

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE DEPARTMENT OF COMMERCE, COMMUNITY AND
ECONOMIC DEVELOPMENT**

In the Matter of:)	
)	OAH Nos. 04-0271-TOB
HOLIDAY ALASKA, INC.,)	04-0284-TOB
)	04-0299-TOB
)	[Department. Nos. 0500-04-021,
)	0500-04-048, 0500-04-067]
Respondent.)	
_____)	

DECISION AND ORDER

I. Introduction

This case is a tobacco enforcement proceeding by the Department of Commerce, Community and Economic Development under AS 43.70.075 against Holiday Alaska, Inc., the owner of stores licensed to sell tobacco products. The department issued a Notice of Suspension of Tobacco Endorsement to Holiday Alaska for three outlets.

Holiday Alaska requested a hearing in each case. The department transferred the case to the Office of Administrative Hearings.¹ By agreement of the parties, the three cases are consolidated. A hearing was held in conformance with regulations at 12 AAC 12.800 – 12 AAC 12.990. This document is the proposed decision for the department in accordance with AS 43.70.075(m) and (n). Based on the evidence and in accordance with AS 43.70.075(d)(1), it is recommended that under AS 43.70.075(d)(1), a 20-day suspension and a \$300 penalty be imposed against the tobacco endorsement at all three Holiday Alaska stores.

II. Facts

No witnesses testified at the hearing. Exhibits admitted as evidence by stipulation of the parties include the State's Exhibits 1 through 4 and Holiday Alaska's Exhibits A, B, C, E, G, I, J, K, M, N, O, P, Q, R, S. References are made in the fact findings to the audiocassette tape

¹ The Office of Administrative Hearings (OAH) was created in 2004. See AS 44.64.010. Under a transitional provision relating to transfer of employees, the hearing officer for the Department of Commerce, Community and Economic Development was transferred to OAH.

comprising the record made at the hearing, which is not transcribed. The following findings are based on the record in this case:

1. Holiday Alaska, Inc., is a corporation engaged in retail sales including the sale of tobacco products.² Each of the 26 stores it operates in Alaska has its own tobacco endorsement issued by the Department of Commerce, Community and Economic Development. (Exhs. 1, A, G, Q, R)

2. On June 10, 2004, Travis Chambers was working at the Holiday Alaska outlet located at 2300 Cushman in Fairbanks and was authorized to sell tobacco products. He sold tobacco to a minor and was cited for violating AS 11.76.100. On June 16, 2004, Chambers pled no contest to the charge and was found guilty. (Exh. 3; 6/21/05 Stipulation; Tape 1A)

3. On July 28, 2004, Justin Walker was working at the Holiday Alaska outlet located at 2900 East Tudor in Anchorage and was authorized to sell tobacco products.³ He sold tobacco to a minor and was cited for violating AS 11.76.100. On August 3, 2004, Walker pled guilty to the charge. (Exh. 2; 6/21/05 Stipulation; Tape 1A)

4. On November 14, 2004, Vernice Hayes was working at the Holiday Alaska outlet located at 4105 Geist Road in Fairbanks and was authorized to sell tobacco products.⁴ She sold tobacco to a minor and was cited for violating AS 11.76.100. On November 18, 2004, Hayes pled guilty to the charge. (Exh. 4; 6/21/05 Stipulation; Tape 1A)

5. Based on the criminal convictions of Chambers, Hayes and Walker, the Department of Commerce, Community and Economic Development gave notice to Holiday Alaska that under AS 43.70.075(d)(1), the corporation's tobacco endorsements for the outlets where they worked at the time of the unlawful sales were suspended for 20 days and civil fines of \$300 were imposed for each location. Holiday Alaska requested a hearing and was represented by counsel during the consolidated hearing proceedings. No employee of Holiday Alaska at any of the three outlets had previously been convicted for violating AS 11.76.100(a)(1). (Notice of Suspension; Notice of Defense; Tape 1B)

² No witness testified at the hearing for Holiday Alaska, Inc. Corporate documents refer to Holiday Stationstores, Inc., with corporate offices in Bloomington, Minnesota and "Holiday Companies." (Exhs. G) The business license application provides a Minneapolis, Minnesota address for Holiday Alaska, Inc. (Exh. 1)

³ The police citation for Mr. Walker indicates that he worked at Williams. (Ex. 2) Holiday Alaska, Inc., was the successor in interest to Williams.

