

08-1734
MISCELLANEOUS
SIGNED 08-06-09

BEFORE THE UTAH STATE TAX COMMISSION

<p>PETITIONER</p> <p>Petitioner,</p> <p>vs.</p> <p>PROCESSING DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p>Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 08-1734</p> <p>Account No. #####</p> <p>Tax Type: Cigarette/Tobacco License</p> <p>Judge: Phan</p>
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Presiding:

Marc Johnson, Commissioner
D'Arcy Dixon Pignanelli, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER REP 1, Attorney at Law
PETITIONER REP 2, Vice President, PETITIONER
For Respondent: RESPONDENT REP 1, Assistant Attorney General
RESPONDENT REP 2, Assistant Director Processing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing pursuant to Utah Code Sec. 63-46b-6 et al., on May 12, 2009. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. This matter is before the Commission on Petitioner's ("PETITIONER'S") appeal of Respondent's (the "Division's") revocation of PETITIONER license to sell cigar, cigarettes or tobacco products for a period of one year. The revocation was issued by notice dated July 8, 2008. The notice was timely appealed and the matter proceeding through the administrative hearing process to the Formal Hearing.

2. The reason given by the Division for the revocation was based on “receipt of written notification from the AREA Health Department that [PETITIONER] has been found to have sold tobacco products to underage persons four times AREA Health Department had found PETITIONER in violation of provisions that prohibit the sale of tobacco products to minors on four occasions over a twelve month period was not in dispute. In fact, the violations themselves were not in dispute. The violations were as follows:

Notice of Violation issued December 11, 2006, indicated that PETITIONER employee EMPLOYEE 1 had sold tobacco to a person younger than 19 years of age on or about December 7, 2006.

Notice of Violation issued March 13, 2007, indicated that PETITIONER employee EMPLOYEE 2 sold tobacco to a person younger than 19 years of age on or about March 12, 2007.

Notice of Violation issued July 17, 2007, indicated that PETITIONER employee EMPLOYEE 2 Waddell again sold tobacco to a person younger than 19 years of age on or about June 7, 2007.

Notice of Violation issued October 17, 2007, indicated that PETITIONER employee EMPLOYEE 3 sold tobacco to a person younger than 19 years of age on or about September 18, 2007.

4. PETITIONER had appealed the fourth violation and the matter proceeded to a hearing before a Hearing Officer for the AREA Health Department on December 12, 2007. The hearing officer received testimony and exhibits into evidence and issued a decision on January 10, 2008, upholding the violation, imposing a penalty of \$\$\$\$\$, which was less than the \$1000 total penalty that could have been imposed, and finding the violation to be the fourth within a twelve month period.

5. PETITIONER appealed the decision and the matter proceeded to further hearing before the AREA Health Department’s Chief Hearing Officer, who issued his decision on April 18, 2008, which upheld the January 10, 2008 decision.

6. Since the violations, PETITIONER has implemented processes to train employees

and prevent further sale of tobacco products to minors. The store currently has multiple warning signs that state “We Card” and “We do not sell Tobacco products to Persons Under 19.” Additionally, PETITIONER has employed the BARS Program (“Be A Responsible Store”), which provides training and random site visits to check on employees’ compliance. PETITIONER representative proffered that PETITIONER had purchased a new cash register system at a cost of \$\$\$\$\$, which requires that the store clerk type in the birth date of anyone purchasing cigarettes. The Division did not refute this proffer, or that PETITIONER has implemented programs and processes aimed at preventing future sales of tobacco products to minors.

7. PETITIONER projects that a one year revocation will result in a decrease in that store’s sales of \$\$\$\$\$ and they would lose the net proceeds on tobacco sales of approximately \$\$\$\$\$ per year. PETITIONER has also paid fines and incurred the cost of administrative hearings. They proffered that the four violations represented \$\$\$\$\$ in gross revenue.

8. The Commission recognizes that since the violations, PETITIONER has incurred significant financial costs on training and equipment to assure inappropriate sales of tobacco do not occur.

9. The Division provided articles and papers that supported its contention that preventing persons under the age of 19 from smoking was an important public policy concern.

