

**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)
)
 WADE BALL, INC.)
_____)

Case No. OAH 06-0182-TOB
Agency Case Nos. 0501-05-316

DECISION

I. Introduction

The Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing (“the division”), notified Wade Ball, Inc. that it was suspending Wade Ball, Inc.’s tobacco endorsement for 45 days and imposing a civil penalty of \$5,000 for allowing a vending machine to sell tobacco in its establishment without obtaining a tobacco endorsement. Wade Ball, Inc. requested a hearing. The Commissioner of Commerce, Community and Economic Development referred the case to the Office of Administrative Hearings to establish the facts and recommend a decision. Administrative Law Judge Dale Whitney heard the case on May 16, 2006. Louise Stutes, a partial owner of the business, represented Wade Ball, Inc. by telephone. Wade Ball, also a partial owner, was present by telephone with Ms. Stutes. Assistant Attorney General Cynthia Drinkwater represented the division. The administrative law judge finds an appropriate penalty to be a \$5,000 monetary penalty with all but \$250 suspended, and suspension of the licensee’s right to sell tobacco for 45 days.

II. Facts

The following facts were established by testimony at the hearing. Wade Ball, Inc. owns an establishment in Kodiak called the Village Bar. Wade Ball, Inc. is in turn owned by Ms. Stutes, her brother Wade Ball, and another sister who lives out of state. Wade Ball, Inc. was organized in 1986 by the three siblings when they inherited the Village Bar from their father. The corporation does not engage in any business other than the operation of The Village Bar. Ms. Stutes and her brother handle the day-to-day management of the establishment.

Located in the Village Bar is a vending machine that has been dispensing cigarettes to bar patrons since the late 1960s. The machine is owned, stocked and maintained by a local Kodiak company called Lester Brothers Vending, which is owned by Lester Brothers, Inc. Lester Brothers Vending pays Wade Ball, Inc. a percentage of gross income from the machine totaling, on the

average, approximately \$40.00 per month. Mr. Ball testified that for the period from April 1, 2006 through April 30, 2006, which represented a typical month, Lester Brothers' Vending collected \$803.50 in gross sales from the machine, and paid Wade Ball, Inc. \$56.24.

Long before this case arose, Ms. Stutes and Mr. Ball had asked Lester Brothers Vending whether it had all the necessary endorsements to sell tobacco, and they had received an affirmative response. Ms. Stutes and Mr. Ball were not aware that the owners of premises where a tobacco vending machine is located must also hold a tobacco endorsement. Kenny Lester, one of the owners of Lester Brothers' Vending, testified that he has been in the cigarette vending business in Kodiak for twenty-six years and was never aware that each of the businesses where his cigarette machines are located was required to maintain tobacco endorsements. Mr. Lester testified that when the tobacco endorsement requirement was introduced, it had been his belief that his business's endorsement met all requirements for the locations where his company's machines were located. Mr. Lester testified that he was surprised when Ms. Stutes contacted him to say she was being penalized for not having an endorsement.

In October or November of 2005 an inspector from the Department of Revenue toured Kodiak to verify that cigarettes being sold there were labeled in compliance with tobacco tax laws. The inspector came into the Village Bar and checked to see if cigarettes in the machine had the proper revenue stamps on them. The inspector talked with Mr. Ball and, according to Mr. Ball, mentioned that "it might be a good idea" to get a tobacco endorsement on his business license. Mr. Ball testified that the inspector offered this information in a tone of friendly advice, not in a way that would suggest or imply that an endorsement was mandatory or that his business was violating the law. Mr. Ball testified that he did not look into the matter further because he was aware that Lester Brothers Vending held all necessary licenses and permits to sell tobacco, and that while he intended to fully comply with all applicable laws, he did not have time to follow up on every good idea that he received. Apparently, the cigarettes in the machine did have proper tax stamps, and Wade Ball, Inc. heard nothing further from the Department of Revenue.

An investigator from the division, Donald Faulkenbury, testified that the investigator from the Department of Revenue forwarded to the division a list of the businesses it found in Kodiak that were selling tobacco. The division then checked the names of these businesses against its list of current business licenses to see if the businesses had tobacco endorsements. Investigator Faulkenbury testified that approximately ten to twelve businesses were selling tobacco in Kodiak, and about half of them lacked a tobacco endorsement. These businesses, including Wade Ball, Inc,

were sent notices of suspension and imposition of civil penalty. The investigator testified that fifty percent compliance with the tobacco endorsement requirement is typical of businesses selling tobacco across rural Alaska.

