

**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)	
)	
GEORGE BOWEN)	Case No. OAH 07-0286-TOB
dba ONE STOP)	Agency Case No. 0501-07-140
_____)	

DECISION

I. Introduction

The Department of Commerce, Community and Economic Development, Division of Corporations, Business and Professional Licensing (“the division”), notified George Bowen, doing business as One Stop, that it was suspending his entitlement to hold a business license tobacco endorsement for 45 days and imposing a civil fine of \$5,000.00. Mr. Bowen 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 November 13, 2007. Mr. Bowen appeared by telephone. Assistant Attorney General Cynthia Drinkwater represented the division.

Under the circumstances of this case, Mr. Bowen should be required to pay a \$5,000 civil penalty, with \$4,000 suspended on the condition that Mr. Bowen complies with this order and the tobacco business license endorsement requirement for a period of two years. Suspension of Mr. Bowen’s tobacco endorsement should be stayed for the same two-year period contingent on compliance with this order.

II. Facts

Most of the facts in this case are not in dispute. George Bowen is the sole proprietor of the One Stop convenience store located at 5455 Kenai Spur Highway in Kenai. He has had a business license with a tobacco endorsement since he bought the business in 2003. Besides running the One Stop, Mr. Bowen also works shifts on the North Slope. The One Stop sells gasoline, cigarettes, candy, chips and snack food, and a small amount of groceries. The One Stop also has a divided-off section housing a package liquor store. Mr. Bowen testified that the One Stop sells between \$200 and \$300 worth of cigarettes per day, and that cigarette sales make up about ten percent of the store’s business.

Mr. Bowen employs three people at the One Stop. Although Mr. Bowen is a sole proprietor of the business, until recently his wife Amy Bowen has been very actively involved in the operation of the business. Ms. Bowen has managed the books and accounts of the business, handled the incoming mail, placed stock orders and managed the store's various licenses and permits. Ms. Bowen also had a general power of attorney for Mr. Bowen so that she could take care of the business while he was on the Slope. Mr. Bowen and his wife are now in the process of a divorce, and they do not communicate frequently.

When the One Stop's business license and tobacco endorsement expired on December 31, 2006, it was not immediately renewed. Mr. Bowen was unaware of that fact when he went to an Anchorage Costco wholesale store late in February, 2007, to buy stock.

The Anchorage Costco charges an Anchorage tobacco tax on all cigarettes sold. For wholesale customers outside of the municipality, the store maintains copies of business licenses on file to verify that these customers are exempt from the Anchorage tax. Mat-Su Borough customers must pay a borough cigarette tax. Early in the year, it is routine for Costco to have to remind wholesale cigarette customers from out of town that their current business licenses are not on file, and they must provide an update if they wish to buy cigarettes without paying the Anchorage tax. Costco does not check to see if customers have a valid tobacco endorsement, and it will sell cigarettes to anybody of age. But if a customer does not want to pay the Anchorage tax, the customer must provide a copy of a current business license showing an address outside of the municipality.

When Mr. Bowen went to Costco in February, the store advised him that the business license copy it had on file for him had lapsed. At this point, the facts are somewhat unclear. It is well-established that Mr. Bowen made a call from Costco, and someone faxed in a copy of a business license for Mr. Bowen. A copy of this fax is at Exhibit 3, page 2. Mr. Bowen was a credible witness, but even he declined to speculate about the origin of this document. Mr. Bowen agrees, from viewing the document, that it appears to have been altered. He testified that Ms. Bowen has not fully explained to him what happened with the business license.

Though it cannot be determined with any certainty, it is more likely than not that when Mr. Bowen went into Costco and was told he needed a copy of his current business license, he called Ms. Bowen and asked her to fax a copy of the store's business license, which he believed to be current. It is more likely than not Ms. Bowen printed language indicating that the license was valid

from January 3, 2007, through December 31, 2007, taped it over the expired business license that was on display in the store, and faxed it to Costco.

Costco personnel noticed that the business license appeared altered and contacted the division to determine whether it was valid. The store was informed that the license had lapsed on December 31, 2006, and had not been renewed. Mr. Bowen, in the meantime, had been doing some other shopping. The store advised him that it would not accept the business license that had been faxed in, and it could not sell him cigarettes without charging the Anchorage tax. Mr. Bowen saw the copy of the business license, but he was not clear on what the problem was with it. He bought his other stock merchandise and went to another supplier to buy cigarettes.