APPLICABLE LAW

Title 26, Chapter 42 of the Utah Code is known as “Civil Penalties for Tobacco Sales to Underage Persons.” Utah Code Ann. §26-42-102 provides definitions, as follows:

As used in this chapter:

- (1) "Commission" means the Utah State Tax Commission.
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- (3) "Enforcing agency" means the state Department of Health, or any local health department enforcing the provisions of this chapter.
- (4) "Licensee" means a person licensed:
 - (a) under Section 59-14-201 to sell cigarettes at retail; or
 - (b) under Section 59-14-301 to sell tobacco products at retail.
- (5) "License to sell tobacco" or "license" means a license issued:
 - (a) under Section 59-14-201 to sell cigarettes at retail; or

- (b) under Section 59-14-301 to sell tobacco products at retail.
- (6) "Tobacco" means cigarettes or tobacco products as defined in Section 59-14-102.

Utah Code Ann. §26-42-103 provides penalties for a licensee or employee selling tobacco to an underage person, 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 that 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).
- (4) When the commission revokes a license under Subsection (3)(b), the commission may not issue to the licensee, or to the business entity using the license that is revoked, a license under Section 59-14-201 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.
- (5) This section does not prevent any bona fide purchaser of the business, who is not a sole proprietor, director, corporate officer, or partner or other holder of significant interest in the entity selling the business, from immediately applying for and obtaining a license to sell tobacco.

Utah Code Ann. §59-14-203.5 provides that the Commission shall suspend or revoke a license to sell cigarettes, 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 finding 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 licensee, 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 Ann. §59-14-301.5 provides that the Commission shall 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 tobacco products to a person younger than 19 years of age, upon receipt of notice of an enforcing agency's order or order of default, finding 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 order or order of default finding 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 licensee, 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.

CONCLUSIONS OF LAW

1. The argument from the parties in this matter was not regarding the facts, but the application of the law at Utah Code Secs. 26-42-102 & 103 and Utah Code Secs. 59-14-203.5 & 59-14-301.5, to the facts. The Commission reviews the parties' legal argument herein.

2. PETITIONER argues that the Tax Commission has discretion in determining whether to revoke its license to sell tobacco products because the PETITIONER employees who sold the product to

minors were engaging in criminal activities and, therefore, were acting outside the scope of their employment. If employees choose not to follow their training, PETITIONER argues the business should not bear the violation. PETITIONER points to the common law respondeat superior principle, which generally only held the employer responsible for acts of its employee, if the acts were within the scope of employment. The Commission finds this argument unpersuasive and inconsistent with the law. The law clearly contemplates that licenses to sell tobacco products could be used by business entities, which would have employees performing tasks of the business. Further the statute specifically addresses this point at Utah Code Sec. 26-42-103, which states if “an enforcing agency determines . . . that a licensee or *any employee* has sold tobacco to a person younger than 19 years . . . the enforcing agency shall notify the commission . . . The commission, upon receipt of notification . . . shall take action . . .”(Emphasis added). It is clear in this instance under the law that the business is held liable for the actions of its employees regarding the sale of tobacco to those under the age of 19. Therefore, PETITIONER reliance on respondeat superior principles is misplaced.

3. PETITIONER argues that the Commission has discretion to reduce the period of revocation to be something less than one year because the Utah Legislature used the term ‘may not’ instead of ‘shall not.’ PETITIONER points out that Utah Code Secs. 59-14-203 & 59-14-310 both state that “the commission *shall* suspend or revoke” (emphasis added) the license, but then goes on to state once the license has been suspended or revoked the Commission “*may not* issue the licensee” (emphasis added) a license for one year after the date of the violation. It is PETITIONER argument that the choice of wording means that the Tax Commission has discretion to shorten the period of time before it will reissue the license. PETITIONER cites to the case *Utah County v. Butler*, 2008 UT 12, at 19, stating that in that case the Utah Supreme Court noted that the word “may,” as opposed to the word “shall,” evidenced a Legislative intent to give the Commission discretion. It is the Commission’s conclusion that this interpretation by PETITIONER is contrary

to the provisions of statutory construction. While the word “may”¹ alone implies permission to perform or not perform some act, “may not” in the context of the statute means that the Commission does not have permission to issue the license sooner than one year.² As used in the context of the statute, there is no discretion for the Commission. It “shall” revoke the license and it does not have the authority or permission to reissue the license for a period of one year.