⁴ The parties stipulated, perhaps in error, to June 10, 2004, as the date Hayes was an employee of Holiday Alaska working at the 4105Geist Road Store. Exhibit 4, which was admitted as evidence without objection, provides the date of Hayes' citation as November 14, 2004, and the date of her judgment based on a no contest plea as November 18, 2004.

III. Discussion

Holiday Alaska raises a constitutional challenge to the tobacco enforcement law at AS 43.70.075, arguing that it was unable to contest the operative facts underlying the suspensions,⁵ including the findings from convictions under AS 11.76.100(a)(1) that its employees negligently sold tobacco to minors. As a consequence, the statute unlawfully imposes strict liability on a tobacco endorsement holder and denies the protections of constitutional due process. The division relies on the validity of AS 43.70.075, arguing that the statutory presumption of AS 43.70.075(r) was met for establishing that a tobacco sale was made within scope of employment and that Holiday Alaska did not rebut the presumption.

Applicable law for this proceeding will be addressed first. The administrative law judge's authority to rule on constitutional questions is discussed next. The last section of the discussion addresses sanctions.

A. Applicable Law

In this tobacco enforcement case, the Department of Commerce, Community and Economic Development is exercising state regulatory authority under the Alaska Business License Act (AS 43.70). The department grants business licenses in accordance with AS 43.70.020 and 12 AAC 12.020. Under AS 43.70.075(a), the agency issues endorsements to business licenses allowing the retail sale of "cigarettes, cigars, tobacco, or products containing tobacco." AS 11.76.100 provides that it is unlawful under any circumstances to sell tobacco products to a minor (less than 19 years of age). Under AS 43.70.075(d), a violation of AS 11.76.100 subjects the person holding the license to mandatory suspension of the endorsement along with a civil penalty.

AS 43.70.075(m) and 12 AAC 12.835 address the standard of proof in a tobacco enforcement proceeding. The department has the legal burden in this case to prove by a preponderance of the evidence that Holiday Alaska's employees were convicted of violating AS 11.76.100 for a tobacco sale that occurred while they were acting within the scope of employment. Related to that burden, AS 43.70.075(r) establishes a rebuttable presumption that an unlawful tobacco sale is within the scope of agency or employment when there is a "sale of a product containing tobacco by an agent or employee of a person who holds or is required to hold

⁵ Holiday Alaska stated that it did not participate in its employees' criminal proceedings, as it was unaware of the citations when they occurred and was unaware of the court proceedings.

a business license endorsement under [AS 43.70.075] at the location or outlet in a location for which the endorsement was or was required to be issued.”

B. Constitutionality of AS 43.70.075

Holiday Alaska’s argument that AS 43.70.075 is unconstitutional mirrors the argument it made in support of its Motion to Dismiss before the hearing. The motion was denied. The same reasoning applies after receiving evidence at the hearing. This administrative proceeding is not the proper forum for Holiday Alaska’s challenge to the validity of the statute. Rulings on the facial constitutionality of a statute or regulation are generally for the courts to make.⁶ Neither the Commissioner of the Department of Commerce, Community and Economic Development nor the administrative law judge has authority to invalidate a statute. An endorsement holder in a tobacco enforcement proceeding has the option to challenge the validity of AS 43.70.075 in superior court.⁷

In Godfrey v. State of Alaska, Superior Court Judge Collins recently upheld sanctions imposed in a tobacco enforcement case, rejecting a tobacco licensee’s arguments challenging the constitutionality of AS 43.70.075 on due process grounds.⁸

C. Sanctions Are Warranted Under AS 43.70.075(d)(1).

The three Notices of Suspension in this case each contain one count. They allege that Holiday Alaska employees (Chambers, Walker, Hayes) each sold tobacco to a minor while working at Holiday Alaska outlets. The notices further allege that the employees were cited for violating AS 11.76.100(a)(1) and each individual later convicted on the charge. Evidence in this case establishes these allegations as true.

