

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2017-H-3117)

Complainant

v.

D and N Food and Gas, Inc.
d/b/a BP,

Respondent.

Docket No. T-17-4276

Decision No. TB2551

Date: March 23, 2018

DECISION

I sustain the determination of the Center for Tobacco Products (CTP) of the United States Food and Drug Administration (FDA), as stated in its administrative complaint, to impose a civil money penalty of \$2,236 against Respondent, D and N Food and Gas, Inc. d/b/a/ BP.

I. Background

Respondent requested a hearing in order to challenge CTP's determination to impose a civil money penalty against it. I held a hearing by telephone on January 8, 2018. At the hearing I received into evidence 15 exhibits from CTP, identified as CTP Ex. 1-CTP Ex. 15. I received into evidence, one exhibit from Respondent – a video extract from a surveillance tape – that I identified as R. Ex. 1. CTP filed an opening and a closing brief. Respondent did not file a brief.

After the date that I closed the record in this case and after the due date for final arguments by the parties, Respondent filed additional materials consisting of

several e-mails and excerpts of store surveillance tapes. I advised Respondent that it would have to file a motion that I receive these materials into evidence or that I consider any additional arguments by Respondent. I also afforded CTP the opportunity to object to my receiving additional items from Respondent. Respondent did not file a motion by the due date of March 12, 2018 but, rather, sent additional e-mails to me concerning the case. CTP objected to my receiving Respondent's submissions into the record.

I exclude the additional items and arguments filed by Respondent. They are untimely and Respondent has not established good cause for my receiving them.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Respondent contravened federal regulations governing the sale of tobacco products to minors and whether a civil money penalty of \$2,236 is reasonable.

B. Findings of Fact and Conclusions of Law

CTP determined to impose a civil money penalty 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 (C.F.R.). 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). CTP and its agency, FDA, 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. § 331(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 the implementing regulations. 21 C.F.R. §§ 1140.14(a)(1) and (a)(2)(i).

The evidence in this case plainly supports CTP's allegations of noncompliance. CTP proved that on February 12, 2017, an FDA-commissioned inspector, accompanied by a minor, visited Respondent's business establishment at about 1:21 pm. CTP Ex. 8 at ¶ 9. The inspector personally remained near the sales counter of Respondent's establishment while the minor was in the store. *Id.* at ¶ 10. The inspector observed the minor purchase a package of cigarettes from an employee. The employee did not ask for or check the minor's identification. *Id.*

CTP offered as corroborating evidence photographs of the package of cigarettes that the minor purchased on February 12, 2017. CTP Ex. 5; CTP Ex. 6; CTP Ex. 12.

Respondent disputed the veracity of this evidence by offering a brief excerpt from its store surveillance tape. R. Ex. 1. The excerpt shows a bearded man approaching the sales counter in Respondent's store. No other individuals are visible in the background. Respondent asserts that tape proves that it made no sale of tobacco products to a minor purchaser on February 12, 2017.

I do not find R. Ex. 1 to be credible rebuttal of CTP's evidence. The tape records only a 10-second slice of time. That does not undercut the inspector's testimony because it does not exclude the possibility that the inspector and the minor entered the store shortly prior to or shortly after the tape was made. The inspector testified that she and the minor entered the store at 1:21 pm on February 12, 2017. The tape shows a 10-second interval at 1:22 pm on that date. Moreover, the inspector's recitation of the time that she and the minor entered the store may not have been exact: consistent with her testimony she and the minor could have been in the store a few minutes prior to or after 1:21 pm on February 12, 2017.

This case represents the second time that CTP filed an administrative complaint against Respondent. On December 29, 2016, CTP filed a previous administrative complaint against Respondent for two¹ violations of 21 C.F.R. pt. 1140 within a twelve month period. Respondent admitted the allegations of that complaint. CTP Ex. 3. Thus, Respondent's sale of tobacco products to a minor on February 12, 2017 and its employee's failure to check a minor purchaser's identification on that date comprise a third and fourth violation of regulations governing sales of tobacco products to minors within a period of less than two years.

These four violations undergird CTP's civil money penalty determination. The penalty of \$2,236 that CTP proposes is the maximum penalty allowed by law for the violations committed by Respondent. 42 C.F.R. § 17.2; 45 C.F.R. § 102.3. The evidence establishes that Respondent continued to make unlawful sales notwithstanding a previous warning from CTP and the imposition of sanctions for Respondent's past violations of regulations. CTP Ex. 1 at 1.

¹ Two violations were documented on January 20, 2016 (sale to a minor and failure to verify the minor's identification), and one on June 6, 2016 (sale to a minor). 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.

The seriousness of Respondent's unlawful conduct is illustrated not just by the fact that it made repeated sales to minors but also by the nature of the product that it sold and the persons to whom it sold that product. Tobacco is a highly addictive and dangerous product. The reason that sales of tobacco products to minors is unlawful is that consumption of these products at an early age can lead to a lifetime of addiction, to illness, and ultimately to premature death. Sales of tobacco products to minors are unlawful because younger individuals often lack the maturity and judgment to make informed decisions about whether to consume such inherently dangerous and addictive products. Selling tobacco products to these individuals puts them at risk for all of the adverse consequences that addiction can cause.

In its answer to CTP's administrative complaint, Respondent argues that it actively seeks to assure that its employees do not sell tobacco products to minors. It contends that it trains all of its employees for a period of four weeks so that they understand their responsibilities.

That doesn't, however, gainsay the fact that Respondent repeatedly made unlawful tobacco sales. I do not find that Respondent's efforts to comply mitigate the seriousness of Respondent's conduct and they do not justify reducing the penalty that CTP determined to impose.

_____/s/_____
Steven T. Kessel
Administrative Law Judge