

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

Pop/Kab, LLC d/b/a Pops Grocery,

Respondent.

Docket No. C-14-762
FDA Docket No. FDA-2014-H-0275

Decision No. CR3225

Date: May 9, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) initiated the above-captioned matter when it filed an Administrative Complaint for Civil Money Penalties (Complaint) with the Departmental Appeals Board, Civil Remedies Division (CRD) and the Food and Drug Administration's (FDA) Division of Dockets Management. CTP previously initiated a civil money penalty action, CRD Docket Number C-13-718, FDA-2013-H-0513, against the Respondent, which ended when the administrative law judge entered a default judgment against Respondent.¹ CTP now seeks to impose additional civil money penalties under the Federal Food, Drug, and Cosmetic Act (Act) and the Act's implementing regulations.

¹ CTP initiated the previous action by filing an Administrative Complaint for Civil Money Penalties with CRD on May 3, 2013 (May 3, 2013 Complaint). CTP attached the May 3, 2013 Complaint to the Complaint it filed when it initiated the present matter.

The Complaint alleges the following facts. Respondent owns an establishment that sells tobacco products and is located at 267 Grand Avenue, New Haven, Connecticut 06513. Complaint ¶ 3. CTP documented violations during three inspections of the establishment. Complaint ¶ 9.

In the May 3, 2013 Complaint, CTP sought imposition of a civil money penalty consistent with two violations of regulations found at 21 C.F.R. Part 1140. *See* Complaint ¶ 10; *Pop Kab, LLC d/b/a Pops Grocery*, DAB CR2847, at 2-3 (2013). The administrative law judge found that Respondent committed two violations on July 2, 2012, and one violation during a two-part inspection conducted on December 24, 2012, and January 2, 2013. *Pops Grocery*, DAB CR2847, at 3. The administrative law judge entered default judgment against Respondent and ordered it to pay a \$250 civil money penalty. *Pops Grocery*, DAB CR2847, at 4.

During a subsequent inspection of Respondent's establishment, FDA-commissioned inspectors documented the following:

[A] person younger than 18 years of age was able to purchase a package of Maverick Box cigarettes on September 13, 2013, at approximately 12:50 PM; and . . . the minor's identification was not verified before the sale, as detailed above, on September 13, 2013, at approximately 12:50 PM.

Complaint ¶ 1.

In compliance with 21 C.F.R. §§ 17.5 and 17.7, CTP served Respondent with the Complaint on March 10, 2014, via United Parcel Service. CTP charged Respondent with new violations of 21 C.F.R. § 1140.14(a) (sale of tobacco products to a minor) and 21 C.F.R. § 1140.14(b)(1) (failure to verify the age of a person purchasing tobacco products by means of photographic identification containing the bearer's date of birth). Complaint ¶ 1. CTP asked the CRD to impose a \$2,000 civil money penalty based on four violations of the regulations in a 24-month period. Complaint ¶ 13.

The Complaint provided detailed instructions related to filing an answer and requesting an extension of time to file an answer. Complaint ¶¶ 14-18, 20-22. The Complaint stated that failure to file an answer could result in the imposition of a civil money penalty against Respondent. Complaint ¶ 19. Further, after CTP filed the Complaint, CRD sent Respondent an Initial Order informing Respondent of the requirement to file an answer to avoid a default judgment. CRD sent a form answer along with the Initial Order that Respondent could complete and file with CRD. Respondent neither filed an answer nor requested an extension of time within the 30-day time period prescribed in 21 C.F.R. § 17.9.

If a respondent does not file an answer within 30 days of a properly served complaint, the regulations provide that:

[T]he presiding officer shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under the relevant statute, the presiding officer shall issue an initial decision within 30 days of the time the answer was due, imposing:

- (1) The maximum amount of penalties provided for by law for the violations alleged; or
- (2) The amount asked for in the complaint, whichever amount is smaller.

21 C.F.R. § 17.11(a). Further, a failure to file a timely answer means that “the respondent waives any right to a hearing and to contest the amount of the penalties and assessments” imposed in the initial decision. 21 C.F.R. § 17.11(b).

Accepting the facts alleged in the Complaint as true, I find that those facts establish Respondent’s liability under the Act. *See* 21 U.S.C. §§ 333(f)(9), 387c(a)(7)(B), 387f(d); 21 C.F.R. §§ 1140.1(b), 1140.14. I also find that CTP’s request to impose a \$2,000 civil money penalty is permissible. *See* 21 C.F.R. § 17.2.

Therefore, Respondent is directed to pay a civil money penalty in the amount of \$2,000. This initial decision becomes final and binding upon both parties 30 days after the date of its issuance. 21 C.F.R. § 17.11(b).

It is so ordered.

_____/s/
Joseph Grow
Administrative Law Judge