

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant

v.

Johnston Gas, Inc.  
d/b/a Food Mart / Mediterranean Grocery,

Respondent.

Docket No. T-17-2337  
FDA Docket No. FDA-2017-H-0962

Decision No. TB2930

Date: July 27, 2018

**INITIAL DECISION**

I sustain the determination of the Center for Tobacco Products (“CTP”) of the United States Food and Drug Administration (“FDA”) to impose a civil money penalty of \$5501 against Respondent, Johnston Gas, Inc. d/b/a Food Mart/Mediterranean Grocery.

**I. Background**

Respondent requested a hearing in order to challenge CTP’s determination to impose a civil money penalty. I held a hearing by telephone on May 23, 2018. *See* Transcript (Tr.) At the hearing, I received into evidence 15 exhibits from CTP, identified as CTP Ex. 1 - CTP Ex. 15. Tr. 6. These exhibits include the written direct testimony of an FDA-commissioned Inspector, Frank Levesque (CTP Ex. 4). Respondent offered no exhibits. Prior to the hearing, I received briefs from CTP and Respondent. *See* CTP’s Informal Brief (“Br.”); Respondent’s Informal Br. CTP also filed a post-hearing brief. CTP’s Post-hearing Br.

## II. Issues, Findings of Fact and Conclusions of Law

### A. Issues

The issues are whether:

1. Respondent sold cigarettes or smokeless tobacco (tobacco products) to a minor on September 1, 2016, and failed to verify, by means of photo identification containing a date of birth, that the purchaser was 18 years of age or older, in violation of 21 C.F.R. §§ 1140.14(a)(1) and (a)(2)(i)<sup>1</sup>; and
2. A civil money penalty of \$5501 is a reasonable remedy.

### 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). 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)(i).

This case constitutes the second time that CTP has imposed or seeks to impose a civil money penalty against Respondent. CTP previously filed an administrative complaint against Respondent charging it with unlawful sales of tobacco products to minors and failures to verify the purchasers' ages by means of photographic identification. *See* CTP Ex. 1. That complaint proposed the imposition of a civil money penalty against Respondent, charging it with three violations of applicable regulations.<sup>2</sup> Respondent admitted to the allegations and the case became administratively final. *See* Complaint ¶ 11; CTP's Informal Br. at 3 n.2; CTP's Post-hearing Br. at 3 n.1

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<sup>1</sup> On August 8, 2016, the citations to certain tobacco violations changed. For more information see: <https://federalregister.gov/a/2016-10685>.

<sup>2</sup> The sales and failures to check identification asserted in the first CTP complaint against Respondent transpired on April 2, 2015, and on September 1, 2015. *See* CTP Ex. 1 ¶¶ 9-10. Although there were a total of four violations identified by that complaint, CTP, as a matter of administrative discretion, opted to treat the two violations occurring on April 2, 2015, as a single violation. Thus, CTP premised the first civil money penalty on three violations of relevant regulations. *Id.* ¶ 1.

CTP bases its present case on the results of an inspection of Respondent's facility, conducted on September 1, 2016. *See* Complaint ¶ 8; CTP Ex. 4. Mr. Levesque, an FDA commissioned inspector, testified that on September 1, 2016, he went to Respondent's establishment accompanied by a minor who was employed for the purpose of attempting to purchase tobacco products from business establishments under inspection. CTP Ex. 4 at 2. He testified that he verified that the minor did not carry tobacco products on her person nor did she have photographic identification with her. *Id.* Mr. Levesque testified that he parked "directly across the street" from Respondent's establishment. Tr. 13. He testified that the chaperone and he remained in the vehicle after the minor exited, because he felt that his "presence would compromise the undercover nature of the inspection." CTP Ex. 4 at 3. He averred that he watched the minor as she left his car, entered the store, and returned very shortly thereafter with a package of cigarettes in her possession. *Id.*; *see* Tr. 15-22. He corroborated his testimony with photographs of the package of cigarettes that the minor gave to him when she returned to his vehicle. CTP Ex. 8; CTP Ex. 9.

If credible, Mr. Levesque's testimony, plus the corroborating photographs, prove that on September 1, 2016, Respondent sold cigarettes to a minor purchaser and failed to verify the minor's age by photographic identification, in violation of applicable regulations. The only reasonable inference that I can draw from the testimony and corroborating photographs is that the minor, who entered the store without identification or cigarettes on her possession and who returned to Mr. Levesque with a package of cigarettes, purchased the cigarettes in Respondent's establishment.

I find Mr. Levesque's testimony to be credible. The evidence establishes that he had an unobstructed view of Respondent's establishment, foreclosing the possibility that the minor could have obtained cigarettes from some other location. Tr. at 13-15. Moreover, Mr. Levesque eliminated the possibility that the minor could have been carrying cigarettes on her person when she entered the store, because he instructed her to leave her handbag and bulky clothing in his vehicle during her encounter at Respondent's establishment and because he had her turn out her pockets prior to entering that establishment. Tr. at 22-23.

Respondent offered no evidence to rebut that which CTP offered. It concedes that, perhaps, Respondent's son may have inadvertently sold cigarettes to a minor on September 1, 2016, but that this sale would not have been a violation of regulations because it was not intentional. *See* Respondent's Informal Br. at 5. I disagree. The regulations governing unlawful sales of tobacco products explicitly make certain transactions unlawful. It is not necessary to establish that an establishment willfully sold tobacco products to a minor in order to prove a violation. It is sufficient only to prove that an unlawful transaction occurred. Moreover, even if Respondent's son made a mistake in selling cigarettes to a minor he could have avoided that error simply by asking the minor to produce her identification.

CTP proved that it is more likely than not that Respondent violated regulations governing the sale of tobacco products to minors, committing five violations during a one-year period. That is egregious conduct. Regulations authorize a penalty of up to \$5501 for the violations committed by Respondent. 45 C.F.R. § 102.3; 21 U.S.C. § 333(f)(9).

The egregiousness of Respondent's conduct amply justifies the penalty amount. I take notice that tobacco products are highly addictive and dangerous to the health of those who consume them. They may have lethal long-term effects on consumers. Younger purchasers are highly susceptible to becoming addicted. A penalty of \$5501 is plainly reasonable given the dangers of tobacco products and Respondent's repeated unlawful sales of these products to minor purchasers.

Respondent contends that it is unable to afford this penalty and that having to pay it would jeopardize its ability to remain in business. *See* Respondent's Informal Br. at 4. However, Respondent offered no evidence to support this assertion. I do not find it to be credible in the absence of proof.

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/s/  
Steven T. Kessel  
Administrative Law Judge