

BRAINTREE BOARD OF HEALTH

MINUTES

November 14, 2007

IN ATTENDANCE: Paula Dowd, Chairman
Dr. Mark Samuelson, Clerk

ALSO PRESENT: Marybeth McGrath, Executive Health Officer
Brian Riley, Town Counsel

Mrs. Dowd called the meeting to order at 7:00pm.

MINUTES:

Motion By: Dr. Samuelson to approve the minutes of October 18, 2007.

Second By: Paula Dowd

OLD BUSINESS:

1. Sale of Tobacco Violation

Present: Elizabeth Nee, Director and Jerry McLaughlin, Enforcement Officer
So. Shore Boards of Health Collaborative, Tobacco Control Program

a. Hennessy News-250 Granite Street, Suite # 157

Present: Jason McGaughey, Manager of family owned business
Gene Santorelli, employee

Mrs. Dowd advised that this matter was tabled from the October 18, 2007 meeting.

Mr. McLaughlin advised the Board that on September 8, 2007 at approximately 1:54pm, a routine compliance check was conducted at Hennessy News at 250 Granite Street, Braintree, MA which is at the South Shore Plaza. At that time, a seventeen year old female entered the premises to go to Hennessy's for the purpose of conducting a compliance check. She left his vehicle with no monies on her, except what was given to her by the Collaborative, and with no ID's. She went to Hennessy News and at that time a transaction for a tobacco product was made. The clerk was a young adult female. At that time, the clerk did not ask the buyer for an ID or her age. A pack of Newport cigarettes was purchased for \$ 5.15. She went directly back to his vehicle, where the cigarettes were marked and kept by him until the first hearing and kept by the Collaborative in their office until this point.

Ms. McGrath advised Mr. Riley that Mr. McGaughey and Mr. Santorelli appeared before the Board on October 18, 2007 when this hearing first took place, and they brought a surveillance video from the store that apparently shows the transaction or the time of the transaction and they wanted the Board to view the video. There is some question or concern about viewing the video because videos can be edited. After some discussion, the Board requested additional information such as the register tape and an employee log of that day, and that Town Counsel be present to assist them in making a legal interpretation about the viewing of this video.

Mr. Riley advised the Board that basically the Board of Health is sitting as a judge on this. The Board gets the information that they get from the Collaborative and the merchants and decide whether they found the violation happened or not.

Further, Mr. Riley advised that he did read the minutes from the October 18, 2007 meeting and he knows there was concern raised about the fact that videos can be altered and chain of custody issues.

He advised that although the Board is sitting as a judge, the formal rules of evidence that they might have in a criminal or civil trial do not apply. He would say the Board would have a little more flexibility to consider whatever evidence it wanted to. So, specifically he advised that if the Board felt that looking at this video would be useful in deciding whether they found this violation taken place or not. In his opinion, they could certainly do that. They are not required to. The Board may decide there are enough questions in their mind about what that is going to show that they may decide not to.

Mrs. Dowd advised that it would not be of value to the Board because they do not know who the youth is that is buying, it would just be people to them. Therefore, it would not be helpful for the Board to view.

Mr. Riley advised that is a valid point as well, and he knows the Board also asked for register information.

Dr. Samuelson advised that his biggest concern is them professing their innocence and if they have evidence that backs it up then the Board should oblige them. But, also evidence of just a video by itself that could be done any day that doesn't show somebody there doesn't mean much to him. So, that is why he asked for the other corroborating evidence that showed that it was definitely that Saturday September 8, 2007 and they have people coming in and out of the store and the register tape backs that up. Then, it gives it a little more validity. But, if they don't have that then he would not even entertain looking at the tape.

Mr. McGaughey advised the Board that at the last meeting the Board requested that he bring with him tonight the receipt for the register, employee timecards as well as the video. He has all three of those items.

Dr. Samuelson asked if he reviewed them.

Mr. McGaughey advised yes.

Dr. Samuelson asked if they matched up.

