

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

In the Matter of)	
)	OAH No. 13-0618-TOB
SUPER BEAR SUPERMARKET)	Agency No. 2013-000763
_____)	

REVISED DECISION

I. Introduction

An employee of Super Bear Supermarket was convicted of selling tobacco products to an underage customer while at work at Super Bear. Although the conviction was set later aside for the employee after he completed probation, the existence of the conviction means that the Department must impose a penalty on Super Bear. Because Super Bear had program of education, compliance, and discipline regarding underage tobacco sales, it qualifies for mitigation of the maximum 20-day suspension of its tobacco endorsement for its business license. Based on the strength of its program, Super Bear's tobacco endorsement for its business license is suspended for 16 days.

II. Facts

In 2011, Patrick Haley was working as a checker at Super Bear Supermarket in Juneau, where he had worked since 2001. Mr. Haley would sometimes work at the checkout stands at which tobacco products were sold.¹

On July 22, 2011, Mr. Haley sold a can of chewing tobacco to a minor under 19 years old. He did not request that the minor produce identification. He entered his own birth date into the cash register in order to bypass the age verification feature on the cash register.²

The minor to whom Mr. Haley sold the chewing tobacco worked as a confidential informant for the Department of Health and Social Services. Mr. Haley was charged with a violation of AS 11.76.100. A trial was held before District Court Judge Keith Levy in Juneau on February 15, 2012. Mr. Haley was represented by counsel, and testified at the trial. At the trial, Mr. Haley admitted that he sold the chewing tobacco to a minor without checking the minor's identification.³

¹ *State v. Haley*, Case No. 1U-11-1048 MO (Feb. 15, 2012) transcript at 17.

² Division's Exhibit 4.

³ *State v. Haley* transcript at 38.

He also testified, however, that he personally was opposed to tobacco use by minors.⁴ The reason he did not request I.D. from the minor was that he believed this customer was a repeat customer from whom he had already requested I.D. and verified age in the past. He revealed that on the day in question he was in a very emotional state due to a combination of circumstances, including the condition of a close family member who had a terminal illness.⁵ He believed that his judgment was clouded that day due to the trying circumstances.

Judge Levy convicted Mr. Haley of the offense.⁶

Super Bear had a zero tolerance policy with regard to tobacco sales to a person under age 19. Under this policy, if Mr. Haley was convicted, he would lose his job. Shortly after Mr. Haley made the sale to the underage informant, Samuel Hobbs, the general manager of Super Bear, gave Mr. Haley a verbal warning that he would be fired if he was convicted of the crime of selling a tobacco product to an underage informant. Super Bear followed this up the next day with a letter to Mr. Haley containing a written warning.⁷

At the trial, Judge Levy expressed understanding that Mr. Haley was under very difficult circumstances at the time of the sale. The judge was concerned about the collateral consequences to Mr. Haley of the conviction. In order to provide some leeway that might allow Mr. Haley to retain his job, Judge Levy imposed a suspended imposition of sentence, and explained that this action would allow the conviction to be set aside after a probationary period.⁸ After Mr. Haley successfully completed the probationary period, the conviction was set aside. Mr. Haley was not fired from his job.

Based on Mr. Haley's conviction, on April 12, 2013, the Division of Corporations, Business and Professional Licensing issued a Notice of Suspension of Tobacco Endorsement and Imposition of Civil Penalty to Super Bear. This notice imposed a 20-day suspension on Super Bear's tobacco endorsement, which meant that Super Bear would not be able to sell tobacco products for 20 days. Super Bear appealed. As part of the appeal process, both parties filed

⁴ *Id.* at 20.

⁵ *Id.* at 28. Mr. Haley's son died a few months later. *Id.*

⁶ *State v. Haley* transcript at 64.

