

**Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Civil Remedies Division**

Center for Tobacco Products,
(FDA No. FDA-2017-H-0690)

Complainant

v.

South Preston Jiffy Mart LLC
d/b/a South Preston Jiffy Mart,

Respondent.

Docket No. T-17-2088

Decision No. TB2513

Date: March 14, 2018

INITIAL DECISION

The Center for Tobacco Products (CTP) seeks to impose a civil money penalty (CMP) against Respondent, South Preston Jiffy Mart LLC d/b/a South Preston Jiffy Mart, for two violations of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140. CTP alleges that Respondent violated the Act by selling cigarettes to a minor, and by failing to verify the purchasers were 18 years of age or older. For the reasons discussed below, I find in favor of CTP and impose a \$275 CMP against Respondent.

PROCEDURAL HISTORY

CTP began this matter by serving an administrative complaint seeking a \$275 civil money penalty on Respondent, South Preston Jiffy Mart, at 2073 North Mountaineer Highway, Newburg, West Virginia 26410, and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. On March 29, 2017, Respondent timely answered CTP's complaint. On March 31, 2017, I issued an Acknowledgment and Pre-Hearing Order (APHO) that set out the deadlines for the parties' submissions in this case.

On April 25, 2017, Respondent requested an unredacted copy of the photo identification used by the undercover minor CTP utilized to conduct the July 30, 2016 inspection described in CTP's complaint. CTP sought a protective order, to which Respondent objected. After considering the parties' arguments, I issued a limited protective order directing CTP to produce a redacted copy of the identification used by the minor during the July 30, 2016 inspection.

On June 19, 2017, CTP filed its pre-hearing exchange which included its informal brief, a list of proposed witnesses and exhibits, and 34 marked exhibits. CTP's exhibits included the declarations of two witnesses.¹ Respondent filed an informal brief, but did not submit any exhibits. Respondent also filed a letter and supporting documents responsive to CTP's discovery request.

On August 23, 2017, I held a pre-hearing conference in this case. I explained the limited purpose of a hearing under the applicable regulations: to allow for cross- and re-direct examination of any witnesses who had provided sworn testimony in pre-hearing exchanges, where the opposing party elected to cross-examine the witness. During the conference, Respondent, through its principal, Paul Frederick, conceded the violation that CTP alleged occurred on January 16, 2016. However, Mr. Frederick disputed the violation that CTP alleged took place on July 30, 2016. Mr. Frederick also indicated his intent to cross-examine both CTP witnesses, Laurie Sternberg and Inspector Dayton Whitt.

Accordingly, I held a hearing in this case on September 27, 2017 by telephone to address the July 30, 2016, violation alleged by CTP. During the course of the hearing, I admitted CTP's exhibits into evidence. Hearing Transcript (Tr.) at 9. Respondent waived cross-examination of CTP witness Laurie Sternberg, thus stipulating to her testimony, *id.* at 11, and conducted cross-examination of Inspector Whitt, who I duly swore in. *Id.* at 19-20, 23-25.

The hearing transcript became available to the parties on October 19, 2017, and I allowed them until December 5, 2017 to submit post-hearing briefs. I also afforded the parties an opportunity to file response briefs by January 9, 2018. On December 5, 2017, CTP electronically forwarded Respondent's post-hearing brief dated November 28, 2017, to my office. CTP did not file a post-hearing brief. Neither party submitted a response brief. The record is therefore now closed, and the matter ripe for adjudication.

APPLICABLE REGULATIONS AND GUIDELINES

¹ CTP subsequently filed a Motion to Amend the Declaration of Laurie Sternberg, along with an amended declaration, to correct a typographical error in the original submission. At the September 27, 2017 hearing, I granted CTP's motion to amend the declaration, and struck CTP Exhibit (Ex.) 3 (Docket No. 15d) from the record. *See* Hearing Tr. at 8. Ms. Sternberg's amended declaration, also identified as CTP Ex. 3, is found at Docket No. 23a.

