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

	)	OAH No. 08-0245-TOB
	)	Agency No. 0500-08-009
	)	
	)	OAH No. 08-0313-TOB
In the Matters of:	)	Agency No. 0500-08-026
	)	
HOLIDAY ALASKA, INC.	)	OAH No. 08-0314-TOB
d/b/a Holiday,	)	Agency No. 0500-08-028
	)	
Respondent.	)	OAH No. 08-0420-TOB
	)	Agency No. 0500-08-010
	)	
	)	OAH No. 08-0621-TOB
_____	)	Agency No. 0500-08-059

DECISION

I. Introduction

A. Overview of Cases

This is the consolidated decision in five independent civil enforcement cases regarding underage tobacco sales. In each of the cases, a sales associate at a retail outlet of Holiday Alaska, Inc. sold a tobacco product to an undercover state agent who was too young to make the purchase, and in each the sales associate was subsequently convicted of violating Alaska Statute 11.76.100 for "negligently sell[ing] . . . a product containing tobacco to a person under 19 years of age."[1] The Division of Corporations, Business and Professional Licensing (division) issued notices seeking to suspend the license endorsements that permit the retail outlets in question to sell tobacco, as well as to impose monetary penalties against Holiday. Holiday requested a hearing to contest each of the five notices.

Four of the five cases fall under the new version of Alaska's key civil tobacco enforcement law, AS 43.70.075, as it was amended in 2007. These are the first cases to be decided after a contested hearing under the new law. One case falls under the pre-2007 version of the law.

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[1] AS 11.76.100(a)(1).

By agreement of the parties, the five cases were heard together so that testimony common to all of them could be offered without repetition. Holiday also raised several constitutional defenses common to all of the cases. In this decision, the constitutional defenses are handled in a preliminary discussion that applies to all the cases, and each defense is rejected either on jurisdictional grounds or because Holiday has not met its burden to establish the defense. Each of the five cases is then reviewed separately on the merits under the applicable statute. In each, a fine of $300 has been imposed and the tobacco endorsement of the outlet in question has been suspended for either 13 or 20 days.

B. Evidence Taken

The main body of testimony was taken in a two-day hearing that has been transcribed.[2] The two-day session encompassed testimony from Thomas Iverson, a Regional Director for Holiday Alaska, and from Steven Rush, the Director of Corporate Compliance and Government Relations for Holiday Alaska's parent company in Minnesota.[3] Subsequent to the main hearing, there was a stipulated procedure to allow the division to offer rebuttal testimony on factual questions related to Holiday's equal protection defense. Most of this additional material came in as prefiled testimony in the form of affidavits filed as pleadings on January 27 and February 2, 2009, and indexed in the pleadings file under those dates. There was a short additional session for live testimony on February 3, 2009, which was recorded but has not been transcribed. Two Department of Health and Social Services officials, L. Diane Casto and Joe Darnell, testified in this session. The record also encompasses supplemental affidavits from Casto (February 4, 2009) and from division licensing supervisor Colleen Kautz (July 23, 2009).

Exhibits were admitted as follows, factoring in the rulings on all post-hearing motion practice:

Joint Exhibits A – K, P – Z, AA – NN, and KK-1	Admitted without objection. Replacement S substituted without objection. Second replacement S substituted by stipulation on 7/9/09.
Holiday Exhibits 1, 2, 4, 10	Admitted over objection
Holiday Exhibit 5	As substituted, admitted without objection
Holiday Exhibits 12, 14, 15	Admitted without objection
Division Exhibits 1 - 3	Admitted without objection for sole purpose of addressing issue in AS 43.70.075(m)(6)

[2] Citations to this partial transcript are introduced by the abbreviation "Tr."

[3] An untimely effort by Holiday to add a third witness, Brent Cole, to this hearing was rejected.

Division Exhibits 4 - 8	Admitted without objection. Replacement 4 substituted without objection.

This hearing was subject to 12 AAC 12.840(d), which provides (in a provision parallel to Alaska's Administrative Procedure Act) that hearsay is admissible if it is the sort of evidence on which responsible people are accustomed to rely in the conduct of serious affairs, but further provides that hearsay is not sufficient "by itself" to support a finding of fact "unless it would be admissible over objection in a civil action." The initial scheduling order in this action established that the limitation on use of hearsay "will apply only if a timely hearsay objection is made."[4] The requirement for a timely objection exists because the hearsay status and eligibility for an exception of evidence is not always self evident, and because a party receiving a hearsay objection may be able to cure the hearsay status of the evidence or substitute other evidence. Hearsay that would not be admissible over objection in a civil action, and that was timely objected to in this proceeding, can be admitted subject to the limitation that it can only be used "to supplement or explain direct evidence."[5]

In this case, there was one express hearsay objection on one occasion that proved moot,[6] and one implicit hearsay objection that may limit certain testimony received about procedural circumstances surrounding the conviction of John Mikel, discussed below.[7] The use of hearsay in this proceeding is not otherwise limited by timely objections.

II. Common Factual Background

Holiday Alaska, Inc. is an affiliate of Holiday Stationstores, Inc. of Bloomington, Minnesota, which in conjunction with its affiliates operates convenience stores in twelve states.[8] At the times relevant to this case, Holiday Alaska operated 26 stores in Alaska.[9] Holiday has held tobacco business license endorsements for all of these stores.[10] In addition, liquor stores at four of the locations have been operated as separate retail outlets, carrying their own tobacco endorsements,[11] bringing the total number of retail outlets selling tobacco to 30.

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4 Scheduling Order (June 30, 2008), at 4.
5 12 AAC 12.840(d).
6 Tr. 247-248. The objection was made in anticipation of possible hearsay; none was subsequently received.
7 Tr. 254. Arguably this objection was subsequently waived through failure to include its basis in a motion to strike as discussed at Tr. 255.
8 *See* Tr. 40.
9 Tr. 43.
10 Ex. P.
11 *Id.* at 26-30; Affidavit of Kautz.

Selling tobacco to underage individuals is, in Holiday's view, "bad business," detrimental to the company both because of legal sanctions and because of risk to the company image.[12] Holiday has an active program to prevent its sales associates from making such sales. The sales associates are, by and large, a relatively low-wage and transient set of workers.[13]

The elements of Holiday's program to prevent underage sales include a computer-based training program called Holiday University that seems quite well adapted to the target audience; employees must complete the basic elements of Holiday University on tobacco sales before beginning to make sales.[14] Employees are also generally required to sign paperwork notifying them of the company policy, and in Alaska they must have a single-topic conversation with the District Manager on the subject of tobacco sales before being allowed to go on the register.[15] Holiday also conducts regular secret shopper inspections to ensure that employees are complying with the company policy on tobacco sales, with a reward for employees who pass these anonymous checks and immediate firing for those who fail.[16] These and other elements of the Holiday program will be discussed in more detail in connection with the individual enforcement cases.

III. Constitutional Defenses

Holiday Alaska has raised three constitutional defenses to all of the cases. The three defenses are: (1) a *facial* challenge to the constitutionality of AS 43.70.075 on the basis of procedural due process; (2) a claim that the most recent version of AS 43.70.075 is not a validly enacted law because it was enacted in a way that allegedly hampered Holiday's participation in the legislative process; and (3) a challenge to AS 43.70.075 *as applied* to Holiday on the basis of the Equal Protection clauses of the United States and Alaska constitutions. Holiday moved for summary adjudication on the three issues, and the motion was denied with a brief explanation on October 13, 2008. The three defenses remained pending at the hearing.

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12 Tr. 213.
13 *See, e.g.*, Tr. 49, 169; Ex. Z – CC.
14 *See* Ex. EE; Tr. 53ff.
15 Tr. 51, 52.
16 Tr. 71-78.

A. Facial Challenge to AS 43.70.075 Based on Procedural Due Process

1. Commissioner's Jurisdiction to Hear Facial Challenge

Holiday challenges the fundamental structure of AS 43.70.075, whereby a conviction of one of a retailer's clerks creates presumptions affecting a subsequent, more significant enforcement action against the retailer. Holiday posits that a clerk may choose default, a plea agreement, or a desultory defense in a prosecution for which the sentence may be a small fine; the retailer (which was not a party to the prosecution) is then hobbled in its defense of a later suspension proceeding in which tens or hundreds of thousands of dollars of economic consequences may be at stake.

In making this argument, Holiday is challenging AS 43.70.075 on its face—that is, Holiday is contending that regardless of how the statute might be implemented in practice, it is unconstitutional and therefore null. This kind of challenge is called a "facial challenge" to the statute.[17]

In the circumstances of this case, where neither the statute in question nor a virtually identical statute has previously been ruled unconstitutional by the judicial branch, it would not be appropriate for an executive branch decisionmaker to rule on a constitutional challenge that seeks to nullify the statute.[18] Under the doctrine of separation of powers, that function is reserved for the judicial branch, and unless and until judicial invalidation occurs the executive branch must obey the statute.

It can be permissible for an executive branch adjudication to make a factual record for a constitutional challenge such as this one, and to take the further step of making factual findings based on that record,[19] even though actual invalidation of the statute is beyond its scope. In this case, the parties stipulated that a factual record should be collected but that "the ALJ should not make findings of fact regarding any constitutional issues that he believes he and the commissioner cannot decide."[20] However, because much of the evidence on this issue came in through testimony and the credibility of some of the testimony was challenged, it would be inappropriate to defer all factfinding to a later decisionmaker who will not have had the benefit

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[17] *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987).

[18] *See, e.g., Johnson v. Robinson*, 415 U.S. 361, 368 (1974).

[19] This seems to have occurred in *Treacy v. Municipality of Anchorage*, 91 P.3d 252, 270 (Alaska 2004), and the Alaska Supreme Court upheld both the administrative procedure and the refusal of the Superior Court to retry the matter on appeal.

[20] Notice of Status and Order for Further Proceedings (Dec. 8, 2008), at 2.

of direct observation and interaction with the witness.[21] Accordingly, the stipulation is rejected in part, and certain factual findings that primarily bear on this constitutional challenge have been made below.