⁷ Hobbs testimony. The letter was not made an exhibit at the hearing, and although Mr. Hobbs had Super Bear staff search Mr. Haley's personnel file, and other files, such as those related to tobacco, Super Bear was unable to locate a copy of the letter. At the time of the hearing, Super Bear had not asked Mr. Haley if he retained a copy of the letter. *Id.*

⁸ *State v. Haley* transcript at 68.

motions for prehearing rulings on legal issues. An order on the prehearing motions was issued on December 3, 2013.⁹

Two of the main legal issues in this case were disposed of in the prehearing order. First, the order held that the setting aside of the conviction had no effect on these proceedings—the Division could still bring an enforcement action against Super Bear, even though the conviction had been set aside. The prehearing order determined that this issue was controlled by *State, Div. of Corp., Bus. and Prof. Licensing, Alaska Bd. of Nursing v. Platt*.¹⁰ Under *Platt*, a conviction continues to exist, and can be considered by a licensing authority, even after it has been set aside for certain purposes. Therefore, the Division has authority to proceed against the store under AS 43.70.075, which authorizes an action when an employee “has been convicted of violating AS 11.76.100.”¹¹

Second, the order held that the errors in the testimony of the state’s investigator at Mr. Haley’s trial also had no effect on these proceedings. At the trial, the investigator had at first given erroneous testimony about where he was positioned during the sale, and about his movements after the sale. Although Super Bear argued that these errors undermined the conviction to such an extent that this tobacco endorsement action could not proceed, that argument was rejected because the statute does not allow the agency to ignore or reject an actual criminal conviction. The remedy for a respondent who, like Super Bear, contests the validity of the conviction that underlies the tobacco endorsement action against the respondent, is to rebut the presumption that its employee negligently sold tobacco to a minor.¹²

⁹ Order Denying Super Bear’s Motions to Dismiss and to Preclude State from Calling Witnesses to Support Conviction and Granting Division’s Motion for Partial Summary Adjudication with Respect to Legal Effect of Set Aside Under AS 12.55.085 (Dec. 3, 2013). A corrected version of the Order, correcting minor typographical errors, was issued on December 31, 2013.

¹⁰ 169 P.3d 595 (Alaska 2007).

¹¹ AS 43.70.075(d).

¹² AS 43.70.075(m)(5). The prehearing order also noted that Super Bear’s argument regarding fraud by the State’s investigator was factually incorrect. Although the witness initially gave incorrect testimony about how close he was when the sale took place, Judge Levy watched the video of the sale and therefore knew approximately where the investigator actually was when the sale took place. The witness conceded that the video was correct. Further, in convicting Mr. Haley, Judge Levy relied on the fact that Mr. Haley confessed to making the sale. Therefore, the court was not misled about the facts.

The hearing was postponed while Super Bear petitioned the superior court to overturn the rulings. The superior court found that Super Bear's arguments did not meet the threshold for review of non-final interlocutory decisions, and rejected the petition.¹³

A telephonic hearing was held on March 27, 2014. By agreement of the parties, the issue for hearing had been narrowed to the issue of the appropriate sanction.¹⁴ The question of whether the suspension of the tobacco endorsement can be reduced, and, if so, the extent of the reduction, turns on Super Bear's policy and education, compliance, and disciplinary actions to prevent the sale of tobacco products to people under 19 years old.

Most of the facts regarding Super Bear's tobacco policy are not in dispute.¹⁵ The record contains several iterations of Super Bear's written policy, which employees were periodically required to sign. The policy explained that possession of tobacco by any person under 19 was illegal and that an employee who sold tobacco products to anyone under 19 would be prosecuted and terminated if found guilty.¹⁶ Under the policy, only certain registers could sell tobacco products, and checkers under age 19 could not work at those registers. The policy also prohibited all courtesy clerks from retrieving, bagging, or otherwise handling tobacco products.¹⁷

At the time that Mr. Haley was caught in the sting, Super Bear generally required a checker to see an I.D. from a person who was 27 or younger before selling tobacco products to that person. If a checker had a regular customer, however, whose I.D. had already been verified, the checker was permitted to sell tobacco products to that customer without requiring the customer to produce I.D. again.¹⁸

¹³ Order Denying Petition to Review, *Super Bear Supermarket v. State, Dep't of Commerce, Cmty. and Econ. Dev.* (Alaska Superior Court, January 29, 2014).

