members

Licensee signed and returned this Waiver Letter. Licensee agreed to a warning for the sale of tobacco to a minor. No fine was imposed for the sale of tobacco to a minor. Licensee did not

decline or accept the \$100.00 waiver fine for the Education Regulation No. 3(b) violation, nor did it request a hearing.

6. Inv. Ross performed a second compliance check on January 22, 2021. Licensee again sold tobacco to the same tobacco minor who had purchased a cigar on December 4, 2020. Licensee does not contest that this sale occurred. Licensee received the following Waiver Letter, admitted as State's Exhibit 3, alleging an August 19, 2020 violation; a Hearing was requested:



State of Vermont
Department of Liquor & Lottery
Division of Liquor Control
13 Green Mountain Drive
Montpelier, VT 05602
liquorcontrol.vermont.gov

[phone] 802-828-2339
[fax] 802-828-1031

Patrick Delaney, Commissioner

January 26, 2021

I hereby waive my rights to a formal hearing in the matter of tobacco violation Title 7, V.S.A. 1003 (a) occurred on August 19, 2020 that allegedly occurred on the licensed premises of:

#7998-001
Scott & Cheryl McCarthy LLC
d/b/a Quarry Hill Quick Stop
296 Quarry Hill
Barre VT 05654

I hereby indicate the option I have chosen with respect to the administrative action(s). This will not have any effect on or preclude any court action.

Accept and agree to the 2 Weekday Suspension (MARCH 3 AND 4)

I decline the above Suspension and request a hearing before the Board of Liquor and Lottery

Signature: Cheryl McCarthy

Title: Owner

Date: 1/29/21

This form must be returned within 10 days of receipt.

If you have any questions, please contact us at 802-828-2339.



Liquor Control Board:
Martin Manahan, Chair, Thomas Lauzon, Sam Guy, Ed Flanagan, Sabina Haskel, Members

CONCLUSIONS OF LAW

1. The Board is established as the paramount authority in the administration of Vermont's liquor and tobacco statutes and regulations. *See, e.g., Verrill, Jr. v. Daley, Jr.*, 126 Vt. 444, 446 (1967).
2. Licensee holds a valid tobacco license and, therefore, is subject to this Board's jurisdiction.
3. DLL served Licensee with the Notice of Hearing on or after February 3, 2021 for the February 10, 2021 Hearing. Absent exigent circumstances, Licensees should be afforded more than one week's notice to prepare their defense, arrange for the appearance of and/or subpoena witnesses and/or consult with an attorney if it wishes to do so.²
4. With respect to the alleged December 4, 2020 violations, Licensee admits that it sold a tobacco product to a minor and had a lapsed certification of required tobacco training. Further, with respect to January 22, 2021, Licensee does not contest that it sold tobacco to a minor on that date.
5. The penalties proscribed for the December 2020 violations include up to a \$100.00 civil penalty for the first sale of tobacco to a minor (7 V.S.A. § 1007 (a)) and a \$100.00 penalty for an Education Regulation No. 3(b) violation. For the alleged January 2021, second sale of tobacco to a minor within six months of a previous violation, a two-day weekday suspension is mandated by 7 V.S.A. § 1007 (b)(2)(A).
6. DLL's errors in pursuing both the December 2020 and January 2021 violations against Licensee, include:
 - a. The Notice of Hearing contained incorrect dates of alleged violations: December 7, 2020 and January 24, 2021, rather than December 4, 2020 and January 22, 2021;

² *See* 3 V.S.A. § 809(a) ("In a contested case, all parties shall be given an opportunity for hearing after reasonable notice.").

- b. DLL’s January 26, 2021 “Waiver Letter” alleged a *third* incorrect date of violation, specifically the sale of tobacco to a minor alleged to have occurred on August 19, 2020; and
 - c. Issuing a warning for sale of tobacco to a minor, which is not within DLL’s discretion.
- 7. Licensee did not commit any violations of any tobacco statute or regulation on August 19, 2020, December 7, 2020, and/or January 24, 2021.
- 8. Notices of Hearing and Waiver Letters are critical documents; accuracy matters. A licensee is entitled to a clear statement of the allegations against it. Furthermore, the “Waiver Letter” requests a licensee to consider agreeing that a violation occurred. Stipulating to a violation bears on a licensee’s ability to conduct business, and indeed their livelihood. If a licensee elects to do, it explicitly waives its right to a hearing before the Board and to present a defense, critical due process rights not to be taken lightly. The January 26, 2021 “Waiver Letter” sought a stipulation to an alleged *August 19, 2020* violation. But, there was no August 19, 2020 violation. This is not a distinction without a difference and could be seen by subsequent DLL staff and/or Board members, not involved in this matter, as a separate offense altogether from the ones considered at Hearing.
- 9. The Board concludes that the failures associated with the Notice of Hearing and January 26, 2021 Waiver Letter are fatal to establishing and/or sanctioning the alleged January 22, 2021 violation and is, therefore, compelled to dismiss the alleged January 22, 2021 violation. While the Board can find no internal precedent for this, it finds guidance in the Vermont Rules of Civil Procedure governing adjudication of traffic and municipal ordinance violations. Under V.R.C.P. 80.6(c)(8), a hearing officer may dismiss a complaint for omissions and inconsistencies that render the complaint defective and can dismiss such complaint with prejudice in cases where the defects appear in successive iterations of the same complaint. We find that is analogous to what happened here and, accordingly, the “complaint” of a January 22, 2021 violation is defective both in the Notice of Hearing and Waiver Letter and will be dismissed with prejudice. While Licensee will avoid liability for its violation, the public policy

interest is greater: ensuring in subsequent cases where DLL charges a licensee with a violation, requests a licensee to waive due process rights and/or notifies a licensee of a hearing, that such documents will be carefully prepared, clear and accurate with respect to the violations alleged.

10. Turning to the December 4, 2020 violations, Licensee had proper notice and conceded them. The December 8, 2020 Waiver Letter, State's Exhibit 2, however, is neither consistent with current law, nor a model of clarity. First, the Waiver Letter should not have offered a warning as a sanction for the 7 V.S.A. §1007(a) (sale of tobacco to a minor) violation. A fine is mandatory. Licensee, however, was offered and accepted a warning for the sale of tobacco to a minor on December 4, 2020; that matter is final and we will not disturb that. Second, it appears from that Waiver Letter that Licensee had a variety of options: either concede one or both violations, or request a hearing on one or both violations. Notwithstanding the confusing nature of the Waiver Letter, Licensee took no action regarding the alleged Education Regulation No. 3(b) violation; it did not agree to the sanction or request a hearing. Having taken no such action, and by not contesting such violation at the Hearing, DLL has established a violation of Education Regulation No. 3(b) on December 4, 2020. The Board will impose the applicable fine of \$100.00.

ORDER

Based on the foregoing *Findings of Fact* and *Conclusions of Law*, Licensee, Quarry Hill Quick Stop, is hereby **FINED** \$100.00 for its violation of Education Regulation No. 3(b); the fine is to be paid within 60 days of this decision, unless stayed by order of this Board.

The alleged violation of 7 V.S.A. §1003(a) on January 22, 2021 is hereby **DISMISSED WITH PREJUDICE**.

DATED at Montpelier, this 17th day of March 2021.

VERMONT BOARD OF LIQUOR AND LOTTERY

A handwritten signature in black ink, appearing to read "Mark Wainwright", written over a horizontal line.

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).