

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

American Gas and Oil, Inc.
d/b/a AGO 3 / 36th Street Citgo,

Respondent.

Docket No. T-17-4298
FDA Docket No. FDA-2017-H-3139

Decision No. TB2140

Date: November 3, 2017

DECISION

I sustain the determination of the Center for Tobacco Products (CTP) to impose a civil money penalty of \$5591 against Respondent, American Gas and Oil, Inc. d/b/a AGO3 / 36th Street Citgo.

I. Background

CTP moved for summary judgment against Respondent, asserting that there are no disputed issues of material fact and contending that the only outstanding issues are legal in nature. Respondent opposed the motion, stating its arguments in the informal brief that it filed with its pre-hearing exchange.

It is unnecessary that I decide whether the traditional criteria for summary judgment are met here. CTP offered no exhibits in support of its motion, relying on admissions that Respondent made in its answer to CTP's complaint. Respondent offered a single exhibit,

which appears to be an excerpt from an administrative law judge's decision. I find no need to admit that exhibit inasmuch as the entire decision that Respondent excerpts is a matter of public record. There is no need to schedule a hearing in this case inasmuch as there are no exhibits of record and because neither CTP nor Respondent offered witness testimony. I decide this case based on the parties' arguments and also on the admissions made by Respondent in its answer to CTP's complaint.

II. Issue, Findings of Fact and Conclusions of Law

A. Issue

The issue in this case is whether a civil money penalty of \$5591 is reasonable.

B. Findings of Fact and Conclusions of Law

CTP bases its penalty determination on allegations, admitted by Respondent, that Respondent unlawfully sold tobacco products to minors and unlawfully failed to verify the identification of minor purchasers of tobacco products. These transgressions contravene regulations governing sales of tobacco products at 21 C.F.R. §§ 1140.14(a)(1) (unlawful sales of tobacco products to minors) and 1140.14(a)(2)(i) (failure to verify the age of a customer purchasing tobacco products by means of photographic identification containing the bearer's date of birth).

Specifically, CTP asserts that Respondent committed five violations within a period of 36 months. The first three of these violations were addressed in a default judgment entered against Respondent. Initial Decision and Default Judgment, FDA Docket No. FDA-2016-H-2392, CRD Docket No. T-16-1590. In that judgment, Respondent was found liable for: (1) selling cigarettes or smokeless tobacco to a minor on April 1, 2015; (2) selling cigarettes or smokeless tobacco to a minor on February 5, 2016; and (3) failing to verify the age of a minor purchaser on that same date.

In its present complaint CTP alleges – and Respondent admits – two additional regulatory violations. These consist of selling cigarettes to a minor on February 18, 2017 and failing to verify the minor's age on that same date.

CTP asserts that the three regulatory violations addressed by the default judgment plus the two additional violations add up to a total of five violations, justifying the \$5591 civil money penalty that CTP determined to impose. The penalty amount is the maximum permitted by regulations. 21 C.F.R. § 17.2; 45 C.F.R. § 102.3.

The penalty amount is reasonable on its face. Respondent repeatedly sold a highly addictive and inherently dangerous product to minors and failed to check these purchasers' identification. The risks of using tobacco products are well documented.

Sales of tobacco products to minors are unlawful precisely because younger individuals are more susceptible to making decisions that will endanger their lives down the road. Retailers who choose to sell a highly dangerous and addictive product such as tobacco bear a heavy burden to assure that they make their sales in compliance with law. Repeated failure to comply justifies the significant penalty that CTP determined to impose in this case.

Respondent makes three arguments for mitigation of the penalty. It argues, first, that CTP is in effect, double counting the violations that Respondent committed on February 18, 2017 in order to find a total of five regulatory violations. 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.

Second, Respondent contends that CTP's penalty determination is unreasonable in light of Respondent's extensive efforts to assure compliance with applicable regulations. It asserts that it has spent between \$25,000 and \$30,000 on compliance measures. It contends that it has done all that it practicably can do to assure compliance and that any violations are due to its employees' failures to follow directions.

I do not find this argument justifies mitigation of the penalty amount. Respondent is not obligated to sell tobacco products to anyone. Once it makes the decision to sell such an inherently dangerous product it assumes the duty to assure that it complies fully with the applicable law and regulations. That Respondent may have intended to comply and was thwarted by the actions of its employees is not an excuse.

Finally, Respondent asserts that there are possible irregularities in the way that CTP inspects facilities, including Respondent's facility that suggest that CTP is inspecting facilities in a way that it intends to maximize imposition of penalties. I find this argument to be without merit. How CTP conducts its inspections is irrelevant to the issue