¹⁴ See Order Limiting Issues and Evidence (March 24, 2014). After the prehearing issues were decided, Super Bear agreed that it would not dispute any of the facts that are a predicate under statute to determining whether a sanction could be imposed for the sale to an underage buyer. See AS 43.70.075(m)(1), (2), (3) and (5). Therefore, the only issue for hearing was whether and to what extent the suspension of the tobacco endorsement could be reduced. Super Bear reserved its right to continue to dispute on appeal the issues that had been resolved in the prehearing proceedings.

¹⁵ Many of the facts were established by the exhibits attached to the prehearing motions. The only witness to testify at the hearing was Samuel Hobbs, the general manager of Super Bear. Mr. Hobbs was a credible witness. He gave careful testimony, based on his first-hand experience. He stated the facts as he knew them to be, without regard for whether the facts were helpful to his case.

¹⁶ Robinson Affidavit, Exhibit 1 at 11-12. Earlier versions of the policy did not include the "if found guilty" language. *Id* at 19.

¹⁷ Robinson Affidavit, Exhibit 1; Hobbs testimony.

¹⁸ Robinson Affidavit, Exhibit 1 at 18; Hobbs testimony. Since Mr. Haley's conviction, however, that policy has been changed. Now, a checker must require I.D. from every customer who might be 27 or younger. For anyone not carded, the checker must enter the birthdate for the minimum-age eligible to purchase tobacco on that day. That

An additional feature of Super Bear's efforts to ensure that tobacco products were not sold to underage customers was its purchase and implementation of products and resources from *We Card*, a commercial vendor that offers training and materials to help stores comply with laws that restrict tobacco product sales. From *We Card*, Super Bear obtained a training video, which checkers were required to watch, and a manual entitled "Employee Guide to Prevent Tobacco Sales to Minors."¹⁹ It also obtained an eight-question quiz regarding tobacco sale restrictions, which employees were periodically required to take.²⁰

Super Bear did not, however, obtain *We Card's* manager training module. It also did not do background checks on new hires to determine whether they had previous tobacco sales infractions, and it did not do internal "stings" to check on checker compliance with its policy.²¹

No evidence was placed in the record that Super Bear ever enforced discipline against any employee for a violation of tobacco policy or laws before Mr. Haley's July 2011 sale to an underage customer. At the hearing, Mr. Hobbs testified that he was not personally aware of any enforcement action before the date of Mr. Haley's sale to the informant. Mr. Hobbs did testify to two instances in which discipline was enforced after the 2011 sale. In one case, a checker was disciplined by being given a written warning and demoted to courtesy clerk for two weeks for failing to card a young customer; in the other case, a courtesy clerk was given a written warning for having handled a tobacco product.²² In order to determine whether discipline had been enforced before the sale, the record was held open after the hearing, and Super Bear was given an opportunity to submit further evidence. The Administrative Law Judge suggested that the additional evidence could include a copy of the letter to Mr. Haley, and affidavit testimony relating to any sort of enforcement that may have been taken with regard to Super Bear's tobacco policy before the July 22, 2011, sale. Super Bear was encouraged to submit any evidence of enforcement, no matter how minimal. Super Bear did not submit any additional evidence of enforcement of its policy.

system allows supervisors to use video recordings to check on sales made with no I.D. verification to see if those sales were compliant with the policy. Hobbs testimony.

¹⁹ *Id.*; Robinson Affidavit, Exhibit 2.

²⁰ Hobbs testimony. Super Bear now requires a score of 100 percent before a person may be a cashier. *Id.* (March 2014 hearing transcript at 35).

²¹ *Id.*

²² Hobbs testimony.

