IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

HOLIDAY ALASKA, INC., d/b/a HOLIDAY ALASKA, Appellant, v. STATE OF ALASKA, DIVISION OF CORPORATIONS, BUSINESS, AND PROFESSIONAL LICENSING, Appellee.	)	Case No. 3AN-09-10689 CI OAH Nos. 08-0245-TOB 08-0313-TOB 08-0314-TOB 08-0420-TOB 08-0621-TOB 09-0238-TOB

DECISION ON APPEAL

This is a constitutional challenge to the administrative adjudication process that applies to retail outlets accused of selling tobacco products to minors. Six employees at various Holiday retail outlets in the Anchorage area were convicted of violating AS 11.76.100(a)(1), which prohibits individuals from negligently furnishing tobacco products to minors.[1] Convictions under this statute trigger AS 43.70.075, which allows the Division of Corporations, Business and Professional Licensing ("the Division," or "Department," as it is referred to in the statute) to impose a civil fine and suspend the tobacco endorsement of the business license held by the retail outlet that employs the offender. Under this statute, the employee's criminal conviction creates a rebuttable

presumption in the administrative hearing that the licensee violated the terms of its tobacco endorsement. Holiday argues that this legislative scheme deprives the licensee of due process because the licensee's never gets a fair opportunity to show that it was not itself negligent.

FACTS AND PROCEEDINGS

The facts of this case are not in dispute. At all times relevant to this incident, Holiday Alaska operated twenty-six convenience stores within the state and held tobacco business license endorsements for all of these stores.[2] Between March 25, 2006 and March 10, 2009, six employees at five Holiday retail outlets were cited for violating AS 11.76.100. Two of the employees went to trial and were convicted (Cook and Rodriguez),[3] one was found guilty by default after failing to appear (Oliver, though her attorney was present), and three pled guilty (Hapoff, Mikel, and Odden).[4] Five of the six were represented by counsel provided by Holiday.[5] The convictions carry a $300 fine against each employee.

Each conviction also triggered separate administrative actions against the employer licensee under AS 43.70.075, which provides that if either the endorsement holder or his employee "has been convicted of violating AS 11.76.100…the department

[1] The statutory scheme actually prohibits furnishing tobacco products to a person "under 19 years of age," but we use the term "minor" here for simplicity.
[2] Four of these establishments also have liquor stores attached as separate entities, and each of these stores has its own tobacco endorsement, bringing the total number of tobacco retail endorsements to thirty.
[3] Mr. Rodriguez also appealed his case to Superior Court, where it was upheld. *Rodriguez v. State*, 3AN-06-09157 CI.
[4] Mr. Mikel's conviction involved an illegal sale of alcohol to a minor as well, which was apparently dropped in exchange for a plea of no contest to the tobacco charge. ALJ Op. 18.

shall impose a civil penalty as set out in this subsection."[6] Upon receiving notice of the convictions, the Division notified each retail outlet that its tobacco endorsement would be suspended for twenty days and a civil fine of $300 imposed. Holiday indicated it would defend itself and requested hearings in each case, which were granted, consolidated, and conducted by an Administrative Law Judge (ALJ). During the proceedings, Holiday attempted to assert various constitutional challenges through summary judgment motions, which the ALJ denied because he could not "rule on a constitutional challenge that seeks to nullify a statute" in a disciplinary hearing.[7] However, Holiday was allowed to present evidence relevant to its constitutional challenges in order to construct a factual record upon which to base an appeal.[8]

At the hearing, Holiday did not dispute the factual circumstances underlying any of the convictions, nor the fact that the employees had been convicted of selling tobacco to a minor. This is important because, under the current statutory scheme Holiday challenges here, an employee's conviction under AS 11.76.100 creates a rebuttable presumption of negligence—and therefore liability—in the licensee's administrative hearing.[9] Thus, Holiday began its hearing with a presumption of liability to overcome in each case. Under sections (m)(5) and (w), however, Holiday had the opportunity to

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[5] Ae. Br. 2; Tr. 248-249.
[6] AS 43.70.075(d).
[7] ALJ Op. 5. *See Johnson v. Robison*, 415 U.S. 361, 368 (1974) (noting that the "constitutionality of [legislative] enactments has generally been thought beyond the jurisdiction of administrative agencies"). The ALJ did analyze, and reject, the as-applied Equal Protection argument because that analysis did not require a ruling on the constitutionality of the statute. The issue not being raised before this court, we have no reason to discuss the propriety of that decision.
[8] ALJ Op. 5. *Id*. at 5–6, 9–12 (findings of fact relevant to equal protection defense, not on appeal); *Id*. at 17–31, 34–37 (findings of fact relating to due process challenge and the sales underlying each suspension now on appeal).
[9] AS 43.70.075 (m)(5), (w).

present "clear and convincing evidence" to "overcome the rebuttable presumption established" by the conviction.[10] Whether this evidence can be used for the purposes of exculpating the licensee entirely or only as a mitigating factor to reduce any penalty is one of the issues in this case.

Holiday presented substantial evidence on its "zero-tolerance" polices regarding underage tobacco sales, which include education programs for new employees, incentives for passing government sting operations, and immediate termination of any employees who fail such tests. It presented very little or no specific evidence on the factual circumstances of the individual sales that triggered each administrative action.[11]

The ALJ considered Holiday's internal procedures as evidence justifying a mitigation of the penalty,[12] but did not consider these policies as evidence that rebutted liability entirely. Accordingly, he concluded that Holiday had not overcome the presumption of negligence regarding the sales themselves, and was liable for six violations of AS 43.70.075.[13] He recommended suspension in each case, but

[10] *Id*.