CTP determined to impose a CMP against Respondent pursuant to the authority conferred by the Federal Food, Drug, and Cosmetic Act (Act) and implementing regulations at Part 21 of the Code of Federal Regulations. The Act prohibits the misbranding of tobacco products while they are held for sale after shipment in interstate commerce. 21 U.S.C. § 331(k). The Food and Drug Administration and its subordinate agency, CTP, may seek civil money penalties from any person who violates the Act's requirements as they relate to the sale of tobacco products. 21 U.S.C. § 333(f)(9). The sale of tobacco products to an individual who is under the age of 18 and the failure to verify the photographic identification of an individual who is not over the age of 26 are violations of implementing regulations. 21 C.F.R. §§ 1140.14(a)(1), (a)(2).²

ANALYSIS

I. Preponderance of the evidence leads me to conclude Respondent committed two violations of the Act as alleged by CTP.

A. The January 16, 2016 Violations.

Respondent concedes the violations alleged to have taken place January 16, 2016. Respondent's Inf. Br. at 9; Hearing Tr. at 7. Therefore, I find that Respondent: (1) sold cigarettes to a minor on January 16, 2016; and (2) failed to verify that the cigarette purchaser was of sufficient age, in violation of 21 C.F.R. § 1140.14(a)(1) and 21 C.F.R. § 1140.14(a)(2)(i).

B. The July 30, 2016 Violation.

Respondent maintains that it did not sell cigarettes to a minor during the July 30, 2016 inspection. Answer at 6; Respondent's Inf. Br. at 9. CTP alleged it sold a package of Marlboro cigarettes to a minor on that date at approximately 9:32 a.m. Complaint at ¶ 8. Respondent asserted that the clerk on duty during the July 30, 2016 inspection "clearly can be seen, on film, checking month, day and year, not once, but twice, to the Alcohol Compliance Calendar, which is updated daily." Answer at 6.

CTP's case against Respondent relies on the declaration of Inspector Dayton Whitt, who with the assistance of an undercover minor (Minor A), conducted a follow-up compliance check inspection at South Preston Jiffy Mart, on July 30, 2016 that included an attempt by Minor A to purchase cigarettes. Complainant's Inf. Br. at 7; CTP Ex. 4 (Whitt Declaration). At the time of the inspection, Inspector Whitt was a commissioned officer in FDA's compliance check program. CTP Ex. 4 at 1. His duties include conducting undercover inspections to assess retailers' compliance with the age and photographic

² On August 8, 2016, the citations to certain tobacco violations changed. *See* <https://federalregister.gov/a/2016-10685>.

identification requirements relating to the sale of tobacco. *Id.* at 1-2. They also included recruitment, hiring, and training of the minors used to make purchases during undercover inspections. *Id.* at 2.

Inspector Whitt declared that he conducted an inspection of Respondent's establishment, accompanied by a Minor A, on July 30, 2016. CTP Ex. 4 at 4. Inspector Whitt stated that prior to initiating the inspection, he confirmed Minor A's possession of her photographic identification, and that she did not possess any tobacco products. *Id.* The inspector then entered Respondent's establishment, followed by Minor A. *Id.* Inspector Whitt asserted that he obtained an unobstructed view of the sales counter and directly observed Minor A purchasing a package of cigarettes from Respondent's clerk. *Id.* Inspector Whitt noted that the sales clerk did check Minor A's identification but did not provide a receipt after the sale. *Id.*

Beyond Inspector Whitt's declaration, CTP also provided evidence corroborating his testimony, including: photographs of the pack of cigarettes Respondent unlawfully sold cigarettes to Minor A (CTP Exs. 24-28); a copy of the Compliance Check Inspection Notice (CTP Ex. 32); Inspector Whitt's Narrative Report of the undercover inspection (CTP Ex. 22); the TIMS Form (CTP Ex. 23); and a redacted copy of the Minor A's identification establishing her age at the time of the sale (CTP Ex. 5).

Respondent's principal, Mr. Frederick, denied the events resulting in the alleged violation, and asserted Inspector Whitt's testimony is simply false. Respondent's Post-hearing Br. at 1-2. However he has provided no proof to corroborate that claim, but instead relies on inconsistencies he attempted to elicit during the September 27, 2017 hearing. Specifically, he established that Inspector Whitt, in memorializing a subsequent inspection that took place on August 4, 2016, mistakenly indicated the date of the inspection to be "July 4, 2016" on the form which he used to record the event:

Q: Okay. Mr. Whitt, you said you [were] here on this paper on July 4th. Is that true?