III. Discussion

A. The threshold issue in this case is whether Super Bear has met the seven requirements of AS 43.70.075(t)

Alaska has strict laws against the sale of tobacco to underage consumers. A retailer may not sell tobacco products at a retail location unless it has a business license endorsement for tobacco sales at that location.²³ 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 must impose a civil penalty on the retailer.²⁴ If a penalty is imposed, it will include a suspension of the retailer's tobacco endorsement, meaning the retailer cannot sell any tobacco products during the suspension. The retailer is entitled to a hearing regarding the penalty, but the issues that can be contested at the hearing are strictly limited.²⁵

The base term of the suspension for a first conviction at a location is 20 days. The commissioner has discretion to reduce the penalty if the retailer has "adopted and enforced an education, a compliance, and a disciplinary program for agents and employees."²⁶ In order for the commissioner to exercise that discretion, however, the retailer must first prove that, before the date of the violation, the retailer had met the seven required elements of an education, compliance, and disciplinary program before the violation occurred.²⁷ These seven elements are described in AS 43.70.075(t). If even one element is missing, the commissioner cannot reduce the term of the suspension.²⁸ When a retailer has met the threshold requirement, the commissioner will then scrutinize the quality of the retailer's education, compliance, and disciplinary program in order to determine how much reduction of the suspension is warranted. For a first-time suspension, the commissioner has discretion to reduce the suspension by up to 10 days.

²³ AS 43.70.075(a).

²⁴ AS 43.70.075(d); AS 11.76.100(a)(1).

²⁵ AS 43.70.075(m).

²⁶ AS 43.70.075(m)(4).

²⁷ In order to be eligible for a reduction in the suspension, the store must prove the existence of the elements listed in paragraph (t) "before the date of the violation." AS 43.70.075(t). Arguably, this might require proof of enforcement without regard to what action the retailer took in the violation that led to the suspension action. Under the cases previously decided by the commissioner, however, a showing that the store met the requirements of (t) in the particular case at issue would satisfy the threshold requirements of subsection (t), allowing the commissioner to reduce the suspension. *E.g., In re Holiday Alaska, Inc.* OAH Nos. 08-0245-TOB, 08-0313-TOB, 08-03145-TOB, 08-0420-TOB, 08-0621-TOB (*Holiday I*) (Commissioner, Commerce, Community and Economic Development 2009), *aff'd Holiday Alaska, Inc., v. State, Div. Corp., Bus. & Prof. Lic.*, 280 P.2d 537 (Alaska 2012).

²⁸ *Holiday I* at 16.

The first inquiry here, then, is whether Super Bear has met the seven requirements of AS 43.70.075(t). If not, then no further inquiry is necessary—the full 20 day suspension will be imposed. As will be seen, this question turns on whether Super Bear has enforced disciplinary sanctions as required under paragraph (t)(6).

B. Has Super Bear proved that it met the requirements of AS 43.70.075(t)(1)-(5) and (7)?

The Division concedes that Super Bear met six out of the seven requirements of subsection (t). Those six are as follows:

Adoption of a policy. Paragraph (t)(1) requires that the retailer adopt a policy against selling tobacco products to underage customers. Super Bear’s exhibits show that it has a policy.

Informed and trained staff. Paragraph (t)(2) requires that the retailer inform staff of the requirements of the laws, and train staff on complying with the law. Super Bear’s use of the *We Card* materials meets this requirement.

Signature. Paragraph (t)(3) requires that the retailer require staff to sign a form stating that the staff member has been informed of and understands the policy and criminal law regarding sales of tobacco to underage customers. The record shows that Mr. Haley was required on multiple occasions to sign an acknowledgement that he was informed of and understood the policy.

Sufficient experience. Paragraph (t)(4) requires that the retailer confirm that staff had sufficient experience and ability to comply with the law and policy. The Division agrees that Super Bear’s use of the *We Card* quizzes minimally satisfy this requirement.²⁹

Verify age. Paragraph (t)(5) requires that the retailer require staff to use a customer’s government-issued picture I.D. to verify the age of a customer buying tobacco products. The Division concedes that Super Bear has met this requirement because Super Bear generally required production of I.D. from customers under age 27, albeit with the exception that repeat youthful customers were not required to produce I.D.³⁰

²⁹ DCBPL Closing Arguments at 12.