[11] Holiday only contested liability in two instances. In one case (Mikel), one of Holiday's employees pled guilty to selling tobacco to a minor in exchange for a dismissal of the more serious charge of selling alcohol to a minor in the same incident. Holiday argued that this plea constituted clear and convincing evidence that no negligent sale occurred. The ALJ disagreed. ALJ Op. 20. In the other contested case (Oliver), the defendant failed to appear and received a default judgment of guilty, which Holiday suggests is clear and convincing evidence that no negligent sale occurred. Again, the ALJ disagreed. ALJ Op. 28. Holiday did not challenge these factual conclusions in its briefing, and this Court finds the ALJ's conclusions are supported by the record in any event.

[12] AS 43.70.075(t) (detailing the policies a store must have in place in order to receive a suspension reduction).

[13] The ALJ applied the old statutory system to one case (Rodriguez) based on the fact that all of the criminal proceedings occurred prior to the enactment of the new version of AS 43.70.075. Although the application of that system results in a slightly harsher penalty against the licensee, Holiday did not appeal the ALJ's decision on this point. Arguments not addressed on appeal are waived. *State, Dep't of Revenue v. Gazaway,* 793 P.2d 1025, 1027 (Alaska 1990). Thus, Holiday does not appeal the ALJ's use of the pre-2007 statute, and the penalty for the citation based on the Rodriguez conviction ($300 fine, and

recommended a reduction from twenty to thirteen days in three of the six instances based on the evidence regarding internal efforts at compliance. The Commissioner adopted the recommendations, and Holiday appealed to this court. Though Holiday raised several other challenges to the statutory scheme during the adjudication,[14] the due process argument is the sole point still remaining on appeal.

ISSUE PRESENTED

The issue in these consolidated appeals is whether the Division of Commerce adjudication procedure for licensees accused of selling tobacco products to minors violates the licensee's right to procedural due process. Holiday argues that the statutory scheme established in AS 43.70.075: (1) fails the United States Supreme Court's *Matthews v. Eldridge*[15] test for administrative due process; (2) fails the Alaska Supreme Court's test in *Scott v. Robertson*[16] that establishes when previous criminal convictions can be used to prove facts in subsequent proceedings; and (3) violates the right to a meaningful hearing protected by the due process clause.

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20 days suspension) stands because that statute was previously upheld in *Godfrey v. State, Dep't. of Cmty. & Econ. Dev.*, 175 P.3d 1198 (Alaska 2007).

[14] These arguments included the facial due process challenge argued here, an as-applied Equal Protection challenge, and an argument that AS 43.70.075 was invalidly enacted. The latter two, though mentioned in Holiday's points of appeal, were not briefed and are therefore waived. *Gazaway,* 793 P.2d at 1027.

LEGAL STANDARD

The court reviews this constitutional challenge *de novo*, adopting the rule of law that is most persuasive in light of precedent, reason, and policy.[17] We use the "substitution of judgment" standard to analyze legal questions that involve statutory interpretation.[18] "Application of this standard permits a reviewing court to substitute its own judgment for that of the agency even if the agency's decision had a reasonable basis in law."[19]

ANALYSIS

I. Holiday's Argument on Appeal

The crux of this appeal is whether the statutory scheme gives a licensee enough opportunity to prove that it should not be held liable for an employee's illegal sale to a minor. Holiday has argued primarily that a citation against an employee for a negligent sale operates as a *de facto* finding of liability against the store. According to the licensee, a cited employee "has no motivation to defend against an alleged violation of AS 11.76.100(a),"[20] so they frequently plead guilty or no contest, or receive a default judgment by failing to appear.[21] Even when employees have a defense available,

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[15] 424 U.S 319 (1976).
[16] 583 P.2d 188 (Alaska 1978).
[17] *R&Y, Inc. v. Municipality of Anchorage*, 34 P.3d 289, 293 (Alaska 2001).
[18] *Garner v. State Dept. of Health & Soc. Svcs.*, 63 P.3d 264, 267 (Alaska 2003).
[19] *Boyd v. State, Dept. of Commerce & Econ. Dev. Div. of Occupational Licensing*, 977 P.2d 113, 115 (Alaska 1999).
[20] At. Br. 16.
[21] At. Br. 18.

Holiday asserts that they have difficulty successfully defending themselves *pro per*, and licensees cannot intervene to assist.

Licensee argues that these deficiencies essentially relieve the State of its burden of proving that a negligent sale actually occurred for which the licensee should be held accountable. Rather, the State simply obtains a conviction by default or plea that is subsequently used to prove the licensee's negligence. The licensee is then saddled with the difficult task of overcoming by clear and convincing evidence a presumption of liability for the sale in question. Holiday argues that this violates the *Matthews v. Eldridge* test for due process in administrative proceedings, deprives it of a full and fair hearing under Alaska law, and fails to adhere to the *Scott* standard that governs admissibility of convictions in subsequent proceedings.

II. The Statutory Scheme

First, we note that the current version of .075 went into effect on October 16, 2007. These consolidated cases are the first to be decided after a contested hearing under the new law,[22] so it is important that we establish the correct parameters of the new scheme, particularly since we disagree with the ALJ's interpretation of some of its key aspects. A business may not sell tobacco products at a retail location unless it has a business license endorsement for such sales at that location.[23] If an agent or 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

[22] ALJ Op.1
[23] AS 43.70.075(a).