2. Facts Relating to Facial Challenge

Tobacco products represent an important component of Holiday Alaska's business. Part of this importance is in direct sales volume: they represent between 35 and 50 percent of the "inside" (non-gasoline) dollar sales for the stores.[22] Moreover, cigarette customers are among the best customers a convenience store can attract, because when these customers stop for cigarettes they typically buy other, higher-margin non-tobacco products.[23] This means that an inability to sell tobacco strongly depresses non-tobacco sales.

Tobacco endorsement suspensions have an impact beyond the duration of the suspension itself. This is because tobacco customers, unable to get the product they need at the suspended location, will go to another store, and in so doing they may form a lasting habit of going elsewhere.[24] To win lost customers back, a store may have to run expensive promotions.[25]

Precise figures on the losses associated with a tobacco suspension of a particular length cannot be generated from the evidence received. For most of the outlets involved in this case, one can project conservatively that a 20-day suspension would entail a loss of raw sales volume of $100,000 or more and lost profits of $15,000 or more.[26] There is potential for significantly higher losses at certain high-volume locations. A shorter suspension, such as the 10-day suspension possible in connection with a first conviction with strong mitigating factors, would entail proportionately smaller losses at each location.[27] One can infer that a longer suspension would have much greater impact, so that, for example, the 90-day suspension associated with a third conviction would result in lost profits of $60,000 or more at typical Holiday outlets.

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[21] If a reviewing court feels the ALJ should not have made findings of fact on this issue, the findings can readily be ignored. On the other hand, if no findings were made and the reviewing court concluded that they should have been, the result would be a time-consuming and expensive remand.

[22] Tr. 109, 142-3; *see also* Ex. DD. The percentages given in the text aggregate cigarette sales, cigars, and smokeless tobacco.

[23] Tr. 93-4, 109.

[24] Tr. 102, 105, 149.

[25] *See* Tr. 106.

[26] *See* Tr. 88-109, 117, 137-150, Ex. DD, KK, KK-1. This projection is lower than Ex. DD, which I judge to be slightly overstated. The lost profits are inferred from the margins on various classes of products, such as those discussed at Tr. 145.

[27] Tr. 127.

B. Challenge to Method of Enactment of AS 43.70.075

Holiday contends that "[t]he subject statute was . . . passed in violation of . . . the Alaska Constitution," a claim it has since articulated as follows: "that the legislative process involved in amending AS 43.70.075 in 2007 was defective and that [Holiday's] procedural due process rights, as well as the due process rights of other endorsement holders, were violated."[28] Holiday intends to seek to persuade the courts that legislative procedure is limited by procedural due process in ways that have not heretofore been recognized.

This challenge to the statute, like the one described in the preceding section, would nullify it entirely and therefore will not be ruled on here. A factual record has been collected for the court challenge.[29] Because the facts to be drawn from this record are all legislative facts and thus involve no credibility determinations, findings of fact at this level would not assist a reviewing court. In accordance with the parties' stipulation, no factual findings will be made.

C. Equal Protection Challenge to AS 43.70.075 As Applied

Holiday has articulated its equal protection claim as follows:

> The Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and Section 1 of the Alaska Constitution guarantee equal protection under the law. AS 43.70.075 is neutral on its face, but it has been applied in a manner that invidiously discriminates against Holiday. Even though there are 1,396 tobacco endorsements in Alaska, the state has chosen to specifically target Holiday in its enforcement of the statute.
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> . . . Holiday's stores are checked on average *five times more often* than other stores. This discrepancy is statistically significant, and is evidence of an intentional plan to target Holiday stores.[30]

The division has implied, without ever quite saying so, that the Commissioner may not rule on this issue based on the general principle that constitutionality is an issue for the courts.[31] A

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[28] Opposition to Motion to Strike, at 12. The constitutional claim effectively supplants an earlier, factually similar contention that the enactment took place in violation of the Open Meetings Act. The Open Meetings Act does not apply in this situation. AS 44.62.310(h)(3).

[29] The record assembled for this challenge consists primarily of the testimony of Steven Rush and Holiday Exhibits 1, 2, 4, or 10. The exhibits were not admitted for the truth of the matters they assert, but rather to show Holiday's legislative efforts, positions, and perceptions and to show the nature of the communications Holiday had with the legislators. The evidence is discussed more fully in an Order on Motion to Strike issued January 28, 2009.

[30] Memorandum in Support of Motion for Summary Judgment (Sept. 15, 2008) at 21, 23 (italics original).

[31] *See, e.g.*, Opposition to Holiday's Motion for Summary Judgment (Sept. 30, 2008) at 1 (indicating that this principle disposes of all challenges to the prosecution except a statutory Open Meetings Act claim).

factual record on the issue was collected at the hearing for use by any tribunal with authority to rule on it, whether that be the Commissioner or a court hearing the matter on appeal.

1. Commissioner's Jurisdiction to Hear the Equal Protection Defense

Holiday's third overall challenge to this civil prosecution is, like those discussed in A and B above, based on the Alaska and U.S. constitutions, but it is much narrower in focus. It is not a contention that the statute is invalid and that the executive branch therefore should not follow the law the legislature laid down. Instead, it is a contention that staff within the Department of Commerce, Community and Economic Development are applying the statute in an unconstitutional manner by singling out Holiday for disproportionate, selective enforcement.

This contention, though based in the constitution, does not require a ruling on whether the statute is constitutional. Thus, it falls outside the usual adage that "An agency does not have the authority to declare a statute unconstitutional."[32] Although the issue has apparently never been placed squarely before the Alaska Supreme Court,[33] the view of other courts that have given it full consideration is that:

> When the focus of an aggrieved party's claim is an "as applied" challenge to the constitutionality of a statute . . ., the agency may initially rule on the challenge. The policy behind this general rule is to allow the agency the opportunity to correct any error it has made . . . in enforcing a constitutional mandate in an unconstitutional manner.[34]

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[32] Alaska Dep't of Law, Hearing Officer's Manual (5th ed. 2002).

[33] Although it did so in an entirely different context, the Alaska court recently remarked in *Alaska Public Interest Research Group [AkPIRG] v. State*, 167 P.3d 27, 36 (Alaska 2007), that "Administrative agencies do not have jurisdiction to decide issues of constitutional law." This broad statement, made in passing while addressing other issues, cannot be taken beyond the context in which it was offered. *AkPIRG* involved a facial challenge to the workers compensation statute, and it based its *dictum* on a line of cases standing only for the uncontroversial proposition that agencies cannot adjudicate constitutional torts. *See Dougan v. Aurora Elec. Inc.*, 50 P.3d 789, 795 n.27 (Alaska 2002) and authority cited therein. In other contexts, the Alaska court has implicitly acknowledged that agencies need not be blind to some types of constitutional issues, even going so far as to adopt a standard of review for questions of constitutional law decided by an administrative tribunal. *See Holding v. Municipality of Anchorage*, 63 P.3d 248, 250 (Alaska 2003).

[34] *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 455 (Tenn. 1995) (footnote omitted). *See also Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 843 (Tenn. 2008), which elaborated:

> Administrative tribunals do not lack the authority to decide every constitutional issue. It is essential, however, to distinguish between the various types of constitutional issues that may arise in the administrative context. In *Richardson*, we developed three broad categories of constitutional disputes: (1) challenging the facial constitutionality of a statute authorizing an agency to act or rule, (2) challenging the agency's application of a statute or rule as unconstitutional, or (3) challenging the constitutionality of the procedure used by an agency. . . . Administrative tribunals have the power to decide constitutional issues falling into the second and third categories, but the first category falls exclusively within the ambit of the judicial branch. . . . The separation of powers clause reserves for the judiciary constitutional challenges to the facial validity of a statute.

This policy applies in the present case: if it is true that AS 43.70.075 is valid but that lower-level personnel in the department are using it in an unconstitutional way, the chief executive of the department should not be powerless to correct the practice. The Maryland Supreme Court has explained the common sense behind this distinction between authority to rule on constitutionality of a statute and authority to rule on the constitutional *application* of a statute in a different way:

> [T]he lack of authority to issue a declaratory judgment or ruling on the constitutionality of a statute does not mean that an administrative agency or official, in the course of rendering a decision in a matter falling within the agency's jurisdiction, must ignore applicable law simply because the source of that law is the state or federal constitution.[35]

Holiday's equal protection challenge is purely a challenge to how the department is administering the tobacco statute—how it is exercising its discretion. At bottom, it is a claim that, *without disobeying the legislature's directives in any way*, the department can (and must) alter its behavior to follow the statute in a way that does not violate the constitution. It is an issue the Commissioner, as an agency head sworn to uphold the constitution,[36] can and should evaluate.

2. Facts Relating to Equal Protection Defense

One of the ways the State of Alaska enforces the prohibition on tobacco sales to underage persons is through a program of unannounced inspections of tobacco retailers. Much of the program is conducted under the auspices of federal legislation known as the Synar Amendment.[37] To maintain eligibility for certain federal funding, the state must file an annual report on its progress toward meeting the objectives of the Synar Amendment, using data from an approved inspection program.[38]

All of the inspections leading to the five notices of suspension at issue in this case resulted from unannounced inspections under this program, in which an undercover buyer attempts to buy tobacco products using identification showing him or her to be underage. During a period that seems to have spanned about a year, approximately 33 of these inspections took

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[35] *Insurance Comm'r v. Equitable Life Assurance Soc.*, 664 A.2d 862, 872 (Md. 1995). *See also Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995) (agencies may consider constitutional defenses to individual enforcement claims).

[36] AS 31.05.013; Alaska Const. art. XII, § 5.

[37] 42 U.S.C. § 300x. There is also a component of the program conducted independent of Synar. *See* Affidavit [prefiled testimony] of Joe Darnell, ¶¶ 5-6.

