

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

IN THE MATTER OF)	
)	
DOUGLAS R. MYERS dba)	Case No. OAH 08-0547-TOB
THE BLACK MARKET)	Agency Case No. 0500-08-039
_____)	

DECISION

I. Introduction

Douglas Myers appeals from a Notice of Suspension of Tobacco Endorsement and Imposition of Civil Penalty issued on September 17, 2008. A hearing was held on January 14, 2009. Mr. Myers appeared by telephone. Assistant Attorney General Cynthia Drinkwater represented the Division of Corporations, Business and Professional Licensing (“the division”) by telephone.

Because an employee of the Black Market was convicted of selling tobacco to a minor, and because Mr. Myers did not show compliance with all of the elements of A.S. 43.70.075(t), the statute does not permit reduction of the penalty to less than that imposed by the division. The division’s decision is affirmed.

II. Facts

Mr. Myers does not dispute that an employee of the Black Market sold tobacco to a minor and was convicted of selling tobacco to a minor under AS 11.76.100. The division does not dispute Mr. Myers’ assertions that he has made substantial good faith efforts to comply with the spirit of the laws preventing sales of tobacco to minors. These efforts include spending a great deal of money investing in a new cash register system that will not conclude a tobacco sale until the purchaser’s date of birth has been entered into the system, and the system has calculated that the purchaser is over the age of nineteen. Mr. Myers did not present evidence at the hearing or submit documentary evidence. Mr. Myers agreed that there is a likelihood that he could meet most but not all of the seven elements listed in AS 43.70.075.

III. Discussion

According to AS 43.70.075(d),

If...an employee of a person who holds an endorsement issued under this section acting within the scope of the agency or employment, has been convicted of violating AS 11.76.100..., the department shall impose a civil penalty as set out in this subsection. However, following a hearing under (m) of this section, and based on evidence admitted at that hearing concerning questions specified in (m)(4) and (6) of this section, the department

may reduce by not more than 10 days a suspension under (1) of this subsection, or by not more than 20 days a suspension under (2) of this subsection, or increase by not more than 10 days a suspension under (1) of this subsection, or by not more than 20 days a suspension under (2) of this subsection. If a hearing is not requested, or if a hearing is requested and the department determines that the evidence admitted does not support increasing or decreasing the suspension, the department shall suspend the endorsement for a period of

(1) 20 days and impose a civil penalty of \$300 if the person has not been previously convicted of violating AS 11.76.100 , 11.76.106, or 11.76.107 and is not otherwise subject to the sanctions described in (2) - (4) of this subsection....

Because of the word “shall” in the statute, the division is required to impose a civil penalty of \$300 and a 20-day suspension of the person’s tobacco endorsement, unless a hearing is held under paragraph (m) of the statute and evidence addressing the questions in (m)(4) or (m)(6) provides a basis to reduce or increase the penalties. The hearing in this case was held under paragraph (m). The issue is thus whether Mr. Myers submitted evidence under either of these two questions to show that the penalty should be reduced. Because question (m)(6) asks whether there is evidence of previous violations such that the penalty should be increased, the sole issue is whether there is evidence to reduce the penalty under (m)(4).

The question presented by AS 43.70.075(m)(4) is:

Did the person holding the business license endorsement establish that the person holding the business license endorsement had adopted and enforced an education, a compliance, and a disciplinary program for agents and employees of the person as provided in (t) of this section....

Thus, this part of the statute refers the reader to yet another paragraph. Paragraph (t) of the statute states:

Based on evidence provided at the hearing under (m)(4) - (6) of this section, the department may reduce the license suspension period under (d) of this section if the person holding the business license endorsement establishes that, before the date of the violation, the person had

(1) adopted and enforced a written policy against selling cigarettes, cigars, tobacco, or products containing tobacco to a person under 19 years of age in violation of AS 11.76.100 , 11.76.106, or 11.76.107;

(2) informed the person's agents and employees of the applicable laws and their requirements and conducted training on complying with the laws and requirements;

(3) required each agent and employee of the person to sign a form stating that the agent and employee has been informed of and understands the written policy and the requirements of AS 11.76.100 , 11.76.106, and 11.76.107;

(4) determined that the agents and employees of the person had sufficient experience and ability to comply with the written policy and requirements of AS 11.76.100 , 11.76.106, and 11.76.107;

(5) required the agents and employees of the person to verify the age of purchasers of cigarettes, cigars, tobacco, or other products containing tobacco by means of a valid government issued photographic identification;

(6) established and enforced disciplinary sanctions for noncompliance with the written policy or the requirements of AS 11.76.100 , 11.76.106, and 11.76.107; and

(7) monitored the compliance of the agents and employees of the person with the written policy and the requirements of AS 11.76.100 , 11.76.106, and 11.76.107.

Each of these seven elements in paragraph (t) is conjoined by the “and” following subparagraph (6), meaning that each of the elements must be met in order to qualify for the penalty reduction.

Mr. Myers stated that he has met most of the elements, but he agreed that it is more likely than not that he did not meet all of them. The division is therefore required to assess the civil penalty and suspend the business license tobacco endorsement as specified for a first-time violation, which would be \$300 and a twenty-day suspension. This is the action the division has taken.

IV. Conclusion

An employee of the Black Market was convicted of selling tobacco to a minor. Because Mr. Myers did not show compliance with all of the elements of A.S. 43.70.075(t), the penalty may not be reduced below the statutorily specified penalties for a first violation. The division’s decision to assess a civil penalty of \$300 and to suspend the respondent’s business license tobacco endorsement for twenty days is affirmed.

DATED this 3rd day of February, 2009.

By: *Signed* _____
DALE WHITNEY
Administrative Law Judge

Adoption

This Order is issued under the authority of AS 44.33.010 and AS 44.17.010. The undersigned, on behalf of the Commissioner of Commerce, Community and Economic Development and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 4th day of March, 2009.

By: Signed
Signature
Emil Notti
Name
Commissioner
Title

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