Mr. McGaughey advised yes.

Dr. Samuelson asked if he still did not see a sale at this time.

Mr. Santorelli advised that they can see various sales, and they see an older woman at that time purchasing two packs of Newports.

Mr. McGaughey advised that within that time frame of five minutes they sold a pack of Newport to a regular customer who works at Crate & Barrel, and a younger girl who works at H & M who they all know. People who work at the store know them, but outside of that as he said at the last meeting there was a young African-American male who purchased a pack of cigarettes. When he initially watched the tape that is who he saw and thought caught the violation. As he watched the tape further, he called to find out the identity of the person who performed the sting and it was a young female. He further advised that they did sell in that time frame, he went back two hours on the tape but in that ten to fifteen minute time frame between 1:45pm to 1:55pm there are three to four packs of Newport sold but it is to customers they all know. The one they didn't know was ID'ed for that pack of Newports.

Mr. Santorelli advised the Board that the other reason they did bring it is if in fact they do not see them they need to know so they can stop it. They do take it seriously because it is a family business.

Mr. McGaughey advised that in going forward with this as far as the business is concerned it really isn't the Board's problem, it is their problem. Their employees know they will be terminated if they violate the Board's policy. If people are given the suspension or fine or both, going forward they would be taking all of their tobacco products off the shelves without anyone to point the finger at. He does not want to point fingers, but if someone was at fault then that person will be held accountable. Now going forward, if these people violate one of the stings, how can he terminate them if in the past he didn't hold them to that same standard.

Dr. Samuelson advised that the Board is just interested in this one sale. He also asked how much of the video Mr. McGaughey had, a whole days worth.

Mr. McGaughey advised that he has from 1:00pm to 3:00pm.

Mr. McLaughlin advised that it could be a fifteen minute duration around that time.

Dr. Samuelson asked if he had cash register receipts from that two hour slot and the timecards.

Mr. McGaughey advised yes.

Mrs. Dowd asked if he had a young adult female working during that time.

Mr. McGaughey advised yes he had two, one that is nineteen and one that is seventeen or eighteen.

Mr. Santorelli advised that there were two females there, one was about to go home within the hour and the other had just gotten there.

Ms. McGrath advised Mr. Riley that one of the questions is that Mr. McLaughlin has advised the Board that he cannot disclose the minor because the minor is the person that does the compliance checks for them. So, certainly he can look at the video, but he cannot disclose who the minor was. So, there is a bit of a quandary that the Board has had in determining whether or not this video is something that they can view.

Mrs. Dowd advised especially if he does narrow it down and he does see the person there, they will know who that person is because if he narrows it down to this time frame. The merchant would now know who the youth is.

Dr. Samuelson asked if the video could be viewed in Executive Session.

Ms. McGrath advised that she did not know if this is something that would be deemed Executive Session material.

Mr. Riley advised that there are a pretty limited number of circumstances. He doesn't think this would fit.

Dr. Samuelson advised that he would be willing to look at least initially, and again this does not guarantee any outcome other than them observing it and seeing the quality of it.

Mr. McLaughlin inquired with Mr. Riley that under the Executive Session rules, you can go into executive session for the purpose of public safety issues, and under a health issue this may fit under that umbrella because it is a confidential employee of the South Shore Boards of Health, which is an agent of the Braintree Board of Health.

Mr. Riley asked if in their agreement with the minors do they make representations about keeping their identity confidential.

Mr. McLaughlin advised absolutely.

Ms. McGrath advised Mr. Riley that at the last Board meeting Mr. McLaughlin advised that he could certainly show the Board members the picture of the youth buyer, but that is it.

Mrs. Dowd advised that her concern is still that they would be able to know.

Mr. McLaughlin advised the Board that he has no problem reviewing the video, but he would want to review more than that timeframe. Probably fifteen minutes each way, so that if he did see the youth he would not say at what particular time out of that timeframe to try to keep his or her identity confidential.

