

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

In the Matter of:)	
)	
HOLIDAY ALASKA, INC.)	
d/b/a Holiday,)	
)	
Respondent.)	OAH No. 09-0238-TOB
<hr style="width: 100%;"/>)	Agency No. 0500-09-006

DECISION

I. Introduction

A. Overview

On September 4, 2009, the Commissioner entered a consolidated decision in five independent civil enforcement cases regarding underage tobacco sales.¹ In each of those 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.”² The September 4 decision, issued after a hearing and various supplemental proceedings, imposed a suspension and civil fine against Holiday for each of the underage sales.

This is a sixth such case. It relates to an underage sale by an employee named Tiana Odden at Holiday Store 650, located in Wasilla. Although the timing of this case precluded its formal consolidation into the five prior cases, the parties have stipulated that it be handled like the Hapoff case (Agency No. 0500-08-059), which was added to the prior group of cases after the main hearing had taken place. All testimony and exhibits offered in the consolidated matter will be treated as admitted in this case (subject to the same objections and limitations, where applicable), and all arguments made on common issues in the consolidated matter will carry over to this case. The parties expect the five consolidated cases and this case to be appealed, with the multiple appeals to be consolidated thereafter.

¹ The Office of Administrative Hearings case numbers are 08-0245-TOB, 08-0313-TOB, 08-0314-TOB, 08-0420-TOB, and 08-0621-TOB.

² AS 11.76.100(a)(1).

B. Evidence Taken

The evidence admitted in the consolidated matter, and carried over to this case, is described in Part I-B of September 4, 2009 consolidated decision, with one exception. The parties and the administrative law judge agree that Exhibit L (a compilation of legislative history) should have been listed as admitted in Part I-B of the consolidated decision and should be part of the record in this case. Indeed, Exhibit L already appears in the record of the consolidated matter among the admitted exhibits.

A brief hearing was held in this case on September 14, 2009. No new testimony was taken. The following additional exhibits were admitted in the September 14 hearing, all of them without restriction and without objection:

Holiday Exhibits A-650, B-650, C-650, D-650, E-650, and F-650

Division Exhibits 1-650, 2-650, and 3-650.

The status of hearsay in this case is set out in Part I-B of the September 4, 2009 decision.

II. General Factual Background

The “Common Factual Background” provided in Part II of the September 4, 2009 decision is incorporated by reference, except that at the times relevant to *this* case Holiday Alaska operated 27 (rather than 26) stores in Alaska.³

III. Constitutional Defenses

Holiday Alaska has preserved in this case its three constitutional defenses raised in the consolidated matter. One new item of evidence has been offered in this case that is relevant to one of these defenses: Exhibit D-650, a sales loss estimation that supplements the projections found in Exhibit DD to the consolidated matter. Exhibit D-650 bears on the finding accompanying note 26 in Part III-A-2 of the September 4, 2009 decision, and it places Store 650 near the median of the Holiday outlets evaluated in connection with that finding.⁴ It does not change that or any other finding made in the September 4, 2009 decision.

All jurisdictional rulings, findings, and conclusions in Part III of the September 4, 2009 decision are incorporated by reference.

³ Tr. 43.

⁴ In comparing the projections, one must adjust for the fact that D-650 uses a gasoline price of \$3 per gallon, whereas DD uses a price of \$4 per gallon.

IV. The AS 43.70.075 Structure

A retailer may not sell tobacco products at a retail location unless it has a license endorsement for such sales at that location.⁵ 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.⁶ There is no discretion to forego a penalty. The civil penalties are initially imposed through service of a penalty notice on the retailer.⁷

The presumptive civil penalties are as follows:⁸

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 ⁹ in the 24 months before the date of the penalty notice --	20 day suspension at the location where the violation occurred; ¹⁰ \$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

⁵ AS 43.70.075(a).

⁶ AS 43.70.075(d); AS 11.76.100(a)(1).

⁷ AS 43.70.075(m).

⁸ AS 43.70.075(d).