[38] Cross-exam of Casto; Affidavit [prefiled testimony] of L. Diane Casto; Ex. U at 3, 5.

place at Holiday outlets, covering 23 of the company's 26 stores.[39] Holiday became concerned that it was being checked more often than other retailers, and though the discovery process in this case it obtained records of all tobacco inspections done under the program since the new version of AS 43.70.075 was enacted.[40] Holiday also reviewed the methodology reported in the state's 2008 Synar Report.[41]

After reviewing the inspection report records, Holiday concedes that it has not been subject to enforcement checks at a rate disproportionate to other urban retailers.[42] Its claim of disparate enforcement relates to the alleged low rate of inspection of tobacco outlets in certain "remote rural" locations, and to its understanding that no inspections at all took place in communities with fewer than nine tobacco endorsements. All Holiday outlets are in road-served communities and are not in "remote rural" areas.[43]

Holiday's understanding that no inspections occurred in communities with fewer than nine endorsements comes from an error in the 2008 Synar Report. Appendix B of that report indicated that there were only two "strata" in the inspection program, one for "cities with at least 50 licensed tobacco outlets" and one for "cities with 9 to 49 licensed tobacco outlets."[44] However, the division credibly established through testimony that the reference to only two tiers was an error; that the Department of Health and Social Services made an approved amendment to the report reflecting a third tier for communities with fewer than nine endorsements; and that a number of inspections occurred in the third tier.[45]

With respect to the alleged low rate of inspection in "remote rural" communities, Holiday established in a general way that the rate of inspections in *some* communities off the road system is lower than in communities on the road system.[46] Between the effective date of the new tobacco law in 2007 and late 2008, the number of inspections of tobacco outlets in urban centers

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[39] Direct exam of Rush. Four inspections from this group resulted in failures. Mr. Rush, who is Holiday's Director of Corporate Compliance and Government Relations, regards this as an unacceptable failure rate.

[40] *Id.*; Motion to Compel Production of Documents (Sept. 26, 2008); Order on Discovery Motions (Oct. 13, 2008).

[41] The version Holiday reviewed is at Ex. U.

[42] Direct exam of Rush.

[43] ALJ exam of Rush.

[44] Ex. U at 23.

[45] Affidavit [prefiled testimony] of L. Diane Casto; Affidavit of L. Diane Casto Correcting Reference to FFY08 Amended Annual Synar Report and Ex. B thereto; cross-exam of Casto. Among the communities with fewer than nine outlets where inspections occurred were Chicken, Eagle, Northway, Craig, Klawock, and Salcha. Cross-exam of Darnell.

[46] Holiday's numbers were imprecise because of its inclusion of premises inspections in the figures for tobacco compliance inspections. *See* Affidavit [prefiled testimony] of Joyce Villard.

and in one group of rural communities, such as the Haines and Yakutat Boroughs, was approximately equal to the number of outlets in those communities. During the same period, the number of inspections of outlets in a group of communities characterized as "remote rural"[47] was about 35% of the number of outlets in the "remote rural" communities.[48]

Breaking these figures down further, Holiday provided evidence indicating that the rate of inspections in "remote hubs"—that is, off-road communities such as Nome and Bethel that are readily reached by commercial flights[49]—is actually higher than the on-road inspection rate, but that the rate of inspection for outlets in a group of very remote communities is on the order of one-twentieth the rate for road system outlets.[50]

The parameters by which Holiday placed a community in this non-hub "remote rural" class seem to have been rather haphazard: a community would be in this class if it was in one of eight cross-hatched regions on a map in a University of Alaska report on the status of Alaska Natives, provided it was not one of five communities on the map designated "Rural Regional Centers."[51] The result is that communities such as Toksook Bay and Aniak would be in Holiday's non-hub "remote rural" classification, but other communities with difficult access such as Angoon, Akutan, and Chenega Bay would not.[52] Nonetheless, the evidence is suggestive that, in a number of Northern and Western Alaska communities off the road net with populations under about 1000, inspections are much rarer than they are in the state's population centers.

The division admits that villages in Western Alaska that require a fly-out from the Nome, Kotzebue, and Bethel hubs do not "ever" receive undercover tobacco investigations.[53] This is because it is not effective to attempt undercover buys in very small, remote communities where everyone knows everyone else and where the arrival of visitors is a conspicuous, widely-noted

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47 This group of communities was composed of the Wade Hampton Census Area, the Northwest Arctic Borough, the Bethel Census Area, the Lake and Peninsula Borough, the Nome Census Area, the Dillingham Census Area, the Yukon-Koyokuk Census Area, and the North Slope Borough. Villard Affidavit Ex. A at 3.

48 Direct exam of Rush; Holiday Ex. 14.

49 The testimony about what exactly was meant by "remote hub" and "remote rural" in Holiday's statistical categories was imprecise, perhaps because the person giving it was not familiar with Alaska's transportation network. Tr. 242-243. The text reflects the ALJ's best understanding of the testimony after also reviewing Villard Affidavit Ex. A, the underlying report from which Holiday defined these categories. The ALJ's understanding does not correspond literally to some of the statements made by Holiday's witness, such as his belief that the non-hub communities in the "remote rural" classification in the report generally lack airports.

50 *See* Holiday Ex. 15.

51 The map is at Villard Affidavit Ex. A, p. 2.

52 Holiday did not use an expert to develop and describe a systematic way of dividing communities into appropriate classifications for comparison. No information was provided on the volume of sales at the outlets in the communities Holiday classified as remote.

53 Cross-exam of Darnell at Rec. File 10, 38:30.

event.[54] For these communities, the effort to obtain compliance with tobacco laws is pursued through other means.[55] More broadly, the division's choice of communities to receive undercover inspections is also affected by cost, with visits to very remote locations requiring much more personnel time and expense.[56]

3. Holiday's Failure to Establish the Defense

Selective enforcement of a statute violates the equal protection clauses of the Alaska and United States constitutions only if it is part of a deliberate and intentional plan to discriminate based on an arbitrary and unjustifiable classification.[57] To prevail on a selective enforcement defense, a defendant must establish

> first, that other persons similarly situated to the defendant and equally subject to prosecution were not proceeded against; second, that the defendant was singled out as a result of a conscious, deliberate, and purposeful decision; and, third, that the discriminatory selection of the defendant was based upon an arbitrary, invidious, or impermissible consideration.[58]

It is not enough to show that there was disparate treatment; the defendant must prove that the disparity was "motivated by some personal or extra-statutory end" and bears no rational relation to a legitimate state interest.[59]

In this case, Holiday's statistical evidence of disparate treatment was too imprecise to support very broad conclusions about disparate treatment in many areas of the state. Nonetheless, Holiday has proved a disparity of undercover enforcement between its outlets and outlets located in Western Alaska villages. Holiday's 26 stores (30, if one counts separate liquor stores) receive an average of just over one undercover inspection per year, whereas outlets in these villages never receive undercover inspections. Holiday has not met the other two elements of the defense, however.

First, Holiday has not shown that it was "singled out as a result of a conscious, deliberate, and purposeful decision." Instead, it appears that the great majority of retailers are treated

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54 *Id*. at 39:00ff; *see also* Darnell Affidavit, ¶¶ 8-10.

55 Cross-exam and redirect of Darnell.

56 Darnell Affidavit, ¶ 11; Casto Affidavit, ¶¶ 7, 10.

57 *Barber v. Municipality of Anchorage*, 776 P.2d 1035, 1040 (Alaska 1989).

58 *Closson v. State*, 784 P.2d 661, 669-70 (Alaska App. 1989) (quoting criminal procedure texts and federal caselaw), *rev'd on other grounds*, 812 P.2d 966 (Alaska 1991).

59 *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944-5 (9th Cir. 2004), *overruled on other grounds*, 544 U.S. 528 (2005).

similarly, while a deliberate decision has been made to except a small group of retailers from a particular type of compliance check. Moreover, Holiday has not offered any evidence to show that even this group of excepted retailers is not subject to enforcement, or even to vigorous enforcement; it has only shown that one *method* of catching violators is not used with these village retailers. Thus, the showing is at most one of disparate methodology, not disparate enforcement.

Second, Holiday has not shown the disparity in methodology to be motivated by a personal or extra-statutory end, with no rational relation to a legitimate state interest. Instead, the disparity is rooted in two legitimate state interests: an interest in using enforcement methods only when they have a reasonable chance of successful execution, and an interest in allocating budgetary resources where they can be most effective.[60]

Because Holiday has not met its burden of proving two of the three elements of the defense of selective prosecution, it has not established that the five civil prosecutions in this case under AS 43.70.075 represent an unconstitutional administration of the statute by the Division of Corporations, Business and Professional Licensing. It is therefore necessary to address each of the five cases on the merits.

IV. The AS 43.70.075 Structure—New Statute

Below is a description of the enforcement structure that has governed conduct since October 16, 2007, when the current version of AS 43.70.075 became effective. The current version of the statute governs four of the five cases considered in this hearing.

A retailer may not sell tobacco products at a retail location unless it has a license endorsement for such sales at that location.[61] If an employee of the retailer, acting within the scope of employment, is convicted of the crime of negligently selling a tobacco product to a person under 19 years of age, the Department of Commerce, Community and Economic Development must impose a civil penalty.[62] The civil penalties are initially imposed through service of a penalty notice on the retailer.[63]

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[60] Holiday's argument is akin to a motorist, caught in a speed trap on the Seward Highway, arguing that he was subject to disparate enforcement because the troopers do not set up speed traps in Western Alaska villages that have just a few miles of road.

[61] AS 43.70.075(a).

[62] AS 43.70.075(d); AS 11.76.100(a)(1).

[63] AS 43.70.075(m).

The presumptive civil penalties are as follows:[64]

If neither the retailer, nor any agent or employee of the retailer acting within the scope of employment, has been convicted of a similar violation[65] in the 24 months before the date of the penalty notice --	20 day suspension at the location where the violation occurred;[66] $300 fine
If the retailer, or any agent or employee of the retailer acting within the scope of employment, has been convicted of one similar violation in the 24 months before the date of the penalty notice --	45 day suspension at the location where the violation occurred; $500 fine
If the retailer, or any agent or employee of the retailer acting within the scope of employment, has been convicted of two similar violation in the 24 months before the date of the penalty notice --	90 day suspension at the location where the violation occurred; $1000 fine
If the retailer, or any agent or employee of the retailer acting within the scope of employment, has been convicted of more than two similar violation in the 24 months before the date of the penalty notice --	One year suspension at the location where the violation occurred; $2500 fine

The 20- and 45-day suspensions in the above table are subject to adjustment based on factors discussed below. The 20-day suspension is subject to adjustment up or down by up to 10 days. The 45-day suspension is subject to adjustment up or down by 20 days. Downward adjustments for any particular retail location may only be granted once in any 12-month period.[67] 90-day and one year suspensions are not subject to adjustment for any reason.[68]

In evaluating whether, and in what amount, to impose a civil penalty, a hearing regarding a particular alleged violation under this statute is allowed to consider only six questions.[69] These questions, and their status in this proceeding, are summarized in three groups below.