Mr. McLaughlin advised Mr. Riley that the Collaborative continuously uses the buyers. They are employed and have confidentiality for their safety because they have had incidents where they have been intimidated and threatened. So, it is extremely important to the Collaborative.

Mr. Santorelli advised ... "inaudible"...

Ms. McGrath advised that poses another problem again because here we are going into tabling it again for possibly a third time. Additionally, her comment last time was leaving a tape with her, she is not comfortable with. The Board of Health is the enforcing agency and them giving her the tape to hold for them is not something that she is comfortable with because there is no chain of custody and that is why Town Counsel is here.

Mr. McGaughey asked if they could identify which employee it was if they can find it.

Dr. Samuelson asked if there were only two women working at that time, so it was one of those two if there was a sale.

Mr. McGaughey advised it was one of those two.

Mr. McLaughlin advised the Board that his position as the enforcement officer is that the violation is not against the clerk or the person behind that counter, it is against the permit holder whoever has the license. The violation is towards that license, not towards that person. Additionally, what is on the video, it is against the law to have audio, so they are only getting half of the picture. So, he would feel comfortable just stating that yes the person was there or no and leave it as that. They have the information on what the Collaborative by law to provide to them, whether it was a female, whether it was an adult, young adult, older adult.

Mrs. Dowd advised that they have no audio to know if they were even asked for an ID.

Mr. McLaughlin that is against the law. Basically, what he is trying to say is that their job is to see if there was a sale. They are not there to point the finger who did it, why they did it, what they were doing at the time.

Mr. Santorelli advised that the bottom line is that they are all trying to do the right thing and if they have a training issue, they need to fix it.

Dr. Samuelson advised that the best they could do was make an inclusion that there was a sale or not, and they will just have to assume they have a training issue. It is one of two

people that they have narrowed it down to.

Dr. Samuelson advised that again the only reason the Board is entertaining this is because they have come here and said this didn't happen. They are not saying it happened unless they have changed their mind.

Mr. McGaughey stated that is right.

Dr. Samuelson advised that the Board should at least look at it and go from there.

Motion By: Dr. Samuelson to go into a five minute recess at 7:38pm.
Second By: Paula Dowd

Motion By: Paula Dowd to resume the meeting at 7:45pm
Second By: Dr. Samuelson

Dr. Samuelson advised that he is willing to look at the video only if they can set it up like this: pick a time whether it is one o'clock, and they can show him from the get go that there better be a cash register receipt that goes with the video that at 1:10pm or whatever someone rings up and the logs, so at least that way they can get off on the right foot and assume it is the same day.

Ms. McGrath asked if once they have gotten through that process, if per Mr. McLaughlin's request the video could be backed up fifteen minutes on either side of this 1:54pm.

Dr. Samuelson advised that they could even start at 1:00pm and they could fast forward, just to verify that going forward it is the same day.

Mrs. Dowd asked Town Counsel if for the safety of the youth, they could go into Executive Session.

Mr. Riley advised yes, unless they wanted to get things started as the Board might need Mr. McGaughey and Mr. Santorelli to set up.

Mrs. Dowd advised Mr. McGaughey and Mr. Santorelli that they could get it going and then they would go into Executive Session. Then they would ask them to step out but don't leave because the Board will come back into session to give them back their stuff and finish up. She asked if that would be okay.

Mr. McGaughey and Mr. Santorelli set up the equipment to view the video for the Board.

Mr. McGaughey showed the Board all of the employees timecards.

Mrs. Dowd, Dr. Samuelson, Mr. McLaughlin, Ms. Nee, Mr. McGaughey and Mr. Santorelli viewed the video starting at 1:00pm, in conjunction with the register tape to see if they matched.

Mr. McGaughey advised the Board that the difference between the register and the video is two minutes.

Dr. Samuelson advised that is the whole point of bringing it in though.

Mr. McGaughey advised that all of them are consistent, every single transaction is consistent.

They continued to review the video with the register tape.

