

17-595
TAX TYPE: SUSPENDED LICENSE
TAX YEAR: 2017
DATE SIGNED: 5-3-2017
COMMISSIONERS: J. VALENTINE, M. CRAGUM, R. PERO, R. ROCKWELL
GUIDING DECISION

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,	INITIAL HEARING ORDER
Petitioner,	Appeal No. 17-595
v.	Account No. XXXXX-TOB
AUDITING DIVISION OF THE UTAH STATE TAX COMMISSION,	Tax Type: Suspended License
Respondent.	Judge: Phan

Presiding:

Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: REPRESENTATIVE-1 FOR PETITIONER, Attorney At Law
REPRESENTATIVE-2 FOR PETITIONER, Owner, PETITIONER
For Respondent: REPRESENTATIVE FOR RESPONDENT, Assistant Attorney
General
RESPONDENT, Director, Auditing Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission on April 24, 2017, for an Initial Hearing in accordance with Utah Code Ann. §59-1-502.5. The Petitioner is appealing a Notice of 30 Day Suspension of Petitioner's Cigarette/Tobacco License. The Notice was issued by Respondent ("Division") on March 16, 2017.

APPLICABLE LAW

Utah Code §26-42-102 defines terms used in the above-referenced act, as follows in pertinent part:

(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.

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- (5) "License to sell tobacco" or "license" means a license issued:
 - (a) under Section 59-14-201 to sell cigarettes at retail;
 - (b) under Section 59-14-301 to sell tobacco products at retail; or
 - (c) under Section 59-14-803 to sell an electronic cigarette product.
 - (6) "Tobacco" means:
 - (a) a cigarette or a tobacco product, as defined in Section 59-14-102; or
 - (b) an electronic cigarette product, as defined in Section 59-14-802.

Utah Code §26-42-103 addresses the consequences of selling tobacco to a person younger than 19 years of age and the role of the Tax Commission in suspending or revoking a tobacco license, 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 59-14-202, 59-14-301, or 59-14-803 to sell tobacco at the location for which the license was issued for one year after:
 - (a) the day on which the time for filing an appeal of the revocation ends; or
 - (b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.
- (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 §26-42-104 describes the role of the state Department of Health and local health departments in enforcing the above-referenced act, as follows:

The state Department of Health and the local health departments shall enforce this chapter under the procedures of Title 63G, Chapter 4, Administrative Procedures Act, as an informal adjudicative proceeding, including:

- (1) notifying 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 §26-42-106 requires the state Department of Health and local health departments to reduce the amount of the monetary penalty it imposes on a licensee under Section 26-42-103, as follows in pertinent part:

(1) In determining the amount of the monetary penalty to be imposed for an employee's violation of Section 26-42-103, the hearing officer shall reduce the penalty by at least 50% if he determines:

- (a) the licensee has implemented a documented employee training program; and
- (b) the employee has completed that training program within 30 days of commencing duties of selling tobacco products.

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Utah Code §59-14-201(1) provides that “[i]t is unlawful for any person in this state to manufacture, import, distribute, barter, sell, exchange, or offer cigarettes for sale without first having obtained a license issued by the commission under Section 59-14-202.”

Utah Code §59-14-301.5 provides for the Tax Commission to suspend or revoke a tobacco license as required under Section 26-42-103, 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:

- (a) the day on which the time for filing an appeal of the revocation ends; or
- (b) if the revocation is appealed, the day on which the decision to uphold the revocation becomes final.

Utah Code §59-14-301 provides for the registration and licensing of manufacturers and distributors of tobacco products, as follows:

- (1) All manufacturers and distributors of all tobacco products, as defined in Section 59-14-102, who are responsible for the collection of tax on tobacco products under this chapter, and all retailers of all tobacco products:
 - (a) shall register with the commission;
 - (b) shall be licensed by the commission under Part 2, Cigarettes; and
 - (c) are subject to the requirements, procedures, and penalties described in Part 2, Cigarettes.
- (2) A fee may not be charged for registration and licensing of manufacturers, jobbers, distributors, or retailers of tobacco products in addition to the cigarette license if such a license is required.

