

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Darlington Food and Beverage Inc.
d/b/a Darlington Food Store,

Respondent.

Docket No. T-17-4898
FDA Docket No. FDA-2017-H-3789

Decision No. TB2299

Date: December 14, 2017

INITIAL DECISION

I grant summary judgment in favor of the Centers for Tobacco Products of the United States Food and Drug Administration (“CTP”), authorizing it to impose a civil money penalty of \$5,591 against Respondent, Darlington Food and Beverage, Inc. d/b/a Darlington Food Store

I. Background

On October 20, 2017, CTP filed a Motion for Summary Decision (“motion”), contending that there are no disputed issues of material facts. On October 26, 2017, a letter issued at my direction allowed Respondent until November 29, 2017, to file an opposition to CTP’s motion. Respondent filed no opposition to the motion. CTP offered exhibits in support of its motion. *See* CTP Exs. 1-5. Respondent and CTP both filed pre-hearing briefs before CTP filed its motion. *See* Informal Brief of Complainant and Informal Brief of Respondent. It is unnecessary that I admit these exhibits as evidence inasmuch as

there are no disputed issues of fact in this case.¹ However, I refer to them where appropriate in order to illustrate certain undisputed facts.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether:

1. The undisputed material facts establish that Respondent sold tobacco products (cigarettes) to a minor in violation of federal law;
2. A civil money penalty of \$5,591 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). The Food and Drug Administration and its 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. § 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 implementing regulations. 21 C.F.R. §§ 1140.14(a)(1) and (a)(2).²

The undisputed material facts – not denied by Respondent – establish that Respondent violated these regulations in five instances on four occasions. *See* Complaint ¶¶ 1, 9, 11. On December 31, 2014, Respondent unlawfully sold a package of cigarettes to a minor and unlawfully failed to verify that individual's identification. CTP Ex. 1. CTP exercised discretion to treat these first two instances as a single event and sent a warning letter to Respondent. Notwithstanding, on June 14, 2015, Respondent again sold cigarettes to a minor. CTP Ex. 2 ¶ 9. CTP determined to impose a civil money penalty

¹ While Respondent initially denied the allegations in its July 21, 2017 Answer, Respondent subsequently admitted the allegations in its pre-hearing brief. *See* Informal Brief of Respondent at 3-4, 8.

² These regulations were recodified in their present form on August 6, 2016. Prior to that date, the regulations were codified at 21 C.F.R. §§ 1140(a)(1) and (b)(1).

against Respondent for this violation. Respondent and CTP subsequently settled the matter.

On December 18, 2015, Respondent again unlawfully sold a package of cigarettes to a minor. CTP Ex. 4 ¶ 8. CTP determined to impose a second civil money penalty against Respondent. Once more, the parties settled the matter.

Then, on March 8, 2017, Respondent once more unlawfully sold cigarettes to a minor and failed to verify that purchaser's identification. Complaint ¶ 9. It is these fourth and fifth regulatory violations that are the basis for CTP's current determination to impose a civil money penalty against Respondent.

As I have stated, Respondent disputes none of the aforesaid facts. In its pre-hearing brief it argued that CTP is unlawfully "double counting" violations in order to arrive at a total of five instances of unlawful acts. *See* Informal Brief Respondent at 7-8. Respondent contends that instances in which it sold cigarettes unlawfully to a minor and failed to check that purchaser's identification must be counted as a single violation rather than as two regulatory violations because the actions all emanate from a single transaction – the sale of tobacco products to a minor. *See id.*

That argument has been advanced in many cases and has been uniformly rejected. In *Orton Motor Co., d/b/a Orton's Bagley*, DAB No. 2717 (2016) an appellate panel of the Departmental Appeals Board found that it was consistent with regulatory and statutory provisions that the unlawful sale of tobacco products to a minor and failure to check identification be counted as separate violations. Doing so is not only consistent with statutory and regulatory language but it makes sense. If a retailer fails to check a purchaser's identification, that retailer may unlawfully sell a tobacco product to a minor without realizing that the purchaser is under the lawful age for tobacco sales.

Under applicable regulations the maximum civil money penalty that CTP may impose in this case is \$5,591, based on Respondent's five violations. 21 C.F.R. § 17.2. CTP determined to impose the maximum amount here based on the fact that Respondent has violated the law. I find the penalty amount to be entirely reasonable given Respondent's repeated and frequent transgressions.

/s/
Steven T. Kessel
Administrative Law Judge