Dr. Samuelson asked if the video they were watching is the register, it is not the back register.

Mr. McGaughey advised that the video they were watching is showing the front register, not the back register.

They continued to review the video with the register tape.

Dr. Samuelson advised that based on viewing a transaction against the register tape, it looks like there is a three minute difference.

They continued to review the video with the register tape.

Dr. Samuelson advised that the video and register tape does not agree, but show him it agrees with the register.

They continued to review the video with the register tape.

Mr. McGaughey advised to fast forward the video to 1:44pm to review with the register tape transaction.

They continued to review the video with the register tape.

Dr. Samuelson advised that a register transaction with the video shows it's four minutes slower.

They continued to review the video with the register tape.

Dr. Samuelson asked if they could look at the other cash register video and tape.

Motion By: Dr. Samuelson to go into Executive Session at 8:17pm for the purpose of discussing the deployment of public safety personnel.

Second By: Paula Dowd

A roll call vote was taken by the Board of Health to go into Executive Session.

Mark Samuelson, Clerk-Yes
Paula Dowd, Chairman-Yes

The Board of Health came out of Executive Session at 8:50pm.

Mrs. Dowd advised that the Board has come out of Executive Session and is back in regular session to continue on with the Hennessy News, 250 Granite Street, Suite 157 tobacco sale violation.

Dr. Samuelson thanked Mr. McGaughey and Mr. Santorelli for coming to present their case. He advised that his opinion after weighing the evidence, is still in favor that there was a violation. They did look at things. They tried to look at them objectively, closely and again his opinion is that there wasn't enough evidence to suggest there wasn't a sale.

Ms. McGrath advised the Board that the penalty for a first offense is a five day suspension of the tobacco sales permit, a one hundred dollar fine and within thirty days of the first day of the suspension all of the employees involved in tobacco sales must have merchant education.

Motion By: Dr. Samuelson to uphold the penalty for a first offense to begin on Friday November 16, 2007 at 12:00 pm.

Second By: Paula Dowd

Mr. McGaughey asked the Board out of curiosity if the person that performed the compliance check was visible on the tape.

Dr. Samuelson and Mrs. Dowd advised they would rather not comment on that to protect her.

Dr. Samuelson advised that the totality of evidence, he would say there was more evidence suggesting there was a sale than not a sale.

Mrs. Dowd advised that the Board appreciated their hard work and that the Board took their time to look through it.

NEW BUSINESS:

2. Sale of Tobacco Violation:

Present: Elizabeth Nee, Director and Jerry McLaughlin, Enforcement Officer

So. Shore Boards of Health Collaborative, Tobacco Control Program

a. Cumberland Farms-831 Washington Street

Present: Ken Flint, Area Sales Manager and Willie Kwan, Manager

Mr. McLaughlin advised the Board that on September 7, 2007 at approximately 4:42pm, a routine compliance check was conducted at Cumberland Farms of 831 Washington Street in the town of Braintree. At that time, a seventeen year old female exited his vehicle to enter the convenience store for the purpose of completing a compliance check, which is to try to purchase a tobacco product. She left his vehicle with no monies on her except the monies provided to her by the Collaborative, which was six dollars and with no ID. She enter the establishment and a few minutes later returned with a pack of Newport's, which he has at this meeting. It was properly marked and held as evidence. The price was \$ 5.12. During the transaction the purchaser was not asked for an ID, nor was she asked for her age.

Mr. Flint advised the Board that he has been with Cumberland Farms for eighteen years, and recently acquired responsibility of the Braintree store in September.

He advised that tobacco sales are getting harder and harder, and they do as much as they can to train people to be a responsible retailer and not to be able to sell to a minor. They recently signed an agreement with the Attorney General's Office for businesses to support mystery shoppers and educational things with schools.

He advised that Cumberland Farms is trying to do everything in a positive way to discontinue sales to minors. He mentioned that he believed that Cumberland Farms had a prior violation in March.

