

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

West Front Andrew, LLC
d/b/a Andy's Smoking Shop,

Respondent.

Docket No. T-16-949
FDA Docket No. FDA-2016-H-1612

Decision No. TB957

Date: March 16, 2017

DECISION

I sustain the determination of the Centers for Tobacco Products of the United States Food and Drug Administration (CTP) to impose a civil money penalty of \$2,000 against Respondent, West Front Andrew LLC d/b/a Andy's Smoking Shop.

I. Background

Respondent requested a hearing in order to challenge CTP's determination to impose a \$2,000 civil money penalty against it. I held a hearing by telephone on February 8 and 10, 2017. At the hearing I received into evidence from CTP exhibits identified as CTP Ex. 1 - CTP Ex. 9 and exhibits from Respondent identified as R. Ex. A - R. Ex. F. I heard the cross-examination testimony of the following witnesses: Travis Brown, whose written declaration is in evidence as CTP Ex. 4; Buik Hong, whose written declaration is in evidence as R. Ex. E; and Michael Rice, whose written declaration is in evidence as R. Ex. F.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether:

1. Respondent offered or sold tobacco products (cigarettes) to a minor in violation of federal law;
2. A civil money penalty of \$2,000 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). The Food and Drug Administration 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).¹ Offering tobacco products for sale via a self-service display in a facility that is accessible to minors is also a violation of implementing regulations. 21 C.F.R. § 1140.16(c).

There is no dispute that Respondent operates a business that sells tobacco products to members of the public. CTP contends that Respondent violated the regulations in six respects on September 9 and December 8, 2015. Specifically, CTP asserts that on September 9 and December 8, 2015, Respondent unlawfully sold tobacco products to a minor and failed to verify the minor purchaser's identification. CTP contends also that Respondent unlawfully maintained self-service displays of tobacco products on September 9 and December 8, 2015.

Respondent tacitly admitted to having committed three of the asserted violations and offered no defense against CTP's allegation of a fourth violation. In its answer to CTP's administrative complaint Respondent did not deny that it had

¹ Certain of the regulations governing sales of tobacco products were recodified effective August 8, 2016. In this decision I cite to the regulations as they were codified prior to August 8, 2016 because all of Respondent's violations predated the recodification.

unlawfully sold tobacco products to a minor on September 9, 2015 or that it had failed to check the minor purchaser's identification on that date. Respondent also did not deny that it operated unlawfully a self-service display on September 9, 2015. Respondent's failure to deny these allegations effectively is an admission that they are true. 21 C.F.R. § 17.9(b)(1).²

Furthermore, Respondent admitted in its pre-hearing brief that it operated unlawfully a self-service display on September 9 and December 8, 2015. I find CTP's assertion that Respondent unlawfully operated a self-service display on these dates to be undisputed in light of Respondent's admission.³

That leaves to be decided only the questions of whether Respondent unlawfully sold a tobacco product to a minor purchaser on December 8, 2015 and failed to check the minor's identification on that date. I find that CTP's allegations of these violations are supported by the preponderance of the evidence.

CTP's evidence consists of Travis Brown's testimony and corroborating photographs. Mr. Brown has worked for five years as a police officer in the State of Alaska. He served also as a commissioned officer with a third party contractor charged with conducting inspections on behalf of the Food and Drug Administration in order to determine whether retailers are offering tobacco products for sale or selling them to minors in violation of the law. CTP Ex. 4 at 1. Mr. Brown conducted both the September 9 and December 8, 2015 inspections of Respondent's facility in the company of a state-contracted minor.

Mr. Brown testified that, on December 8, 2015, he went to Respondent's facility accompanied by the minor. Prior to the inspection Mr. Brown verified that the minor had photographic identification in her possession and that she did not have any tobacco products on her person. CTP Ex. 4 at 4. He testified that he remained outside of the facility as the minor entered, but that he was at a location where he

² In its pre-hearing brief Respondent seems to make arguments disputing the allegations of unlawful sales on September 9, 2015. I do not accept these arguments in light of Respondent's failure to deny these sales in its answer to CTP's complaint. In any event, I find Respondent's denial of unlawful sales on September 9 to be without merit and I discuss my reasons for making that finding, below.

³ One of Respondent's exhibits, R. Ex. D, is a photograph of what appears to be a display case. The door to the case has a padlock, which is unlocked in the photograph. I am uncertain as to Respondent's intent in offering this exhibit inasmuch as it did not contend that this display case is the sole display of tobacco products in its facility nor did it assert that it was locked on December 8, 2015.

had an unobstructed view of both the minor and Respondent's sales counter. *Id.* He watched the minor obtain a package of roll-your-own tobacco from a self-service display and purchase the tobacco from an employee of the facility. *Id.* He observed that the employee who conducted the transaction failed to verify the minor's photographic identification. *Id.*

Mr. Brown testified that he took possession of the tobacco product purchased by the minor immediately after she exited Respondent's facility on December 8. He observed that the product was Top tobacco. CTP Ex. 4 at 5. He made photographs of the product. CTP Ex. 4, App. L-P.

Respondent attempted to rebut this evidence through the testimony of Mr. Hong and Mr. Rice. I do not find that this evidence rebuts that which CTP presented.⁴

Mr. Hong testified that he has been Respondent's sole employee since Respondent's business was established in 2013. R. Ex. E at 1. He asserted that throughout Respondent's operation Top cigarette tobacco has always been offered at the same price, \$5.99 per package. *Id.* As corroboration, Respondent offered a photograph of a package of Top cigarette tobacco bearing a sticker showing an apparent sales price of \$5.99. R. Ex. C.

