

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2018-H-0819)

Complainant

v.

La Libertad Market Cafeteria Inc.
d/b/a La Libertad Market Cafeteria,

Respondent.

Docket No. T-18-1402

Decision No. TB3013

Date: August 17, 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 \$559 against Respondent, La Libertad Market Cafeteria Inc. d/b/a La Libertad Market Cafeteria.

I. Background

Respondent requested a hearing in order to challenge CTP’s determination to impose a civil money penalty. CTP filed a pre-hearing exchange consisting of a brief and 22 proposed exhibits that are identified as CTP Ex. 1 - CTP Ex. 22. Respondent filed no proposed exhibits but filed a written statement opposing CTP’s determination. On July 26, 2018, I sent an order to the parties directing Respondent to advise whether it desired an in-person hearing for the purpose of objecting to my receiving any of CTP’s proposed exhibits and cross-examining any of CTP’s witnesses. Respondent did not reply to my order.

I decide this case based on the parties' written submissions.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether:

1. Respondent sold tobacco products to minor purchasers in violation of federal regulations governing the sale of tobacco products; and
2. A civil money penalty of \$559 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 is a violation of implementing regulations. 21 C.F.R. § 1140.14(a)(1). Failure to verify the age of a purchaser of tobacco products by means of photographic identification also is a violation of implementing regulations. 21 C.F.R. § 1140.14(a)(2)(i).

CTP premises its case on the results of inspections of Respondent's facility, conducted on July 15, 2017, and February 8, 2018. Krystle Kirkland-Mobley, an FDA-commissioned inspector, stated in written direct testimony that she went to Respondent's establishment on July 15, 2017, accompanied by a minor. CTP Ex. 5 at 2. The inspector confirmed that the minor had no tobacco products in his/her possession and that the minor had state-issued photographic identification. *Id.* Ms. Kirkland-Mobley testified that she accompanied the minor into the Respondent's establishment. She observed Respondent's employee sell a package of cigarettes (Marlboro cigarettes) directly to the minor without checking the minor's photographic identification. *Id.* at 3. Immediately after the sale, Ms. Kirkland-Mobley made photographs of the package of cigarettes that she had observed being sold to the minor. *Id.*; *see* CTP Ex. 10; CTP Ex. 11.

A second FDA-commissioned inspector, Jessie Carry, testified that, on February 8, 2018, she went to Respondent's establishment accompanied by a minor. CTP Ex. 6. Ms. Carry averred that she determined that the minor had no tobacco products in his/her possession and had photographic identification. *Id.* at 2-3. Ms. Carry testified that she remained outside of Respondent's establishment while the minor entered it. *Id.* at 3. She observed

the minor exit Respondent's establishment a few minutes after entering it with a tobacco product in his/her hand (Newport cigarettes). *Id.* Ms. Carry photographed the cigarettes immediately after the minor delivered them to her. *Id.*; *see* CTP Ex. 17; CTP Ex. 18.

I find the inspectors' testimony to be credible absent any rebuttal evidence. There is no evidence to rebut Ms. Kirkland-Mobley's eyewitness account of an unlawful sale of tobacco products and a failure to check identification on July 15, 2017. Neither is there evidence to rebut what Ms. Carry testified she observed on February 8, 2018.

From Ms. Carry's testimony I infer that Respondent sold tobacco products to a minor purchaser. That is the only reasonable inference that I may draw from the fact that the minor entered Respondent's establishment without tobacco products in his/her possession and emerged with them. I also infer that Respondent's employee failed to check the photographic identification of the minor purchaser. That inference emanates from the fact that the minor was able to purchase cigarettes on February 8, 2018. Had Respondent's employee checked the minor's identification on that date, then, the employee would have known that the minor was underage and, presumably, would not have sold tobacco products to that individual.

There is ample corroboration of the inspectors' testimony in the photographs of the cigarettes that were purchased by minors on July 15, 2017 and February 8, 2018. CTP Ex. 10; CTP Ex. 11; CTP Ex. 17; CTP Ex. 18.

Respondent denies that its employees made unlawful sales of tobacco products to minors or failed to check minors' identification. However, Respondent has offered no evidence to prove that its sales were lawful nor, as I have explained, has Respondent offered evidence to rebut any of the evidence introduced by CTP.

CTP has proven that it is more likely than not that Respondent violated regulations governing the sale of tobacco products to minors, committing three violations during a period of less than one year.¹ That is egregious conduct. Regulations authorize a penalty of up to \$559 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 must justify the penalty amount. On two occasions within less than a year, Respondent sold tobacco products to minor purchasers in violation of the law. On both occasions Respondent also violated the law by failing to check the photographic identification of minor purchasers. It committed its February 8, 2018 violations despite being warned by CTP after the July 15, 2017 violations that it would impose penalties against Respondent for future violations.

¹ For purposes of determining a civil money penalty amount CTP opted to count the two violations that occurred on July 15, 2017 as a single violation.

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 \$559 is plainly reasonable given the dangers of tobacco products and Respondent's repeated violations of regulations governing sales of these products to minor purchasers.

/s/

Steven T. Kessel
Administrative Law Judge