Ms. McGrath advised that a prior sale occurred on March 26, 2007.

He further advised that he did not have this area at that time, so he was uncertain if anyone appeared before the Board for that hearing.

Ms. McGrath advised that Julia, the manager at that time appeared before the Board.

Mr. Flint advised that anytime they have a violation, the training department comes in and reviews all the training videos and We Card program with all the employees in the store. From that point forward, every employee in the store is put through the We Card CD every month for recertification. Any new hires are trained, as well. They take this very seriously. Unfortunately, they had a hit for a second violation. When he goes into the store once a week, he reviews the journal tapes, when Willie and his employees are selling cigarettes or whatever. The age key is shut off at the registers, so when he scans a pack of cigarettes, the register prompts to ask for the customer's date of birth. So, at that point they have to show an ID or ask for a date of birth.

When Mr. Flint goes in on his weekly visit, he reviews the electronic journal tapes in an effort to make sure the cashier is not just punching in their own date of birth or whatever it may be on a continual basis, and in fact, that they are punching in the correct date of birth.

Mr. Flint also advised the Board that in their employee application kit that when they hire someone, a question on the application asks if they or anyone in their supervision have ever had a tobacco violation. So, the company takes this very seriously. Cigarettes represent approximately 45% of the business at this location, and quite frankly without cigarettes sales they would not be there. Any suspension that takes place kills them financially. He would like to take the money and spend it on training.

Mr. Flint advised that the regulations and policies in Braintree are much stricter than any other city or town. He asked if they could come to some sort of an agreement tonight where this could be considered a first time violation and he doesn't have his license suspended for ten day, and he can prove to the Board that he is doing his best job not to sell cigarettes to a minor.

Mr. Flint also advised the Board about the rewards program that Cumberland Farms has in place for employees when a satisfactory compliance check has occurred.

He hoped the Board would give him some consideration in this matter.

Dr. Samuelson asked if Mr. Flint had checked the register system in this case because the compliance check report indicated the purchaser was not asked for an ID.

Mr. Flint advised that he looked at the video tape and the whole thing. The store was busy at the time. He indicated that the clerk used the override key and chose not to ask for an ID.

Dr. Samuelson advised that the Board does take this very seriously and do not feel that they should be rewarded for following the law, but penalized for not following the law. The Board understands their financial hardship, but if they have to choose between the health of the youth and their financial hardship, then the youth win out.

Ms. McGrath advised that there is no variance provision in the regulations to alter what the penalty is.

Motion By: Dr. Samuelson to implement the penalty for a second offense to begin on Friday November 16, 2007 at 12:00pm.
Second By: Paula Dowd

3. Request for Variance of Well Regulations- (Property Line and Drainage Setback)

a. Corcoran Management Company-100 Grandview Road

Ms. McGrath advised the Board that Corcoran Management Company, which is at 100 Grandview Road, which is somewhat adjacent to or across from the theater, and a commercial building would like to install an irrigation well on the property. They are seeking several variances. They are seeking a variance for a property line setback. The required property line setback is twenty five feet and they can only make twelve and one half feet on one side. Also, to a subsurface storm drain. The requirement is twenty five feet and they are only able to make 2.5 feet to one of the storm drains.

Mr. Collins from the department has conducted a site visit and does not see a concern, but because of the close proximity to the storm drain, we ask the Town Engineer to give his opinion. The storm drain is not a Town storm drain, it is a private storm drain on Corcoran's property, but it would lead into a Town's storm drain.

Mr. Campbell, the Town Engineer has provided a memo which advises if they damaged it they would have to fix it, otherwise he does not see a problem.

Motion By: Dr. Samuelson to approve the request for variance.
Second By: Paula Dowd

INFORMATIONAL:

Ms. McGrath advised the Board that the flu clinics are going well.

MATTERS BY THE BOARD:

Motion By: Paula Dowd to adjourn the meeting at 8:57 pm
Second By: Dr. Samuelson