Division of Commerce, Community, and Economic Development "shall impose a civil penalty as set out in this subsection [.075(d)]."[24] The presumptive civil penalties increase if there have been multiple violations within 24 months.[25]

The licensee may request a hearing to contest liability and/or argue for mitigation of the penalty.[26] This hearing is statutorily limited to the questions listed in section (m).[27] The first two questions—which allow evidence of the conviction (Question 1) or other offense (Question 2)[28] underlying the citation—relate to whether there is any liability at all. Question 3 allows evidence of the licensee's other violations (if any) for the purposes of establishing the presumptive penalty.[29] Questions 4 and 6 provide the

[24] AS 43.70.075(d).
[25] *Id*.
[26] AS 43.70.075(m).
[27] *Id*. Section (m) lists the only questions at issue in the hearing:

> (1) was the person holding the business license endorsement, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted by plea or judicial finding of violating AS 11.76.100, 11.76.106, or 11.76.107;
> (2) if the department does not allege a conviction of AS 11.76.100, 11.76.106, or 11.76.107, did the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, violate a provision of (a) or (g) of this section;
> (3) within the 24 months before the date of the department's notice under this subsection, was the person, or an agent or employee of the person while acting within the scope of the agency or employment of the person, convicted of violating AS 11.76.100, 11.76.106, or 11.76.107 or adjudicated for violating a provision of (a) or (g) of this section;
> (4) 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;
> (5) did the person holding the business license endorsement overcome the rebuttable presumption established in (w) of this section;
> (6) within five years before the date of the violation that is the subject of the hearing, did the department establish that the person holding the business license endorsement [previously violated various sections].

Id.
[28] These include such offenses as applying for a tobacco endorsement while one is suspended, which violates AS 11.76.075(a), but is not necessarily a criminal offense.
[29] AS 43.70.075(m)(3).

basis for adjusting sentences based on the licensee's internal compliance program (as described in subsection [t]) and repeat offenses.[30]

Question 5 asks the question at the heart of this challenge: "(5) did the [licensee] overcome the rebuttable presumption established [by the employee's conviction]…."[31] In response to this question, Holiday presented evidence on several of the underlying sales for the purpose of showing that its employee was not negligent in the particular instance[32] The ALJ believed this evidence was to be used "as a basis for partial mitigation" and could not be used to "negate liability entirely."[33] Based on the evidence presented, he concluded that Holiday had not proven a lack of negligence, so he did not mitigate or vindicate the licensee on this basis.[34] However, he recommended a suspension period reduction in some instances based on (m)(4) evidence regarding internal compliance procedures.

III. The Effect of *Godfrey* on the Current Case

A. The *Godfrey* Decision

In 2007, the Supreme Court upheld a nearly identical challenge against the former version of this statute in *Godfrey v. State*.[35] Under the previous version, the conviction of an employee under 11.76.100 established a conclusive presumption of

[30] *See* AS 43.70.075(d) (the department may reduce by not more than 10 days a suspension "based on evidence admitted at the hearing concerning questions specified in [m][4] and [6]"); AS 43.70.075(t) ("Based on evidence provided at the hearing under (m)(4)–(6), the department may reduce the license suspension under (d)….").
[31] AS 43.70.075(m)(5).
[32] ALJ Op. 20, 28.
[33] ALJ Op. 16.
[34] ALJ Op. 20, 28.

liability against the licensee. In 2006, Judge Morse found the system unconstitutional because the conclusive presumption never allowed licensees the opportunity to defend themselves and protect their endorsement from suspension.[36] The Supreme Court, however, reached the opposite conclusion in *Godfrey*, a different case reviewing the same system.[37] By the time the Court issued its decision, however, the legislature had already amended the statute to give the licensee the opportunity to rebut the presumption.

In *Godfrey*, two of the licensee's tobacco retail outlets were cited for violating the prohibition against sales to minors. Each responsible employee pled guilty or no contest to the criminal citation, which resulted in convictions for negligent sales. The only issue at the subsequent licensing hearings was whether the licensee, his agent or employee, had been convicted by plea or judicial finding of violating AS 11.76.100.[38] Under the pre-2007 system at issue in *Godfrey*, these convictions were used in the subsequent administrative hearings as conclusive proof licensee's liability for the sales.

The *Godfrey* Court boiled the ultimate question down to one that sounds strikingly familiar in the context of this case: "whether due process requires that the license holder be allowed in the licensing proceedings to challenge the employee's

[35] *Godfrey v. State, Dep't. of Cmty. & Econ. Dev.*, 175 P.3d 1198 (Alaska 2007).
[36] *Holiday v. State*, 3AN-05-14036CI (Oct. 27, 2006).
[37] *Godfrey v. State, Dep't. of Cmty. & Econ. Dev.*, IJU-04-375CI, Superior Ct. Order, Feb. 14, 2005.
[38] Rather than the six questions used now, hearings under this old scheme were limited to three questions: (1) was there a conviction of the licensee or an agent/employee acing within the scope of employment; (2) if not, did the licensee or his agent/employee violate one of the other provisions that is not a basis for a criminal violation under 11.76 (such as applying for an endorsement while a prior one is suspended); and (3) were there any additional violations within 24 months of the current incident, for the purposes of establishing the presumptive penalty.

