

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Ozark Supermarket, Inc.
d/b/a Murfin's Market,

Respondent.

Docket No. T-16-1173
FDA Docket No. FDA-2016-H-1885

Decision No. TB716

Date: January 11, 2017

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 \$11,000 against Respondent, Ozark Supermarket, Inc., d/b/a Murfin's Market.

I. Background

Respondent requested a hearing in order to challenge CTP's determination to impose an \$11,000 civil money penalty against it. CTP filed a brief plus five proposed exhibits that are identified as CTP Ex. 1- CTP Ex. 5. Respondent filed a brief plus six proposed exhibits that are identified as Respondent's Exhibit 1-Respondent's Ex. 6.

I held a pre-hearing conference by telephone at which the parties concurred that an in-person hearing would be unnecessary. Consequently, I decide this case based on the parties' written exchanges.

I receive the parties' proposed exhibits into evidence.

II. Issues, Findings of Fact and Conclusions of Law

A. Issue

The issue is whether a civil money penalty of \$11,000 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). FDA 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), (b)(1).

Respondent admits that it sold tobacco products unlawfully to minors and it admits also that its staff unlawfully failed to check the photographic identification of minors seeking to purchase tobacco products. It argues, however, that the proposed civil money penalty of \$11,000 is unreasonable. It asserts two contentions: first, that CTP improperly double counted violations in order to make it seem as if Respondent violated applicable regulations more frequently than it did; and second, that a penalty of \$11,000 is unreasonable in light of Respondent's sincere efforts to assure that it complies with the law.

I find both of these arguments to be unpersuasive.

Respondent's double counting argument is that CTP improperly asserts two violations of the law where a retailer sells a tobacco product unlawfully to a minor and at the same time fails to check the minor's photographic identification. Respondent contends that such events really constitute only a single transaction – the unlawful sale of tobacco products – and that it defies reality to split that transaction into components.

An appellate panel of the Department Appeals Board addressed that identical argument in *Orton Motors Co. d/b/a Orton's Bagley*, DAB No. 2717 (2016) and rejected it. As a matter of law an unlawful sale and an unlawful failure to check identification are separate violations of regulations and CTP may treat each violation as an independent basis for

imposing a remedy. The law not only permits these acts to be treated as separate transgressions but it makes sense to do so. That is because failure to check identification plainly is separable from an unlawful sale. A retailer could fail to check customers' identification and thereby sell tobacco products to minors without ever intentionally selling these products to underage persons. By the same token, a retailer could check identification and nevertheless willfully sell tobacco products to underage individuals.

Respondent made unlawful sales of tobacco products to minors or failed to check individuals' identification six times within a 48-month period, all in violation of 21 C.F.R. §§ 1140.14(a) and 1140.14(b)(1). It admitted unlawfully selling a tobacco product to a minor on April 11 and September 16, 2014, and on May 26, 2015. It admitted failing to check a minor's identification on September 16, 2014. Most recently, Respondent sold a tobacco product unlawfully to a minor on January 4, 2016 and failed to check that individual's identification on that date. CTP Ex. 1; CTP Ex. 2.

These admitted violations undergird CTP's civil money penalty determination. The penalty that CTP proposes is the maximum penalty allowed by law for the violations that admittedly occurred. 42 C.F.R. § 17.2. CTP warned Respondent repeatedly that its continued violations of law might result in the imposition of substantial civil money penalties. CTP not only sent a letter warning Respondent of the consequences of its unlawful actions but it filed a previous administrative action against Respondent sanctioning it for its earlier transgressions of law. CTP Ex. 3. Respondent continued to make unlawful sales notwithstanding these repeated warnings and sanctions.

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.

Respondent argues that it has made sincere efforts to prevent unlawful sales of tobacco products to minors. It asserts that it has been diligent in attempting to avoid unlawful sales of such products since the 1990s. It contends that it thoroughly retrained its staff in June 2015 after having received a notice of violation from CTP. It argues that it modified its register system to make it difficult for its employees to sell tobacco products unlawfully. It suggests that one employee was responsible for unlawful sales that it made after December 2015 and it avers that it terminated this individual's employment.

