

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Center for Tobacco Products,

Complainant

v.

Daniel D. Moore  
d/b/a A B C,

Respondent.

Docket No. C-15-4071  
FDA Docket No. FDA-2015-H-3294

Decision No. CR4705

Date: September 15, 2016

**DECISION**

I sustain the imposition of a civil money penalty of \$500 against Respondent, Daniel D. Moore d/b/a A B C.

**I. Background**

Respondent requested a hearing in order to challenge the determination of the Center for Tobacco Products (CTP) of the Food and Drug Administration to impose a \$500 civil money penalty against it. CTP filed a pre-hearing brief plus nine proposed exhibits that are identified as CTP Ex. 1- CTP Ex. 9. Respondent did not file a pre-hearing brief or exhibits.

I held an in-person hearing by telephone on June 29, 2016 at which I received into evidence CTP's exhibits. At that hearing Respondent's counsel cross-examined one witness, Peter King.

I afforded the parties the opportunity to file post-hearing briefs. Neither party did so.

## **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**

There is no dispute in this case that Respondent is a business that sells tobacco products to the general public.

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).

CTP's case against Respondent rests on the testimony of Mr. King plus corroborating evidence. CTP Ex. 4. Mr. King is an FDA-commissioned inspector whose duties include determining whether retail outlets are unlawfully selling tobacco products to minors. *Id.* at 1-2. Mr. King's inspections entail accompanying minors whom he has recruited, hired and trained, to attempt to purchase tobacco products from retail establishments such as the one operated by Respondent. *Id.*

Mr. King testified that he went to Respondent's place of business on two occasions, on August 6, 2014 and on May 6, 2015. CTP Ex. 4 at 2-5. On each occasion a minor whom he had recruited and hired accompanied him. *Id.* Mr. King averred that on each occasion he verified that the minor was carrying neither photographic identification nor tobacco products by asking the minor to empty her pockets prior to entering Respondent's business. On each occasion he gave the minor cash sufficient to purchase a pack of cigarettes. Mr. King testified that he

remained outside of the store at a location where he could keep the entrance to the store under surveillance. On each occasion he watched the minor enter the store and then exit it a short time later with a pack of cigarettes in her hand. *Id.*

Mr. King stated that on each of the two visits he retained the cigarettes purchased by the minor, labeled them as evidence, and made photographs of the packs. CTP Ex. 4 at 3, 4-5, 11-12, 17-18.

Mr. King's testimony plus the corroborating evidence consisting of photographs of the packs of cigarettes that he obtained from the minor on August 6, 2014 and May 6, 2015, are proof that Respondent unlawfully: sold a tobacco product to a minor on two occasions; and failed to check the minor's identification before making the sale. Although Mr. King did not personally witness the sale he observed the minor enter Respondent's establishment on two occasions without cigarettes or identification and emerge on both occasions with cigarettes in hand. That testimony, plus the corroborating evidence, leads to the inference that the minor could only have obtained cigarettes by purchasing them at Respondent's business establishment.

At the hearing Respondent's counsel attempted to raise questions as to the credibility of the minor, who was not identified by name and who did not testify. I explained then and reiterate here that the minor's credibility is not at issue in this case. As I explained at the hearing, the minor served only as a vehicle for making a purchase of tobacco products. The evidence that she made such a purchase consists entirely of Mr. King's testimony plus corroborating evidence.

Assuming that the minor entered the store without identification and without tobacco products in her possession, the only reasonable explanation that I can find for her emerging from the store with cigarettes is that she purchased them in the store. And, it follows that the store employee could not have checked the minor's identification when she purchased the cigarettes because the minor had no identification with her when she entered the store.

Respondent's counsel also questioned whether the minor actually entered the store on the two dates at issue without identification and without cigarettes in her possession. He raised the issue of whether it was possible that the minor could have concealed tobacco products or identification on her person prior to entering the store.

That possibility exists. Mr. King verified that the minor did not have cigarettes or identification in her possession by asking the minor to empty her pockets prior to entering Respondent's store. He did not frisk her or conduct a body search. Could the minor have nevertheless concealed cigarettes or identification somewhere on

her person other than in her pockets? *See* Tr. at 25. Yes, but I do not find it reasonable to infer that she did so. As Mr. King testified, the minor was asked to empty her pockets into a Ziploc baggie prior to entering the store and to leave her purse in Mr. King's car. Tr. at 21-22. That greatly reduces the probability that she would be carrying identification and/or cigarettes into the store. Furthermore, the cigarettes that the minor presented to Mr. King on August 6, 2014 and on May 6, 2015 were in pristine and undamaged packages. CTP Ex. 4 at 11, 17. One would reasonably expect that these packages would show signs of crushing had the minor concealed them in, say, her shoe or under her garments prior to entering the store.

CTP determined to impose a civil money penalty against Respondent of \$500. The proposed penalty is the maximum allowed by law. 21 C.F.R. § 17.2. I find the amount to be reasonable given the circumstances of this case. Respondent sold a tobacco product – a dangerous and highly addictive substance – to a minor on more than one occasion. Furthermore, it sold a tobacco product unlawfully and failed to check a minor purchaser's identification after CTP had warned it explicitly not to do so. That establishes a high level of culpability on Respondent's part.

\_\_\_\_\_/s/\_\_\_\_\_  
Steven T. Kessel  
Administrative Law Judge