

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

In the Matter of:)
)
GABBY D. GABORIK) OAH Nos. 11-0182/0205/0286-TOB
) Agency Nos. 2011-000207/000596
_____)

DECISION

I. Introduction

In December, 2010, Gabby D. Gaborik was the sole proprietor of Santa’s Pull Tabs and Santa’s Mailbag. Mr. Gaborik held Alaska business licenses in both of those business names; his license in the name of Santa’s Mailbag (but not Santa’s Pull Tabs) included a tobacco endorsement. The Division of Corporations, Business and Professional Licensing issued two notices of suspension to Mr. Gaborik, alleging violations of AS 43.70.075(a) and (d), and stating its intent to impose a fine of \$300 and to suspend his tobacco endorsement for 20 days.

Mr. Gaborik filed three requests for a hearing relating to the two notices. The cases initiated by those requests were consolidated. The administrative law judge conducted a telephonic hearing on September 27, 2011. Mr. Gaborik represented himself and was the sole witness. Assistant Attorney General Andy Harrington represented the Division.

The testimony and the evidence at the hearing established that on December 21, 2010, an individual under the age of 19 purchased cigarettes from Robert Hafer, who was acting within the scope of his duties as Mr. Gaborik’s employee or agent, and that Mr. Hafer was convicted of violation of AS 11.76.100 as a result of the sale. Mr. Gaborik did not establish an affirmative defense under AS 43.70.075(w),¹ and accordingly Mr. Gaborik has violated AS 43.70.075(d) and he is subject to suspension of his tobacco endorsement and imposition of a fine. A suspension of 20 days and a fine of \$300 are imposed. No violation of AS 43.70.075(a) occurred.

II. Facts

Gabby D. Gaborik conducts business as a sole proprietor under two assumed business names, Santa’s Pull Tabs and Santa’s Mailbag. Mr. Gaborik holds two Alaska business licenses,

¹ AS 43.70.075(w) affords an employer a complete defense under certain circumstances. *See Holiday, Inc. v. State, Division of Corporations, Business and Professional Licensing*, No. 3 AN-09-10689 CI (Alaska Superior Court, December 15, 2010) (TOB080245, available online at www.state.ak.us/officeofadminhearings/Documents), *appeal pending*, No. S-14155 (Alaska Supreme Court).

one in the name of Santa's Pull Tabs (ABL No. 946573) and the other in the name of Santa's Mailbag (ABL No. 308487). Under the name Santa's Pull Tabs, Mr. Gaborik is a commercial pull tab operator. Under the name Santa's Mailbag, Mr. Gaborik answers letter to Santa Claus delivered to Santa's North Pole, Alaska, address, using largely volunteer labor. In December, 2010, Mr. Gaborik was conducting business under both names out of 3340 Badger Road, Suite 180, in North Pole. With the Christmas holiday approaching, it was the height of the season at Santa's workshop.

In order to generate the minimal funds needed to operate as Santa's earthly agent, Mr. Gaborik had obtained a tobacco sales endorsement for the business license he held in the name of Santa's Mailbag. Santa's Mailbag's retail tobacco customers are the patrons of Santa's Pull Tabs; Santa's Mailbag does not advertise or solicit tobacco customers from the general public. Mr. Gaborik uses the proceeds from the sale of cigarettes to pay for stamps for Santa's return mail to the persons whose letters are answered and to otherwise defray the costs of answering Santa's mail. Selling cigarettes to Santa's Pull Tabs patrons has the ancillary benefit to Mr. Gaborik of enabling Santa's Pull Tabs patrons to remain on the premises and continue to engage in pull tab activities when they run out of cigarettes.

On December 21, 2010, a person under age 19 entered the Badger Road premises and purchased cigarettes from Robert Hafer. Mr. Hafer was convicted of a violation of AS 11.76.100 as a result of that transaction, for negligently selling cigarettes to an underage buyer. Mr. Hafer was a paid employee, and an agent, of Mr. Gaborik. Mr. Hafer divided his time between managing the pull tab operation and answering Santa's mail, depending on the needs of the respective business operations at any given time. In making the sale of cigarettes, Mr. Hafer was acting within the course and scope of his duties for, and as the employee or agent of, Mr. Gaborik's business operations as a sole proprietor.

III. Discussion

A. Mr. Gaborik Did Not Violate AS 43.70.075(a)

The Division's first notice of suspension, dated April 21, 2011, alleged that Mr. Gaborik violated AS 43.70.075(a). It is a violation of AS 43.70.075(a) for a person to sell tobacco products unless the person holds a business license with a tobacco endorsement for the sale

location.² Pursuant to AS 43.70.075(k), a person who violates AS 43.70.075(a) is subject to a fine of \$250 per day (to a maximum of \$5,000) and to suspension of the person’s tobacco endorsement or the right to obtain one for a period of up to 45 days for a first offense.