The first two questions relate to whether there is any liability at all. Question 1 is whether the retailer, or one of its agents or employees acting within the scope of employment, has been convicted of a trigger crime (in these four cases, the crime of negligently selling a

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64 AS 43.70.075(d).

65 The similar violations are any other violation under AS 11.76.100, AS 11.76.106, or AS 11.76.107.

66 AS 43.70.075(e) confines the suspension "to the retail outlet in the location in which the violation occurs."

67 AS 43.70.075(u).

68 AS 43.70.075(d).

69 AS 43.70.075(m).

tobacco product to a person under 19 years of age).[70] In all four cases under the new statute involved in this decision, there is no dispute (i) that a conviction of an employee occurred and (ii) that the employee was acting within the scope of employment.[71] Question 2 relates to alternative triggering conduct (unlicensed sales, improper packaging) that is not applicable in any of these cases.[72]

The third question involves what tier the violation falls into in the table printed above: how many, if any, prior convictions are there in the preceding 24 months?[73] Although the literal language of the statute could lead to a different conclusion, this inquiry has consistently been interpreted to be confined to *convictions in connection with the particular retail location at issue*; convictions of employees of other locations operated by a chain retailer are not considered.[74]

The fourth, fifth, and sixth questions are three factors—the only three factors—that may be considered in adjusting a presumptive suspension period up to 10 or (or on a second offence, up to 20) days above or below the baseline in the first two rows of the table above. Each of these has some complexity and will receive a paragraph of discussion below.

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[70] AS 43.70.075(m)(1).

[71] Tr. 38.

[72] *See* AS 43.70.075(a), (g), (m)(2).

[73] AS 43.70.075(m)(3).

[74] The substance of the question in 43.70.075(m)(3)—that is, the use of penalty tiers based on number of convictions in the past 24 months—dates back to the original version of AS 43.70.075 in 1990. The department has a longstanding and consistent practice, endorsed through repeated adjudicatory decisions at the commissioner level, of interpreting it to be a location-specific inquiry. An example is *In re Williams Express, Inc.*, Nos. 0500-01-030, 024, 006, and 0500-02-001 (Commissioner of Commerce, Community & Economic Development 2003), Decision at 11 ("none of these stores [was] the location of a prior violation"). Other examples are explained and reprinted in Division's Response to OAH's Request for Parties' Views (July 17, 2009).

AS 43.70.075(e) does not compel this result, because it addresses only the similar question of where suspensions are to be imposed after they have been determined; it does not address whether prior convictions at other locations might be considered in the calculation of the suspension's length. The plain meaning of AS 43.70.075(d) and (m)(3) would suggest that all prior convictions of employees of the "person" holding the license endorsement, wherever incurred, would be considered in calculating the number of convictions in the preceding 24 months. However, the Alaska Supreme Court has bluntly stated that "'We will ignore the plain meaning of an enactment . . . where that meaning leads to absurd results.'" *Martinez v. Cape Fox Corp.*, 113 P.3d 1226, 1230 (Alaska 2005)(quoting *Davenport v. McGinnis*, 522 P.2d 1140 (Alaska 1974)). Interpreting the statute literally in this context would create vast unfairness to chain retailers by subjecting them to enormously greater risk of enhanced penalties than owners of single outlets, and might make it impractical for chain grocery stores, convenience stores, and liquor stores to sell tobacco. It seems clear that the legislature did not intend this kind of far-reaching result. *See, e.g.*, Memorandum from Sen. Szymanski to Sen. Uehling re HB 141, Feb. 24, 1990 (Ex. A to Division's Response to OAH's Request for Parties' Views (July 17, 2009)).

Question 4 is whether the license-holder has established that it both adopted and enforced an education, compliance, and disciplinary program for its agents and employees.[75] The license-holder has the burden of proof on this factor.[76] The factor can operate only to *reduce* a suspension; failure to establish it does not increase the suspension.[77] To receive credit for the factor, the license-holder must prove that *all* of seven components were in place.[78] The seven components involve:

1. Adopting and enforcing a written policy;
2. Informing and training employees of the law's requirements;
3. Requiring employees to sign a form acknowledging understanding;
4. Determining that employees have sufficient experience and ability;
5. Requiring employees to verify by means of photo ID;
6. Setting and enforcing disciplinary sanctions for noncompliance; and
7. Monitoring compliance.

They will be reviewed in more detail when evaluated in connection with the individual cases below.

Question 5 is whether the retailer has proved, by clear and convincing evidence, that the convicted agent or employee—notwithstanding the conviction—in fact did not negligently sell a tobacco product to a person under 19.[79] It is important to note that this factor does not negate liability entirely, but rather functions solely as a basis for partial mitigation of a first- or second-offense suspension term.

Balanced against the two possible mitigating factors in Questions 4 and 5 is Question 6, which can function to increase a first- or second- offense suspension term. Question 6 focuses on the preceding five years and, putting aside any convictions in the last 24 months used to enhance the base period of suspension, asks whether the department has shown any prior similar

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75 AS 43.70.075(m)(4).

76 *Id.*

77 AS 43.70.075(t).

78 The seven components are listed in AS 43.70.075(t), conjoined by the word "and." Had the legislature intended that a license-holder could receive a reduction for a program omitting some of the elements, it could easily have used the conjunction "or" or otherwise phrased the provision to so provide. One item in the legislative history provides some confirmation that the people involved in drafting the bill understood that all of the elements listed in subsection (t) would have to be in place in order to receive a reduction. Memorandum of Dep't of Health and Soc. Serv. reviewing HB 187 Version M, April 25, 2007 (found at Ex. A, p. 29 to Motion to Strike Testimony and Exhibits, Dec. 19, 2008).

79 AS 43.70.075(m)(5), (w).

violations by the retailer or one of its agents or employees.[80] It also covers any conduct by the retailer that "was or is likely to result" in a sale to a person under 19.[81]

In short, a conviction of a retailer or its employee requires the imposition of a fine and suspension. A base fine and suspension term is set on the basis of whether there have been zero, one, two, more than two other convictions at the location within the preceding 24 months. If there have been two or more than two other convictions, the base penalty cannot be adjusted. If there have been zero or one prior convictions, the base suspension period can be adjusted up or down by about 50%, based on three factors. Two of the factors are grounds for mitigation and one is a ground for enhancement.

Following a hearing on a notice of suspension, the department may increase or decrease the suspension proposed in the notice.[82] The notice does not place a ceiling on the penalty that can be imposed under the statute.

V. Application to the Four Cases Governed by the Current Statute

The present version of AS 43.70.075 applies to the four cases for which the underlying conduct in violation of the law took place on or after October 16, 2007, when the new statute became effective. These are Cases 0500-08-009 (violation by John Mikel), 0500-08-010 (violation by Sabrina Cook), 0500-08-026 (violation by Melissa Oliver), and 0500-08-059 (violation by Vonetta Hapoff).

A. Case 0500-08-009 (Mikel)

1. Violation

On January 22, 2008, John K. Mikel, an employee at the Holiday liquor store at 10630 Old Seward Highway, was cited for negligent sale of a tobacco product to a person under 19. He was convicted on a plea of no contest on April 9, 2008.[83] The division issued a notice of suspension on April 23, 2008.

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[80] AS 43.70.075(m)(6)(A), (B). The five year period is measured backward from the "date of the violation." This will always be an earlier date than the "date of the department's notice" that is the date from which 24 months is counted back to identify prior convictions for the base suspension under subsection (d). Thus, in the context of suspension enhancement, somewhat more than three years is added to the look-back period.

[81] AS 43.70.075(m)(6)(C).

[82] AS 43.70.075(d).

[83] Ex. I (recording). Ex. A at 2 incorrectly records the plea as guilty.

The Mikel conviction grew out of a sale of both alcohol and cigarettes to an underage person who in fact was a state agent. The circumstances of the undercover investigation are detailed at Exhibit Q. There is no contrary evidence as to how the underlying events took place.

Holiday does not dispute the fact of the conviction, nor does it contest that Mikel was acting in the scope of employment when he made the sale at issue. Thus, apart from the constitutional defenses, Holiday admits liability under the statute.

2. Base Penalty

The inquiry then moves to setting the base penalty for the violation. During the 24 months preceding the date of the notice of suspension, one Holiday employee was convicted of violating the same statute, AS 11.76.100.[84] That employee was Hector Rodriguez, an employee at a different Holiday outlet carrying a different tobacco endorsement.[85] As discussed above at notes 73-74 and accompanying text, prior offenses do not carry over from one location to another. Accordingly, the base penalty for the Mikel matter is a 20 day suspension and a $300 fine. The suspension is imposed at the location where the violation occurred.[86]

3. Mitigation—Compliance Program

In connection with Mikel's conviction, Holiday set out to prove both potential mitigators permitted by the statute, which could reduce the 20-day presumptive suspension by an aggregate of up to 10 days. The first is the seven-component education, compliance, and disciplinary program. The next seven paragraphs review Holiday's achievement of those components.

Written policy. One element of the required program is "a written policy against selling [tobacco products] to a person under 19 years of age."[87] Holiday had such a written policy.[88]

Training. The second element of the program is that the retailer must inform its agents and employees "of the applicable laws and their requirements" and must conduct "training on complying with the laws and requirements."[89] The division concedes that Holiday had such a

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84 *See, e.g.*, Ex. S.

85 Rodriguez was convicted on June 7, 2006, 22 months before the Mikel penalty notice. The Rodriguez violation occurred at a regular store that has the same address as the liquor store where Mikel worked (10630 Old Seward Highway), but the regular store and liquor store are separate and have separate endorsements. *See* Affidavit of Colleen K. Kautz (filed July 23, 2009).