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DISCUSSION

The facts in this case were not in dispute at the hearing. Petitioner is a limited liability company owned by REPRESENTATIVE-2 FOR PETITIONER, which operates at one retail location in CITY-1, Utah. This retail location has been open and operating since YEAR. This is REPRESENTATIVE-2 FOR TAXPAYER only business and it is a small business with three full time employees and four part-time employees. Ninety to ninety-five percent of the product sold at the retail location is tobacco product, for which the business needs a Tobacco License to sell.

Over a twelve month period, the Salt Lake County Health Department and local law enforcement conducted a compliance investigation into Petitioner's business on three separate occasions. A representative from the Salt Lake County Health Department, NAME-1, explained how they performed these compliance investigations. A Department of Health employee and a law enforcement officer would send an individual who is under nineteen years of age into a retail location to purchase cigarette or tobacco products. If cigarette or tobacco products were sold to this underage individual, the individual would bring the product out of the location to the Health Department employee and officer, who then would immediately enter the location and give a citation to the clerk who sold the product. Within a few days of the visit to the business, the COUNTY-1 Health Department mails a Notice of Violation, notifying the business and imposing a penalty, which is graduated based on the number of prior offenses during a twelve-month period. The visits to Petitioner's establishment had occurred on May 23, 2016, October 5, 2016 and February 16, 2017 and at each visit tobacco product was sold to the underage individual. NAME-1 had personally been at the location during the second and third visits. She stated that

during the second visit there were a number of people in the location who appeared to be underage. She also noted that the location is fairly close to CITY-1 High School.

When asked at the Initial Hearing, NAME-1 did not have information regarding whether or not there had been compliance visits to Petitioner's establishment prior to the twelve month period that encompassed these last three violations. She was not able to provide whether the store had been in compliance during some or all visits prior to the twelve month period. She did indicate that this was the first time there had been three violations within a twelve month period.

For the first Notice of Violation, the Health Department assessed a \$300 penalty against the business. For the second violation, the penalty imposed was \$750. Petitioner did not contact the Health Department to request a hearing on either of these violations. With the third violation, the amount of the penalty imposed was \$1,000. Petitioner did contact the Health Department and the penalty was reduced by 50% based on Petitioner providing evidence of an employee-training program under Utah Code Sec. 26-42-106.

The Petitioner explained that he was unaware of the first two violations. He indicated that he had hired a manager to manage the retail establishment prior to reporting for an 18 month period of incarceration out of state. Because of this situation, he was not able to be at the retail establishment and did not know what was going on. He had returned prior to the third violation and when he became aware of the problem, he implemented employee training, set the policy that the store will "ID" all customers and had employees sign acknowledgments that they will not sell to underage persons. He has also requested that the Department of Health come to the location and conduct a training. He said he had fired the manager and is now at the store on a regular basis as the manager. It was the position of the Petitioner that now that he was managing this location he was taking seriously the requirement that they not sell to underage individuals.

The Petitioner requests that the Tax Commission exercise discretion and impose a suspension of less than thirty-days. He indicates that a thirty-day suspension would require him to lay-off employees as he could not keep the location open and fully staffed during the suspension period because most of what he sold was tobacco product. Petitioner's representative points to the fact that the law states that the Commission is to take action by suspending the license for "not more than 30 days." See Utah Code Subsection 26-42-103(3)(a). He argues that this language gives the Tax Commission discretion to impose a suspension of something less than thirty-days.

It was the Division's position that the full thirty-day suspension should be imposed in this case because of the fact that there were three violations within a twelve month period, which shows the business was not in compliance. The Division's representative pointed out that there

was a violation every time the store was visited in a compliance inspection and this indicated that they regularly sold to underage persons. He also cited the nearness to the high school and argued that everyone at the high school would have been aware of the lack of enforcement at this location. He indicated that the full thirty-day suspension was needed to lose the underage clientele so the business could start over with “legitimate customers” and that was the purpose of the suspension. Although not a party in this proceeding, NAME-2, COUNTY-1 Deputy District Attorney, provided information that the COUNTY-1 Health Department would like the Tax Commission to apply a uniform and strict application of the law.