On March 6, 2007, a renewal application was submitted for the business license with a signature that purported to be Mr. Bowen's. Mr. Bowen testified that this signature, seen on Exhibit 1, page 2, is a forgery and is not his. Mr. Bowen testified that the signature on his 2002 business license application at Exhibit 1, page 4, is his genuine signature. The handwriting on the two forms is not the same hand. Mr. Bowen testified that he believed the most recent application to have been completed and signed by Ms. Bowen.¹

Mr. Bowen testified that his wife has handled the books and business of the company for many years without incident. He testified that during this year he began to discover inconsistencies, and he has withdrawn his power of attorney and taken back all operations of the business. In light of the pending divorce, it is unlikely that Ms. Bowen will have any further involvement with the business.

III. Discussion

This case is governed by the following provisions of AS 43.70.075:

(a) Unless a person has a business license endorsement issued under this section for each location or outlet in a location where the person offers tobacco products for sale, a person may not sell or allow a vending machine to sell in its location or outlet cigarettes, cigars, tobacco, or other products containing tobacco as a retailer at that location or outlet. Each endorsement required under this section is in addition to any other license or endorsement required by law. A person may not apply for an endorsement under this section for a location or outlet if an endorsement issued for the same location or outlet is currently suspended or revoked. An endorsement issued for a location or outlet to a person in violation of this subsection is void.

¹ The Request for Hearing form stated that the license had been paid for in December, 2006. Under cross-examination, Mr. Bowen denied writing this statement, and he did not appear to be familiar with the form. Comparison of the handwriting and signature on the hearing request to the two business license applications suggests that Mr. Bowen was not the person who initially requested a hearing in this matter.

* * * * *

(k) If a person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violates a provision of (a) or (g) of this section, the department may suspend the person's business license endorsement or right to obtain a business license endorsement for a period of not more than (1) 45 days....

* * * * *

(s) If a person violates (a) of this section, the department may impose a civil penalty not to exceed \$250 for each day of the violation. The total civil penalty imposed under this subsection for each violation may not exceed \$5,000. The civil penalty described in this subsection may be imposed in addition to a suspension of a business license endorsement or the right to obtain a business license endorsement ordered by the department under (k) or (o) of this section.

Mr. Bowen does not dispute the division's claim that from January 1, 2007, through March 6, 2007, he sold tobacco at the One Stop without a valid business license. The sole issue in this case is the amount and duration of the penalty, if any, to be assessed.

The division asserts that the maximum amount of both the monetary penalty and the suspension of Mr. Bowen's tobacco endorsement should be imposed. The division argues,

As he readily admitted, he basically let his wife, or his ex-wife, run the business with virtually no supervision or oversight by him. And that's just not acceptable, although it might be understandable in some ways to a person who is working on the Slope part-time and thinks perhaps his wife is going to be left in charge, it's just as a legal matter not acceptable to abdicate responsibility especially in an area such as this.²

The division also argues that Mr. Bowen should have been quicker to investigate the status of his business license when Costco identified a problem with it.

While the division is obviously correct that Mr. Bowen cannot evade responsibility for failure to renew his tobacco endorsement because he trusted his wife to take care of the matter, the fact that he did so can hardly be considered an aggravating circumstance. The situation is comparable to reliance on an employee who, after many years of faithful and trustworthy service, begins behaving erratically because of some initially undetected personal problem. The employer is liable for his employee's actions, but cannot be faulted for the employee's omissions any more than if they had been his own omission. The fact that Mr. Bowen's wife failed to renew the endorsement presents no more of an aggravated situation than if Mr. Bowen had been handling the matter himself and forgotten to send in his renewal. Further, Ms. Bowen had been consistently keeping One Stop's books and records in good order for a number of years. Mr. Bowen's reliance on his wife was justified up until the time she failed to renew the license. Trusting a spouse to manage the books

and renew the business's licenses and permits is no more shocking allowing a junior cashier to actually sell tobacco without direct supervision and make the judgment call whether to demand identification or refuse to sell tobacco. This is something that businesses all over Alaska do every day.

The falsified license submitted to Costco is an unusual circumstance, and the division at least implies that this incident warrants a more extreme penalty. The incident is troubling, as it appears to involve fraudulent or even criminal alteration of an official state document. But AS 43.70.075 cannot be used as a catch-all statute to punish bad behavior in general. There are penalties for doing business without a license,³ there may be penalties for falsifying documents, there could be civil remedies for misleading Costco, or penalties for evading the Anchorage municipal tax. But these penalties and remedies should be pursued by the appropriate party, under the appropriate law in the appropriate forum. An administrative review of a violation of AS 43.70.075 is not the appropriate place to consider these matters. The Costco incident should not affect the penalty in this case.⁴

One Stop sold tobacco for two months and six days without a valid endorsement. If the maximum penalty of \$250 per day were imposed, it would take only twenty days to reach the maximum total penalty of \$5,000. One Stop's violation falls somewhat in the middle of the spectrum for the number of days of violation. The case is more serious than a case in which a tobacco renewal endorsement was late by several days, but far less serious than a business that has been in operation for many years without an endorsement.