4. PETITIONER pointed to a prior Commission decision, Tax Commission Appeal No. 05-0492 for support that the Commission may exercise discretion in determining the length of time before it reissues a license to sell tobacco products. However, Appeal No. 05-0492 involved the third violation, not the fourth violation. The statutory language for a third violation is dissimilar to the section that is at issue in this matter. Utah Code Sec. 26-42-103 (3) provides that the Commission shall take action “by suspending the licensee’s license to sell tobacco at that location for *not more than* 30 days.” (Emphasis Added.) Whereas that same section provides for a fourth violation, the number of violations at issue in this matter, the Commission is to take action by “revoking the license.” (Utah Code Sec. 26-42-103(3)(b).) That section goes on to indicate if the license has been revoked, the “Commission *may not*” issue a license for one year. (Emphasis added.) (Utah Code Sec. 26-42-103(4).) In Appeal No. 05-0492 the Commission did interpret the statutory provision regarding the third violation to give discretion to the Commission to set a number of days for the suspension that was less than thirty. However, there is a clear difference in the subsections and the Commission does not see its decision in that appeal to be applicable in this matter where the time period of one year is set by the legislature.

1 See Black’s Law Dictionary, 6th Edition, which defines “May” as “an auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency.”

2 See Black’s Law Dictionary, 6th Edition, which defines “May not” as “A phrase used to indicate that a person is not permitted to do or to perform some act, e.g. a person may not be allowed to sit for the bar examination in certain states without specific academic credits. “May not” speaks to permission, whereas “cannot” generally deals with ability.”

5. PETITIONER argues that a revocation for one year's time is unconstitutional under the Excess Fines/Forfeitures Clauses contained in the Seventh Amendment to United States Constitution and Article I, Sec. 9 of the Utah Constitution. The Commission does acknowledge that it is a severe consequence to this business and would be to many businesses that sell tobacco products. Certainly there is a difference in severity between the amount of fine imposed, which had been \$\$\$\$\$, but could have been as high as \$1,000 and a one-year revocation. Further, the length of time the license is revoked, one year for the fourth offense, is a significant increase from the "not more than 30 day" suspension imposed after a third violation within a twelve month period. However, the Commission agrees with the Division's point that this is not a fine, the license to sell tobacco is a privilege that the state can grant or take away. In writing this into the statute, the legislature must have determined that a one year revocation was appropriate in light of the public policy concerns regarding underage smoking. The Commission has no basis or authority to conclude that its application of the direct statutory language regarding the revocation for a period of one year would be unconstitutional, regardless of the amount of money that PETITIONER may lose from the suspension.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission denies PETITIONER appeal in this matter. PETITIONER license to sell cigarettes or tobacco products is revoked. The revocation becomes effective thirty-days from the date of this order. The Commission will not reissue the license to PETITIONER for a period of one year thereafter. It is so ordered.

DATED this _____ day of _____, 2009.

Jane Phan
Administrative Law Judge

Appeal No. 08-1734

BY ORDER OF THE UTAH STATE TAX COMMISSION:

DATED this _____ day of _____, 2009.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Marc B. Johnson
Commissioner

CONCURRENCE

I agree that under the statutory framework the Tax Commission lacks discretion to impose a shorter suspension of the license. If the Commission had the discretion, it may be appropriate to consider a reduced suspension. The taxpayer has implemented better procedures including use of the Be A Responsible Store or BARS program, which provides training and random checks for employee compliance; the purchase of a new cash register system, which requires the store clerk to type in the birth date of anyone purchasing cigarettes; and the placement of multiple warning signs through out the store stating “We Card” and “We do not sell Tobacco products to Persons Under 19”. A reduced suspension would still financially punish the taxpayer. It is possible any further training of employees could be accomplished in a shorter suspension time as well as it could during a year suspension.

D’Arcy Dixon Pignanelli
Commissioner

Notice and Appeal Rights: Failure to pay the balance due as a result of this decision within thirty (3) days from the date hereon could result in additional penalties. You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code §63-46b-13 and Utah Admin. Rule R861-1A-29. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code §§59-1-601 et seq. and 63-46b-13 et. seq.
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