

05-0492  
MISCELLANEOUS  
SIGNED 08-11-05  
COMMISSIONERS: P. HENDRICKSON, R. JOHNSON, P. DEPAULIS, M. JOHNSON  
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

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PETITIONER,	)		
	)	<b>ORDER</b>	
Petitioner,	)		
	)	Appeal No.	05-0492
v.	)	Account No.	#####
	)		
PROCESSING DIVISION OF	)	Tax Type:	Cigarette Licensing
THE UTAH STATE TAX	)		
COMMISSION,	)	Judge:	Phan
	)		
Respondent.	)		

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**Presiding:**  
Jane Phan, Administrative Law Judge

**Appearances:**  
For Petitioner:    PETITIONER REP 1, Operations Manager  
                    PETITIONR REP 2, Store Manager  
For Respondent:    RESPONDENT REP, Assistant Attorney General

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for an Initial Hearing pursuant to the provisions of Utah Code Ann. 59-1-502.5, on June 15, 2005. The issue before the Tax Commission in the Initial Hearing concerns the Tax Commission suspension of Petitioner's Cigarette License for a period of thirty-days, specifically the issue was whether the suspension should be for the full thirty-day period or some lesser period.

APPLICABLE LAW

The law provides for penalties and suspensions for selling cigarettes to persons under 19 as set out at Utah Code Sec. 26-42-103 as follows:

(1) If, following an investigation or issuance of a citation or information under Section 77-39-101, an enforcing agency determines under Section 26-42-104 that a licensee or any employee has sold tobacco to a person younger than 19 years of age, as prohibited by Section 76-10-104, the enforcing agency may impose upon the licensee the following administrative penalties: (a) upon the first violation, a penalty of not more than \$300; (b) upon a second violation at the same retail location, and within 12 months of the first violation, a penalty of not more than \$750; and (c) upon a third or subsequent violation at the same retail location and within 12 months of the first violation, a penalty of not more than \$1,000.

(2) The enforcing agency shall notify the commission in writing of any order or order of default finding a violation of Subsection (1) which is a third or fourth violation.

(3) The commission, upon receipt of the written notification under Subsection (2), shall take action under Section 59-14-203.5 or 59-14-301.5 against the license to sell tobacco; (a) by suspending the licensee's license to sell tobacco at the location for not more than 30 days, upon receipt of notification of a third violation under Subsection (1)(c); and (b) by revoking the license to sell tobacco at that location held by the licensee, including any license under suspension, upon receipt of notification of a fourth violation under Subsection (1)(c). (Utah Code Sec. 26-42-103.)

The state and local health departments are designated as the entities with the authority to enforce these provisions as provided at Utah Code Sec. 26-42-104 as follows:

The state Department of Health and the local health departments shall enforce this chapter under the procedures of Title 63, Chapter 46b, Administrative Procedures Act, as an informal adjudicative proceeding, including: (1) notifying the licensees of alleged violations of Section 26-42-103; (2) conducting hearings; (3) determining violations of this chapter; and (4) imposing civil monetary administrative penalties. (Utah Code Sec. 26-42-104.)

The Tax Commission is designated as the agency responsible to suspend or revoke a license to sell tobacco products as follows:

(1)(a) The commission shall suspend or revoke licenses to sell tobacco, as required under Section 26-42-103 regarding suspension or revocation of a license due to the sale of cigarettes to a person younger than 19 years of age, upon receipt of notice of an enforcing agency's findings of a violation of section 26-42-103. (b) The commission shall provide written notice of the suspension or revocation to the licensee.

(2) It is the duty of the enforcing agency to advise the commission of any finding of a violation of Section 26-42-103 for which suspension or revocation of the license is a penalty.

(3) When the commission revokes a licensee's license under this section the commission may not issue to the license, or to the business entity using the license that is revoked, a license under Section 59-14-202 or 59-14-301 to sell tobacco at the location for which the license was issued for one year after the date of the violation for which the license was revoked. (Utah Code Sec. 59-14-203.5.)

#### DECISION AND ORDER

This appeal presents a matter of first impression before the State Tax Commissioners. It is unique in that the Utah Legislature has determined to divide enforcement provisions in the area of selling cigarettes to minors between the State Tax Commission and State or Local Health Departments. The legislature was very specific that it was the Health Departments that should hold a hearing and determine whether or not a retailer was in violation of Utah Code Sec. 26-42-103 by selling cigarettes to a minor, and whether the violation was a third violation. Once a Health Department has made a determination that a retailer has had a third violation in one year, the law states the Health Department must inform the Tax Commission. The applicable statutes, Utah Code Secs. 26-42-103 and 59-14-203.5, state that the upon receipt of such notification the Tax Commission must suspend the license for not more than thirty-days. The task implied but not explicitly assigned to the Tax Commission or Health Department is who should determine the number of days up to thirty and upon what criteria this decision should be based. It is the issue of the length of the suspension that is before the Tax Commission in this matter.

The facts were not substantially in dispute. Petitioner operates a convenience store. Petitioner was cited for selling cigarettes to a minor on March 1, 2005. The AREA Health Department convened a hearing pursuant to Utah Code Sec 26-42-104 late in March 2005, at which a hearing officer received the evidence and testimony offered by the parties. The hearing officer issued a Findings of Fact and Order on April 4, 2005, ("Health Department Order") finding that Petitioner was in violation of Utah Code Sec. 26-42-

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103 and that it was, in fact, a third violation. The Health Department Order did specify that Petitioner was to pay the fine indicated for a third violation. The order also stated as follows: "The AREA Health Department will notify the Utah State Tax Commission of this Findings of Fact as required by section 26-42-103(2) Utah Code Ann., 1953 as amended." The Health Department Order was silent on the issue of a suspension.