criminal fault."[39] Noting that the sale of tobacco products is "heavily regulated because tobacco has hazardous impacts on public health" and that "administrative sanctions may be imposed without a finding of intentional or even negligent misconduct," the Court upheld the effectively strict liability scheme in that case. It emphasized that the legislature intentionally hinged the licensee's liability on the conviction itself, and did not require the State to re-prove allegations already adjudicated in the criminal proceeding against the employee.[40] An employee's conviction alone "provide[d] a reliable basis both for finding that the license holder has given a minor unlawful access to tobacco and for imposing administrative sanctions on that ground."[41] The *Godfrey* Court specifically rejected many of the arguments raised by Holiday here, including the assertion that Holiday was unfairly prejudiced by its employees' supposed lack of motivation, ability, or resources to mount a defense, by pointing out that the legislature took this into account by allowing the presumption to arise regardless of whether the conviction occurred by "plea or judicial finding."[42]

The Court then applied this finding specifically to the *Matthews v. Eldridge* test, which determines whether a regulated entity has received due process by balancing the competing interests of the regulated entity and the State along with the "risk of erroneous deprivation" involved in the procedures under review.[43] The Court concluded

[39] *Godfrey*, 175 P.3d at 1203.
[40] *Id*. at 1204.
[41] *Id*. at 1205.
[42] *Id*. at 1203; AS 43.70.075(m)(1).
[43] *Matthews v. Eldridge*, 42 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

that even though Godfrey had a valuable interest in his tobacco endorsement, the procedures in place at the time posed "no risk of erroneous deprivation."[44] The statute required a conviction before any suspension could be imposed, and licensees had an opportunity to dispute whether an employee had been convicted and whether the employee was acting within the scope of employment. While these safeguards were not as stringent as Godfrey would have liked since he was not permitted to re-litigate the facts of the underlying conviction at all, the Court concluded that *Matthews* did not preclude the State from suspending the retailer's license solely because of a conviction, even if the conviction was the result of a plea.

The Court also addressed the more general claim that the proceedings denied the licensee a meaningful hearing because he was prevented from presenting defenses related to his employee's conduct. Godfrey argued that he would have offered multiple defenses at the administrative hearing if it was allowed by statute: that at least one clerk was not negligent given the facts of the underlying sale; that the employees were not acting within the scope of employment because selling to minors was against company policy; entrapment; and government misconduct.[45] The Court noted that the ALJ did not consider these defenses because the only relevant question under the statute was whether the employee had been convicted. These arguments only "raised disputes as to whether the clerks were negligent in making the sales or whether their conduct

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Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[44] *Godfrey*, 175 P.3d at 1205.

[45] *Id*. at 1202.

should have been criminally excused."[46] Under the pre-2007 statute, a dispute about negligence and criminal fault was simply not relevant in an administrative hearing after an employee was convicted for an illegal sale. The Court held that due process did not require the licensee have the opportunity to litigate these issues in a licensing proceeding.

B. *Godfrey* Applies to the Current Case

Turning to the present case, we must first decide whether and to what degree *Godfrey* controls the issues on appeal. The State argues that *Godfrey* answers essentially all the questions in this case: the Court rejected a similar challenge to a statutory scheme that was nearly identical to the current one except that it offered even less opportunity for the licensee to contest the violation. Holiday asserts that *Godfrey* is inapposite because it dealt with a strict liability scheme that is no longer in effect. According to Holiday, the addition of subsection (w) "made the issue of the employee's negligence material to a license revocation" by allowing the licensee the opportunity "to avoid any sanction by rebutting the facts underlying the conviction."[47] This, it argues, indicates that it is a vicarious liability scheme, not a strict one, which means both that *Godfrey* does not control this case and, more substantively, that due process requires an opportunity for the licensee to defend itself from being found vicariously liable for the negligence of an employee.

[46] *Id*. at 1206.
[47] At. R. Br. 5.

The fairest reading of *Godfrey* and the two statutory schemes lies somewhere between these two extremes. Although *Godfrey* does not control this case entirely, it certainly helps this court answer the questions now on appeal. While the current scheme is slightly different from that under consideration in *Godfrey*, the due process concerns are largely the same under both frameworks, so this court's analysis of the overlapping issues will be guided by the Supreme Court's discussion in *Godfrey*.

This is so in spite of any relevant distinction between vicarious and strict liability frameworks. The fact that the new legislative scheme is now closer to a vicarious liability statute and includes a heightened burden of proof does not matter because the *Godfrey* decision does not rest on the technical differences between these two principles. The majority in *Godfrey* expressly declined to define the statute as one based on either strict or vicarious liability, concluding that the ultimate question was whether the State could impose liability on the licensee without allowing the licensee to contest the employee's negligence. It concluded that it could, regardless of the liability system, because the conviction was a reliable basis upon which to impose liability. Justice Matthews's dissent (and Judge Morse's superior court ruling) argued that the old statute relied on vicarious liability, and thus due process required that the licensee have the opportunity to contest the employee's negligence before holding the licensee liable.[48] Because this concern has been addressed by the amendments that allow evidence on this very point, as explained below, the distinction is even less important to the resolution of this case.

[48] *Godfrey*, 175 P.3d at 1207 (Matthews, J., dissenting); *Holiday v. State*, 3AN-05-14036CI, *13.

IV. The Current Scheme Does Not Violate Due Process Requirements

Thus we turn to the analysis of the present statutory system, and attempt to delineate what *Godfrey* can settle for us and what requires new analysis. In some ways, we must merely determine whether any of the differences between the current and pre-2007 version of this statute have so changed the statutory structure that a different result is required.

