

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products

v.

James S. Zimmerman d/b/a Beverage Mart,

Respondent

Docket No. C-12-754
FDA Docket No. FDA-2012-H-0538

Decision No. CR2573

Date: July 27, 2012

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving a complaint on Respondent, James S. Zimmerman, doing business as Beverage Mart, at 1021 Kingshighway Street, Rolla, MO 65401, and by filing a copy of the complaint with the Food And Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that Beverage Mart impermissibly sold tobacco products to a minor and failed to verify the age of a person purchasing tobacco products, violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations, 21 C.F.R. Part 1140, and seeks a \$500 civil money penalty.

As provided for in 21 C.F.R. §§ 17.5 and 17.7, on June 6, 2012, CTP served the complaint on Respondent Beverage Mart by United Parcel Service. In the complaint and accompanying cover letter, CTP explained that, within 30 days, Respondent Beverage Mart should pay the penalty, file an answer, or request an extension of time in which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days, the Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision ordering it to pay the full amount of the proposed penalty.

Respondent Beverage Mart has not filed an answer within the time prescribed. Pursuant to 21 C.F.R. § 17.11, I assume that the facts alleged in the complaint (but not its conclusory statements) are true. Specifically:

- At Beverage Mart on January 28, 2012, an FDA-commissioned inspector observed the sale of smokeless tobacco to a person younger than 18 years of age;
- At Beverage Mart on January 28, 2012, an FDA-commissioned inspector observed staff's failure to verify prior to sale, by means of photo identification containing the bearer's birth date, the age of a person purchasing tobacco products;
- On May 24, 2011, an FDA-commissioned inspector observed the sale of smokeless tobacco or cigarettes to a person younger than 18 years of age;
- In a warning letter dated August 18, 2011, the CTP informed Respondent Beverage Mart of the inspector's May 24, 2011 observations, and that such sales violate federal law, 21 C.F.R. § 1140.14(a). The letter further warned that Beverage Mart's failure to correct its violation[s] could result in a civil money penalty or other regulatory action;

These facts establish Respondent Beverage Mart's liability 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. § 387f(d). *See* 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R. § 1140.1(b). Under 21 C.F.R. § 1140.14(a), no retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age. Under 21 C.F.R. § 1140.16(c)(1), a retailer may sell cigarettes and smokeless tobacco only in a direct, face-to-face exchange between retailer and consumer. Sales by means of self-service displays are explicitly prohibited.

A \$500 civil money penalty is permissible under 21 C.F.R. § 17.2.

Order

For these reasons, I enter default judgment in the amount of \$500.00 against Respondent Beverage Mart. Pursuant to 21 C.F.R. § 17.11(b), this order becomes final and binding upon both parties within 30 days of the date of its issuance.

/s/
Carolyn Cozad Hughes
Administrative Law Judge