⁹ The similar violations are any other violation under AS 11.76.100, AS 11.76.106, or AS 11.76.107.

¹⁰ AS 43.70.075(e) confines the suspension “to the retail outlet in the location in which the violation occurs.”

adjustments for any particular retail location may only be granted once in any 12-month period.¹¹ 90-day and one year suspensions are not subject to adjustment for any reason.¹²

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.¹³ 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 this case, the crime of negligently selling a tobacco product to a person under 19 years of age).¹⁴ In the present case, there is no dispute (i) that a conviction of an employee occurred and (ii) that the employee was acting within the scope of employment.¹⁵ Question 2 relates to alternative triggering conduct (unlicensed sales, improper packaging) that is not applicable in this case.¹⁶

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?¹⁷ 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.¹⁸

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 offense, 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.

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.¹⁹ The license-

¹¹ AS 43.70.075(u).

¹² AS 43.70.075(d).

¹³ AS 43.70.075(m).

¹⁴ AS 43.70.075(m)(1).

¹⁵ Statement of counsel for Holiday at Sept. 14, 2009 hearing.

¹⁶ See AS 43.70.075(a), (g), (m)(2).

¹⁷ AS 43.70.075(m)(3).

¹⁸ For a fuller discussion, see *In re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Economic Development 2009), Decision at 15 & n.74.

¹⁹ AS 43.70.075(m)(4).

holder has the burden of proof on this factor.²⁰ The factor can operate only to *reduce* a suspension; failure to establish it does not increase the suspension.²¹ To receive credit for the factor, the license-holder must prove that *all* of seven components were in place.²² 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 facts of this particular case 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 19.²³ 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 violations by the retailer or one of its agents or employees.²⁴ It also covers any conduct by the retailer that “was or is likely to result” in a sale to a person under 19.²⁵

²⁰ *Id.*

²¹ AS 43.70.075(t).

²² The seven components are listed in AS 43.70.075(t) and conjoined by the word “and.” For further discussion, *see In re Holiday Alaska, Inc.*, OAH No. 08-0245-TOB (Commissioner of Commerce, Community & Economic Development 2009), Decision at 16 & n.78.

²³ AS 43.70.075(m)(5), (w).

²⁴ 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.

²⁵ AS 43.70.075(m)(6)(C).

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.²⁶ The notice does not place a ceiling on the penalty that can be imposed under the statute.

V. Application to Case 0500-09-006 (Odden)

A. Violation

On March 10, 2009, Tiana M. Odden, an employee at the Holiday Store Number 650 at 7383 West Parks Highway, Wasilla, was cited for negligent sale of a tobacco product to a person under 19.²⁷ She was convicted on a plea of guilty on March 24, 2009.²⁸ The division issued a notice of suspension to Holiday on April 1, 2009.

The Odden 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 3-650. 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. Odden was acting in the scope of employment when she made the sale at issue. Thus, apart from the constitutional defenses, Holiday admits liability under the statute.

B. Base Penalty

The inquiry then moves to setting the base penalty for the violation. There is no evidence that during the 24 months preceding the date of the notice of suspension, any Holiday employee was convicted of violating AS 11.76.100 or any other relevant statute in connection with Store

²⁶ AS 43.70.075(d).

²⁷ Exhibit 3-650 at 5.

²⁸ Ex. 2-650 (recording); Ex. 1-650 (judgment).

650.²⁹ Accordingly, the base penalty for the Odden matter is a 20 day suspension and a \$300 fine. The suspension is imposed at the location where the violation occurred.³⁰

C. 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.”³¹ Holiday had such a written policy.³²

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.”³³ As discussed in connection with the Mikel violation at pages 18-19 of the September 4, 2009 decision, Holiday had such a program that met the statutory standard.

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].”³⁴ Ms. Odden signed such a form by electronic signature one second before she signed her employment application on the date that she was hired.³⁵ The division points out that signing this form as part of a broader paperwork packet probably is not the most effective way to emphasize its importance. The statute, however, requires only the signed form.

