

**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)	
)	
DOMINADOR GUEVARRA)	OAH No. 06-0617-TOB
_____)	Div. No. 0501-06-115

DECISION

I. Introduction

The Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing (“the division”), notified Dominador Guevara that it was suspending Mr. Guevarra’s entitlement to hold a business license tobacco endorsement and that the division was imposing a civil fine against Mr. Guevarra. Mr. Guevarra 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 April 3, 2007. Mr. Guevarra appeared by telephone. Assistant Attorney General Cynthia Drinkwater represented the division. Consideration of the evidence and applicable law shows a proper penalty to be \$1,000 with \$900 suspended, and suspension of the right to sell tobacco for a period of 45 days.

II. Facts

The following facts were established by testimony at the hearing.

Mr. Guevarra lives in Dutch Harbor most of the year and works for Unisea Seafoods as a seafood processor. Mr. Guevarra earns \$7.15 per hour, working under consecutive renewable contracts that typically last three to four months. Mr. Guevarra lives in the Unisea bunkhouse in a room with his fiancée, Erlinda Usi.

In October of 2005 Mr. Guevarra began running a small side business out of his room at the bunkhouse, selling small quantities of phone cards and cigarettes. Mr. Guevarra obtained this merchandise from a woman named Rosalina or Rose Hook, who runs a store in Dutch Harbor. Mr. Guevarra put “Marlboro” and “Kool” stickers on the door of his room to advertise the availability of cigarettes, but for the most part his customers consisted of his relatives. Mr. Guevarra has fifteen to twenty relatives who work at Unisea, and they don’t always have time to go to the store to get cigarettes. Mr. Guevarra typically sold about ten packs of cigarettes per month. He estimates that in his busiest month he probably sold about 25 packs.

Kris Heikkila is an investigator with the Department of Revenue Tax Division. As a Department of Revenue employee, Investigator Heikkila's principal interest in tobacco sales is compliance with tobacco tax stamp requirements, but in the course of his investigations he also checks for compliance with business licensing rules. In June of 2006 Investigator Heikkila was in Dutch Harbor following up reports that some businesses in the community may have been selling untaxed cigarettes. During this visit, the investigator was informed by local residents that some people may have been selling cigarettes in the Unisea bunkhouse. Accompanied by a partner and a Unisea security officer, Investigator Heikkila toured the Unisea bunkhouse. Investigator Heikkila testified that the bunkhouse was a very large complex with many rooms. He found that three or four of the rooms had stickers or signs made from cigarette cartons advertising the availability of cigarettes. Among these was Mr. Guevarra's room, room 207.

Investigator Heikkila testified that when he knocked on the door, Mr. Guevarra opened it and was very cooperative with the investigator and his partner. Mr. Guevarra stated that he did have cigarettes for sale, and he invited the investigators in to inspect his inventory. When asked about his business license, Mr. Guevarra presented a business license with a tobacco endorsement that had been issued to "Rose's Prepaid Phone Cards" which indicated that the business was owned by Rosalina Hook. This license had expired on December 31, 2005. Mr. Guevarra testified that he told Investigator Heikkila that he thought Ms. Hook had provided him with a current license, but after looking around the room Mr. Guevarra was unable to find a current license. Investigator Heikkila testified that he did not remember if Mr. Guevarra had looked for a current license. Mr. Guevarra was candid in his testimony that, although he looked around to see if he could find a current license, he was aware that the previous license had expired and that he probably didn't have a current one.

Mr. Guevarra testified that he had been buying cigarettes from Ms. Hook for \$4.85 per pack, and selling them for \$5.25. Investigator Heikkila testified that Mr. Guevarra had stated he was selling cigarettes for \$6.00 per pack, and that Ms. Hook kept a percentage of sales. Mr. Guevarra has at times described himself as an agent or employee of Ms. Hook. While there may have been some truth to this characterization in 2005, at least by the time Investigator Heikkila arrived Mr. Guevarra was operating independently, and Ms. Hook was merely a supplier. Mr. Guevarra was, however, truthful and candid about the nature of the business, both with Investigator Heikkila and at the hearing. To the extent there are discrepancies in his statements, they can be attributed in part to the fact that Mr. Guevarra is from the Philippines and speaks English as a second language, and that

he is not an experienced businessperson. It is also possible that Mr. Guevarra has characterized his business in a light that might allow him to avoid responsibility for a business license. But the greater explanation seems to be that the enterprise was a very informal one, with low volumes and small amounts of money changing hands. The business relationship between Mr. Guevarra and Ms. Hook appears to have been very casual, as one might expect for the very low volumes of money and merchandise involved.

Mr. Guevarra stopped selling cigarettes in May or June of 2006, mostly because he had been frightened by Investigator Heikkila's visit and alarmed by the possible legal ramifications of being in the tobacco business, of which he lacked a clear understanding. At that time Mr. Guevarra had ten to twenty cartons of cigarettes remaining, which he returned to Ms. Hook.