Petitioner could have requested a department appeal of the Health Department Order if done so within ten days from the date of the order and Petitioner's representative indicated they did not because of erroneous information given to them by an employee of the Health Department. Petitioner's representatives indicated that they were aware there was a possibility of suspension and that was the issue that they had tried to address at the Health Department hearing.

As the Health Department Order was silent on that issue, they went to the Health Department and asked if their license would be suspended. They indicate that the clerk looked through previous orders on cases where a third violation had been found. They report that the clerk told them all the other orders specifically stated the license would be suspended and were dissimilar to Petitioner's order for that reason. It was Petitioner's representatives understanding from the conversation that their license would not be suspended. They indicate this was the reason they did not request an appeal. To support this contention, prior to this Initial Hearing before the Tax Commission, they had requested from the AREA Health Department copies of the last twelve orders that had dealt with a third violation. The AREA Health Department provided eight orders issued in 2001 or 2002. It was Petitioner's position that these were the only orders involving a third violation issued prior to their own. All of the other orders specifically stated that the license would be suspended and were dissimilar in this respect to the Health Department Order. However, some said the suspension would be for thirty days and some said up to thirty days.

As required by statute the AREA Health Department sent a letter to the State Tax Commission dated April 13, 2005, notifying the Tax Commission of the third violation. The letter, issued by the same

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hearing officer who had issued the Health Department Order, stated, “Based on the foregoing, the Health Department hereby gives notice to the Tax Commission of the third violation within twelve months and requests that the Licensee’s license to sell tobacco or tobacco products be suspended for a period of not more than thirty (30) days as provided for in Section 26-42-103(3), Utah Code Ann. 1953 as amended.”

Respondent issued on April 19, 2005, a Notice of Cigarette/Tobacco License Suspension. The notice indicated that the suspension would be for a period of thirty-days. Respondent’s representatives explained that since July 2002, Respondent has a written policy concerning the length of suspension. The policy states, “The suspension shall be for the period stated in the order. If the order fails to state a specific period the suspension will be for the full 30 days allowed by statute.” Respondent indicates that this is done for reasons of uniformity. In Petitioner’s situation, as the length of suspension had not been specified by the Health Department, Respondent followed its policy and applied the term of thirty days.

Respondent’s representative argues that the Health Department has been designated by statute as the finder of fact in this matter. Hearing officers for the Health Department hear evidence of the violation and any mitigating circumstances. If a Health Department recommended something less than thirty-days based on the evidence before it, the Commission should give the decision deference. Respondent indicates that this has occasionally occurred with the some of the various local Health Departments. Respondent’s representative points out if it was left to the Tax Commission to make a decision as to the number of days up to thirty for the suspension the Tax Commission would have to hold a hearing, receive evidence and testimony and essentially many of the same issues would be litigated before the Tax Commission as were litigated before the Health Department.

Petitioner’s representatives also argues that the Health Department was the one who was the finder of fact and the hearing officer who had heard the evidence and testimony should be the one making a determination as to the length of the suspension. Petitioner’s representatives had contacted the Health

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Department and tried to reopen the appeal but had been told there was no further action that would be taken by the Health Department.

The Commission must follow the statute as written. The law states the license would be suspended “for not more than 30 days.” (Utah Code Sec. 26-42-103.) The Utah Legislature could have eliminated the issue in the appeal at hand simply by stating the license would be suspended for 30 days. The fact that the Legislature chose the phrase it did can only be interpreted to mean that the suspension may be for a period of less than thirty days.

It is also clear that the Health Department was intended to be the finder of fact. The Health Department duties in pertinent part are specified as, “(2) conducting hearings; (3) determining violations of this chapter; and (4) imposing civil monetary administrative penalties.” (Utah Code Sec. 26-42-104.) The Tax Commission’s duties are to “suspend” and “provide written notice of the suspension.” (Utah Code Sec. 59-14-203.5.) Therefore, the only interpretation from the combination of the statutes is that any matter that needed to be decided based on the facts at a hearing should be decided by the Health Department. It follows that it would be appropriate for a Health Department to consider any mitigating factors and make a specific finding as to the length of the suspension in their orders. For future violations concerning the sale of cigarettes or tobacco products to a minor, the Tax Commission would encourage the various Health Departments to make a specific finding as to the length of the suspension in their orders. The matter of the length of the suspension should not be left to the Tax Commission to make without benefit of hearing the evidence, testimony and argument in the matter. If left to the Tax Commission it is appropriate to apply a written policy that specified a set number of days in all cases.

In the appeal before the Tax Commission, not only did the Health Department fail to make a specific finding as to the length of time for the suspension, the Health Department Order failed to indicate a suspension should be imposed. This was dissimilar to prior orders to the extent that Petitioner’s

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representatives and allegedly a Health Department employee misunderstood the resulting effect of the order. The subsequent letter from the Hearing Officer did indicate a suspension should be imposed, but it is not consistent with the actual order issued. In addition, the Health Department failed to consider reopening or giving further review to its decision, even though Petitioner had alleged it had relied on erroneous advice from the Health Department when deciding whether to requests agency review of the Health Department Order. These raise questions concerning whether Petitioner was provided sufficient due process in this matter.

Based on the specific factors and circumstances in this appeal, the Commission finds that the ten-day suspension Petitioner has already served is a sufficient length of suspension in this matter. Respondent is ordered to reinstate Petitioner's license. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission  
Appeals Division  
210 North 1950 West  
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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Jane Phan  
Administrative Law Judge

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BY ORDER OF THE UTAH STATE TAX COMMISSION.

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

Pam Hendrickson  
Commission Chair

R. Bruce Johnson  
Commissioner

Palmer DePaulis  
Commissioner

Marc B. Johnson  
Commissioner

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