³⁰ DCBPL Closing Arguments at 13. This decision accepts Super Bear’s past general compliance with (t)(5) to meet the threshold showing for compliance with (t)(5), even though in this case, Mr. Haley failed to comply with (t)(5). This approach might appear to indicate a departure from the ruling in *Holiday I*. It is not.

In *Holiday I*, the commissioner determined that one of the Holiday stores failed to meet the I.D. requirement because Holiday found that the clerk’s failure to request an I.D. in the particular case that led to the violation did not violate company policy. *Holiday I* at 19 (Mikel case). The store, however, generally required verification of age by production of an I.D. card. *Holiday I* holds that a failure to apply the policy “in connection with [the current] violation” can lead to a finding that the store has not met the threshold (t) factors. *Id.* at 20.

Monitored compliance. Paragraph (t)(7) requires that the retailer monitor the compliance of staff with the law and policy. The Division concedes this point, finding that the quizzes “helped with some level of monitoring.”³¹ More to the point, Mr. Hobbs testified that the front-end supervisor would watch cashiers and that management had video cameras monitoring all cash registers. Although the supervisors were not specifically tasked with monitoring compliance with tobacco policy, they were authorized to intervene when “a cashier did something wrong.”³² This testimony establishes minimum threshold compliance with paragraph (t)(7).

In sum, Super Bear has met the requirements of AS 43.70.075(t)(1)-(5) and (7). This decision turns next to paragraph (t)(6): the question of whether Super Bear has established and enforced disciplinary sanctions for noncompliance with policy or law.

C. Has Super Bear proved that it enforced disciplinary sanctions for violation of policy or law as required under AS 43.70.075(t)(6)?

Under paragraph (t)(6), Super Bear is required to show that it “established and enforced disciplinary sanctions for noncompliance with the written policy or the requirements of [criminal laws governing tobacco sales].”³³ Because “established” and “enforced” are joined by the word “and,” Super Bear is required to prove that it did both—just doing one is not sufficient.

Based on Super Bear’s written policy that it would terminate an employee who was found guilty of selling tobacco products to an underage customer, the Division concedes that Super Bear has met the requirement of *establishing* disciplinary sanctions. The Division argues, however, that Super Bear did not prove that it *enforced* its disciplinary sanctions because Super Bear took no disciplinary action against Mr. Haley and did not introduce any evidence of any enforcement action regarding its tobacco policy at any time since the adoption of that policy.

In *Holiday I*, however, the store found no violation of its policy even in the face of a clerk not carding a customer when the clerk had little reason for his failure to require production of I.D. Thus, the failure of the store to *require* I.D. in the current case negated past policy. Here, on the other hand, Super Bear believes that Mr. Haley at least had a good faith belief that he had previously carded the customer, and the Division has agreed that Super Bear’s action meets the requirements of paragraph (t)(5). Although Super Bear’s failure to find a violation of policy after it became clear that Mr. Haley had been mistaken could have been viewed as a failure to meet (t)(5) under *Holiday I*, the Division did not raise that argument. Given the unusual circumstances in this case, this case does not undermine the holding in *Holiday I* that the store’s actions in the current violation can lead to a finding of failure to meet the (t) factors.

³¹ DCBPL Closing Arguments at 14. The quizzes, however, appear to have been more of an educational tool than a compliance tool.

³² Hobbs testimony.

³³ AS 43.70.057(t). The three criminal laws governed by the statute are AS 11.76.100 (selling or giving tobacco to a minor); 11.76.106 (selling tobacco outside controlled access); and 11.76.107 (failure to supervise cigarette vending machine).

In making this argument, the Division made clear that in the unusual circumstances of this case, Super Bear was not required to terminate Mr. Haley in order to meet (t)(6). In the Division's view, however, the failure to discipline Mr. Haley with even so little as a letter to his file, together with the lack of evidence of past enforcement, demonstrated that Super Bear had not met the requirements of paragraph (t)(6).