A: That is an incorrect date, yes.

Q: Thank you. Have you misstated other things in the past?

A: You need to restrict that question to a time frame.

Q: During this case at any time.

A: No.

Hearing Tr. at 23.

But this scrivener's error, made by the inspector concerning an inspection that occurred after the violations at issue here, is largely irrelevant and fails to undermine the inspector's credibility. Respondent did not establish any errors made by Inspector Whitt during the inspection at issue in this case.

Similarly, Respondent failed to establish any inconsistencies in Inspector Whitt's report based on the number of people that could allegedly fit in his vehicle, or that the inspector colluded with Respondent's employee who made the sale. Hearing Tr. at 23-25. By contrast, Inspector Whitt established that aside from his commissioned work for the FDA, he had a combined 27 years of law enforcement employment. While not dispositive, his long years of employment enforcing the law cannot be dismissed in the light of a conspiracy theory with no corroborating evidence. In sum, I find no basis in Respondent's cross-examination to find Inspector Whitt less than credible.

Respondent's primary basis for questioning Inspector Whitt's version of events is the video footage it submitted showed that the employee who sold Minor A cigarettes did in fact check her identification prior to the sale. *See* Docket at 13d (Resp.'s Ex. 2), 13e (video), 13f (video), 13g (video), 13h (video). Review of the four clips, specifically Docket 13e at 00:00-00:26, does in fact show a sales clerk checking the identification of a customer prior to the sale of a package of cigarettes. However, I note that there are no date or time markers to indicate when this video was actually taken. During the hearing, I provided an additional opportunity for Respondent to provide date- and time-stamped version of these videos. Hearing Tr. at 26-27. Mr. Frederick indicated he did not possess them. *Id.* Lacking such basic authentication, it is difficult to conclude the videos provided by Respondent are in fact those pertaining to the transaction that forms the basis of the alleged violation here.

However, even assuming the video in question is accurate and pertains to the transaction at issue, Respondent's claim is not actually inconsistent with Inspector Whitt's report. Concerning the July 30, 2016 inspection, Inspector Whitt explicitly stated ". . . I observed Minor A purchase a package of cigarettes from an employee at the establishment. I also observed that the clerk *did check the minor's identification.*" CTP Ex. 4 at 4 (emphasis added).

Respondent appears to conclude that the only inference I can draw from this fact is that Minor A must have provided a false identification to its employee; Mr. Frederick went so far as to assert that seconds before Inspector Whitt and Minor A entered, his manager had instructed the store clerk to make sure and check Minor A's identification. Respondent's Post-Hearing Br. at 1.

But even if this were true, I need not conclude Inspector Whitt colluded with Respondent's employee (with no apparent motive), or that he provided Minor A false identification prior to the inspection. The other more reasonable conclusion I can reach is that Respondent's employee simply made an error of calculation when she examined Minor A's identification and determined she was over 18. Mr. Frederick indeed seems to allow for this conclusion; he first states that if his clerk made a mistake, it was without criminal intent. *Id.* at 2. He then lays blame for such a mistake on his employee, arguing

that she should be fined, not Respondent. *Id.* But this argument is without merit; as the Board has observed, employers are clearly liable for the actions of their employees who act in the course of their employment. *TOH, Inc. d/b/a Ridgeville Service Center*, DAB 2668 (Dec. 10, 2015) at 16-17. The Board noted that the mere fact employees are instructed to not sell tobacco to minors is insufficient where employees plainly act in the course of their employment, and are held out to the public as cashiers. *Id.* at 17. Liability was intended to motivate the retailer, not the individual sales clerk, to take measures to prevent illegal sales and ensure compliance. *Id.* at 18, *citing* 21 C.F.R. § 1140.14.

I find facts sufficient to conclude Respondent's employee who sold Minor A cigarettes was held out to the public as a cashier, and acted in the normal course of employment when she improperly sold cigarettes to Minor A. I also find, based on the preponderance of the evidence before me, that Respondent's clerk did check Minor A's identification prior to the sale, but mistakenly concluded she was over 18.

