

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

3 Amigos L.L.C.
d/b/a Cowboy Country Store 4,

Respondent.

Docket No. T-16-43
FDA Docket No. FDA-2016-H-0307

Decision No. TB603

Date: December 16, 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 \$500 against Respondent, 3 Amigos L.L.C. d/b/a Cowboy Country Store 5. The preponderance of the evidence establishes that Respondent sold tobacco products to minors and failed to verify the purchaser's identification during a twenty-four month period in violation of 21 C.F.R. §§ 1140.14(a) and 1140.14(b)(1). These actions were violations of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 387c(a)(7)(B).

I. Procedural History

Respondent requested a hearing in order to challenge CTP's determination to impose a \$500 civil money penalty against it. I held a hearing by telephone on

October 27, 2016. At the hearing I received exhibits into evidence from CTP that are identified as CTP Ex. 1- CTP Ex. 10. I also received exhibits into evidence from Respondent that are identified as Respondent's exhibits R. 1- R. 18. I heard the cross-examination testimony of William Wainman, an inspector working on behalf of CTP.

CTP and Respondent filed closing briefs in support of their positions.

II. Issues, Findings of Fact and Conclusions of Law

A. Issues

The issues are whether:

1. Respondent violated regulations governing the sale of tobacco products to minors;
2. 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), (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. Wainman's testimony as well as corroborating evidence. CTP Ex. 4 and Appendices A-I. Mr. Wainman testified that he is an FDA-commissioned officer employed by Information Systems and Networks Corporation, a third-party contractor in the State of South Dakota. Mr. Wainman testified that, on July 6, 2015, he went to Respondent's facility in the

company of a minor under the age of 18 whom had recruited and trained for the purpose of ascertaining whether retailers sold tobacco products to minors unlawfully. CTP Ex. 4 at 2. According to Mr. Wainman, he stood at a location in Respondent's facility where he could observe and hear the minor. He testified that he personally observed the minor purchase a package of Marlboro Smooth cigarettes from a store employee. *Id.* at 3. Mr. Wainman testified that he took custody of the cigarette package after the minor left the store, marked the package, and photographed it. *Id.* at Appendix A-Appendix C.

Mr. Wainman testified that he returned to Respondent's facility on October 17, 2015, in the company of the same minor. CTP Ex. 4 at 4. He testified that he again personally observed the minor purchase a package of cigarettes – Camel Blue cigarettes – from a store employee. *Id.* He averred that, on this occasion, the store employee did not ask to see the minor's photographic identification before selling cigarettes to the minor. Mr. Wainman testified that he once again took custody of the cigarette package after the minor left the store, marked the package, and photographed it. *Id.* at Appendix F-G.

Mr. Wainman's testimony and the corroborative evidence consisting of photographs of the packages of cigarettes is persuasive proof that Respondent committed three violations of applicable regulations. On July 6 and October 17, 2015, Respondent sold cigarettes to a minor unlawfully. Additionally, on October 17, 2015, Respondent's employee failed to check the photographic identification of a minor purchaser of tobacco products. These comprise three distinct violations of 21 C.F.R. §§ 1140.14(a) and (b)(1).

Respondent challenges the credibility of Mr. Wainman's testimony. It asserts, first, that CTP failed to establish that Mr. Wainman has the training and professional experience sufficient to conduct an impartial and accurate investigation of Respondent's facility. Respondent's Brief and Final Argument at 3. ("Respondent's Brief"). I disagree. Mr. Wainman has served as a police officer for 21 years. He also is an experienced inspector, having worked as a commissioned officer to conduct inspections of retailers since July 2014. CTP Ex. 4 at 1-2.

Second, Respondent asserts that CTP failed to establish the chain of custody of the cigarette packages that the minor purchased. Respondent's Brief at 5. I find that assertion to be incorrect. The evidence proves that the cigarettes that the minor purchased on July 6 and October 14, 2015 went directly from Respondent's facility to the minor purchaser and from there to Mr. Wainman. Mr. Wainman personally marked the cigarette packages and photographed them. That is more than enough to prove that the cigarettes that Mr. Wainman photographed are the cigarettes that Respondent's employee sold to the minor.

Respondent also asserts that there is no proof that the contents of the two cigarette packages purchased on July 6 and October 17, 2015 actually are tobacco products. Respondent's Brief at 5. It contends that, absent such proof, one cannot conclude that Respondent sold tobacco products to a minor. *Id.* Respondent's argument notwithstanding, I can reasonably infer that the two cigarette packages that were sold on July 6, 2015 and October 17, 2015, contain tobacco products. The packages were unopened packs with the manufacturer's brand name and logo on them. It is, I suppose, within the realm of possibility that these packages do not contain tobacco products (cigarettes). But, I find that possibility to be remote to the point of nonexistence given the pristine condition of the packaging.

Respondent also argues that the transaction occurring on October 17, 2015, should be counted as comprising, at most, a single violation of regulations, asserting that the sale and the failure to check identification is all one transaction, and not two distinct unlawful acts. Respondent's Answer at 1. An appellate panel of the Departmental Appeals Board considered that argument in *Orton Motor Company, d/b/a Orton's Bagley*, DAB 2717, at 24 (2016), and rejected it. I do so here as well. Failure to check identification clearly is a separate violation from an unlawful sale.

Respondent also asserts that Mr. Wainman's testimony is not credible because he failed accurately to describe the employee who sold tobacco products to a minor on October 17, 2015. Respondent's Brief at 5. Mr. Wainman described the employee as having light brown hair, a mustache, and wearing glasses. Respondent avers that the employee on duty on the relevant date and time has very dark brown hair, is balding, and does not have a mustache (although he wears glasses). I find the discrepancy between these descriptions not to impeach Mr. Wainman's overall credibility. There is no evidence to show that he deliberately inaccurately described the employee in question. Moreover, whatever discrepancies may exist, they do not gainsay from the fact that CTP produced photographic proof of the products sold unlawfully on the dates at issue.

Additionally, Respondent relies on the testimony of four of its employees: Jody Carter-Clarambeau, Jamie Eddington, Wayne Fiebelkorn, and Edward E. Spies. R. Ex. 14-17. These employees either deny making the sales at issue or assert that Respondent took abundant precautions to assure that it made no unlawful sales. However, these witnesses provide no direct evidence contradicting the evidence offered by CTP that unlawful transactions occurred on July 6 and October 17, 2015. Nothing that they assert gainsays the proof of unlawful sales and the failure to check identification. I do not find that the evidence that they offered rebuts CTP's proof that Respondent unlawfully sold cigarettes to a minor and failed to check that individual's identification.