A common dictionary defines "enforce" to mean: "to give force to"; "to urge with energy"; "to put into force; cause to take effect"; "constrain, compel"; and "[e]nforce refers to requiring operation, observance, or protection of laws, orders, contracts, and agreements by authority."³⁴ Therefore, any action to give force to a policy could be considered enforcement of discipline. Under the circumstances of this case, any degree of discipline for any degree of violation of policy will meet the minimum threshold requirement.³⁵

The Division agreed that any showing of past enforcement of tobacco policy would have been sufficient to meet the minimum threshold requirement of paragraph (t). Further, the Division offered that if Super Bear could demonstrate that it had disciplined Mr. Haley in any way for making the sale, that would suffice to meet the minimum threshold, even if the discipline was minimal and far short of the termination otherwise required by its policy.

Mr. Hobbs testified about the content of the verbal warning and the letter. He was asked "what was that verbal warning?" He replied "[t]hat the policy is normally to terminate an employee if they were caught selling tobacco to a minor, but it would wait until his trial." With regard to the content of the letter, he stated "[t]he written warning was essentially what was in the verbal warning, that if – if he was – well, that he would be – could be terminated for selling tobacco to a minor. If he was found guilty at his trial, then he would be terminated."³⁶ Later in the hearing, Mr. Hobbs was asked to be more specific about the content of the letter. He explained that "they were written warnings," apparently referring to a form used for warning employees of possible discipline.³⁷ The letter included a description of the incident, a place for the employee to respond, and the consequences—here, that Mr. Haley would lose his job if convicted.

³⁴ *Websters Third Int'l Dict.* at 761 (1986).

³⁵ After explaining that any level of enforcement was acceptable, the record was held open to give Super Bear ample opportunity to come forward with evidence of enforcement.

³⁶ Hobbs testimony (March 2014 hearing transcript at 15).

³⁷ *Id.* at 39-40.

In the circumstances of this case, the confrontation and warning given to Mr. Haley constitute enforcement of Super Bear’s disciplinary policy. The confrontation was not merely a restatement of a policy that applies to all employees. This confrontation was the application of the policy to an individual. The warning was not a sham or a hollow act—but for the special circumstances of Mr. Haley, and Judge Levy’s setting aside Mr. Haley’s conviction, Mr. Haley would have been terminated. Therefore, the verbal warning given to Mr. Haley meets the requirement of AS 43.70.075(t)(6).

D. How many days should be Super Bear’s tobacco endorsement be suspended?

The statute allows, but does not require, the department to reduce the 20-day suspension by up to 10 days for a retailer that has every element of the program required under subsection (t)(6).³⁸ A framework for determining how to determine any reduction is provided by the commissioner’s decision in *Holiday*.³⁹ In *Holiday I*, which consolidated five different cases, the quality of each element of the program in each case was carefully analyzed. In each case, the length of the reduction was based on an overall assessment of the quality of the program.

For the three cases in which all elements of subsection (t) were present, Holiday’s program was quite well developed and strong. For example, Holiday provided in-depth training through its own “Holiday University” that was found at hearing to be “quite well adapted to the target audience.”⁴⁰ To ensure compliance with paragraph (t)(4)—ensuring that employees had sufficient experience and ability to comply with its tobacco policy—Holiday would conduct background checks on new employees. And with regard to monitoring and enforcement, Holiday would conduct internal anonymous “secret shopper inspections,” firing employees who fail, and rewarding those who pass. Between 70 and 100 Alaska employees had been terminated of three to four years under this program, most as a result of internal stings.⁴¹ In general, Holiday was found to have a corporate culture that was opposed to underage tobacco sales.⁴² Yet, even with evidence of this high degree of compliance with subsection (t), the three stores that met all elements were given reductions of only seven days, and were made to serve a 13-day suspension. In short, although Holiday’s program was good, it had room for improvement.