III. Discussion

There are no material facts in dispute in this case. A person must have a valid tobacco endorsement to a business license in order to sell tobacco.¹ Mr. Guevarra concedes that he was selling tobacco from his room, and that he did not have a current tobacco endorsement. The maximum penalty allowed by law is \$250 per day of violation, not to exceed \$5000, and suspension of the person's business license endorsement or right to obtain a business license endorsement for up to 45 days.² 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 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 order to be liable for the maximum penalty, it must be shown that Mr. Guevarra was selling tobacco on at least twenty days. The division has stated the specific days on which it believes that Mr. Guevarra was selling tobacco; Mr. Guevarra has not disputed that he was selling tobacco on at least twenty different days.

The principal dispute concerns the amount of the monetary penalty, if any, that should be assessed. The division recognizes that Mr. Guevarra sold a very small quantity of cigarettes, but it argues that because of the public's interest in preventing the sale of tobacco to minors, a heavy penalty should be imposed in order to convey a strong message to even informal dealers of small quantities of tobacco that state licensing requirements must be followed. The division has

¹ AS 43.70.075(a).

² AS 43.70.075(s), (k).

recommended a \$5,000 fine, with \$2,500 suspended on the condition that Mr. Guevarra refrain from selling tobacco unless he has a valid license.

Donald Faulkenburry, an investigator with the division, testified that the division relies on the list of holders of tobacco endorsements to enforce taxation laws and possible sales to minors. According to Investigator Faulkenburry, holders of tobacco endorsements are tested for sales to minors by sending minors to buy tobacco at businesses with tobacco endorsements. If a business is not listed as a holder of a tobacco endorsement, the state cannot monitor that business for sales to minors. The division asserts that the state has a strong public health interest in preventing sales of tobacco to minors. The sale of tobacco to someone under nineteen years of age is a non-criminal violation, with a minimum penalty of \$300 and a maximum penalty of \$500.³

The division appears to recognize that Mr. Guevarra is or is close to being a least-serious offender. Before the division even notified him of its administrative action for lack of a tobacco endorsement, Mr. Guevarra self-imposed the best possible outcome the division could wish for: realizing that the tobacco business was more serious and complicated than he had thought, Mr. Guevarra returned his inventory to his supplier and got out of the business completely. He was open and cooperative with investigators. Initially, he may not have been entirely up-front about the business relationship he had with Ms. Hook, but Mr. Guevarra appears to have been entirely truthful at the hearing and prepared to take responsibility for any legal missteps he may have taken. In this case, a fine of \$1,000.00 with \$900.00 suspended on the condition that Mr. Guevarra comply with all tobacco laws for a year is adequate to meet the interests of the state, and to send a strong message to Mr. Guevarra and others in a similar situation.

In addition to a monetary penalty, a person's right to obtain a tobacco endorsement may be suspended for up to 45 days. The division advocates imposition of the full 45 days of suspension. The division further suggests that, because Mr. Guevarra is no longer selling tobacco, the 45 days should not commence until such time as Mr. Guevarra actually applies for a tobacco endorsement. There is a certain logic to the division's recommendation. Suspending a person's right to sell tobacco when the person has no intent to sell tobacco would not appear to constitute a meaningful penalty. But this logic overlooks the fact that Mr. Guevarra has voluntarily chosen to withdraw from the tobacco business because of his worries over the possibility of offending the state. Having decided to abandon the business altogether rather than risk running afoul of licensing laws, Mr.

³ AS 11.76.100; AS 12.55.035(b)(7).
OAH 06-0617-TOB

Guevarra should not be punished any more than a similarly situated person who elects to continue profiting from sales of this dangerous product. To the extent Mr. Guevarra evades meaningful punishment, he receives a reward for electing not to engage in the business of selling tobacco, a desirable result. Further, the logistical challenge of monitoring for a trigger to begin the period of suspension that would outweigh the benefit. Mr. Guevarra's right to sell tobacco should be suspended for 45 days, beginning at a time to be selected by the division but commencing within a reasonable time after the adoption of this decision as a final order.

IV. Conclusion

The proper penalty in this case is a \$1,000 fine, with \$100 to be paid and \$900 suspended for one year on the condition that the licensee not sell tobacco without 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, Mr. Guevarra shall pay a fine of \$100, with an additional \$900 suspended for one year on the condition that Mr. Guevarra not sell tobacco without a business license tobacco endorsement. Mr. Guevarra shall be prohibited from selling tobacco for a period of 45 days, commencing within a reasonable time to be determined by the division.

DATED this 3 day of ~~June~~^{July}, 2007.

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 15th day of August, 2007.

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:

D. Guevarra
Cynthia Drinkwater
Richard Union CCED
Signature _____ Date 8/16/07