86 AS 43.70.075(e).

87 AS 43.70.075(t)(1).

88 Ex. LL at 2; Ex. NN at 19-22; Tr. 46-49, 186-87.

89 AS 43.70.075(t)(2).

training program,[90] and so a detailed review of the considerable evidence about it is not necessary. The division faults the program for failing to mention AS 11.76.100, but a specific reference to the statute is not required by AS 43.70.075's description of a training program; moreover, such a technical approach would not be an effective way of presenting the necessary material to the target audience of low-wage sales clerks.

Signed forms. The third element is that each employee be "required . . . to sign a form stating that the . . . employee has been informed of and understands the written policy and [the law]."[91] The division concedes this element with respect to Mikel.[92]

Experience and ability. The fourth element is that the retailer determine that its employees have "sufficient experience and ability to comply with the written policy and [the law]."[93] The division concedes this element with respect to Mikel.[94]

Requiring verification. The fifth element is to require employees "to verify the age of purchasers . . . by means of a valid government issued photographic identification."[95] It is not disputed that Holiday generally, and quite strictly, required its employees to do this. However, with Mr. Mikel, it did not. Instead, after Mikel was caught making an underage sale, Holiday's District Manager noted that Mikel had asked the undercover agent orally for his or her age, and that the agent had lied in response. Based on this explanation, the District Manager "preliminarily concluded that you have not violated . . . company policy."[96] This shows that the company did not hold Mr. Mikel to a requirement to verify age by means of government issued photographic identification.

Disciplinary sanctions. The sixth element is to establish and enforce "disciplinary sanctions for noncompliance with the written policy and [the law]."[97] In Mikel's case, after the company preliminarily concluded that his sale without verifying age by means of a government issued ID was not a violation of company policy, the company transferred him to a different job[98] but did not otherwise take any disciplinary action until Mikel resigned on April 10, 2008,

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90 Division's final argument (rebuttal).

91 AS 43.70.075(t)(3).

92 Division's final argument (rebuttal); *see also* Ex. Z at 8. The form does not cover all subjects mentioned in AS 43.70.075(t)(3), but it appears to cover the matters relevant to the duties of the sales associate.

93 AS 43.70.075(t)(4).

94 Division's final argument (rebuttal); *see also* Tr. 84-86, 184-85; Ex. Z at 10.

95 AS 43.70.075(t)(5).

96 Ex. Z at 3; Tr. 163.

97 AS 43.70.075(t)(6).

98 Ex. Z at 15. This occurred five days after the underage sale.

the day after his conviction.[99] It is not clear that this was an application of a disciplinary program to him.

Monitoring. The final required element of the program is monitoring employees' compliance with the written policy and the law.[100] The division concedes that Holiday conducts monitoring sufficient to meet this element.[101]

Net reduction. Because Holiday's program lacked one or two of the required elements at the time of and in connection with Mr. Mikel's violation, the suspension period cannot be reduced on the basis of this factor.

4. Mitigation—No Negligent Sale

Holiday sought to prove that Mr. Mikel did not negligently sell a tobacco product to a person under 19 years of age. If proved by clear and convincing evidence, this showing could justify a reduction of the suspension period.[102]

The only admitted evidence on which Holiday relies to make this showing is Exhibit A, the court documentation pertaining to the criminal case against Mr. Mikel.[103] Holiday points out that Mr. Mikel was charged with two offenses: the violation of AS 11.76.100 that is the basis for this proceeding, and an addition charge of providing alcoholic beverages to an underage person, a class A misdemeanor with a much heavier potential penalty.[104] The more serious charge was dismissed and Mikel pleaded guilty to the lesser charge, a sequence that suggests a plea bargain. Other evidence confirms that a plea bargain occurred.[105]

Holiday contends, without explanation, that this sequence of events constitutes clear and convincing proof that Mr. Mikel did not negligently sell tobacco to an underage person, the lesser crime to which he entered a plea of no contest. It does not.

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99 Ex. Z at 17.

100 AS 43.70.075(t)(7).

101 Division's final argument (rebuttal).

102 AS 43.70.075(m)(5), (w).

103 Holiday's final argument.

104 *See* Ex. A at 3.

105 The fact of an agreement is confirmed in the recording at Ex. I, which was admitted without objection or limitation. The testimony at Tr. 254, lines 16-23, which was admitted over a hearsay objection, also confirms a plea bargain. Despite the objection, that testimony is useable under department regulations to "explain direct evidence" (12 AAC 12.840(d)) and thus can be relied upon to explain the sequence of events in the court record. For discussion of the limitations on use of hearsay in this case, *see supra* Part I-B.

5. Enhancement

The division advocates an enhancement of the suspension at the Old Seward store on the basis of the prior violations by Holiday employees at other outlets over the preceding five years. AS 43.70.075(m)(6) authorizes, but does not require, an enhancement of the suspension on the basis of violations over the preceding five years at any location for which Holiday holds a tobacco endorsement. Holiday employees at other locations had five violations in the five years preceding the Mikel violation: a violation by Hector Rodriguez at the Old Seward Highway convenience store (a separate retail location from Mikel's place of work), a violation by Melissa Oliver at the West Dimond location in late 2007, and three Fairbanks violations in 2004.[106] In the context of a retailer operating 30 busy retail locations[107] over a five-year period, however, this number of violations may be relatively low. It is mathematically equivalent to a retailer operating at a single location having five underage sales over the course of 150 years, or one violation every 30 years. In the absence of additional evidence from the division showing that this rate of violations should be considered excessive, the discretion to enhance the suspension on the basis of the violations at other locations should not be exercised in the circumstances of this case.

6. Net Penalty

Because there are no enhancements or mitigators, the suspension period for the Mikel violation is the base period, 20 days, to be imposed at the retail liquor store location at 10630 Old Seward Highway. A fine of $300 must also be imposed.

B. Case 0500-08-010 (Cook)

1. Violation

On February 11, 2008, Sabrina Cook, an employee at the Holiday outlet at 3727 Spenard Road, was cited for negligent sale of a tobacco product to a person under 19. She was found

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[106] The three Fairbanks violations are documented at Division Exhibits 1-3. Enforcement proceedings against Holiday itself in connection with these violations were invalidated in *Holiday Alaska, Inc. v. State of Alaska, Division of Corporations, Business and Professional Licensing*, No. 3AN-05-14036 CI (Alaska Superior Court, Morse, J., 2006) [found at Ex. B, p. 24 to Motion to Strike Testimony and Exhibits)]. However, the invalidation of those collateral proceedings does not alter the existence of the prior violations *by the employees* for purposes of this enforcement proceeding under a re-written statute. On the other hand, the only proof of the Fairbanks violations comes from convictions in proceedings to which Holiday was not a party, and Holiday may not be bound by the outcome of those proceedings. Since the proposed enhancement is denied in any event, the adequacy of the proof of the Fairbanks violations need not be addressed.

[107] 26 convenience stores plus four liquor stores.

guilty by default judgment on July 9, 2008. The division issued a notice of suspension on July 21, 2008.

The Cook conviction grew out of a sale of chewing tobacco to an underage person who in fact was a state agent. The circumstances of the undercover investigation are detailed at Exhibit G. There is no contrary evidence as to how the underlying events took place.

Holiday does not dispute the fact of the conviction, nor does it contest that Cook was acting in the scope of employment when she made the sale at issue. Apart from the constitutional defenses, therefore, Holiday admits liability under the statute.

2. Base Penalty

The inquiry then moves to setting the base penalty for the violation. During the 24 months preceding the date of the notice of suspension, neither Holiday nor any of its employees was convicted of violating AS 11.76.100 or any other relevant statute at the Spenard store.[108] Accordingly, the base penalty for the Cook matter is a 20 day suspension and a $300 fine. The suspension is imposed at the location where the violation occurred.[109]

3. Mitigation—Compliance Program

Holiday set out to prove one of the two potential mitigators permitted by the statute, which could reduce the 20-day presumptive suspension by up to 10 days. The mitigator Holiday sought to prove is the seven-component education, compliance, and disciplinary program. The next seven paragraphs review Holiday's achievement of those components.

Written policy. One element of the required program is "a written policy against selling [tobacco products] to a person under 19 years of age."[110] Holiday had such a written policy.[111]

Training. The second element of the program is that the retailer must inform its agents and employees "of the applicable laws and their requirements" and must conduct "training on complying with the laws and requirements."[112] As discussed in connection with the Mikel violation, Holiday had such a program and the division's criticism of it is not well-taken.

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108 *See, e.g.*, Ex. S.
109 AS 43.70.075(e).
110 AS 43.70.075(t)(1).
111 Ex. LL at 2; Ex. NN at 19-22; Tr. 46-49, 186-87.
112 AS 43.70.075(t)(2).

Signed forms. The third element is that each employee be "required . . . to sign a form stating that the . . . employee has been informed of and understands the written policy and [the law]."[113] The division concedes this element with respect to Cook.[114]

Experience and ability. The fourth element is that the retailer determine that its employees have "sufficient experience and ability to comply with the written policy and [the law]."[115] The division concedes this element with respect to Cook.[116]

Requiring verification. The fifth element is to require employees "to verify the age of purchasers . . . by means of a valid government issued photographic identification."[117] It is not disputed that Holiday generally, and quite strictly, required its employees to do this, and the division has not made this element an issue in the Cook case.

Disciplinary sanctions. The sixth element is to establish and enforce "disciplinary sanctions for noncompliance with the written policy and [the law]."[118]

Holiday currently has a policy of "zero tolerance" toward underage tobacco sales, with sales associates terminated immediately upon the first failure of an internal or government sting (internal stings being much more frequent than government ones). The company has terminated between between 70 and 100 Alaska employees over the course of three to four years under this program.[119]

At the time of Ms. Cook's violation, such dismissals were not instantaneous; instead, the employee was suspended while the issues were investigated.[120] There was, nonetheless, a strong disciplinary program in effect at that time.