Mr. Bowen admits that he failed to renew his license and that some penalty is appropriate. Mr. Bowen suggests a \$1,000 fine with no period of suspension his tobacco endorsement, with the balance of the full penalties suspended for a very long period of time to allow him to demonstrate his willingness to comply with the law.

Several mitigating factors weigh in Mr. Bowen's favor. Mr. Bowen, or his wife on his behalf, did renew the tobacco endorsement within a week or two of the Costco incident, when it

² Division's closing argument.

³ AS 43.05.290(h).

⁴ This is especially true when one considers that each of these "offenses" could turn out to be not an offense at all. Doing business without a license requires a willful violation; it appears that Mr. Bowen thought, perhaps negligently, that he did have a valid license. Regardless of what he presented to Costco, Mr. Bowen was in fact eligible for the Anchorage municipal tax exemption. Because the falsified business license was not actually used to promote any fraudulent or illegal activity, it is unclear that Mr. Bowen or even Ms. Bowen did anything "wrong" by presenting the falsified business license to Costco. The appropriate remedy for this situation may have been nothing more than for Costco to refuse to sell cigarettes without collecting the city tax, which is in fact what happened.

came to light that the license and endorsement had expired. The renewal was made a month before the division served him with the notice of suspension of his tobacco endorsement, and there is no indication that Mr. Bowen or his wife had any indication that One Stop had attracted the division's attention. This indicates that One Stop does intend to comply with the law, and that the failure to renew was a mere oversight.

Mr. Bowen has resumed personal control and supervision of all aspects of his business and provided credible assurances that all licenses will be timely renewed in the future; the division's concern that Mr. Bowen may not have been exercising adequate oversight of the business has clearly been addressed. There is no evidence of any history of repeated violations or intentional disregard of the law; to the contrary, it appears that One Stop has been in compliance with the tobacco endorsement law from the time Mr. Bowen acquired the store in 2003. Finally, Mr. Bowen openly acknowledges the violation and accepts responsibility for it; he does not seek to evade all penalties, he merely asks that most of the penalty be suspended to provide him with an opportunity to prove that the violation was an aberration that will not be repeated.

When all of the circumstances are considered, this case presents a fairly routine example of a small business that forgot to renew its tobacco endorsement on time but remedied the situation on its own when the omission was discovered. A \$250 monetary penalty and a period of suspension of Mr. Bowen's tobacco endorsement, along with a suspended amount of monetary penalty and endorsement suspension would normally be adequate to put Mr. Bowen and other business owners on notice regarding the seriousness of not timely renewing a tobacco endorsement. Because One Stop relies on tobacco sales for a disproportionate share of its revenue in comparison with other businesses, Mr. Bowen's recommendation that the penalty be weighted towards a monetary in lieu of suspension of his endorsement is reasonable.

IV. Conclusion

The penalty in this case should be a \$5,000 civil penalty, with \$4,000 suspended for a period of two years from the time this decision becomes final on the condition that Mr. Bowen comply with the tobacco licensing endorsement requirement. Suspension of Mr. Bowen's tobacco endorsement should be stayed for the same two-year period on the condition that he remains in compliance with the tobacco endorsement requirement.

V. Order

Upon adoption of this Decision as a final administrative decision in this matter, Mr. Bowen shall pay a civil penalty in the amount of \$1,000. Payment of an additional \$4,000 shall be suspended for a period of two years on the condition that Mr. Bowen pay the \$1,000 penalty and comply with the tobacco business license endorsement requirement. Suspension of Mr. Bowen's business license tobacco endorsement shall be stayed on the condition that Mr. Bowen complies with the terms of this order for a period of two years.

DATED this 20th day of November, 2007.

By: _____

DALE WHITNEY

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 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 _____, 2007.

By: _____

Signature

Name

Title

2. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with 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:

The Division will increase the fine from \$1000 to \$2500, a suspension of Bowen's tobacco endorsement for 45 days with 25 stayed, and an increase to four years for the period during which the remainder of the fine and suspension are stayed.

THE UNDERSIGNED CERTIFIES THAT ON THIS DATE AN EXACT COPY OF THE FOLLOWING WAS PROVIDED TO THE FOLLOWING INDIVIDUALS:

C. Bowen by Jenkins
C. Drinkwater, Lt Governor

DATED this 7th day of April, 2008.

DATE 4/7/08

By: _____

Signature

Emil Notti

Name

Commissioner

Title