⁶ See Califano v. Sanders, 430 U.S. 99, 109 (1977). See also Treacy v. Municipality of Anchorage, 91 P.3d 252, 270, n. 90 (Alaska 2004) (citing Califano for the proposition that “the hearing officer could not properly have ruled on the constitutionality of the ordinance); United States v. RCA Communications, Inc., 597 P.2d 489, 507 (Alaska 1979) (“Evaluations of constitutionality . . . are within the special expertise of the courts”); K. Davis and R. Pierce, II Administrative Law Treatise, § 15.5, p. 331 (3rd ed. 1994). Cf. McGhee v. State of Alaska, 951 P.2d 1215, 1218 n. 3 (Alaska 1998) (DMV hearing officers are not empowered to rule on constitutional challenges to facially valid Alaska judgments).

⁷ See Diedrich v. City of Ketchikan, 805 P.2d 362, 365-66 (Alaska 1991); Appellate Rule 602(a)(2). See also Renwick v. State of Alaska, 971 P.2d 631, 634-35 (exhaustion of administrative remedies required before declaratory action).

⁸ See Richard Godfrey d/b/a Mendenhall Valley Tesoro, 1JU-04-00375 CI, p. 23 (2/14/05 Order on Appeal). The judge noted that imposition of an administrative sanction through strict liability for employers who sell tobacco to minors has the “same social policy rationale” as that recognized by the supreme court “for improper sales of yet another dangerous and highly regulated substance, alcohol.” See id. at 22-23 (quoting Alesna v. LaGrue, 614 P.2d 1387, 1391 (Alaska 1980)).

Holiday Alaska does not dispute that Chambers, Walker and Hayes were employed by the company on the dates of their respective unlawful sales. The presumption of AS 43.70.075(r), therefore, applies. Holiday Alaska was allowed the opportunity to assert defenses at the hearing in this case, including defenses based on the questions enumerated at AS 43.70.075(m)(1), (2) and (3). It chose to call no witnesses. Based on the presumption of AS 43.70.075(r), which was not rebutted, the three unlawful tobacco sales in this case were made by the employees within the scope of employment as a matter of law.

Holiday Alaska argues that it did not receive adequate notice of its employee's citation for violating AS 11.76.100 and of the subsequent court proceeding in which it was not a participant. However, AS 11.76.100 does not extend to Holiday Alaska a right to defend in the criminal case. AS 43.70.075 cannot be construed as extending any right in the criminal proceedings. The convictions in criminal cases involving Chambers, Walker and Hayes cannot be collaterally attacked in this administrative proceeding.⁹

With regard to Holiday Alaska's strict liability argument, Alaska courts recognize that strict liability is permitted for criminal offenses involving heavily regulated industries.¹⁰ The sale of tobacco products is a heavily regulated industry.

Lastly, Holiday Alaska took the position at the hearing that it was precluded from presenting evidence, arguing that AS 43.70.075 violates due process by not allowing it to present evidence at the hearing. At the hearing, Holiday Alaska was given the opportunity to call witnesses and it declined the invitation.