Ms. Cook failed a government sting after eight months of apparently successful employment with Holiday.[121] The failure occurred on February 11, 2008, and she left Holiday's employ the next day.[122] Her termination appears as a "Voluntary Quit" in her personnel

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113 AS 43.70.075(t)(3).
114 Division's final argument (rebuttal); *see also* Ex. CC at 11.
115 AS 43.70.075(t)(4).
116 Division's final argument (rebuttal); *see also* Tr. 84-86; Ex. CC at 8-10.
117 AS 43.70.075(t)(5).
118 AS 43.70.075(t)(6).
119 The figure is taken from Iverson's direct testimony regarding BARS and district manager stings. A few additional terminations have resulted from government stings.
120 Tr. 246.
121 Ex. CC at 6, 7.
122 Ex. CC at 4.

record.[123] The sequence of events suggests either that she was terminated but her termination was entered as voluntary to ameliorate the impact on her future job prospects, or that she quit while her involuntary termination was still pending. Neither scenario would be an indication that she was exempted from the disciplinary program.

Monitoring. The final required element of the program is monitoring employees' compliance with the written policy and the law.[124] The division concedes that Holiday conducts monitoring sufficient to meet this element.[125]

Net reduction. Because Holiday's program fulfilled all of the required elements at the time of and in connection with Ms. Cook's violation, the suspension period will be reduced on the basis of this factor. AS 43.70.075(d) provides that in these circumstances "the department may reduce by *not more* than 10 days" (emphasis added) the presumptive suspension for this violation. In this case, the evidence showed that Holiday's compliance program is not only present but is quite strong. The monitoring element of the program is particularly impressive, with hundreds of internal stings staged every year. The program does have weaknesses, however. As shown in connection with Mikel, the company has not always been unequivocal in asserting that its policy is that every employee must verify age through identification on every occasion. Moreover, with respect to the training element, some of the training materials reviewed at the hearing were generic materials developed for the lower 48, and had not been adapted to Alaska requirements or Alaska conditions, which could lead to employee confusion.[126] Holiday also seems to have been willing to put employees on the register before they completed portions of the training program that emphasize the importance of checking identification.[127]

The division proposed at oral argument that a reduction of "closer to ten than nothing" for the seven compliance program factors, based on the generally strong but imperfect program, and Holiday offered no alternative reasoning to set the amount of reduction. A reduction of seven days is appropriate, leaving a net penalty, before any further adjustments, of 13 days' suspension.

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123 *Id.*
124 AS 43.70.075(t)(7).
125 Division's final argument (rebuttal).
126 *See, e.g.*, Tr. 57-69, 132.
127 *See, e.g.*, Tr. 68 and 130.

4. Mitigation—No Negligent Sale

Holiday did not contend that it had met its burden of proof on this mitigator in connection with Ms. Cook.[128]

5. Enhancement

AS 43.70.075(m)(6) authorizes, but does not require, an enhancement of the suspension on the basis of violations over the preceding five years at any location for which Holiday holds a tobacco endorsement. Holiday employees at other locations had six violations in the five years preceding the Cook violation: the violations by Mikel (one month prior), Oliver (two months prior) and Rodriguez (23 months prior), and three Fairbanks violations in 2004.[129] In the context of a retailer operating 30 retail locations over a five-year period, however, this number of violations may be relatively low. It is mathematically equivalent to a retailer operating at a single location having six underage sales over the course of 150 years, or one violation every 25 years. In the absence of additional evidence from the division showing that this rate of violations should be considered excessive, the discretion to enhance the suspension on the basis of the violations at other locations should not be exercised in the circumstances of this case.

6. Net Penalty

Because there are no enhancements and there is a single mitigator that has been assessed as meriting a seven-day reduction, the suspension period for the Cook violation is 13 days, to be imposed at the retail location at 3727 Spenard Road. A fine of $300 must also be imposed.

C. Case 0500-08-026 (Oliver)

1. Violation

On December 12, 2007, Melissa Oliver, an employee at the Holiday outlet at 2025 West Dimond Boulevard, was cited for negligent sale of a tobacco product to a person under 19. She was found guilty by default judgment on May 14, 2008. The division issued a notice of suspension on July 18, 2008.[130]

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128 Holiday's final argument. *See* AS 43.70.075(m)(5), (w).

129 *See supra* note 106.

130 There was a prior notice of suspension handled under the same case number that related to a different employee and location; it should be disregarded for purposes of fixing the date of the suspension notice in this case. *See* Tr. 35.

The Oliver conviction grew out of a sale of cigarettes to an underage person who in fact was a state agent. The circumstances of the undercover investigation are detailed at Exhibit F. There is no contrary evidence as to how the underlying events took place.

Holiday does not dispute the fact of the conviction, nor does it contest that Oliver was acting in the scope of employment when she made the sale at issue. Apart from the constitutional defenses, therefore, Holiday admits liability under the statute.

2. Base Penalty

During the 24 months preceding the date of the notice of suspension, neither Holiday nor any of its employees was convicted of violating AS 11.76.100 or any other relevant statute at the Dimond store.[131] Accordingly, the base penalty for the Oliver matter is a 20 day suspension at the location where the violation occurred and a $300 fine.

3. Mitigation—Compliance Program

Holiday set out to prove both potential mitigators permitted by the statute, which could reduce the suspension by an aggregate of up to 10 days. The first is the seven-component education, compliance, and disciplinary program. The next seven paragraphs review Holiday's achievement of those components.

Written policy. One element of the required program is "a written policy against selling [tobacco products] to a person under 19 years of age."[132] Holiday had such a written policy.[133]

Training. The second element of the program is that the retailer must inform its agents and employees "of the applicable laws and their requirements" and must conduct "training on complying with the laws and requirements."[134] As discussed in connection with the Mikel violation, Holiday had such a program and the division's criticism of it is not well-taken.

Signed forms. The third element is that each employee be "required . . . to sign a form stating that the . . . employee has been informed of and understands the written policy and [the law]."[135] Although Holiday had a policy of requiring employees to sign a form of this nature, there is no such form in Ms. Oliver's personnel file[136] and none has been offered elsewhere in the record. The administrative law judge infers from the absence of this form that Ms. Oliver

131 *See, e.g.*, Ex. S.
132 AS 43.70.075(t)(1).
133 Ex. LL at 2; Ex. NN at 19-22; Tr. 46-49, 186-87.
134 AS 43.70.075(t)(2).
135 AS 43.70.075(t)(3).
136 *See* Ex. AA.

was not required to sign one. Credit cannot be given for this component of the program where the component was not followed for the particular employee who committed the violation.

Experience and ability. The fourth element is that the retailer determine that its employees have "sufficient experience and ability to comply with the written policy and [the law]."[137] In contrast to the other employees at issue in this case, Holiday offered no evidence that Ms. Oliver's experience was ever examined, that the company ever required her to submit to a background check for prior underage tobacco sales or other criminal history, or that she was required to sign a form indicating that she understood the tobacco policy.[138] Credit therefore cannot be given for this component of the program.

Requiring verification. The fifth element is to require employees "to verify the age of purchasers . . . by means of a valid government issued photographic identification."[139] It is not disputed that Holiday generally, and quite strictly, required its employees to do this, and the division has not made this element an issue in the Oliver case.

Disciplinary sanctions. The sixth element is to establish and enforce "disciplinary sanctions for noncompliance with the written policy and [the law]."[140] As noted in connection with the Cook case, the company generally applied strong disciplinary sanctions for noncompliance with the tobacco policy and law. The evidence indicates that Ms. Oliver was suspended for a period after she was cited for an underage sale, and that "walked off [the] job" fairly soon thereafter.[141]

Monitoring. The final required element of the program is monitoring employees' compliance with the written policy and the law.[142] The division concedes that Holiday conducts monitoring sufficient to meet this element.[143]

Because Holiday's program lacked two of the required elements at the time of and in connection with Ms. Oliver's violation, the suspension period cannot be reduced on the basis of this factor.

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137 AS 43.70.075(t)(4).
138 *See* Ex. AA.
139 AS 43.70.075(t)(5).
140 AS 43.70.075(t)(6).
141 Ex. AA at 2; Tr. 154.
142 AS 43.70.075(t)(7).
143 Division's final argument (rebuttal).

4. Mitigation—No Negligent Sale

Holiday seeks to prove that Ms. Oliver did not negligently sell a tobacco product to a person under 19 years of age. If proved by clear and convincing evidence, this showing could justify a reduction of the suspension period.[144]

The only admitted evidence on which Holiday relies to make this showing is Exhibit B, the court documentation pertaining to the criminal case against Ms. Oliver.[145] Holiday points out that Ms. Oliver entered a plea of not guilty but then failed to appear at trial, resulting in a default judgment.

Holiday argues that this sequence of events constitutes clear and convincing proof that Ms. Oliver did not negligently sell tobacco to an underage person. It does not.

5. Enhancement

AS 43.70.075(m)(6) authorizes, but does not require, an enhancement of the suspension on the basis of violations over the preceding five years at any location for which Holiday holds a tobacco endorsement. Holiday employees at other locations had four violations in the five years preceding the Oliver violation: the violations by Rodriguez (21 months prior) and three Fairbanks violations in 2004.[146] As discussed above in connection with Mikel and Cook, however, this number of violations may be relatively low; it is mathematically equivalent to a retailer operating at a single location having one underage sale every 37 years. In the absence of additional evidence from the division showing that this rate of violations should be considered excessive, the discretion to enhance the suspension on the basis of the violations at other locations should not be exercised in the circumstances of this case.

6. Net Penalty

Because there are no enhancements or mitigators, the suspension period for the Oliver violation is the base period, 20 days, to be imposed at the retail location at 2025 West Dimond Boulevard. A fine of $300 must also be imposed.

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144 AS 43.70.075(m)(5), (w).

145 Holiday's final argument.

146 *See supra* note 106.

D. Case 0500-08-059 (Hapoff)

1. Violation

On July 14, 2008, Vonetta Hapoff, an employee at the Holiday outlet at 285 Muldoon Road, was cited for negligent sale of a tobacco product to a person under 19.[147] She was convicted on a plea of no contest on October 28, 2008.[148] The division issued a notice of suspension on October 31, 2008.