The primary difference between these two statutes is simple: the former scheme included an irrebuttable presumption against the licensee for any employee conviction under AS 11.76.100; the current one gives the licensee the opportunity to rebut this presumption. This is an important change, but it is one that clearly favors the licensee. The licensee now has the opportunity to overcome the charge against him entirely and/or mitigate his punishment in ways that were impossible under the old scheme. This change addresses most or all of the issues that the *Godfrey* dissent and Judge Morse regarded as constitutionally inadequate, even though such changes were not strictly necessary in light of the *Godfrey* ruling. Thus, the licensee bears a heavy burden in this case to explain how the current statutory scheme could violate due process when it gives the licensee more opportunities to be heard than did the old system, which, according to the *Godfrey* Court, provided sufficient opportunity anyway.

A. Licensee Now has the Opportunity to Negate Liability Entirely

Far from offering the licensee merely a token opportunity to appear, amended subsections (m) and (w) expand the rights of the licensee considerably. The old statute

specifically precluded the licensee from even addressing the facts underlying the employee's conviction. The current system allows the licensee to present "clear and convincing evidence that the agent or employee did not negligently sell"[49] a tobacco product to a minor as alleged in the citation. Although the hearing officer concluded, without explanation, that rebuttal evidence regarding the facts of the sale could be used only to mitigate the penalty and not to negate liability entirely, the State concedes that if a licensee can prove by clear and convincing evidence that its employee did not negligently sell a tobacco product to a minor, the licensee avoids any administrative sanction.[50]

This interpretation is consistent with the language of the statute,[51] the legislative history of the amendments,[52] and a fair reading of the overall structure established by the legislature in response to Judge Morse's decision in 2006. It would make little sense to ask whether the licensee had "overcome the rebuttable presumption" that the employee had negligently sold a tobacco product illegally if the hearing officer was still precluded from finding as a matter of fact that there was no negligence or sale.[53] Rather, it seems clear that this system is intended to give the conviction due weight while nevertheless allowing the licensee to present evidence that the conviction was wrongfully reached. In the administrative context, it is reasonable for a lawfully obtained

[49] AS 43.70.075(w).
[50] Ae. Br. 4 n.23.
[51] See *infra* notes 71–73 and accompanying text.
[52] *See, e.g.*, Testimony of Cindy Drinkwater, Assistant Attorney Gen., State of Alaska, Commercial Aff. Bus. Section, before the House Fin. Cmte. (May 11, 2007) ("[U]nder paragraph 5 there is a mechanism for the endorsement holder to argue and put on proof that there wasn't a negligent sale of tobacco product to a minor .... [If] they overcame that presumption then they would not be subject to a suspension period."
[53] AS 43.70.075(w).

conviction to presumptively establish the fact that a negligent sale occurred rather than force the State to re-prove that fact in a suspension hearing. The *Godfrey* Court found that the State was not required to prove anything other than a conviction, and further held that the licensee did not even have the right to challenge the underlying facts of the conviction if the legislature did not choose to bestow that right. Thus, as a practical matter, a system that offers the licensee more opportunity to prove his innocence than he is entitled to by right cannot possibly violate due process.

B. The Current Statute Satisfies *Matthews v. Eldridge*

The analysis here may begin just as it did in *Godfrey*:

> A tobacco endorsement is a valuable property interest … protected by the due process clause of the Alaska and United States Constitutions. Due process of law thus entitles the holder of an endorsement permitting the sale of tobacco products to a meaningful hearing before the endorsement may be removed or suspended. "Considerations of fundamental fairness" guide our determination of what constitutes a meaningful hearing.
>
> To determine what due process requires in particular disputes we have adopted the sliding scale set out by the United States Supreme Court in *Mathews v. Eldridge.* We will consider:
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> > First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens

> that the additional or substitute procedural requirement would entail.[54]

1. Government's Interest

Applying each of these factors to the current statutory system, we note first that the state's interest in protecting its citizens from the dangers of tobacco use, particularly minors, is extremely high.[55] That is part of why the Supreme Court has upheld legislation that imposes liability on tobacco retailers based exclusively on the actions of their agents, even absent proof of wrongdoing by the license holders themselves.[56] The threat of sanctions against the licensee ensures that the licensee will exercise the utmost vigilance over those employees who are ultimately responsible for preventing our children from being exposed to the dangers of tobacco.[57] Additionally, the licensee derives substantial benefits from its tobacco sales, as the licensee here has thoroughly explained. "In a business so fraught with public interests, a licensee should not be entitled to the benefits of the enterprise, yet be relieved of the responsibilities"[58] by letting the consequences fall to the salesclerks alone. The state's interest in enforcing its regulations against the licensee is no less than its interest in enforcing the regulations against the sales clerks themselves, and both interests are very strong.

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[54] *Godfrey*, 175 P.3d at 1203 (quoting *Matthews v. Eldridge*, 42 U.S. 319, 335 (1976)).
[55] *Id*.; s*ee also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (noting that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States").
[56] *Godfrey*, 175 P.3d at 1204.
[57] *See Alesna v. LeGrue*, 614 P.2d 1387, 1390–91 (Alaska 1980) (discussing extensively the fairness of holding a "licensee responsible for the establishment's operation even though the licensee does not have actual control of the day-to-day functions").
[58] *Id*. at 1391.

Additionally, we note that the government's interest in maintaining the current procedure is logically based on the efficiency of allowing convictions to serve as the main evidence in an administrative hearing. This presumption, for example, avoids the unnecessary burden that would arise from subpoenaing the officers who witnessed illegal sales in cases where the facts of the sale were not in dispute. The State cannot take such shortcuts at the expense of due process, but as discussed already, the presumption of liability alone does not violate the licensee's rights to be heard.

