

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

| | | |
|--------------------------------|---|-----------------------------|
| IN THE MATTER OF |) | |
| |) | |
| KIM P. DANIELOWSKI |) | OAH No. 07-0076-TOB |
| DBA Riverside Grocery and Deli |) | Agency Case No. 0501-07-031 |
| _____ |) | |

DECISION AND ORDER

I. INTRODUCTION

Ms. Danielowski admits she violated AS 43.70.075(a) when she sold tobacco products for 11 days with out the required business license endorsement. She challenges the division’s imposition of penalty for her violation.

A hearing was held on May 14, 2007. The division was represented by Assistant Attorney General Cynthia Drinkwater. Ms. Danielowski participated by telephone and appeared *pro se*. The parties agree that the only issue remaining is the appropriate penalty, if any, to be imposed for Ms. Danielowski’s violation.

II. FACTS

Ms. Danielowski owns a grocery store in Sutton, Alaska that sells, among other items, tobacco products. Daily tobacco sales total, on average, \$35.00. Total daily sales range from \$700.00 to \$1,200.00. Ms. Danielowski has had a business license endorsement to sell tobacco products since June 17, 2004. In October 2006 the division sent Ms. Danielowski a notice that her endorsement would expire at midnight December 31, 2006 and must be renewed.¹ She attempted to renew online but was unable to complete the transaction. Ms. Danielowski testified that she filled out the form and wrote the check in December; however, for tax purposes she made her check payable to the State of Alaska on dated January 3, 2007.² She explained that the check was dated January 3, 2007 because the first and second of January were holidays. The division received her completed renewal on January 11, 2007.³ The tobacco endorsement was

¹ Exhibit 2 p. 7.

² Exhibit 4.

³ Exhibit 2 pp. 6, 7.

issued January 12, 2007. Ms. Danielowski admits that she had tobacco sales everyday from the first of January through the twelfth of January.

The division presented the testimony of its investigator Donald Faulkenbury. He explained that the division typically resolves tobacco endorsement cases by entering into a memorandum of agreement (MOA) with the violator. When entering into an MOA and determining an acceptable penalty the division considers the duration of the violation, who took the first action to correct the problem, and whether it is a repeat offender. For a first time offender such as Ms. Danielowski, Mr. Faulkenbury testified that the division would have agreed to either 1) a 45 day suspension of her endorsement and a stay of 80% of the fine or 2) 100% of the fine and a stay of the endorsement.

III. DISCUSSION

If a person offers tobacco products for sale without a valid endorsement issued on their business license, the division may impose a civil penalty up to \$250.00 for each day of the violation (not to exceed \$5,000.00) and suspend the endorsement for a period not to exceed 45 days.⁴ Ms. Danielowski argues that she was only two days late in applying for her tobacco endorsement; she had completed the application, wrote the check and placed everything in the mail on the first business day of the New Year. She had taken all necessary steps to correct the violation before it was discovered.

Although Ms. Danielowski's tobacco sales are small they are important to her business. Ms. Danielowski argues that the maximum penalty allowed by statute, \$2,750.00 and a 45 day suspension of tobacco sales is excessive and would impose an extreme hardship on her business. As a practical matter, she believes she completed all steps necessary for an endorsement by January 3, 2007. She understands the importance of an endorsement and believes under the circumstances no penalty should be imposed.

A tobacco endorsement is not valid until it is issued.⁵ Ms. Danielowski's endorsement was issued January 12, 2007. She offered tobacco products to the public without an endorsement for 11 days. While Ms. Danielowski's total tobacco sales may not exceed \$35.00 per day, it is conceivable that when in the store, these customers purchase impulse items which contribute to her total revenues of \$700.00 to \$1,200.00 per day. The maximum penalty permitted under these

⁴ AS 43.70.075(a), (k) and (s).

facts is \$2,750.00, an amount that equates to almost three days of total revenue to Ms. Danielowski. The maximum fine could be extremely burdensome to a small business such as Ms. Danielowski's.

However, Ms. Danielowski's violation is the direct result of a conscious business decision intended to provide favorable consequences. When Ms. Danielowski decided to wait until after the New Year to renew her tobacco endorsement she knew she would be offering tobacco products without a valid endorsement in violation of the law. If Ms. Danielowski had desired to be in compliance with AS 43.70.075 she could have placed a sign on the counter that said she was temporarily not selling tobacco products. She did not. Ms. Danielowski made a business decision to intentionally violate AS 43.70.075(a) and a penalty is warranted.