Investigator Faulkenburry testified that most cases involving sale of tobacco without a business license endorsement end in a settlement agreement. The typical penalty in these settlements is a 45-day suspension of the right to sell tobacco at the establishment, and a \$5,000 civil penalty with \$4,000 of that amount suspended on the condition that the business comply with business licensing laws for a period of four years. Upon cross-examination, Investigator Faulkenburry testified that, in the cases of the Kodiak businesses that recently received civil penalties, most of them reached settlements with all of the civil penalty but \$500 suspended. Investigator Faulkenburry testified that in many of those cases a mitigating factor was found, specifically that the businesses had been told by the owner of the vending machines in their stores that they did not need tobacco endorsements in addition to the one held by the owner of the machines.

Wade Ball, Inc. received its Notice of Suspension of Tobacco Endorsement and Imposition of Civil Penalty on a Friday in February, 2006. The following Monday, Mr. Ball applied for a tobacco endorsement for Wade Ball, Inc. On the application, Mr. Ball wrote that the corporation would be doing business as the Village Bar. The division replied that a change in the business name required a new license, and it provided a form to apply for a new business license in the name of the Village Bar. Ms. Stutes completed the form showing that the name of the business was Village Bar, owned by Wade Ball, Inc., and she returned it to the division with the appropriate fees.

III. Discussion

There are no material factual disputes in this case. Wade Ball, Inc. concedes that it allowed a vending machine to sell tobacco on its premises, and that it did not have a tobacco endorsement. While admitting that it was in violation of AS 43.70.075(a) and subject to penalty under AS 43.70.075(k) and (s), Wade Ball, Inc. argues that the division's proposed monetary penalty is excessive. The division asks that the maximum penalty of \$5,000 be imposed.

The maximum penalty allowed by law in this matter is \$250 per day of violation, not to exceed \$5000.¹ No statutory or regulatory rules provide guidance as to what factors should be considered when the amount of a penalty is being determined, nor does there appear to be relevant

¹ AS 43.70.075(s).

case law. Since the legislature provided for a range of penalties from no penalty up to the maximum, it is reasonable to conclude that the intent of the statute was to reserve the maximum penalty for worst-case scenarios and the minimum penalty, which might be nothing more than a warning, for the most mitigated circumstances.

In deciding what factors to consider in setting penalties, the policy behind the requirement should be considered. Investigator Faulkenbury testified that the state's interest in requiring tobacco endorsements is to create a database of businesses selling tobacco. This database can then be used for audits and inspections to determine whether the businesses are selling tobacco to minors. The endorsement requirement appears to have no other purpose than facilitating enforcement programs to prevent and penalize the sale of tobacco to minors. According to Investigator Faulkenbury, the state's collection of tobacco lawsuit settlement funds is conditioned on the vigor of these programs.

A number of factors can be considered in determining the correct penalty for Wade Ball, Inc. Without specific legal authority on which should be given the greatest weight, I consider the following factors together, not necessarily in order of importance.

I find credible the testimony of Ms. Stutes and Mr. Ball that they honestly believed that the language on the business license application did not apply to them because they thought Lester Brothers, Inc., not Wade Ball, Inc., was the party that would be deemed to be selling "tobacco products as a retailer." The form states that there must be a tobacco endorsement for each location where tobacco is sold, but it does not specifically state that more than one endorsement might be necessary for a single place of business selling tobacco.² Wade Ball, Inc. made at least some inquiry of Lester Brothers, Inc and was reassured that all necessary permits and endorsements were in place for the vending machine. Other than the form, there is no evidence that Wade Ball, Inc. had any actual notice that a tobacco endorsement was required. The division asserts that Wade Ball, Inc. had notice of the requirement for a tobacco endorsement because the application for a business license directs applicants to indicate whether "the business will sell tobacco products as a retailer." Investigator Faulkenbury testified that there had been articles in the newspapers when the tobacco endorsement requirement was introduced, but there had been no specific effort made to notify businesses of the requirement. Investigator Faulkenbury further testified that the

² A substantial portion of the tobacco violation caseload could probably be easily eliminated by simple clarification of the language on this form.

endorsement requirement has not been substantially enforced until just recently, and that a number of other businesses have been unaware of the requirement.