Holiday points out that combining these proceedings into one hearing that deals with both the clerk's guilt and the licensee's resulting culpability might decrease the administrative burden on the State. It is not clear how such a hearing could function, considering, for example, that an administrative agency lacks authority to fine a person who does not hold a license. The courts have that power and are better equipped to deal with individual negligence cases. Additionally, a single hearing would risk conflating the issues, pitting defendants against each other, and unnecessarily wasting time (from the employee's perspective) listening to evidence on the other questions contained in section (m). If the employee was ultimately acquitted, for example, the evidence on the licensee's compliance efforts would be completely unnecessary. So even if there is some benefit to a unified hearing, this benefit is not so overwhelming that we are compelled to strike down the system devised by the legislature, particularly since the State has no burden of proving that its system is the most efficient available.[59]

[59] *Kingik v. State, Dept. of Admin., Div. of Retirement & Benefits*, 239 P.3d 1243, 1250 (Alaska 2010) (upholding an administrative procedure even though it could have been "improved" because the procedure under review was "adequate"); *see also Alaska Public Interest Research Group v. State*, 167

The State has at least a justifiable and rational interest in maintaining the current procedures and burden allocations, and due process does not require it to implement the scheme Holiday has advocated.

2. Licensee's Interest

On the other hand, the retailer's tobacco endorsement is likewise an important interest that is entitled to due process protection. Tobacco products account for between 35 and 50 percent of non-gasoline sales at convenience stores, and tobacco purchasers are among the most steady and profitable clientele.[60] For most of the outlets involved in this case, the ALJ calculated "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."[61] High-volume locations would suffer even higher losses.

Holiday's valuable interest in its endorsement is not disputed, but this interest is purely economic. It also operates in the heavily-regulated and hazardous field of selling tobacco products, so its interest is subject to the strict guidelines established by the State. Because Holiday's interest is purely economic, based on a hazardous activity, and rightly subjected to the highest degree of State oversight, this Court views its interest as subordinate to that of the State.

P.3d 27, 34 (Alaska 2007) (noting that a statute is presumed to be constitutional, with the burden of showing otherwise on the party challenging it).

[60] ALJ Op. 6.

[61] *Id*. When these regular customers cannot get the products they want, they may quickly change their routine in order to make their purchases elsewhere. These habits may outlast the suspension period, so the suspension generally causes an overall decline in revenues beyond the immediate lost sales. *Id*.

3. Risk of Erroneous Deprivation

This does not mean, of course, that Holiday is not entitled to a fair hearing to protect its interests. The remaining factor in *Matthews* weighs the risk of erroneous deprivation posed by the current procedure. The *Godfrey* Court went so far as to say that the previous system, in which the conviction alone proved the licensee's liability, posed "no risk of erroneous deprivation."[62] The current system gives licensees significantly more freedom to challenge the evidence against them. As a result, under the *Godfrey* Court standard, the risk that a licensee will be wrongfully punished is either slight or non-existent.

In fact, the legislature addressed almost all of the complaints that Holiday has raised, even though *Godfrey* indicates that due process did not require it. The underlying concern in most of Holiday's arguments is that its employees either cannot or will not defend themselves adequately in the criminal case, which leaves Holiday with a presumption of liability to overcome in the administrative hearing. Holiday asserts that its employees cannot afford lawyers, do not want to go through the trouble of defending themselves over such a small fine, and cannot properly mount a defense if they try. For its own part, Holiday is allegedly incapable of intervening in the criminal case, becomes saddled with a burden of proving its own innocence, and is unable to present adequate evidence in any event because it has fired the employee who could testify on the sale in question.

[62] *Godfrey*, 175 P.3d at 1205.

The simple response to all of these arguments is that, no matter how or if the employee mounts a defense, Holiday has (and had throughout these hearings) the opportunity to present evidence that its employee was not negligent during the sale in question.[63] Thus, even if Holiday has legitimate concerns over the apparent ease with which the State may convict its employee, these concerns are satisfied by the amendments that gave Holiday a chance to show its innocence.

The more precise response is that the facts in this case simply do not support Holiday's arguments. Several of the employees defended themselves in court, even if unsuccessfully, so the fine provides some incentive at least. *Godfrey* specifically reached the same conclusion.[64] There is also no reason to believe that these criminal proceedings are any more complicated than, for example, contested motor vehicle violation hearings of the kind in which participants regularly defend themselves.

Even less convincing is the claim that the licensee is utterly prevented from involving itself in the employee's criminal defense effort. Contrary to Holiday's assertion, the Division is required to notify the licensee that its agent or employee has received a citation.[65] Holiday does not claim it did not received such notice. As for the argument that the employees cannot afford a lawyer and Holiday cannot intervene in

[63] The Court recognizes that the ALJ considered the evidence relating to an employee's negligence only for the purposes of mitigation, rather than for liability. He concluded as a factual matter that the evidence did not overcome the presumption of negligence. ALJ Op. 20, 28. Holliday has not specifically challenged that finding in any detail. Even if it had, the finding is supported by the evidence, so this Court has no occasion to overturn it. Because that finding equally supports the conclusion that Holiday could not overcome the burden for the purpose of negating liability entirely, the ALJ's error does not affect the disposition of this case.

[64] *Id*.

