

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,
(FDA No. FDA-2015-H-0214)

Complainant,

v.

Gabino Aulis
d/b/a 211 Food Mart,

Respondent.

Docket No. C-15-1025

Decision No. CR3732

Date: March 27, 2015

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) began this matter by serving an administrative complaint on Respondent, Gabino Aulis d/b/a 211 Food Mart, at 4901 Red Springs Road, Red Springs, North Carolina 28377 and by filing a copy of the complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The complaint alleges that 211 Food Mart unlawfully sold tobacco products to a minor and offered individual cigarettes for sale, thereby violating the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 et seq., and its implementing regulations, Cigarettes and Smokeless Tobacco, 21 C.F.R. pt. 1140. CTP seeks to impose a \$250 civil money penalty against Respondent 211 Food Mart.

As provided for in 21 C.F.R. §§ 17.5 and 17.7, on January 29, 2015, CTP served the complaint on Respondent 211 Food Mart by United Parcel Service. In the complaint and accompanying cover letter, CTP explained that, within 30 days, Respondent should pay the penalty, file an answer, or request an extension of time in which to file an answer. CTP warned Respondent that, if it failed to take one of these actions within 30 days, the

Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision ordering it to pay the full amount of the proposed penalty.

Respondent 211 Food Mart has neither filed an answer within the time prescribed, nor requested an extension of time within which to file an answer. Pursuant to 21 C.F.R. § 17.11, I assume that the facts alleged in the complaint (but not its conclusory statements) are true. Specifically:

- At an unspecified time on April 22, 2014, at Respondent's business establishment, 4901 Red Springs Road, Red Springs, North Carolina 28377, an FDA-commissioned inspector observed open packages of Newport and Marlboro cigarettes behind the sales counter. The manager on duty informed the inspector that the establishment sold individual cigarettes for \$0.50 ;
- In a warning letter dated July 2, 2014, CTP informed Respondent of the inspector's April 22, 2014 observation, and that such action violates federal law, 21 C.F.R. § 1140.14(d). The letter further warned that Respondent's failure to correct its violations could result in a civil money penalty or other regulatory action;
- At approximately 5:55 p.m. on August 27, 2014, at Respondent's business establishment, 1027 Central Avenue, Chester, Pennsylvania 19013, FDA-commissioned inspectors observed that a person younger than 18 years of age was able to purchase a package of L and M Menthol cigarettes.

These facts establish Respondent 211 Food Mart's liability under the Act. The Act prohibits misbranding of a tobacco product. 21 U.S.C. § 331(k). A tobacco product is misbranded if sold or distributed in violation of regulations issued under section 906(d) of the Act. 21 U.S.C. § 387f(d); *see* 21 U.S.C. § 387c(a)(7)(B); 21 C.F.R. § 1140.1(b). The Secretary of the U.S. Department of Health and Human Services issued the regulations at 21 C.F.R. pt. 1140 under section 906(d) of the Act. 21 U.S.C. § 387a-1; *see* 21 U.S.C. § 387f(d)(1); 75 Fed. Reg. 13,225, 13,229 (Mar. 19, 2010). The regulations prohibit the sale of tobacco products to any person younger than 18 years of age. 21 C.F.R. § 1140.14(a). The regulations also prohibit the sale of individual cigarettes. 21 C.F.R. § 1140.14(d).

A \$250 civil money penalty is permissible under 21 C.F.R. § 17.2.