³⁸ AS 43.70.075(t).

³⁹ *Holiday I*.

⁴⁰ *Id.* at 4.

⁴¹ *Id.*

⁴² *Id.*

With regard to how much, if any, reduction should be given to Super Bear's suspension, the parties were asked to take note of the fact that Holiday had a program that was superior to Super Bear's program. Given that Holiday's superior program resulted in 13 day suspensions, the parties were asked how that should affect this case.

Super Bear responded that no comparison to Holiday should be made. Holiday is a large corporation with 27 stores in Alaska, and hundreds of stores nationwide. Super Bear, on the other hand, is a family-owned independent grocery store. It does not have the resources to implement a tobacco program that is comparable to that of Holiday. Super Bear also noted that the unique circumstances of Mr. Haley, the testimony of the state's investigator, and Super Bear's clean record warranted the full 10-day reduction.

Super Bear's argument about Holiday's resources and size cuts both ways. True, no one would expect Super Bear to have its own university or to prepare exclusive training materials. Yet, a small operation that had fully integrated the principle of opposing underage tobacco sales arguably could be more nimble and effective in working with its employees to enforce its policy. This decision will recognize neither a "small-store advantage" nor a "large-corporation advantage" when determining whether a store merits a reduction in its suspension. In order to maintain consistency, the *Holiday* precedent will be considered in evaluating Super Bear's program and determining its suspension.

For its part, the Division provided both a point-by-point comparison of Super Bear's program with Holiday's program, and suggested a formula for determining how much of a reduction a store merits.⁴³ The formula requires rating the quality of each element, and then summing the scores to determine a final reduction. Use of the formula is commendable, particularly in negotiations of settlements where the division is trying to be consistent across different fact patterns. The formula is not adopted in regulation, however, and it will not be adopted here. Nothing in the statute indicates that each element of subsection (t) is to be weighted the same as every other element. As noted above, a small store may be better able to implement some elements, while a large corporation may be better at other elements. At the end of the day, after examining the quality of each element, the overall quality of the program will determine the size of the reduction.

⁴³ Division Closing Argument at 8-10 (comparison approach); 11-14 (formula approach).

Here, Super Bear’s adoption of *We Card*, the use of the training video, the frequent administration of the quizzes, and the frequent requirement that employees read (and re-read) and sign the policy are all strengths of Super Bear’s program as it existed at the time of Mr. Haley’s infraction. Yet, in comparison to Holiday’s program, Super Bear’s program as it existed in 2011 was minimal. Super Bear did no customization of the training to fit it to its employees, and it administered the same quiz over and over with no variation. Super Bear had a very weak policy on checking identification that allowed checkers to enter their own birthdate or another date when the checker believed a customer was a repeat customer. It did no internal stings or other compliance checks with its underage tobacco sales policy. It did not do background checks on new employees.

Particularly striking is the absence of evidence that Super Bear took steps to enforce its program before Mr. Haley’s infraction. Super Bear argues that this absence is a good thing—to Super Bear, this shows a spotless record, for which, in its view, it should be rewarded. Yet, it does not take an actual illegal sale to an underage customer to trigger the need for enforcement. Any violation of policy—for example, a checker selling a tobacco product to a person who is 25 years old without requesting identification—would be a reason for Super Bear to enforce discipline. Here, even though Super Bear was given the opportunity to come forward with affidavit evidence that it had, in fact, enforced its policy, or attempted to enforce its policy, during the years before July 2011, it did not do so.

In evaluating the strength of a program, some of the elements in subsection (t) are elements on which a retailer can demonstrate initiative and commitment. For example, a retailer with initiative could customize its monitoring, training, and enforcement, as Super Bear has begun to do since the July 2011 sale. Although monitoring and enforcement are two separate elements for purposes of meeting the (t) factors, for purposes of evaluating the strength of a program, in some cases monitoring and enforcement can be merged. A strong program of monitoring with the intent to discipline any infraction of the rules—such as conducting internal stings—could be evaluated as a strong program in both monitoring and *attempted* enforcement of discipline, even if no employee was caught in an infraction. In contrast, a program with weak monitoring can be given no credit for its “clean record” because it has done little or nothing to detect infringements.