A “person” includes an individual, firm, a legal entity such as a corporation or partnership, and a group or combination acting as a unit.³ In this case, there is only one “person” involved: Gabby Gaborik, an individual doing business as a sole proprietor under two assumed business names.⁴ The Division did not establish that either Santa’s Pull Tabs or Santa’s Mailbag is a person within the meaning of AS 43.70.075. Nor did it establish that either name identifies a distinct “business” within the meaning of AS 43.70.075, that is, a business entity distinguishable from Mr. Gaborik as an individual.⁵ That Mr. Gaborik operates as a sole proprietor under more than one business name at the Badger Road premises, and that he holds more than one business license for his business activities there, does not mean that he must hold a tobacco endorsement in both names, even if he was required to hold multiple business licenses to cover all of the business activities he was engaged in⁶ and all of the assumed names he used in conducting those business activities.⁷

All that AS 43.70.075(a) requires is that the person (Mr. Gaborik) who (personally or through an agent or employee) makes the sale must hold at least one business license for that location with a tobacco endorsement. This is demonstrated by the Commissioner’s prior decision In Re Ketchikan Entertainment Center.⁸ In that case, a single business entity, Ketchikan Entertainment Center LLC (KEC), conducted multiple businesses under different names in a “large building located at 2050 Sea Level Drive in Ketchikan,” including a bar (Roller Bay Bar), a pizza restaurant (Godfather’s Pizza – Ketchikan) and a bowling alley (Ketchikan Bowling Center), none of which was distinguished by interior signage. In

² AS 43.70.075(a).

³ AS 43.70.110(4).

⁴ Cf. Roeckl v. Federal Deposit Insurance Corporation, 885 P.2d 1067, 1074-1075 (Alaska 1994) (under Alaska law, registration of business names is permissive); State v. ABC Towing, 954 P.2d 575, 577-579 (Alaska App. 1998) (holding that a “firm” does not include a sole proprietorship with employees, for purposes of AS 11.81.900(b)(3); noting that at common law, sole proprietorship is alter ego of individual proprietor).

⁵ For purposes of AS 43.70, a “business” is an “entity” of some sort. See AS 43.70.110(1).

⁶ See 2 AAC 12.020(a), (h) (requiring a separate business license for each line of business; limiting business activities to the line of business stated in the business license).

⁷ See AS 43.23.020(a) (requiring business license to include “the business name to be used by the licensee”); 2 AAC 12.020(g) (business license holder must advertise and operate in the name that appears on the business license).

⁸ OAH No. 07-0180-TOB (Commissioner of Commerce, Community and Economic Development 2007).

November, 2006, KEC held two business licenses at that location, identifying two different primary lines of business. One, in the “full service restaurant” line of business, included a tobacco endorsement. The Division cited KEC for sale of tobacco without a tobacco endorsement, arguing that absent a tobacco endorsement on a business license issued in the name of the bar, KEC lacked a valid endorsement. The Commissioner dismissed the citation on the grounds that (1) the Division had not proved that KEC was doing business as the bar as an entity distinct from KEC; and (2) the tobacco endorsement issued to KEC identifying 2050 Sea Level Drive as the location of sales was sufficient. The latter rationale is authority for the proposition that where a single business entity holds multiple business licenses at a single location, a tobacco endorsement on any one of those licenses specifying that location inures to the benefit of the entity (the “person” who holds the license), regardless of the name under which the entity sells tobacco products, and regardless of whether the entity is otherwise in violation of applicable business licensing laws.⁹

Through April 21, 2011, the date on which the citation alleging a violation of AS 43.70.075(a) was issued, Mr. Gaborik held a business license to do business as a sole proprietor at the Badger Road premises in the name Santa’s Mailbag, and that license had a tobacco endorsement. The Division did not amend that citation to allege sales by Mr. Gaborik at the Badger Road premises without an endorsement for a date after April 21, 2011, and the later citation it issued did not allege any violation of AS 43.70.075(a) at all.¹⁰ Because Mr. Gaborik held a business license with a tobacco endorsement for the Badger Road location at the time of the sale at issue in this case, and he continued to hold the endorsement for that location through the date of the citation alleging a violation of AS 43.70.075(a), the Division has not shown grounds for imposition of a penalty under AS 43.70.075(k).¹¹

B. Mr. Gaborik Violated AS 43.70.075(d)

AS 43.70.075(d) provides that if an agent or employee of a person who holds a business license with a tobacco endorsement is convicted of a violation of AS 11.76.100 the Division

⁹ *Id.*, at 6. See notes 6, 7, *supra*.

