

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant

v.

Family Diskount Food Stores Inc.,

Respondent.

Docket No. C-15-2662  
FDA Docket No. FDA-2015-H-1834

Decision No. CR4641

Date: June 23, 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 \$250 against Respondent, Family Diskount Food Stores, Inc.

**I. Background**

Respondent requested a hearing in order to challenge CTP's determination to impose a \$250 civil money penalty against it. I held a hearing by telephone on April 12, 2016. At the hearing I received exhibits into evidence from CTP that are identified as CTP Ex. 1-CTP Ex. 9. I heard the cross-examination testimony of James Naso, an inspector working on behalf of CTP. I also received into evidence exhibits offered by Respondent that are identified as R. Ex. 1-R. Ex. 10.

CTP and Respondent filed briefs in support of their positions.

## 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 \$250 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).

There is no dispute that Respondent offers tobacco products for sale to the public. At issue in this case is whether Respondent unlawfully: sold tobacco products to a minor; and failed to check the identification of a minor purchaser of tobacco products.

CTP's case against Respondent rests on Mr. Naso's testimony as well as corroborating evidence. CTP Ex. 4. Mr. Naso testified that he visited Respondent's establishment on September 16, 2014 and January 27, 2015 in the company of a minor who was employed for the specific purpose of ascertaining whether retailers sold tobacco products to minors. He testified that on both occasions he verified that the minor had no tobacco products on her person before entering Respondent's establishment. *Id.* at 3-4. Mr. Naso averred that, on September 16, he observed the minor enter the store and return with a package of Camel Crush Menthol cigarettes. On January 27, he observed the minor enter the store and return with a package of Marlboro Gold Pack cigarettes. *Id.* Mr. Naso labeled the packages of cigarettes and photographed them. The photographs are in evidence as attachments to CTP Ex. 4. Finally, Mr. Naso testified that, on September 16, the minor reported to him that Respondent's employee had not verified her identification.

I find Mr. Naso's testimony to be credible and to be corroborated by photographic proof that the minor purchased cigarettes from Respondent on September 16, 2014 and January 27, 2015. Mr. Naso's testimony establishes that the minor had no cigarettes on her possession before entering the store on both occasions and had cigarettes upon leaving that establishment. Mr. Naso continuously observed the store while the minor was inside, eliminating the possibility that the minor could have obtained the cigarettes somewhere else while Mr. Naso awaited her return. Consequently, the only reasonable inference that I can draw from the evidence is that the minor obtained cigarettes from someone in the store. It is also reasonable to infer that a store employee failed to check the minor's identification on September 16, 2014 because that identification showed the minor to be underage. I infer that the store's employee would not have sold cigarettes to someone so clearly identified as a minor on that occasion.

Respondent asserts that it is being victimized by a government conspiracy to impose civil money penalties on it and other retailers. In my opening remarks at the hearing of this case I ruled that Respondent had offered no credible evidence of an alleged conspiracy. Respondent has not revived that argument.

Respondent also asserts that Mr. Naso's testimony is unreliable. At the hearing it argued that Mr. Naso could not have been certain that the minor was not carrying cigarettes prior to entering Respondent's establishment because Mr. Naso did not physically search the minor. However, Mr. Naso testified that the minor was wearing jeans that would have crushed any package of cigarettes that she possessed prior to entering the store and that the cigarettes that she produced upon exiting the establishment were not crushed. Tr. at 11-12. I find that this testimony buttresses Mr. Naso's credibility.

Respondent also asserts that the minor's recollection of what occurred in its establishment is unreliable hearsay. I agree that it is hearsay. However, I do not rely on the minor's account to find that Respondent sold cigarettes to her and failed to check her identification. I find that CTP established its case based entirely on what Mr. Naso observed personally coupled with the corroborating evidence that I have discussed.

Respondent contends that the initials marking the two packages of cigarettes are different, suggesting that there was some sort of tampering with the evidence. I find no basis for that assertion. The credible evidence is that after the purchases Mr. Naso sealed both packages of cigarettes in plastic containers and that he personally signed the containers. CTP Ex. 4, attachments.

CTP elected to impose a civil money penalty of \$250 against Respondent. That is the maximum allowed for Respondent's violations and I find it to be reasonable.

The evidence proves that Respondent's employees willfully sold a dangerous product – cigarettes – to a minor on two occasions. The willfulness of Respondent's actions is sufficient to justify the penalty amount. Respondent has not proven that it lacks the wherewithal to pay the civil money penalty.

/s/

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Steven T. Kessel

Administrative Law Judge