[65] AS 44.29.094(g). This was added as part of the 2007 Amendments, SLA 2007 ch. 61 sec. 7, in response to criticism that such notice was not required or routinely proved.

the criminal case, the facts simply do not support this: in five of these six cases, the employee was represented by an attorney supplied by Holiday.[66] Even where the employees plead guilty or no contest in these cases, Holiday was not deprived of the opportunity to present evidence in the administrative proceeding to rebut the presumption that a negligent sale occurred and thereby negate the plea's effects entirely. In fact, it attempted to do so in two of these cases, but did not carry its burden.

C. The System Provided Holiday with a Fair Hearing

This failure to overcome the presumption illustrates the final point: the legislature assigned the burdens in this case, and those burdens are well within its authority. Citing *Javed v. Dep't of Public Safety, Div. of Motor Vehicles*, Holiday argues that it was denied a meaningful hearing because it was forced to bear the burden on a matter of central importance: the negligence of its employee. Here again, *Godfrey* indicates that due process does not even require that the licensee have the opportunity to litigate this issue, much less force the State to bear the burden on it after already obtaining a conviction against the employee:

> An employee's conviction for negligently selling tobacco to a minor, whether by plea or judicial finding, provides a reliable basis both for finding that the license holder has given a minor unlawful access to tobacco and for imposing administrative sanctions on that ground. Therefore, the legislature's reliance on the fact of conviction as presumptive proof of sanctionable conduct has a rational basis and is neither arbitrary nor capricious.[67]

[66] Cook, Exc. 371–72; Hapoff, Exc. 337; Mikel, Exc. 64; Oliver, Exc. 370; and Rodriguez, Exc. 65–66.
[67] *Godfrey*, 175 P.3d at 1205.

It is not unreasonable to require that a party provide clear and convincing evidence if it seeks to show that a prior judicial proceeding reached an inaccurate judgment. This is so even when negligence is at issue or the employee pled guilty.[68] *Godfrey* declared that a licensee has no right to contest anything about the conviction. This court must concur with this precedent, and so cannot conclude that by giving the licensee more procedural rights, the legislature has somehow made an already adequate procedure less fair. Though it may be difficult in some cases to produce the evidence that would meet this burden, the risk of finding the licensee liable for a sale that was not, in fact, negligent is minimal. Due process requires only a reasonable opportunity to be heard, not an exemption from the burdens of proof the legislature has decided to apply in a particular administrative proceeding.

In this case, Holiday presented no evidence that its employees were not negligent other than the description of its employee training and compliance programs. It contends this is the type of evidence that should be considered in determining whether it was negligent with regard to an employee's sale to a minor. But this does not appear to have been what the legislature had in mind when it gave the licensee the opportunity to "rebut by clear and convincing evidence that the agent or employee did not negligently sell a [tobacco product to a minor]."[69]

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[68] *See* Alaska R. Crim. P. 11(f) (a judge must be satisfied that there is a reasonable factual basis for a plea in order to accept it).

[69] AS 43.70.075(w). *See* Testimony of Cindy Drinkwater, Assistant Attorney Gen., State of Alaska, Commercial Aff. Bus. Section, before the House Fin. Cmte. (May 11, 2007) ("[T]he presumption is that the citation…is proof of the fact underlying fact that the sale occurred ….") Ms. Drinkwater went on to specifically articulate the State's position at that time that subsection (m)(5) provided the mechanism for the licensee to argue and present evidence to overcome the presumption. The Committee apparently accepted this explanation and approved the bill.

Subsection (w) indicates that the conviction serves as presumptive "proof of the fact" that an employee negligently sold a tobacco product to a minor. This is a fact question that pertains only to the issue of whether a sale occurred that violated AS 11.76.100. That fact is enough to hold the licensee accountable. Evidence of the employee's training and store procedures is not relevant to the determination of whether that fact is true. Subsection (w) simply allows the licensee to provide evidence that its agent or employee did not negligently sell the product, not provide evidence that the licensee was not negligent in the sale of the product or the training of its employees. Thus, only evidence that directly relates to the individual sale in question can contradict the facts presumptively established by the conviction.

Additionally, subsection (w), which describes the details of the rebuttable presumption framework, contains language specifically limiting it to "the purposes of (m)(5)" only, indicating that (w) and (m)(5) work together to guide the inquiry into ultimate liability for the sale. Nowhere does the statute indicate that the presumption can be overcome by evidence pertaining to the store's training and compliance procedures.[70] Evidence on these efforts is allowed under (m)(4) and goes to mitigation, according to subsections (d) and (t).[71]

[70] However, it is unclear whether evidence of an employee's relative degree of negligence in a particular sale should be used as a basis for sentence mitigation if it is shown that the employee was fooled by a piece of fake identification, for example. Section (t) allows the department to reduce the license suspension period "based on evidence provided at the hearing under (m)(4)–(6)," which includes (m)(5) dealing with the facts underlying the conviction. However, subsection (d) indicates that reductions should only be based on "evidence admitted at the hearing concerning questions specified in (m)(4) and (6)," (emphasis added) which explicitly excludes evidence on the facts underlying the conviction from being considered as mitigation evidence. Because Holiday produced no convincing evidence contesting the facts of the underlying sales at the licensing hearing, we need not reach this issue. The ALJ did not have any evidence that could have mitigated Holiday's suspension based on relative degrees of fault. Such

Holiday argues that HB 187, which ultimately failed to become law during the 2007 Amendment process, would have provided licensees with the opportunity to disprove negligence with evidence on the licensee's training program.[72] They are correct—HB 187 would have established a system like the one Holiday contends exists here. But the simple fact is that the bill did not become law, and the opportunity it would have provided was not required to satisfy due process. In fact, by passing an alternative that specifically omits the use of section (t) information as a basis for overcoming the presumption of the licensee's liability, the legislature rejected the policy that Holiday asks us to interpret in the current version of AS 43.70.075.