¹⁰ The Division elicited testimony at the hearing suggesting that Mr. Gaborik continued to sell tobacco at the Badger Road premises after filing a change of address form changing the location of Santa’s Mailbag. However, conduct occurring after the notice of suspension that was the basis for the administrative hearing in this case is outside the scope of the hearing.

¹¹ AS 43.70.075(k) also provides for imposition of a penalty for violation of AS 43.70.075(g), but the department did not allege a violation of AS 43.70.075(g).

must, for a first offense, suspend the tobacco endorsement for a period of 20 days (unless specified grounds for a reduction are proved at a hearing) and impose a civil fine of \$300.¹²

Mr. Gaborik does not deny that Mr. Hafer made an illegal sale in the course and scope of his duties as an employee or agent of Mr. Gaborik, and that Mr. Hafer was convicted of a violation of AS 11.76.100. Mr. Gaborik made no attempt to prove that *Mr. Hafer* was not negligent in making the sale, as would be required to establish an affirmative defense under AS 43.70.075(w). Rather, Mr. Gaborik argued that he should not be held liable for the actions of Mr. Hafer in the absence of any personal fault by *Mr. Gaborik*. However, in a 2007 decision the Alaska Supreme Court concluded that it was within the legislature's authority to impose liability under AS 43.70.075(d) on a business owner who bears no personal responsibility for an illegal sale of tobacco by their employee or agent.¹³ Neither the Division nor the commissioner may disregard AS 43.70.075(d). Mr. Gaborik may be entirely blameless, but under the law passed by the legislature and found constitutional by the judiciary, he is nonetheless subject to a \$300 fine and suspension of his tobacco endorsement.

C. A 20-Day Suspension Is Proper

Imposition of the \$300 fine for a first offense is mandatory and there is no provision in law for suspending it. However, the department has discretion to reduce the term of the suspension by not more than ten days upon a satisfactory showing by the person holding the license.¹⁴ In this case, Mr. Gaborik did not argue at the hearing that he meets the requirements stated in law for a reduction in the term of suspension. Rather, he argued that because he voluntarily suspended his operations at the Badger Road premises for about 5 months, no further period of suspension should be ordered. But Mr. Gaborik's unilateral decision to suspend operations is not, nor should it be, binding on the department. A voluntary suspension whose timing and length are based solely on the business owner's own interests is no sanction at all. Absent a showing of grounds for a shorter suspension as provided by law, there is no basis for waiving imposition of the period of suspension that is otherwise required by law.

¹² AS 43.70.075(d)(1).

¹³ See Godfrey v. State, Department of Commerce and Economic Development, 175 P.3d 1198 (Alaska 2007).

¹⁴ See AS 43.70.075(t).

The Division, for its part, argued that in addition to imposing the requisite period of suspension, an order should be entered barring issuance of a tobacco endorsement at the Badger Road premises for the same period of time as the Santa's Mailbag endorsement is suspended.

The Division did not cite to any specific statutory authority for entry of an order barring issuance of a tobacco endorsement to Mr. Gaborik for the Badger Road location. AS 43.70.075(k) provides that if a person violates AS 43.70.075(a) at a location, the department may suspend that person's right to obtain a tobacco endorsement at that location. Mr. Gaborik did not violate AS 43.70.075(a), and thus AS 43.70.075(k) does not apply. AS 43.70.075(a) provides that a person may not apply for a tobacco endorsement for a location if another license at that location is "currently" suspended or revoked. Mr. Gaborik transferred the Santa's Mailbag tobacco endorsement from the Badger Road location to another location on June 16, 2011, and thus AS 43.70.075(a) does not authorize suspension of his right to obtain a license at the Badger Road location. Because the Division did not identify a statute providing authority for the order requested under the specific facts of this case, the request for entry of an order barring issuance of a tobacco endorsement for the Badger Road location is denied.¹⁵

IV. Conclusion

Gabby Gaborik does not dispute that his agent or employee was convicted of a violation of AS 11.76.100, and he has not established an affirmative defense or grounds for reduction in the otherwise-mandatory period of suspension. Accordingly, the Division's decision to assess a civil penalty of \$300 to suspend Mr. Gaborik's business license tobacco endorsement for twenty days is affirmed. The Division shall notify Mr. Gaborik of the date the suspension begins, which shall be no later than 45 days after the date this decision is adopted.

DATED: January 11, 2012.

Signed _____
Andrew M. Hemenway
Administrative Law Judge

¹⁵ AS 43.70.075(b) provides that the department "shall" issue a tobacco endorsement "upon payment" of the requisite fee. Whether, in its discretion, the Division may withhold issuance of an endorsement for a location pending completion of a period of suspension at another location is an issue that need not be decided.

Adoption

This Order is issued under the authority of AS 43.70.075, AS 44.17.010 and AS 44.33.010. 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 24th day of February, 2012.

By: Signed
Signature
Susan Bell
Name
Commissioner
Title

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