Before 2011, Super Bear was weak on monitoring and enforcement. No evidence demonstrates that it attempted to enforce its policy on underage tobacco sales. At the hearing, after Mr. Hobbs described the supervisory personnel who patrol the front-end of the store where tobacco sales take place, he was asked “is it specifically part of their job duties to keep an eye on tobacco transactions?”⁴⁴ He answered, “no.”

In sum, Super Bear had a program, and that program had some strengths. Because Super Bear’s program was relatively weak, however, and given that Holiday’s relatively strong program received a seven-day reduction, Super Bear would qualify for at most a three or four day reduction based on the strength of its education, enforcement, and disciplinary program. Because Super Bear had no violations during the five years before Mr. Haley’s sale, it can be given the benefit of the doubt, and awarded a reduction of four days.⁴⁵

E. Should the reduction be conditional on Super Bear’s future compliance?

The Division requests that conditions should be placed on the reduction of Super Bear’s suspension. Specifically, the Division asks that the reduction be contingent on Super Bear’s being compliant with the law, prompt payment of penalties, and properly and timely serving its suspension.⁴⁶ Super Bear argued that the statute does not authorize making the reduction conditional, and suggests that imposition of a probationary period might be acceptable in a negotiated settlement, but not in an order that is being imposed by the department.

The Division is correct that the statute gives the department discretion to reduce or not reduce the suspension. It follows that a conditional reduction would appear to be within the department’s discretion.

Yet, under the statutory scheme, the length of the reduction is determined based on Super Bear’s past behavior, not on Super Bear’s future compliance.⁴⁷ In addition, the effect of the contingency would be that, if Super Bear had another violation during the probation period, Super Bear would then be suspended for the four days that were reduced from this suspension. That additional suspension, however, would duplicate the effect of the statute, which already

⁴⁴ Hobbs testimony (March 27, 2014, transcript at 67).

⁴⁵ The Division agrees that a reduction of four days would be appropriate. Division Closing Argument at 15. The Division argues, however, that Super Bear’s lack of violations cannot be considered a mitigator because a prior violation would be an “aggravator.” In its view, Super Bear has already received the benefit its clean record by not having its penalty increased. Division’s Closing Argument at 6. Under subsection (t), however, the department is instructed to base its reduction on “evidence provided at the hearing under (m)(4 – 6) of this section.” Paragraph (m)(6) allows the department to consider compliance during the past five years.

⁴⁶ Division’s closing argument at 15.

⁴⁷ AS 43.70.075(t).

significantly increases the suspension upon a second violation.⁴⁸ Although a conditional reduction would give an additional incentive to avoid future violations—and certainly could be an approach to negotiated settlements—it adds a layer of complexity that may not be necessary in this case. Therefore, this decision will not make the reduction conditional.

IV. Conclusion

An employee of Super Bear was convicted of selling a tobacco product to an underage customer while acting within the scope of his employment at Super Bear. Super Bear does not contest that the sale was negligent. As required by statute, Super Bear’s tobacco endorsement will be suspended under AS 43.70.075(d). Because Super Bear had adopted and enforced a program of education, compliance, and discipline, however, it qualifies for a reduction of four days from the standard 20-day suspension. The following sanction is imposed:

- Super Bear Supermarket’s tobacco license endorsement is suspended for 16 days;
- Under AS 43.70.075, (d)(1), a civil penalty of \$300.00 is imposed.

Under 12 AAC 12.845(a)(1), this sanction shall be effective 60 days from the date the Commissioner of Commerce, Community and Economic Development issues this decision, as defined in 12 AAC 12.855(c).

DATED this 8th day of August, 2014.

Signed

Susan K. Bell
Commissioner
Alaska Department of Commerce, Community and
Economic Development

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

⁴⁸ AS 43.70.075(d).