

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Cliff's Hilltop Market Inc.
d/b/a Cliff's Hilltop Market,

Respondent.

Docket No. T-16-1675
FDA Docket No. FDA-2015-H-4874

Decision No. TB809

Date: February 6, 2017

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 \$500 against Respondent, Cliff's Hilltop Market, Inc. d/b/a Cliff's Hilltop Market.

I. Background

Respondent requested a hearing in order to challenge CTP's determination to impose a \$500 civil money penalty against it. CTP and Respondent filed briefs in support of their positions. In addition, CTP filed 21 proposed exhibits that are identified as CTP. Ex. 1- CTP Ex. 21.¹ Respondent did not object to my receiving

¹ CTP identified its exhibits with the prefix "GE." I have re-identified CTP's exhibits with the appellation "CTP Ex." in order to make them consistent with the Civil Remedies Division's required format for filed exhibits.

these exhibits and I receive them into the record. Petitioner filed a proposed exhibit consisting of the written declaration of Cynthia Overstreet. CTP moved that I exclude the exhibit because Respondent filed it untimely. Respondent did not oppose CTP's motion and I granted it.

Neither party requested that I conduct an in-person hearing.

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 \$500 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) (1), (a)(2)(i).

There is no dispute in this case that Respondent unlawfully sold tobacco products to minors on more than one occasion. CTP conducted an inspection of Respondent's premises on November 26, 2013. On that occasion Respondent sold cigarettes to a minor unlawfully. Respondent again sold cigarettes to a minor unlawfully on June 4, 2014. For these violations CTP determined to impose a civil money penalty of \$250 against Respondent and filed an administrative complaint. On January 29, 2015, Respondent settled the case. Respondent acknowledged that it made unlawful sales of tobacco products to minors and agreed not to contest the findings of unlawful sales. CTP Ex. 3.

CTP conducted an additional inspection of Respondent's premises on September 21, 2015. An inspector who worked on behalf of CTP at the time testified that on that date she witnessed a minor purchase cigarettes at Respondent's establishment. CTP Ex. 20 at 3.

CTP offered corroborating evidence consisting of photographs of the package of cigarettes purchased by the minor on September 21. CTP Ex. 6-CTP Ex. 14.

Respondent does not deny that its employee made an unlawful sale of cigarettes to a minor on September 21, 2015. It argues only that the proposed civil money penalty of \$500 is unreasonable. I find the penalty amount to be reasonable and I sustain it.

The penalty of \$500 that CTP determined to impose is the maximum amount allowed by regulations, based on Respondent's three unlawful sales of tobacco products to minors over a period of less than two years. 21 C.F.R. § 17.2. I find the penalty amount to be modest and reasonable in light of the fact that the undisputed facts prove that Respondent repeatedly sold tobacco products unlawfully to minors. It is also reasonable given the likely harm that will be caused by the sale of tobacco products to minors. I take notice that tobacco is a highly addictive and dangerous substance that potentially can kill users. The sale of tobacco products to minors endangers individuals who, as a matter of law, are not able to form reasoned judgments about the safety of their decisions. In selling tobacco products to minors Respondent potentially endangered these individuals.

Respondent argues that the penalty amount is unreasonable in light of the cost that it has incurred attempting to police its premises. I find that to be no defense. Assuring that tobacco products not be sold to minors is a necessary business expense of any establishment that intends to sell tobacco products. Respondent argues also that the unlawful sale that occurred on September 21, 2015 was the action of an unreliable employee who Respondent discharged upon discovering that the employee had made the sale. That may be so but Respondent is responsible for the acts and omissions of its employees.

_____/s/_____
Steven T. Kessel
Administrative Law Judge