This testimony and the photograph are relevant because the package of Top cigarette tobacco that Mr. Brown testified that he obtained on December 8, 2015, bears a sticker with the designation "699." I infer that the number "699" is the retail price of the product. Respondent would have me conclude that Mr. Brown's testimony is unreliable because photographs of Top cigarette tobacco offered by CTP as corroboration of the unlawful sales of December 8, 2015 allegedly do not depict the product sold at Respondent's facility.

However, there are reasons to doubt the veracity of Mr. Hong's testimony. First, and as I state above, Respondent initially did not deny that it violated applicable restrictions on tobacco sales to minors on September 9, 2015. The product that Respondent tacitly admitted that it sold to a minor on that date was also Top

⁴ The evidence presented by CTP as to the September 9 sales is identical in substance to that presented about the December 8 sales. It includes the testimony of Mr. Brown plus photographs of the product purchased by the minor on September 9. CTP Ex. 4 at 2; *Id.* App. D-G. As I discuss above, Respondent forfeited the opportunity to defend against the allegations of the unlawful sales on September 9, by not denying in its answer to CTP's complaint that it made such sales. However, the evidence presented by Respondent that arguably relates to the September 9 sales – its asserted proof that it did not sell Top cigarette tobacco at \$6.99 per package – is insufficient rebuttal in any event.

cigarette tobacco. CTP Ex. 4, App. D-G. The product that Respondent sold on that date is identical to the Top tobacco product that Mr. Brown observed being sold on December 8, 2015. Photographs of the product sold on September 9 also bear sales stickers with the number “699.” *Id.* Thus, Respondent initially admitted selling the same product on September 9, 2015 that it contends it could not have sold on December 8, 2015 and at a retail price of \$6.99.

Furthermore, the photograph of the Top cigarette tobacco package that Respondent contends is typical of its inventory depicts a tobacco product that is different from that shown in CTP’s photographs of the Top cigarette tobacco products sold on September 9 and December 8, 2015. The photograph offered by Respondent shows a product labeled as “Top Super.” R. Ex. C. The products sold on September 9 and December 8, 2015 are “Regular” Top cigarette tobacco. The fact that Respondent sold “Top Super” for \$5.99 does not rebut CTP’s proof that Respondent sold a different product at a different price on September 9 and December 8, 2015.

Respondent also argues that the video surveillance tape that it made of transactions occurring on December 8, 2015 fails to show any sale to the minor purchaser who accompanied Mr. Brown on that date. Mr. Rice testified that Respondent has four operative security cameras that make surveillance tapes. R. Ex. F. He asserted that these cameras are triggered by motion within the store. He contended that, between 4:06 p.m. on December 8 and approximately 7:30 that evening, no individual triggered the surveillance cameras. *Id.* From that testimony, Respondent would have me conclude that Mr. Brown’s assertion that the unlawful transactions occurred at about 5:02 p.m. on December 8 is not credible.

As support for Mr. Rice’s testimony Respondent offered a screen shot taken from a surveillance tape. R. Ex. B. Respondent asserts that the screen shot depicts Mr. Hong standing alone at a sales display at approximately 4:06 p.m. on December 8. According to Mr. Rice, Mr. Hong remained in a back room at his facility and only entered the store area when a customer entered, triggering an alarm bell. Respondent suggests that the only activity in Respondent’s facility on the afternoon/evening of December 8, 2015 was the instant where Mr. Hong stood at a sales display.

I do not find Respondent’s evidence to be credible. Respondent did not offer as evidence the surveillance tapes that were made on December 8, 2015. Rather, it offered only a screen shot plus Mr. Rice’s testimony. Given that, it is impossible to verify the truthfulness of the testimony that Respondent’s cameras were activated only by motion or that they showed no activity on December 8 other than Mr. Hong standing in front of a display case. Furthermore, there is a glaring inconsistency between Mr. Rice’s testimony and the allegedly corroborative

evidence offered by Respondent. If, in fact, the surveillance cameras were triggered *only* by motion, why wouldn't they have depicted a sequence, showing Mr. Hong entering the sales area of Respondent's facility, standing in front of the sales display, and then leaving the sales area? In fact, the screen shot offered by Respondent doesn't show motion at all, but only depicts an instant where Mr. Hong stood motionless.

The civil money penalty demanded by CTP, \$2,000, is within the permissible range of penalties authorized by regulations. 21 C.F.R. § 17.2. Indeed, the commission of four violations within a 24-month period authorizes a penalty of \$2,000. In this case, Respondent committed six violations⁵ within a period of about 90 days. The multiple and repeated violations committed by Respondent over a short period of time are more than ample grounds for a \$2,000 penalty. In fact, the commission of only four violations – admitted to or not refuted by Respondent – justifies the remedy that CTP seeks to impose.

That is especially so given that Respondent received a warning letter after it was found to have committed violations on September 9, 2015. CTP Ex. 1. That letter described the September 9 violations and explicitly warned Respondent that it would be subject to remedies if it committed additional violations. Respondent not only committed additional violations despite receiving the letter, but it misrepresented the corrective actions that it would undertake. For example, through its counsel, Respondent averred that, after September 9 it would keep its tobacco products in a locked glass case. CTP Ex. 2.

The egregiousness of Respondent's noncompliance is particularly striking in light of the fact that tobacco products are highly addictive and dangerous. I take notice of the dangers caused by use of these products. Minors are particularly vulnerable to becoming addicted to them and to suffering the adverse health consequences of use. In light of that, Respondent's multiple violations more than support a \$2,000 civil money penalty.

/s/

Steven T. Kessel
Administrative Law Judge

⁵ Three violations were documented on September 9, 2015, and three on December 8, 2015. In accordance with customary practice, CTP counted the violations at the initial inspection as a single violation, and all subsequent violations as separate individual violations.