

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant,

v.

MMS Enterprises, Inc.
d/b/a One Stop Convenience,

Respondent.

Docket No. C-13-887
FDA Docket No. FDA-2013-H-0706

Decision No. CR2896

Date: August 20, 2013

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 seeks to impose civil money penalties under the Federal Food, Drug, and Cosmetic Act (Act) and the Act's implementing regulations.

The Complaint alleges the following facts. Respondent owns an establishment in Boston, Massachusetts, that sells tobacco products. Complaint ¶ 3. CTP conducted three inspections of the establishment. Complaint ¶ 9. During one of the inspections, an FDA-commissioned inspector observed that Respondent:

[Sold] tobacco products to a minor. . . . Specifically, a person younger than 18 years of age was able to purchase a package of Newport Box cigarettes on May 7, 2011, at approximately 11:49 AM ; and . . . the minor's identification was not verified before the sale . . . on May 7, 2011, at approximately 11:49 AM ET."

Complaint ¶ 10.

On July 21, 2012, CTP issued a warning letter to Respondent specifying the violations that the inspector observed. The letter warned Respondent that if it failed to correct the violations, civil money penalties could be imposed on it and that it was Respondent's responsibility to ensure compliance with the law. Complaint ¶ 10.

On July 22, 2011, Ariful Matubbar, owner of One Stop Convenience, telephoned CTP in response to the warning letter and on behalf of Respondent. "Mr. Matubbar stated that Respondent's policy prohibits the sale of tobacco products to anyone who is under eighteen years old and that all employees are required to check the identification of anyone under twenty-seven years who is purchasing tobacco products." Complaint ¶ 11.

On September 20, 2011, CTP acknowledged, in writing, receipt of the establishment's response. In the letter, CTP reminded Respondent of its continuing obligation to comply with the Act and its implementing regulations. Complaint ¶ 11.

During a subsequent inspection, an FDA-commissioned inspector documented that "a person younger than 18 years of age was able to purchase a package of Newport Box 100s on December 15, 2012, at approximately 9:46 AM ET." Complaint ¶ 1. The inspector also documented that "the minor's identification was not verified before the sale . . . on December 15, 2012, at approximately 9:46 AM ET." Complaint ¶ 1.

In compliance with 21 C.F.R. §§ 17.5 and 17.7, CTP served Respondent with the Complaint on June 24, 2013, via United Parcel Service. CTP charged Respondent with violating 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, 10. CTP asked the CRD to impose a \$500 civil money penalty based on three alleged 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 may result in the imposition of a civil money penalty against Respondent. Complaint ¶ 19. 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:

the 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 \$500 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 \$500.00. 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/_____
Scott Anderson
Administrative Law Judge