Based on the record as a whole, I conclude that CTP has established by a preponderance of the evidence that Respondent sold cigarettes to Minor A on July 30, 2016, in violation of 21 C.F.R. § 1140.14(a)(1).

Therefore, I find that CTP has met its burden to establish Respondent South Preston Jiffy Mart's liability under the Act for two violations³ within a 12-month period.

II. Civil Money Penalty

Pursuant to 21 U.S.C. § 333(f)(9), Respondent South Preston Jiffy Mart LLC d/b/a South Preston Jiffy Mart is liable for a civil money penalty not to exceed the amounts listed in FDA's civil money penalty regulations at 21 C.F.R. § 17.2. In its complaint, CTP sought to impose the maximum penalty amount, \$275, against Respondent for two violations of the Act and its implementing regulations within a 12-month period. Complaint at ¶ 1.

As discussed above, I have found that Respondent committed two violations of the Act and its implementing regulations within a 12-month period. When determining the amount of a civil money penalty, I am required to take into account "the nature, circumstances, extent and gravity of the violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." 21 U.S.C. § 333(f)(5)(B).

A. Nature, Circumstances, Extent and Gravity of the Violations

³ Two violations were documented on January 16, 2016 and one on July 30, 2016. In accordance with customary practice, CTP counted the violations at the initial inspection as a single violation, and all subsequent violations as separate individual violations.

Respondent committed three violations of selling cigarettes to minors in a twelve-month period, though it has only been held liable for two of those violations. The violations at issue involve sales of tobacco to minors and are thus serious in nature. The relatively low civil money penalty amount sought by CTP reflects the first-time nature of these violations.

B. Respondent's Ability to Pay and Effect on Ability to Do Business

Respondent has not presented any evidence that it does not have the ability to pay the \$275 penalty sought by CTP.

C. History of Prior Violations

The current action is the first civil money penalty action brought against Respondent for violations of the Act and its implementing regulations. As noted above, Respondent has twice violated the prohibition against selling cigarettes to persons younger than 18 years of age, and failing to verify the age of a person purchasing cigarettes by means of photographic identification containing the bearer's date of birth. 21 C.F.R. §§ 1140.14(a)(1); 1140.14(a)(2)(i).

D. Degree of Culpability

Based on my finding that Respondent committed the two violations in the complaint, I hold it fully culpable for two violations of the Act and its implementing regulations.

E. Additional Mitigating Factors

Respondent has asserted it provided training to its employees regarding sale of tobacco to minors, and that the employee who made the sale at issue here did so mistakenly. However, the fact that Respondent did in fact attempt to check identification for the minor prior to the sale is not in itself a mitigating factor, since Respondent through its employee failed to actually prevent the sale. Moreover, CTP's proposed penalty takes into account the fact that Respondent attempted to check identification during the second inspection, and is based on only two violations, not the three it proved. Finally, Respondent made no effort to take responsibility for the violation, instead blaming its employee and urging me to fine that individual directly. And rather than make assurances as to reinforced training or other procedures that could promote compliance, Respondent simply notes receipt of a compliance calendar and hopes it will make a difference. Respondent's Post-hearing Br. at 2. Accordingly, I have no basis in the record before me to find mitigating factors that would allow me to reduce the penalty requested by CTP, which I find proportional and appropriate in this case.

F. Penalty

For the foregoing reasons, I find the \$275 penalty sought by CTP to be appropriate and impose such penalty against Respondent. *See* 21 U.S.C. §§ 333(f)(5)(B), (f)(9).

CONCLUSION

Pursuant to 21 C.F.R. § 17.45, I enter judgment in the amount of \$275 against Respondent, South Preston Jiffy Mart LLC d/b/a South Preston Jiffy Mart, for two violations of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 *et seq.*, and its implementing regulations, 21 C.F.R. pt. 1140, within a 12-month period. Pursuant to 21 C.F.R. § 17.11(b), this order becomes final and binding upon both parties after 30 days of the date of its issuance.

/s/

Bill Thomas
Administrative Law Judge