As a result, it seems clear that the legislature intended for the presumption to be overcome only by evidence that an employee was not negligent in the sale in question (*i.e.*, employee was entrapped, or was reasonably fooled by a fake piece of identification), rather than by evidence of the employee's training. This opportunity to present evidence on the sale itself is exactly what Godfrey wanted in the previous case, and most of what Holiday wants now. In a situation where an employee was entrapped or has some other defense that he fails to assert or fails to assert successfully, the licensee has the chance to present that defense at its suspension hearing. That it bears

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evidence was presented in Mr. Rodriguez's criminal trial, but that case was decided under the old statute where such evidence was undoubtedly immaterial. This evidence was not introduced at the licensing hearing, nor argued on the briefs in this appeal, so it does not affect the outcome of any of these cases.

[71] *See* AS 43.70.075(d) ("[F]ollowing a hearing under (m)…, and based on evidence admitted at that hearing concerning questions specified in (m)(4) and (6) of this section, the Department may reduce…a suspension….").

[72] At. Br. 22–25. *See* Exc. 88, Working Draft, HB 187 (proposing to add the following version of paragraph (m)(4) to AS 43.70.075 as a question to be considered at the hearing: "(4) did the person holding the business endorsement negligently violate AS 11.76.100…; in making this determination, the hearing officer may consider whether the person holding the business license endorsement had adopted and used an employee education, compliance, and disciplinary program as provided in (t)…").

the burden on this issue does not mean it is not receiving a fair hearing. It simply means that the licensee (rightfully) faces an uphill battle in seeking to have an administrative body declare that a court of law has reached an incorrect verdict in a case with identical facts.

In this case, Holiday did not present any evidence of entrapment or any other affirmative defense regarding the underlying sale. Yet Holiday had the opportunity to present such evidence at its hearing to overcome the presumption, but failed to do so. So whether entrapment would have been a viable defense in any of these cases or not, Holliday failed to present any evidence supporting the defense, and in fact failed to present any factual evidence that could have caused the ALJ to question the conclusion of the criminal court that adjudicated each employee's case. The fact that neither Holiday nor its employee could successfully contest the charges against them does not mean the system is flawed—it more likely indicates that in each case a sale occurred for which the licensee should be held responsible.

D. The Statute Does Not Fail the *Scott* Test

Holiday's final argument is that using the conviction as evidence in the licensing hearing violates the *Scott* test. In *Scott v. Robertson*, the Alaska Supreme Court allowed a conviction for drunk driving to be used as conclusive proof of negligence in a subsequent civil action for damages arising out of the same incident.[73] The Court concluded that this was permissible because (1) the prior conviction was for a serious criminal offense; (2) the defendant had a full and fair hearing; and (3) the factual issues

for which the judgment was being offered had necessarily been decided in the previous trial.[74] Holiday argues that the use of the employees' convictions fails this test.

While Holiday's argument would be appealing if this decision were based purely on the common law, the *Scott* test does not preclude the use of the conviction here for two reasons. First, *Scott* set the requirements for allowing a conviction to be used as conclusive evidence of the underlying facts.[75] Here, the licensee has the opportunity to rebut the underlying facts the conviction purportedly establishes, so it is even less likely that a fact finder will reach the wrong conclusion based on the conviction.

Second, *Scott* was a choice between two common law options, not a constitutional ruling. The Court was faced with the decision of whether a conviction should collaterally estop a defendant from denying the facts alleged against him in a subsequent civil action, absent any legislative direction on the issue. The decision was based on collateral estoppel principles and the belief that a conviction is generally to be regarded as legitimate proof of facts necessarily established.[76] As a common law rule, it is the law only insofar as it does not conflict with statute.[77] Here, the legislature has explicitly directed that an employee's conviction be treated as competent evidence that a negligent sale occurred at the location involved in the suspension proceeding. Since

[73] 583 P.2d 188 (Alaska 1978).
[74] *Id*. at 191–92.
[75] *Id*. at 193.
[76] *Id*. at 192 ("Normally, a criminal conviction, incorporating the high burden of proof on the state and the stringent safeguards against violations of due process, should be admissible absent strong showing of irregularity.").
[77] AS 01.10.010.

that rule does not violate any other constitutional provision, it is permissible in spite of any difficulties it might face under *Scott* in the absence of a statute.

RULING

The system established by AS 43.70.075 does not unduly restrict the licensee's right to a fair hearing, nor is it likely to result in erroneous deprivation of the licensee's interest in lawfully selling tobacco products. Though Holiday argues the system makes it "too easy" for the State to hold the licensee liable for negligent sales, license suspension was easier under the system upheld by the Supreme Court in *Godfrey*. One cannot start at "not too easy" (per *Godfrey),* move in the direction of "more difficult," and end up at "too easy." Though we interpret the statutory scheme slightly differently than did the ALJ, the system itself complies with *Matthews*, and Holiday presented no evidence that could plausibly lead to a different result. The suspensions adopted in the prior proceedings are AFFIRMED.

ENTERED this 15th day of December, 2010, in Anchorage, Alaska.

Signed
Hon. Patrick J. McKay
Judge of the Superior Court

**I certify that on 12-17/10,
a copy of the above was mailed to each of
the following at their addresses of record:**

Signed
K. Nixon/Judicial Assistant

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