

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Ricky Brown Sr.
d/b/a Morgan's Grocery,

Respondent.

Docket No. C-14-1443
FDA Docket No. FDA-2014-H-0952

Decision No. CR3367

Date: September 12, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Ricky Brown Sr. d/b/a Morgan's Grocery, alleging facts and legal authority sufficient to justify imposing a civil money penalty of \$500. Respondent did not timely answer the Complaint, nor did Respondent request an extension of time within which to file an Answer. Therefore, I enter a default judgment against Respondent and order that Respondent pay a civil money penalty in the amount of \$500.

CTP began this case by serving a Complaint on Respondent and filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent's staff unlawfully sold cigarettes to minors and failed to verify, by means of photo identification containing a date of birth, that cigarette purchasers were 18 years of age or older, thereby violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations, found at 21 C.F.R. pt. 1140. CTP seeks a civil money penalty of \$500.

On July 14, 2014, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. In the Complaint and accompanying cover letter, CTP explained that within 30 days Respondent should pay the penalty, file an answer, or request an extension of time within which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days an Administrative Law Judge could issue an initial decision by default ordering Respondent to pay the full amount of the proposed penalty. 21 C.F.R. § 17.11.

Respondent has not filed an answer within the time provided by regulation, nor has it requested an extension. Therefore, pursuant to 21 C.F.R. § 17.11(a), I am required to issue an initial decision by default if the Complaint is sufficient to justify a penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

For purposes of this decision, I assume the facts alleged in the Complaint are true. 21 C.F.R. § 17.11(a). Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns Morgan's Grocery, an establishment that sells tobacco products and is located at 1193 Gershal Avenue, Elmer, New Jersey 08318¹. Complaint ¶ 3.
- During an inspection of Respondent's establishment on July 11, 2013, at approximately 3:28 PM, an FDA-commissioned inspector observed that "a person younger than 18 years of age was able to purchase a package of Newport Box 100s cigarettes . . . [.]" The inspector also observed that "the minor's identification was not verified before the sale" Complaint ¶ 10.
- On August 15, 2013, CTP issued a Warning Letter to Respondent regarding the inspector's observations from July 11, 2013. The letter explained that the observations constituted violations of regulations found at 21 C.F.R. § 1140.14(a) and (b)(1), and that the named violations were not necessarily intended to be an exhaustive list of all violations at the establishment. The Warning Letter went on to state that if Respondent failed to correct the violations, regulatory action by the

¹ My office sent an Initial Order Establishing Procedures to the Respondent twice at this address indicating that it must respond to CTP's Complaint within 30 days or the Administrative Law Judge assigned to this case would decide this matter without a hearing. The United States Postal Service returned both of our mailings as undeliverable. However, CTP filed Proof of Service of their Complaint and cover letter, the latter of which informed the Respondent that it must take action within 30 days after delivery of the Complaint. Therefore, the Respondent has notice of the Complaint and is subject to default.

FDA or a civil money penalty action could occur and that Respondent is responsible for complying with the law. Complaint ¶ 10.

- Although UPS records indicate that an individual named “Morgan” received the Warning Letter, CTP did not receive a response to the Warning Letter. Complaint ¶ 11
- During a subsequent inspection of Respondent’s establishment conducted on December 19, 2013, FDA-commissioned inspectors documented that “a person younger than 18 years of age was able to purchase a package of Newport Box cigarettes . . . at approximately 4:34 PM[.]” The inspector also observed that “the minor’s identification was not verified before the sale” Complaint ¶ 1.

These facts establish that Respondent is liable under the Act. The Act prohibits misbranding of a tobacco product. 21 U.S.C. § 331(k). A tobacco product is misbranded if sold or distributed in violation of regulations issued under section 906(d) of the Act. 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R § 1140.1(b). The regulations prohibit the sale of cigarettes or smokeless tobacco to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a). The regulations also require retailers to verify, by means of photo identification containing a purchaser’s date of birth, that no cigarette purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1).

Taking the above alleged facts as true, Respondent violated the prohibition against selling cigarettes to persons younger than 18 years of age, 21 C.F.R. § 1140.14(a), on July 11, 2013 and December 19, 2013. On those same dates, Respondent also violated the requirement that retailers verify, by means of photo identification containing a purchaser’s date of birth, that no cigarette purchasers are younger than 18 years of age. 21 C.F.R. § 1140.14(b)(1). Therefore, Respondent’s actions constitute violations of law that merit a civil money penalty.

CTP has requested a fine of \$500, which is a permissible fine under the regulations. 21 C.F.R. § 17.2. Therefore, I find that a civil money penalty of \$500 is warranted and so order one imposed.

/s/
Steven T. Kessel
Administrative Law Judge