The Hapoff conviction grew out of a sale of cigarettes to an underage person who in fact was a state agent. The circumstances of the undercover investigation are detailed at Division Exhibit 5. There is no contrary evidence as to how the underlying events took place.

Holiday does not dispute the fact of the conviction, nor does it contest that Ms. Hapoff was acting in the scope of employment when she made the sale at issue. Apart from the constitutional defenses, therefore, Holiday admits liability under the statute.

2. Base Penalty

During the 24 months preceding the date of the notice of suspension, no Holiday employee was convicted of a relevant violation at the same retail outlet.[149] Accordingly, the base penalty for the Hapoff matter is a 20 day suspension at the location where the violation occurred and a $300 fine.

3. Mitigation—Compliance Program

Holiday set out to prove one potential mitigators permitted by the statute, which could reduce the suspension by up to 10 days. The mitigator Holiday set out to prove is the seven-component education, compliance, and disciplinary program. The next seven paragraphs review Holiday's achievement of those components.

Written policy. One element of the required program is "a written policy against selling [tobacco products] to a person under 19 years of age."[150] Holiday had such a written policy.[151]

Training. The second element of the program is that the retailer must inform its agents and employees "of the applicable laws and their requirements" and must conduct "training on

147 Div. Ex. 6 at 2.
148 *Id.* at 1.
149 *See, e.g.*, Ex. S.
150 AS 43.70.075(t)(1).
151 Ex. LL at 2; Ex. NN at 19-22; Tr. 46-49, 186-87.

complying with the laws and requirements."[152] As discussed in connection with the Mikel violation, Holiday had such a program and the division's criticism of it is not well-taken.

Signed forms. The third element is that each employee be "required . . . to sign a form stating that the . . . employee has been informed of and understands the written policy and [the law]."[153] Ms. Hapoff executed such a form by electronic signature two weeks before her violation.[154]

Experience and ability. The fourth element is that the retailer determine that its employees have "sufficient experience and ability to comply with the written policy and [the law]."[155] The division concedes this element with respect to Hapoff.[156]

Requiring verification. The fifth element is to require employees "to verify the age of purchasers . . . by means of a valid government issued photographic identification."[157] It is not disputed that Holiday generally, and quite strictly, required its employees to do this, and the division has not made this element an issue in the Hapoff case.

Disciplinary sanctions. The sixth element is to establish and enforce "disciplinary sanctions for noncompliance with the written policy and [the law]."[158] As discussed in connection with the other violations, Holiday had a disciplinary program for compliance failures. The program was applied to Ms. Hapoff by means of immediate discharge after her failure.[159]

Monitoring. The final required element of the program is monitoring employees' compliance with the written policy and the law.[160] The division concedes that Holiday conducts monitoring sufficient to meet this element.[161]

Net reduction. Because Holiday's program fulfilled all of the required elements at the time of and in connection with Ms. Hapoff's violation, the suspension period will be reduced on the basis of this factor. AS 43.70.075(d) provides that in these circumstances "the department

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152 AS 43.70.075(t)(2).
153 AS 43.70.075(t)(3).
154 Holiday Ex. 12 at 7; Tr. 160-62. This and all of Ms. Hapoff's other employment papers, including such basic items as the W-4 form, seem to have been prepared on June 30, 2008, six weeks after her hire date of May 16, 2008. *See* Ex. 12. The testimony at the hearing did not resolve unequivocally why the paperwork was generated or re-generated on the later date.
155 AS 43.70.075(t)(4).
156 Division's final argument (rebuttal); *see also* Tr. 84-86.
157 AS 43.70.075(t)(5).
158 AS 43.70.075(t)(6).
159 Tr. 247.
160 AS 43.70.075(t)(7).
161 Division's final argument (rebuttal).

may reduce by *not more* than 10 days" (emphasis added) the presumptive suspension for this violation. As discussed in connection with the Cook violation, a reduction of seven days is appropriate, leaving a net penalty, before any further adjustments, of 13 days' suspension.

4. Mitigation—No Negligent Sale

Holiday did not contend that it had met its burden of proof on this mitigator in connection with Ms. Hapoff.[162]

5. Enhancement

AS 43.70.075(m)(6) authorizes, but does not require, an enhancement of the suspension on the basis of violations over the preceding five years at any location for which Holiday holds a tobacco endorsement. Holiday employees at other locations had seven violations in the five years preceding the Hapoff violation: the four other violations in this consolidated case and the three Fairbanks violations from 2004.[163] In the context of a retailer operating 30 outlets over a five-year period, however, this number of violations may be relatively low. It is mathematically equivalent to a retailer operating at a single location having seven demonstrated underage sales over the course of 150 years, or one violation every 21 years. In the absence of additional evidence from the division showing that this rate of violations should be considered excessive, the discretion to enhance the suspension on the basis of the violations at other locations should not be exercised in the circumstances of this case.

6. Net Penalty

Because there are no enhancements and there is a single mitigator that has been assessed as meriting a seven-day reduction, the suspension period for the Hapoff violation is 13 days, to be imposed at the retail location at 285 Muldoon Road. A fine of $300 must also be imposed.

VI. The Old Statute

The version of AS 43.70.075 applied above became effective on October 16, 2007.[164] Prior to that date, a simpler version of AS 43.70.075 was in effect from July 1, 2005 (the effective date of the most recent prior amendment) through October 15, 2007.

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[162] Holiday's final argument. *See* AS 43.70.075(m)(5), (w).

[163] *See supra* note 106.

[164] Lacking a special effective date provision, the relevant sections of ch. 61 SLA 2007 became effective 90 days after signature by the governor on July 18, 2007.

A. Why the Old Statute Applies to One Case

In Case 0500-08-028, involving an underage sale by an employee named Hector Rodriguez, the underage sale, the conviction, and the final affirmance of the conviction all occurred prior to October 16, 2007. Thus, all of the conduct making Holiday potentially liable for sanctions occurred while the old statute was in effect.

The division did not initiate its enforcement action against Holiday on the Rodriguez matter until June of 2008. By that time the new statute was in effect, and the division has sought, without analysis or explanation, to use the new statute in establishing Holiday's liability and fixing a penalty.

It is not possible to apply the new statute to the Rodriguez matter. Alaska Statute 01.10.090 provides that "No statute is retrospective unless expressly declared therein." The legislative act amending AS 43.70.075 in 2007 contains no provision declaring the amendments to be retrospective.[165] It is clear, moreover, that to apply the new statute to the Rodriguez matter would be a retrospective application. Interpreting the word "retrospective" in AS 01.10.090, the Alaska Supreme Court has held:

> The following definition is appropriate: "A retroactive [retrospective] statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute."[166]

If the new statute were to be applied to the allegedly negligent sale by Rodriguez, it would give that conduct a different legal effect from that which it would have had without passage of the new statute.

This conclusion is not altered by the fact that some of the material contained in the 2007 amendments to AS 43.70.075 was procedural in nature. Generally, application of new procedural rules to cases that arose prior to the new procedures is not considered "retrospective," because mere procedural changes do not give pre-enactment conduct a different legal effect; they merely change the manner in which that effect is determined.[167] The 2007 amendments to the statute, however, contained a core substantive element: the change from fixed suspension periods to suspension periods that could be adjusted upward or downward by 10 or 20 days

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165 *See* ch. 61, SLA 2007.

166 *Norton v. Alcoholic Bev. Control Bd.*, 695 P.2d 1090, 1093 (Alaska 1985) (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv.L.Rev. 692, 692 (1960)).

167 *See Larson v. Independent Sch. Dist. No. 314*, 233 N.W.2d 744, 747-8 (Minn. 1975); *Matanuska Maid, Inc. v. State*, 620 P.2d 182, 186-7 (Alaska 1980) (in applying new document request procedure to investigation of conduct that predated the new procedure, attorney general "did not retrospectively apply" the new procedure).

depending on a variety of factors. This change altered the penalty for conduct—a substantive change—and the procedural aspects of the 2007 amendment simply implemented that change.

The conclusion that the old statute must be applied also is not altered by the fact that the old statute has been held by Superior Court Judge Morse to be unconstitutional in litigation between these same parties, *Holiday Alaska, Inc. v. State of Alaska, Division of Corporations, Business and Professional Licensing.*[168] To be sure, concerns about that holding seem to have been part of the motive for the 2007 amendments to the statute. Nonetheless, even though the legislature knew about Judge Morse's constitutional concerns, it did not include a provision in its new law that would override the anti-retroactivity presumption in AS 01.10.090. It made adjustments on a going-forward basis, but did not seek to rescue civil prosecutions of prior conduct by making a retroactive repair to the statute. Moreover, the Alaska Supreme Court, contrary to Judge Morse, has more recently found that the old version of the statute was indeed constitutional.[169]

B. The AS 43.70.075 Structure—Old Statute

The statute in effect prior to October 16, 2007 imposed exactly the same schedule of presumptive penalties set out in the table in Part IV above. However, it contained no provision for adjusting these penalties up or down. The hearing, therefore, was limited to evaluating whether to impose a civil penalty, and in making that evaluation the old statute permitted only three questions.[170]

Question 1 was whether the retailer, or one of its agents or employees acting within the scope of employment, had been convicted of a trigger crime (in this case, the crime of negligently selling a tobacco product to a person under 19 years of age).[171] Question 2 related to alternative triggering conduct (unlicensed sales, improper packaging) that is not applicable to the Rodriguez matter.[172] The third question involved what tier the violation occupied in the table printed in Part IV: how many, if any, prior convictions were there in the preceding 24

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168 Case No. 3AN-05-14036 CI (Alaska Superior Court 2006).

169 *Godfrey v. State of Alaska, Dep't of Commerce, Community and Economic Development,* 175 P.3d 1198 (Alaska 2007). *Godfrey* presumably overcomes any collateral estoppel effect the Morse decision might have under the principles discussed in *State v. United Cook Inlet Drift Ass'n,* 895 P.2d 947, 954 & n.23 (Alaska 1995) and *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984), and collateral estoppel has not been asserted as a defense in this case.