This appeal deals with a situation that is unique in that the Utah Legislature has divided enforcement provisions dealing with the sale of cigarette or tobacco products to underage persons between the Utah State Tax Commission and local health departments. Utah Code Subsection 26-42-103(2) provides that if a local health department determines that there has been a third violation of selling to an underage individual at the same retail location within 12 months of the first violation, they are to notify the Utah State Tax Commission in writing. The Utah State Tax Commission then, under Utah Code Subsection 26-42-103(3) “shall take action . . . 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 . . .” The Commission has considered these statutory provisions in a few prior cases that have come up before it on appeal¹ and concluded that the language of “not more than” regarding the third violation does give discretion to the Commission to impose a suspension of something less than thirty days. It has been previously noted that the statutory provisions regarding the third violation are distinct from the provisions regarding a fourth violation. At Utah Code Subsection 26-42-103(3) when a fourth violation occurs the Commission “shall take action . . . (b) by revoking the license to sell tobacco.” Then subsection (4) makes it clear, “When the commission revokes a license under Subsection (3)(b), the commission may not issue . . . a license . . . for one year . . .” This difference indicates an intent on the part of the legislature to give discretion to the Tax Commission to determine the length of suspension up to thirty days on a third violation, but no discretion when there is a fourth violation. In *Utah State Tax Commission Initial Hearing Order, Appeal No. 05-0492* the Commission held at pg. 6:

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

¹ See *Utah State Tax Commission Initial Hearing Orders in Appeal Nos. 05-0459, 08-2639, and Findings of Fact Conclusions of Law, and Final Decision Appeal No. 08-1734*. These decisions are available in a redacted format at tax.utah.gov/commission-office/decisions.

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.

Although the statutory provisions grant discretion as to the length of suspension, they do not provide a suggestion on what factors the Commission should consider in determining the length of the suspension. In *Appeal No. 05-0492*, the Commission exercised its discretion and imposed a shorter suspension (10 days) citing concerns as to whether the petitioner in that case was provided sufficient due process by the department of health that was involved in that case. In *Utah State Tax Commission Initial Hearing Order Appeal No. 08-2639*, the Commission also reduced the suspension to 10 days based in part on the fact that the health department in that case had substantially reduced the fine it had imposed.

It is clear that a suspension for any period of a cigarette or tobacco license would have a significant financial impact on a business that primarily sells cigarette or tobacco products. However, where tobacco is the primary product it seems both employee training would be more effective and the number of errors reduced as the age restriction applies to almost all the product in the store, as apposed to a grocery store were underage individuals have a legitimate reason to be in the store and may legally purchase most of the product sold in the store. It would have been helpful in this matter to know about the establishment's compliance prior to the twelve month period at issue, when Petitioner was present and available to manage the location. It is unknown how many times compliance inspections had been performed since 2012 and how many of those inspections resulted in a violation. All that has been provided on the prior compliance history was that this was the first time there had been three violations in a twelve month period. The COUNTY-1 Department of Health had reduced the fine by 50% based on a provision of law that finds this is appropriate for implementing employee training. Considering all of the factors, the Tax Commission finds it is appropriate to reduce the suspension by 50% as well.

Jane Phan
Administrative Law Judge

DECISION AND ORDER

Based on the foregoing, the Commission suspends the Petitioner's Tobacco License for a period of fifteen consecutive days. During the suspension period, the Petitioner is prohibited from selling tobacco product.

Unless a Formal Hearing is requested, the fifteen day suspension period will begin on the first Monday that occurs more than 30 days after the date of this order as shown below. During the suspension period, the Petitioner will be allowed to apply for reinstatement of its tobacco license so that it can begin selling tobacco immediately after the last day of the fifteen day suspension period. 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, or emailed, 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

or emailed to:
taxappeals@utah.gov

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

DATED this _____ day of _____, 2017.

John L. Valentine
Commission Chair

Michael J. Cragun
Commissioner

Robert P. Pero
Commissioner

Rebecca L. Rockwell
Commissioner