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].”³⁶ In contrast to the other employees for whom credit for this factor was granted in the September 4, 2009 decision, Holiday offered no evidence that the company ever required Ms. Odden to submit to a background check for prior underage tobacco sales or other criminal history. On the other hand, Ms. Odden was so young when hired—barely 19—that such a check

²⁹ Cf. Ex. S.

³⁰ AS 43.70.075(e).

³¹ AS 43.70.075(t)(1).

³² Ex. LL at 2; Ex. NN at 19-22; Tr. 46-49, 186-87.

³³ AS 43.70.075(t)(2).

³⁴ AS 43.70.075(t)(3).

³⁵ Ex. C-650 at 4, 12.

³⁶ AS 43.70.075(t)(4).

would have covered only a brief period since she left juvenile status.³⁷ Moreover, in contrast to the Oliver case discussed in the September 4 decision—where credit for this factor was denied—in this case Ms. Odden was required to detail her past experience before being hired and was required to sign a form indicating that she understood the tobacco policy.³⁸ Further, the company reviewed her performance in detail after three months of employment, including evaluation for compliance with age-restricted sales procedures.³⁹ Although the showing is not strong, on balance Holiday is entitled to a finding that it met the fourth element.

Requiring verification. The fifth element is to require employees “to verify the age of purchasers . . . by means of a valid government issued photographic identification.”⁴⁰ 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 Odden case.

Disciplinary sanctions. The sixth element is to establish and enforce “disciplinary sanctions for noncompliance with the written policy and [the law].”⁴¹

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 70 and 100 Alaska employees over the course of three to four years under this program.⁴² The program was applied to Ms. Odden by means of immediate discharge after her failure.⁴³

Monitoring. The final required element of the program is monitoring employees’ compliance with the written policy and the law.⁴⁴ The division concedes that Holiday conducts monitoring sufficient to meet this element.⁴⁵

Net reduction. Because Holiday’s program fulfilled all of the required elements at the time of and in connection with Ms. Odden’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

³⁷ See Exhibit C-650 at 1.

³⁸ *Id.* at 2-4, 12.

³⁹ *Id.* at 9.

⁴⁰ AS 43.70.075(t)(5).

⁴¹ AS 43.70.075(t)(6).

⁴² The figure is taken from Iverson’s direct testimony regarding BARS and district manager stings. A few additional terminations have resulted from government stings.

⁴³ Ex. C-650 at 11.

⁴⁴ AS 43.70.075(t)(7).

⁴⁵ Division’s final argument (rebuttal) in consolidated matter.

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 in most respects. 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 employee Mikel (discussed in the September 4, 2009 decision), 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 first 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.⁴⁶ 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.⁴⁷ Finally, the criminal background check may have been omitted in some cases, including Ms. Odden’s.

The division proposed at oral argument in the consolidated matter 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.

D. Mitigation—No Negligent Sale

Holiday did not contend that it had met its burden of proof on this mitigator in connection with Ms. Odden.⁴⁸

E. Enhancement

The division did not seek an enhancement of the suspension at Store 650 on the basis of prior violations by Holiday employees over the preceding five years.

F. 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 Odden violation is 13 days, to be

⁴⁶ See, e.g., Tr. 57-69, 132.

⁴⁷ See, e.g., Tr. 68 and 130.

⁴⁸ Holiday’s final argument, Sept. 14, 2009. See AS 43.70.075(m)(5), (w).

imposed at Holiday Store Number 650, the retail location at 7383 West Parks Highway, Wasilla, Alaska. A fine of \$300 must also be imposed.

VI. Conclusion

The division has established one conviction for a tobacco sale to an underage customer meriting the following sanction under AS 43.70.075(d):

In OAH Case No. 09-0238-TOB, Agency No. 0500-09-006, suspension of tobacco license endorsement number 430605-26 for the retail location at 7383 West Parks Highway, Wasilla, Alaska for a period of 13 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 sanction. This sanction 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 15th day of September, 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 1st day of October, 2009.

By: Signed
Signature
Emil Notti
Name
Commissioner
Title