170 Former AS 43.70.075(m).

171 Former AS 43.70.075(m)(1).

172 *See* former AS 43.70.075(a), (g), (m)(2).

months?[173] As with the current statute, this provision has always been, and should be, read to be location-specific, so that prior violations at one retail store do not carry over to another.

C. Application to the Single Case Governed by the Old Statute: Case 0500-08-028 (Rodriguez)

1. Violation

On March 26, 2006, Hector Rodriguez, an employee at the Holiday convenience store at 10630 Old Seward Highway, was cited for negligent sale of a tobacco product to a person under 19. The sale was made to a 17-year-old Tobacco Enforcement Unit intern.[174] Rodriguez was found guilty, after a contested trial, on June 7, 2006. The trial magistrate found Mr. Rodriguez to be "a very capable, very honorable, very well-meaning individual" who did not intentionally make the sale; instead, the magistrate attributed the sale to the salesman's uncorrected poor eyesight, observing, "perhaps a magnifying glass would have alleviated the problem."[175] Rodriguez appealed to the Superior Court, which affirmed the conviction on July 16, 2007.[176] For reasons the record does not explain, a notice of suspension was not issued until June 3, 2008.

Holiday does not dispute the fact of the conviction, nor does it contest that Mr. Rodriguez was acting in the scope of employment when he made the sale at issue. Apart from the constitutional defenses, therefore, Holiday admits the elements of liability under the statute.

2. Penalty

The inquiry under either version of the statute then moves to setting the base penalty for the violation. During the 24 months preceding the date of the notice of suspension, no Holiday employee was convicted of a relevant violation at the same retail outlet.[177] Accordingly, the penalty for the Rodriguez matter is a 20 day suspension at the location where the violation occurred and a $300 fine. Under the old statute, this penalty cannot be adjusted.

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173 Former AS 43.70.075(m)(3).

174 Ex. E at 2.

175 *Id.* at 4 n.8.

176 *Id.* at 9.

177 *See, e.g.*, Ex. S. Note that although the address is the same, the outlet is distinct from the one in which sales associate Mikel worked. *See supra* at Section V-A-2.

VII. Contingent Determination of the Result if the New Statute Applied to Case 0500-08-028 (Rodriguez)

The following contingent findings are made to provide a basis to proceed in the event that the division or Holiday persuades the final decisionmaker in this matter to apply the new statute to Case 0500-08-028.

1. Violation

See VI-C-1 above.

2. Base Penalty

See VI-C-2 above. Under the new statute, the base penalty would be subject to adjustment based on the factors below.

3. Mitigation—Compliance Program

Holiday set out to prove one of the two potential mitigators permitted by the statute, which could reduce the suspension by up to 10 days. The mitigator Holiday set out to prove is the seven-component education, compliance, and disciplinary program. The next seven paragraphs review Holiday's achievement of those components.

Written policy. One element of the required program is "a written policy against selling [tobacco products] to a person under 19 years of age."[178] Holiday had such a written policy.[179]

Training. The second element of the program is that the retailer must inform its agents and employees "of the applicable laws and their requirements" and must conduct "training on complying with the laws and requirements."[180] As discussed in connection with the Mikel violation, Holiday had such a program and the division's criticism of it is not well-taken.

Signed forms. The third element is that each employee be "required . . . to sign a form stating that the . . . employee has been informed of and understands the written policy and [the law]."[181] The division concedes this element with respect to Rodriguez.[182]

Experience and ability. The fourth element is that the retailer determine that its employees have "sufficient experience and ability to comply with the written policy and [the law]."[183] The division concedes this element with respect to Rodriguez.[184]

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178 AS 43.70.075(t)(1).
179 Ex. LL at 2; Ex. NN at 19-22; Tr. 46-49, 186-87.
180 AS 43.70.075(t)(2).
181 AS 43.70.075(t)(3).
182 Division's final argument (rebuttal); *see also* Ex. BB at 20.

Requiring verification. The fifth element is to require employees "to verify the age of purchasers . . . by means of a valid government issued photographic identification."[185] It is not disputed that Holiday generally, and quite strictly, required its employees to do this, and the division has not made this element an issue in the Rodriguez case.

Disciplinary sanctions. The sixth element is to establish and enforce "disciplinary sanctions for noncompliance with the written policy and [the law]."[186]

As discussed more fully in the section on Sabrina Cook's violation, Holiday currently has a policy of "zero tolerance" toward underage tobacco sales, with sales associates terminated immediately upon the first failure of an internal or government sting. At the time of Mr. Rodriguez's violation, the dismissal was not instantaneous; instead, the employee was suspended while the issues were investigated.[187] There was, nonetheless, a strong disciplinary program in effect at that time.

Mr. Rodriguez failed a government sting after many years of apparently successful employment with Holiday.[188] The failure occurred on March 26, 2006, but in Rodriguez's case there was a serious question as to whether his failure was negligent. Indeed, the magistrate who eventually convicted him was genuinely troubled by the fact that this older employee seems simply to have misread the driver's license due to poor close-up vision.[189] Holiday appears reasonably to have deferred disciplinary action until Rodriguez was convicted and his conviction was affirmed; Rodriguez then left Holiday's employ on the day following the affirmance.[190] His termination appears as a "Voluntary Quit" in his personnel record, with the notation "Not Rehirable."[191] As in the case of Cook, the sequence of events suggests either that he was terminated but his termination was entered as voluntary to ameliorate the impact on his future job prospects with other employers, or that he quit while his involuntary termination was still pending. Neither scenario would be an indication that he was exempted from the disciplinary program. Indeed, the ineligibility for rehire is a strong disciplinary sanction against an employee

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183 AS 43.70.075(t)(4).
184 Division's final argument (rebuttal); *see also* Tr. 84-86; Ex. BB at 19, 25-27.
185 AS 43.70.075(t)(5).
186 AS 43.70.075(t)(6).
187 Tr. 246.
188 Ex. BB at 1.
189 *See* Ex. E at 3 & n.5, 4 & n.8, 8.
190 Ex. E at 9, BB at 1.
191 Ex. BB at 1.

who had done a good job for many years in a position where the average turnover is less than a year.[192]

Monitoring. The final required element of the program is monitoring employees' compliance with the written policy and the law.[193] The division concedes that Holiday conducts monitoring sufficient to meet this element.[194]

Net reduction. Because Holiday's program fulfilled all of the required elements at the time of and in connection with Mr. Rodriguez's violation, the suspension period would be reduced on the basis of this factor. AS 43.70.075(d) provides that in these circumstances "the department may reduce by *not more* than 10 days" (emphasis added) the presumptive suspension for this violation. As discussed in connection with the Cook violation, a reduction of seven days would be appropriate, leaving a net penalty, before any further adjustments, of 13 days' suspension.

4. Mitigation—No Negligent Sale

Holiday did not contend that it had met its burden of proof on this mitigator in connection with Mr. Rodriguez.[195]

5. Enhancement

AS 43.70.075(m)(6) authorizes, but does not require, an enhancement of the suspension on the basis of violations over the preceding five years at any location for which Holiday holds a tobacco endorsement. Holiday employees at other locations had three violations in the five years preceding the Rodriguez violation: the three Fairbanks violations from 2004.[196] As discussed more fully above, in the context of a retailer operating 30 outlets over a five-year period, this number of violations is mathematically equivalent to a retailer operating at a single location having one proven underage sale every half century. In the absence of additional evidence from the division showing that this rate of violations should be considered excessive, the discretion to enhance the suspension on the basis of the violations at other locations should not be exercised in the circumstances of this case.

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192 *See* Tr. 125, 169.
193 AS 43.70.075(t)(7).
194 Division's final argument (rebuttal).
195 Holiday's final argument. *See* AS 43.70.075(m)(5), (w).
196 *See supra* note 106.

6. Net Penalty

Because there would be no enhancements and there would be a single mitigator that has been assessed as meriting a seven-day reduction, the suspension period for the Rodriguez violation—if the new statute applied—would be 13 days, to be imposed at the convenience store location at 10630 Old Seward Highway. A fine of $300 would also be imposed.

VIII. Conclusion

The division has established four convictions for tobacco sales to underage customers meriting the following sanctions under AS 43.70.075(d):

1. In OAH Case No. 08-0245-TOB, Agency No. 0500-08-009, suspension of tobacco license endorsement number 430605-27 for the Holiday Alaska, Inc. liquor store located at 10630 Old Seward Highway, Anchorage, Alaska for a period of 20 days, and a civil penalty of $300.00.
2. In OAH Case No. 08-0313-TOB, Agency No. 0500-08-026, suspension of tobacco license endorsement number 430605-18 for the retail location at 2025 West Dimond Boulevard, Anchorage, Alaska for a period of 20 days, and a civil penalty of $300.00.
3. In OAH Case No. 08-0420-TOB, Agency No. 0500-08-010, suspension of tobacco license endorsement number 430605-19 for the retail location at 3727 Spenard Road, Anchorage, Alaska for a period of 13 days, and a civil penalty of $300.00.
4. In OAH Case No. 08-0621-TOB, Agency No. 0500-08-059, suspension of tobacco license endorsement number 430605-20 for the retail location at 285 Muldoon Road, Anchorage, Alaska for a period of 13 days, and a civil penalty of $300.00.

The division has established one conviction for a tobacco sale to an underage customer meriting the following sanctions under former AS 43.70.075(d), prior to the effective date of chapter 61 SLA 2007:

In OAH Case No. 08-0314-TOB, Agency No. 0500-08-028, suspension of tobacco license endorsement number 430605-2 for the Holiday Alaska, Inc. convenience store located at 10630 Old Seward Highway, Anchorage, Alaska for a period of 20 days, and a civil penalty of $300.00.

Pursuant to 12 AAC 12.845(a)(1), a modified effective date is set for the above sanctions. Each of these sanctions shall be effective 60 days from the date of issuance of this decision (as

defined in 12 AAC 12.855(c)) by the Commissioner of Commerce, Community and Economic Development or his delegee.

DATED this 27th day of July, 2009.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

The Commissioner of Commerce, Community and Economic Development or his delegee adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of distribution of this decision.

DATED this 4th day of September, 2009.

By: *Signed*
Signature
Emil Notti
Name
Commissioner
Title

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

Appeal pending in Superior Court