

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Hartmann's Moonshine Shoppe, LLC
d/b/a The Moonshine Shoppe,

Respondent.

Docket No. C-15-2868
FDA Docket No. FDA-2015-H-2034

Decision No. CR4625

Date: June 6, 2016

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 \$500 against Respondent, Hartmann's Moonshine Shoppe, LLC d/b/a The Moonshine Shoppe.

I. Background

Respondent requested a hearing in order to challenge CTP's determination to impose a \$500 civil money penalty against it. I held a hearing by telephone on February 16, 2016. At the hearing I received exhibits into evidence from CTP that are identified as CTP Ex. 1-CTP Ex. 12. I heard the cross-examination testimony of Vicki Berg, an inspector working on behalf of CTP. Respondent offered no exhibits.

CTP filed a pre-hearing brief in support of its position. Respondent also filed a brief in support of its position.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether Respondent violated regulations governing the sale of tobacco products to minors and whether a civil money penalty of \$500 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). It is also a violation for a business that offers access to minors to maintain a self-service display of tobacco products. 21 C.F.R. § 1140.16(c). There is no dispute that Respondent offers tobacco products for sale to the public. At issue in this case is whether Respondent unlawfully: maintained a self-service display of tobacco products; sold a tobacco product to a minor; and failed to check the identification of a minor purchaser of tobacco products.

CTP's case against Respondent rests primarily on the testimony of Ms. Berg, an agent employed on behalf of CTP to perform inspections of businesses that sell tobacco products, and corroborating evidence consisting of photographs of tobacco products. CTP Ex. 4; CTP Ex. 8; CTP Ex. 9.

I find Ms. Berg's testimony to be credible and unbiased. Ms. Berg testified that on October 30, 2014, she entered Respondent's establishment. CTP Ex. 4 at 2-3. She observed a customer-accessible display of tobacco products inside the establishment. *Id.* at 3. She observed no physical barriers that would deny customers access to the products in the display. *Id.* She confirmed via a conversation with one of Respondent's employees that Respondent allowed unaccompanied minors to enter its premises. *Id.* Ms. Berg corroborated her

testimony with a photograph that she took of Respondent's display of tobacco products. CTP Ex. 9.

On February 11, 2015, Ms. Berg re-inspected Respondent's premises. CTP Ex. 4 at 3. On this occasion a minor under Ms. Berg's supervision accompanied her. She personally observed the minor purchase a package of cigarettes from one of Respondent's employees. *Id.* at 4. The employee failed to check the minor's identification. *Id.* Ms. Berg corroborated her testimony with a photograph that she took of the cigarettes purchased by the minor on that date. CTP Ex. 8.

Respondent offered no evidence to challenge Ms. Berg's testimony or the corroborating photographs. Respondent's only defense was to aver on the record of the hearing that both Respondent's owner and his brother (the individual who sold cigarettes to the minor on February 11, 2015) knew who Ms. Berg was and neither would have been so stupid as to sell cigarettes to a minor in her presence. Tr. at 10. I do not find that to be a credible defense given the overwhelming evidence presented by CTP.

CTP determined to impose a civil money penalty of \$500. That is the maximum penalty amount authorized by regulations. 21 C.F.R. § 17.2. I find that amount to be reasonable.

Respondent's violations are egregious. After the first unlawful transaction CTP sent a warning letter to Respondent putting it on notice that it had been found in violation of law. Yet, Respondent sold tobacco products unlawfully and failed to check a minor's identification less than four months after the initial violation and less than three months after it had received CTP's warning letter. I can only conclude from this conduct that Respondent willfully disregarded its obligations not to sell tobacco products to minors.

Tobacco products are addictive and highly dangerous. Selling these products to minors is not only a blatant violation of law but it endangers these individuals' health and safety. Given that, and Respondent's egregious violations, a civil money penalty of \$500 is eminently reasonable.

Respondent stipulated that it has the wherewithal to pay the penalty amount. CTP Ex. 12. Therefore, there is no issue in this case of whether Respondent is capable of paying the penalty.

/s/

Steven T. Kessel
Administrative Law Judge