

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

In the Matter of:	)	
	)	
JANICE ACKERSON,	)	
d/b/a Moose Valley Mercantile,	)	
	)	
Respondent.	)	OAH No. 10-0542-TOB
_____	)	Agency No. 2010-000893

**DECISION**

**I. Introduction**

Janice Ackerson appeals the Division of Corporations, Business and Public Facilities' decision to suspend her business license tobacco sales endorsement for 20 days and to impose a civil penalty of \$300. The administrative law judge conducted a telephonic hearing on December 17, 2010. Ms. Ackerson admitted that she had made a sale of tobacco to a minor, and asked for lenience in the penalty imposed.

Because Ms. Ackerson did not establish grounds for reducing the period of suspension, and the department lacks authority to reduce the civil penalty, her appeal is denied.

**II. Facts**

For the past ten years, Janice Ackerson has operated a small convenience store at .5 Mile of Mosquito Lake Road, just off the Haines Highway about 30 miles outside of Haines. The business, known as Moose Valley Mercantile, is nominally a partnership, but it operates as a sole proprietorship. The business has never had any employees and has never had a person other than Ms. Ackerson act as an agent on its behalf. Ms. Ackerson is the sole vendor at the establishment, which is open only five hours a day and which is closed whenever she is out of town or otherwise unavailable.

On July 21, 2010, Ms. Ackerson was at her customary post in the store when a young person came in and asked to purchase a pack of cigarettes. Ms. Ackerson asked him for identification, which the young person provided. Ms. Ackerson mistakenly, and negligently, failed to observe that young person's date of birth was not prior to the latest date of birth for a legal sale of cigarettes. She processed the sale.

On July 21, 2010, Moose Valley Mercantile did not have in place a written policy announcing its adherence to state law regarding the sale of tobacco products and Ms. Ackerson

had not signed a written statement acknowledging the existence of such a policy. However, Ms. Ackerson's policy was not to sell tobacco products to minors, and she was fully aware of the requirement of state law that prohibits the sale of tobacco to persons under the age of nineteen. Ms. Ackerson was of sufficient age, experience, and ability to enforce that policy and applicable tobacco sales laws. Ms. Ackerson's sale of tobacco to a person under the age of nineteen on July 21, 2010, was not the result of the absence of a written policy, knowledge of that policy, or deficiency in training or disciplinary sanctions. It was entirely the result of her personal negligent failure to correctly ascertain her prospective patron's eligibility for the legal purchase of tobacco products, based on photographic identification provided to her.

### **III. Discussion**

Alaska law provides that in order to sell tobacco products, a business must have an endorsement allowing such sales.<sup>1</sup> Alaska Statute 11.76.100 provides that it is illegal to negligently sell tobacco products to a person under nineteen years old.<sup>2</sup> If an agent or employee of a business is convicted of a violation of AS 11.76.100, the division must, for a first offense, suspend the tobacco endorsement for a period of 20 days and impose a civil fine of \$300.<sup>3</sup> Imposition of the fine 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 if the person holding the license shows at hearing that the person had:

- (1) adopted and enforced a written policy against selling tobacco products to persons under age 19;
- (2) informed and trained the person's agents and employees regarding the applicable laws;
- (3) required its agents and employees to sign a form stating that they had been informed of and understood the written policy and applicable law;
- (4) determined that its agents and employees had sufficient experience and ability to comply with the policy and applicable law;
- (5) required its agents and employees to verify the age of purchasers by a valid government issued photographic identification;
- (6) established and enforced disciplinary standards for noncompliance with the policy or applicable law; and
- (7) monitored the compliance of its agents and employees with the policy and applicable law.<sup>4</sup>

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<sup>1</sup> AS 43.70.075(a).

<sup>2</sup> AS 11.76.100(a).

<sup>3</sup> AS 43.70.075(d)(1).

<sup>4</sup> AS 43.70.075(t).

In this case, Ms. Ackerson did not prove that she had complied with all of these requirements. In particular, although she submitted handwritten documents stating the policy, providing for discipline, and showing her signature acknowledging the policy, the date on those documents predated the existence of the requirements for their adoption: Ms. Ackerson's assertion that the documents had been created prior to this offense lacked credibility.

Admittedly, compliance with some of the requirements of AS 43.70.075(t) might be viewed, under the facts of this particular case, as a legal impossibility: because the business had no agents or employees, Ms. Ackerson could not have informed any such person (other than herself) of the business's policies or applicable law, trained them in compliance with those policies or applicable law, disciplined them for noncompliance, or obtained from them a written statement evidencing knowledge and understanding of the policies and applicable law.

Moreover, given that the evident purpose of the requirements is to provide some assurance that a business's agents and employees will not intentionally or negligently make illegal sales of tobacco products, the fact that Ms. Ackerson has no agents or employees renders the requirements, as a practical matter, largely superfluous. Ms. Ackerson is the only person who sells anything at Moose Valley Mercantile, and she knows what the law provides. She does not need a written policy to remind her, and she needs no training to understand it. In this particular case, as she readily admits, Ms. Ackerson made a mistake when she checked a young person's identification. It was her negligence, not an agent or employee's ignorance of the law or negligence, that resulted in the illegal sale.

Under these circumstances, Ms. Ackerman's failure to adhere to the requirements of AS 43.70.075(t) is largely irrelevant for purposes of deciding whether the division should exercise its discretion to shorten the period of license suspension. By her own admission, Ms. Ackerson made a mistake of the most elementary sort, by failing to correctly identify the proper birthdate for a legal sale. In light of the fact that Ms. Ackerson herself is the party at fault for the negligent sale that occurred in this case, a discretionary reduction in the period of suspension would be unwarranted even if the business had met all of the requirements stated in AS 43.70.075(t).

#### **IV. Conclusion**

Ms. Ackerson was convicted of selling tobacco to a minor, and she admits that the conviction was the result of her own negligence. There is no provision in Alaska law for

reduction in the amount of the civil penalty. Ms. Ackerson has not shown compliance with all of the elements of AS 43.70.075(t). Even if she had shown compliance, a discretionary reduction in the period of suspension would be unwarranted, because the sale was the result of her conduct, not the conduct of an employee or agent. The division's decision to assess a civil penalty of \$300 to suspend the respondent's business license endorsement for twenty days is affirmed. Pursuant to 12 AAC 12.845(a)(1), the period of suspension shall begin on January 10, 2011, or two days after this decision is adopted, whichever is later.

DATED: December 30, 2010.

*Signed* \_\_\_\_\_  
Andrew M. Hemenway  
Administrative Law Judge

### **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 29<sup>th</sup> day of February, 2011.

By: *Signed* \_\_\_\_\_  
Signature  
Susan Bell  
Name  
DCCED Commissioner  
Title

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