AS 43.70.075(d)(1) provides that for an initial violation of AS 11.76.100, "the department shall suspend the endorsement for a period of 20 days and impose a civil penalty of \$300." (emphasis added) The plain language of the statute indicates that the disciplinary sanctions are mandatory. Legislative history for AS 43.70.075 also supports this policy determination.¹¹ Consequently, the Commissioner has no discretion to impose a penalty less

⁹ A knowing and voluntary guilty or no contest plea allows the sentencing court to treat each element of the offense as having been proved. See Lewis v. State of Alaska, 565 P.2d 846, 855 n.3 (Alaska 1977)(guilty plea / citing McCarthy v. United States, 394 U.S. 459, 466 (1969)); Scott v. State of Alaska, 928 P.2d 1234 (Alaska App. 1996)(no contest plea). Because a violation of AS 11.76.100(a)(1) includes a finding that there was a negligent sale of tobacco, Holiday Alaska's defense that its employees did not negligently sell tobacco products lacks merit as a matter of law.

¹⁰ See State of Alaska v. Hazelwood, 946 P.2d 875, 883 (Alaska 1997)(negligent discharge of oil).

¹¹ See HB 228, House Judiciary Committee minutes, 4/21/01, log entry 1124; HB 228, House Labor & Commerce Committee minutes, 4/18/01, log entry 1515; SSHB 189, House Judiciary Committee minutes, 5/5/97, log entry 1332; HB 189, House Health, Education and Social Services Committee minutes, 1/16/98, log entry 0900. See also Godfrey, 1JU-04-00375 CI, p. 24 (2/14/05 Order on Appeal)(The public policy goal behind AS 43.70.075 is strong,

than what the legislature has provided. The sanctions in AS 43.70.075(d)(1) apply at all three Holiday Alaska outlets at issue.

IV. Conclusion

In each of the three cases comprising this consolidated proceeding, Holiday Alaska employees were acting within the scope of employment when they sold tobacco products to minors in violation of AS 11.76.100. The division proved the allegations from the Notice of Suspension in each case by a preponderance of the evidence. The following sanctions are recommended to the department in accordance with AS 43.70.075(d)(1).

1. Suspension of Holiday Alaska's tobacco endorsement for a period of 20 consecutive days for outlets located at 2300 Cushman in Fairbanks, 2900 East Tudor in Anchorage, and 4105 Geist Road in Fairbanks.
2. Imposition of a civil penalty in the amount of \$300 for each of the three aforementioned Holiday Alaska outlets.

Unless the parties otherwise agree in writing or this decision is stayed by an appeal, the suspension must commence within 90 days from the date of the final administrative action in this case. The fine must be paid in full before the license returns to active status.

DATED this 1st day of November, 2005.

By: _____
David G. Stebing
Administrative Law Judge

as identified by Judge Collins. “[I]t can hardly be disputed that the government has a very significant interest in the health of children and that the instant statute was designed to achieve a laudable and compelling goal, reduction in tobacco use by children.”)

FINAL AGENCY ACTION

Having reviewed the proposed decision of the administrative law judge in: **Matter of Holiday Alaska, Inc., OAH Case Nos. 04-0271, 04-0284, 04-0299-TOB, I:**

Option 1: adopt the proposed decision in its entirety under AS 43.70.075(n)(1).

Date: 11/17/05 By: _____
Commissioner,
Department of Commerce, Community
and Economic Development

Option 2: remand the matter for further proceedings under AS 43.70.075(n)(2), to receive additional evidence on the following issues:

Date: _____ By: _____
Commissioner,
Department of Commerce, Community
and Economic Development

Option 3: reject the proposed decision under AS 43.70.075(n)(3), review the record, and issue a decision based on the record.

Date: _____ By: _____
Commissioner,
Department of Commerce, Community
and Economic Development

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DBA: HOLIDAY ALASKA, INC.)	
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)	04-0299-TOB
Respondent.)	[Department. Nos. 0500-04-021, 0500-04-048,
)	0500-04-067]
_____)	

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that on the 1st day of November, 2005, a true and correct copy of the **DECISION AND ORDER** was mailed to the following: William Noll, Commissioner, John Treptow, Respondent's Attorney; Cynthia Drinkwater, Assistant Attorney General, Rick Urion, Director, Division of Occupational Licensing; and Rick Younkings, Chief Investigator.

By: _____
Linda Schwass