

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

IN THE MATTER OF )  
 )  
 VALLEY COUNTRY STORES, LLC )  
 )  
 \_\_\_\_\_ )

Case No. OAH 05-0494-TOB  
Agency Case Nos. 0500-04-008  
0500-04-062

ORDER ON LICENSEE'S MOTION

**I. Introduction**

The Department of Commerce, Community and Economic Development ("DCCED") notified Valley Country Stores, LLC ("VCS") that was suspending VCS's tobacco endorsement for 65 days and imposing a civil penalty of \$800 based on two incidents regarding the sale of tobacco to a minor. VCS requested a hearing. VCS then filed a document entitled "Dispositive Motion" that reads, in its entirety, as follows:

The issues in this case are not factual. The issues are purely legal. As Valley Country Stores' Dispositive Motion, attached is a copy of the recent brief filed by a sister company in the Alaskan Supreme Court. The positions and arguments therein are adopted for application to this proceeding. VCS intends to waste no more time with this matter. A stay would be appropriate pending the Decision of the Supreme Court. If no stay is issued here, a stay will be obtained along the line up where commonsense can prevail.

Attached to this motion was the appellant's Supreme Court brief from another case, *Godfrey v. DCCED*.<sup>1</sup>

**II. Facts**

In its Notice of Suspension of Tobacco Endorsement, DCCED alleged the following facts:

1. VCS currently holds a business license with a tobacco endorsement.
2. On July 24, 2004, an employee of VCS named March Ann Case sold tobacco to a minor while working for VCS.
3. Based on the above sale, Case was cited for selling tobacco to a minor and found guilty at trial on February 4, 2005, of violating AS 11.76.100(a)(1) by giving or selling tobacco to a minor.
4. On May 7, 2004, an employee of VCS named Christopher Lee Stumpf sold tobacco to a minor while working for VCS.

<sup>1</sup> *Richard Godfrey dba Mendenhall Valley Tesoro v. State of Alaska, Department of Community and Economic Development*, S.Ct. no. S11894, 1JU-04-0376CI.

5. Based on this incident, Stumpf was charged with violating AS 11.76.100(a)(1) by selling tobacco to a minor. Stumpf entered a plea of no contest and was convicted of the offense on May 20, 2005.

There are no facts in dispute. VCS's statement that "the issues in this case are not factual...the issues are purely legal" clearly indicates that VCS does not challenge the truth of these facts for purposes of this case. It is undisputed that Stumpf and Case were convicted of violating AS 11.76.100(a)(1) by selling tobacco to a minor. Because the administrative action in this case is based on the convictions of Stumpf and Case, I will assume for purposes of this motion that neither of them actually did sell tobacco to a minor.

### **III. Discussion**

The evidentiary hearing in this case should be cancelled and the case should be adjudicated summarily.

VCS requested a hearing in this case, but wishes to forgo an evidentiary hearing. VCS labeled its motion as "dispositive." Counsel's statement that "VCS intends to waste no more time with this matter" appears to be a request for summary adjudication. There is no right to an evidentiary hearing, and summary adjudication is appropriate, in the absence of a factual dispute."<sup>2</sup> The evidentiary hearing scheduled in this matter should be canceled, and the case decided summarily.

The legal issues presented by VCS should not be adjudicated in this administrative hearing.

VCS's motion merely refers to the Supreme Court brief in another case. That brief raises four issues on appeal. Two of these do not apply to this case. In the Supreme Court brief, the appellant complained that it was not afforded an adequate hearing because the department had not adopted regulations specifying hearing procedures. It also argued that it was denied due process because it could not intelligently decide how to prepare a defense without knowing the specific procedures that would be followed.

On June 27, 2004 the department adopted 12 AAC 12.800 – 855, which provide detailed procedures for administrative hearings. VCS did not argue any inadequacy in these new regulations. In this case, VCS has no right to an evidentiary hearing. VCS has not proposed any particular procedures that it feels are necessary to protect its interests, nor has it made any offer of proof to show that any applicable procedure or lack of specifically designated procedure has in any

way prejudiced it. Had it wished, VCS could have proposed procedures that it felt would be fair or even advantageous to its case. It could have submitted a motion and a proposed order establishing procedural safeguards it would have considered satisfactory. VCS has had an opportunity to be heard on any issue; it has stated that it does not wish to waste any time on the matter. VCS has not suffered prejudice from any procedural defect.

The remaining two issues challenge the constitutionality of AS 43.70.075(d) and (m) facially and as applied to the case. VCS has not briefed the issue of whether it is appropriate for an executive branch administrative law judge to consider the constitutionality of a statute. The Alaska Supreme Court has cited *Califano v. Sanders*, 430 U.S. 99, 109 (1976), for the proposition that “constitutional questions obviously are unsuited to resolution in administrative hearing procedures.”<sup>3</sup> While the Supreme Court’s decision in *Treacy v. Anchorage*<sup>4</sup> suggests that a hearing officer cannot properly rule on the constitutionality of an ordinance, and presumably a statute, an argument could be made under that case that legislative facts should be admitted into evidence in an administrative hearing to provide the Superior Court with an adequate record on which to consider constitutional issues. VCS has deemed any fact finding in this matter to be a waste of its time. There is, therefore, nothing that can be done at the administrative level in this case regarding the constitutional issues that VCS has raised.

#### **IV. Conclusion**

Because there are no disputed material issues of fact, summary adjudication is appropriate in this case and the evidentiary hearing currently scheduled should be canceled. DCCED’s decision to suspend VCS’s tobacco endorsement and impose a civil penalty should be affirmed.

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<sup>2</sup> *Church v. State of Alaska, Department of Revenue*, 973 P.2d 1125 (Alaska 1999), citing *Human Resources Co. v. Alaska*, 946 P.2d 441, 445 n.7 (Alaska 1997), *Douglas v. State*, 880 P.2d 113, 117 (Alaska 1994) and *Smith v. State*, 790 P.2d 1352, 1353 (Alaska 1990).

<sup>3</sup> *Treacy v. Municipality of Anchorage*, 91 P.3d 252, fn. 90 (Alaska 2004).

<sup>4</sup> *Id.*

**V. Order**

IT IS HEREBY ORDERED that the motion of Valley Country Stores, LLC for summary adjudication be GRANTED, and that no further proceedings be scheduled in this matter.

IT IS FURTHER ORDERED that the decision of The Department of Commerce, Community and Economic Development to suspend the tobacco endorsement of Valley Country Stores and to impose a civil penalty be AFFIRMED.

DATED this 8<sup>th</sup> day of November, 20<sup>07</sup>

By: \_\_\_\_\_  
DALE WHITNEY  
Administrative Law Judge

**Adoption**

This Order is issued under the authority of AS 44.33.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

DATED this 30<sup>th</sup> day of November, 2005. 1 1 / 1 1

By:

Signature

Deke Whitney

Name

Administrative Law Judge

Title

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Paul Hoffman

AAG Drinkwater

Signature

11.30.05