Weighing Ms. Danielowski's conscious decision to briefly violate the law against the fact that she corrected the matter before it was discovered and that there was no significant disruption to the department's ability to enforce the tobacco laws, it appears fair that a fine be assessed, but that most of it be suspended so long as Ms. Danielowski complies with all tobacco licensing requirements for a year. A suspension of Ms. Danielowski's right to sell tobacco for a period equal to the number of days she was unlicensed also would reflect a fair balancing of these considerations.

IV. CONCLUSION

The proper penalty in this case is a \$2,750 fine, with \$250 to be paid and \$2,500 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 11 days.

V. ORDER

Upon adoption of this Decision as a final administrative decision in this matter, Kim P. Danielowski dba Riverside Grocery and Deli shall pay a fine of \$250, with an additional \$2,500 suspended for one year on the condition that Kim P. Danielowski dba Riverside Grocery and Deli maintain a proper business license tobacco endorsement. Kim P. Danielowski dba Riverside Grocery and Deli shall be prohibited from selling tobacco from the premises of the

⁵ AS 43.70.075(a) ("Unless a person has a business license endorsement *issued...*") (emphasis added).

Riverside Grocery and Deli for a period of 11 days, commencing at a time to be determined by the division.

DATED this 12th day of June, 2007.

By: Signed _____
Rebecca Pauli
Administrative Law Judge

Non-Adoption Options

1. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 43.70.075 and AS 44.64.060, declines to adopt this Decision and Order, and instead orders under AS 44.64.060(e)(2) that the case be returned to the administrative law judge to

take additional evidence about _____;

make additional findings about _____;

conduct the following specific proceedings: _____.

DATED this _____ day of _____, 2006.

By: _____
Signature

Name

Title

2. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 43.70.075 and AS 44.64.060 (e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as follows:

In this matter, the Administrative Law Judge [hereinafter cited as “ALJ”] recommended the payment of a \$2,750 fine, with \$250 to be paid and \$2,500 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 11 days.

The recommendation was based on a finding that Ms. Danielowski sent a check the Division of Corporations, Business and Professional Licensing [hereinafter cited as “DCBPL”] dated January 3, 2007, that her license expired on December 31, 2006, and that Ms. Danielowski was issued a license with a tobacco endorsement on January 12, 2007.

The recommendation made by the ALJ was that Ms. Danielowski had made unlicensed tobacco sales for 11 days. However, this was premised on a conclusion that DCBPL in issuing a license as of the date of processing of the renewal on January 12, 2007 was following a regulation. However, a filing by the Department of Law specifies that there is no applicable regulation regarding when a business license should issue; in actual fact, the license was issued on January 12 due to an internal policy of DCBPL. Nor does the Department of Law filing indicate whether this division policy is in written form or is

an unwritten custom within DCBPL. Nor is there any indication that such a policy would be readily apparent to a licensee, such as Ms. Danielowski.

The sanction proposed by ALJ is based on unauthorized sales of 11 days, and that conclusion is not supported unequivocally. It is reasonable that the date of the check could be reviewed by a member of the public as the time when a business license issues, just as a tax return is filed on the date it is postmarked. Moreover, it is agreed that Ms. Danielowski: (1) has previously and subsequently been in compliance with all licensing requirements; (2) that she attempted to obtain a license in a timely fashion over the Internet, but failed; and (3) that there were no known violations by Ms. Danielowski of any other applicable statutes or regulations during any period applicable to this matter.

Therefore, the undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty or other disposition of this case by suspending all fines as well as any period of a prohibition of the sale of tobacco from the premises of the Riverside Grocery and Deli for a period running from the date of this Non-Adoption Order until and including December 31, 2007 and requires Ms. Danielowski as a condition of suspension to maintain a current business license and tobacco endorsement and apply for and be issued a business license and tobacco endorsement for any calendar year subsequent to 2007 before tobacco sales are made.

DATED this 26th day of July, 2006.

By: Signed
Signature
Emil Notti
Name
Commissioner
Title

[This document has been modified to conform to technical standards for publication.]