An important policy objective is ensuring future compliance. Wade Ball, Inc. immediately obtained a tobacco endorsement when it learned that obtaining an endorsement was not merely a good idea, as the Revenue inspector intimated, but an affirmative legal duty. Wade Ball, Inc. has demonstrated a commitment to compliance with alcohol laws, including successful performance in undercover compliance inspections by minors employed by the Alcohol Beverage Control Board.³ The credible testimony of Ms. Stutes and Mr. Ball established their intent to comply with all laws affecting their business. There is every reason to believe that Wade Ball, Inc. will comply with the tobacco endorsement requirement in the future, and no strong deterrent is necessary to keep this particular licensee in compliance.

A substantial monetary penalty will have a disproportionately harsh effect on Wade Ball, Inc. As a small family-owned business that derives only about fifty dollars per month in tobacco sales revenue, Wade Ball, Inc. be more severely impacted by a monetary penalty than would a large business such as a major supermarket. Conversely, the period of suspension may have much greater impact on larger businesses with high tobacco sales volume, but have little deterrent on a local bar with a vending machine that has very little tobacco sales volume. These must be balanced on a case-by-case basis. In the case of Wade Ball, Inc. a long period of suspension will not have a significant impact on the licensee, but a large fine will have a substantial impact on this small business. The facts of the case do not support the need for the high impact of a large monetary penalty.

Licensees in similar situations should be treated in a similar manner. Investigator Faulkenbury testified that most previous cases have been resolved with a settlement agreement, and that very few cases have actually been adjudicated by hearing. It is somewhat difficult to know what weight should be given to these prior cases. One might assume that an agreed penalty would reflect a reduced penalty, but an equally valid assumption is that the licensees agreed to a higher penalty than might have been warranted under the facts of their cases in order to expeditiously conclude their cases. There appear to be very few cases substantially similar to this one in which a penalty was set without a settled agreement.

³ Exhibits submitted by Wade Ball, Inc. on April 19, 2006, demonstrate successful compliance in undercover sting operations in minors attempted to buy alcohol.

In most settled cases licensees are not required to pay more than \$1000 in similar circumstances, with an additional amount suspended. The evidence shows that in recent cases in Kodiak with similar situations, many of the licensees were only required to pay \$500 because the vending machine owners had told the licensees they did not need an endorsement. It is not clear that Lester Brothers, Inc. specifically stated to Wade Ball, Inc. that it did not need an endorsement, but the evidence does show that by words and actions Lester Brothers Inc. did convey the belief it held that Wade Ball, Inc. did not need an endorsement. It is not known whether Lester Brothers, Inc. was the same vending machine owner as in the other Kodiak cases. Under these circumstances, it would be unfair to assess an actual unsuspended fine of more than \$500 in this case.

The maximum penalty should be reserved for worst-case scenarios and the minimum penalty, which would be a small amount that is all suspended on the condition of good conduct, should be reserved for the most mitigated circumstances. It is easy to imagine far more aggravated cases than this one for which the maximum penalties should be reserved. Upon consideration of all the above facts and circumstances, I find this case to represent a particularly mitigated case.

IV. Conclusion

The proper penalty in this case is a \$5,000 fine, with \$250 to be paid and \$4,750 suspended for one year on the condition that the licensee properly maintain a business license tobacco endorsement, and a suspension of the right to sell tobacco for a period of 45 days.

V. Order

Upon adoption of this Decision as a final administrative decision in this matter, Wade Ball, Inc. shall pay a fine of \$250, with an additional \$4,750 suspended for one year on the condition that Wade Ball, Inc. maintain a proper business license tobacco endorsement for the Village Bar. Wade Ball, Inc. shall be prohibited from selling tobacco from the premises of the Village Bar in Kodiak for a period of 45 days, commencing at a time to be determined by the division.

DATED this 17 day of November, 2006.

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 11th day of December, 2006.

By: _____

Signature

Richard K. Union

Name

Director

Title

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

LOUISE STUTES

CYNTHIA DRINKWATER, AAG

Signature

its

Date

12/12/06