

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Center for Tobacco Products,

Complainant

v.

Citiport Fuel, Inc.
d/b/a Mobil,

Respondent.

Docket No. C-14-1193
FDA Docket No. FDA-2014-H-0698

Decision No. CR3306

Date: July 22, 2014

INITIAL DECISION AND DEFAULT JUDGMENT

The Center for Tobacco Products (CTP) filed an Administrative Complaint (Complaint) against Respondent, Citiport Fuel, Inc. d/b/a Mobil, alleging facts and legal authority sufficient to justify imposing a civil money penalty of \$500. Respondent did not timely answer the Complaint, nor did Respondent request an extension of time within which to file an answer. Therefore, I enter a default judgment against Respondent and order that Respondent pay a civil money penalty in the amount of \$500.

CTP began this case by serving a Complaint on Respondent and filing a copy of the Complaint with the Food and Drug Administration's (FDA) Division of Dockets Management. The Complaint alleges that Respondent's staff unlawfully sold cigarettes to minors and failed to verify that cigarette purchasers were of sufficient age, thereby violating the Federal Food, Drug, and Cosmetic Act (Act) and its implementing regulations, found at 21 C.F.R. pt. 1140. CTP seeks a civil money penalty of \$500.

On June 3, 2014, CTP served the Complaint on Respondent by United Parcel Service, pursuant to 21 C.F.R. §§ 17.5 and 17.7. 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 within which to file an answer. CTP warned Respondent that if it failed to take one of these actions within 30 days an Administrative Law Judge could, pursuant to 21 C.F.R. § 17.11, issue an initial decision by default ordering Respondent to pay the full amount of the proposed penalty.

Respondent has not filed an answer within the time provided by regulation, nor has it requested an extension. Therefore, pursuant to 21 C.F.R. § 17.11(a), I am required to issue an initial decision by default if the Complaint is sufficient to justify a penalty. Accordingly, I must determine whether the allegations in the Complaint establish violations of the Act.

For purposes of this decision, I assume the facts alleged in the Complaint are true. 21 C.F.R. § 17.11(a). Specifically, CTP alleges the following facts in its Complaint:

- Respondent owns Mobil, an establishment that sells tobacco products and is located at 11846 Conner Street, Detroit, Michigan 48205. Complaint ¶ 3.
- During an inspection of the establishment conducted on February 18, 2013, an FDA-commissioned inspector observed that “a person younger than 18 years of age was able to purchase a package of Newport Box 100s cigarettes . . . at approximately 12:33 PM ET[.]” The inspector also observed that “the minor’s identification was not verified before the sale” Complaint ¶ 10.
- On March 7, 2013, CTP issued a Warning Letter to Mobil explaining that the inspector’s February 18, 2013 observations constituted violations of regulations found at 21 C.F.R. § 1140.14(a) and (b)(1). In addition to describing the violations, the letter advised Respondent that the FDA may initiate a civil money penalty action or take other regulatory action against Respondent if it failed to correct the violations. The letter also stated that it was Respondent’s responsibility to comply with the law. Complaint ¶ 10.
- On March 22, 2013, in response to the Warning Letter, CTP received an undated letter from Respondent’s management. The letter explained that “ ‘a minor was able to purchase a pack of cigarettes from one of our employee[s][,]’ ” and that Respondent “took disciplinary action against that employee[] ‘for his violation of our company rules and . . . laws.’ ” The letter also stated that Respondent “would educate employees and inform both employees and customers about the legal age requirement for the sale of tobacco products.” Complaint ¶ 11.

- On February 21, 2014, during a subsequent inspection of Respondent’s establishment, FDA-commissioned inspectors documented that “a person younger than 18 years of age was able to purchase a package of Newport Box 100s cigarettes . . . at approximately 12:28 PM[.]” The inspectors also noted that “the minor’s identification was not verified before the sale” Complaint ¶ 1.

These facts establish that Respondent is liable 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. § 387c(a)(7)(B); 21 C.F.R § 1140.1(b). Under 21 C.F.R. § 1140.14(a), no retailer may sell cigarettes to a person younger than 18 years of age. Under 21 C.F.R. § 1140.14(b)(1), a retailer must verify, by means of photo identification containing the bearer’s date of birth, that no cigarette purchasers are younger than 18 years of age.

Here, Respondent violated 21 C.F.R. § 1140.14(a) on February 18, 2013, and February 21, 2014, when its staff sold cigarettes to minors. Respondent also violated 21 C.F.R. § 1140.14(b)(1) on those dates, when its staff did not verify, by checking the minors’ photographic identification, that these tobacco purchasers were 18 years of age or older. Therefore, Respondent’s actions and omissions on two separate occasions at the same retail outlet constitute violations of law that warrant a civil money penalty. Accordingly, I find that a civil money penalty of \$500 is permissible under 21 C.F.R. § 17.2.

/s/
Steven T. Kessel
Administrative Law Judge