

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF REVENUE

in the Matter of the
Warning Notice of a Violation
of the Minnesota Unfair
Cigarette Sales Act

RECOMMENDATION ON
CROSS-MOTIONS FOR
SUMMARY DISPOSITION

Minter-Weisman Company, Inc.,
Respondent,

V.

Department of Revenue.

The above-entitled matter is before the undersigned Administrative Law Judge on cross-motions for summary disposition.

William R. Skolnick, LuAnn M. Petricka, and Bruce J. Douglas, all of William R. Skolnick, P.A., One Financial Plaza, Suite 2500, 120 South Sixth Street, Minneapolis, Minnesota 55402 appeared on behalf of Minter-Weisman Company, Inc. (Minter-Weisman), the Respondent in this matter. Susan E. Fremouw, Attorney at Law, 10 River Park Plaza, Mail Station 2220, St. Paul, Minnesota 55146-2220 appeared on behalf of the Department of Revenue (Department). The record closed on this motion on October 28, 1993, upon receipt of the Parties' Memoranda on Expenses and Attorney's Fees.

Based on the record herein and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Revenue order that:

1. The Respondent's motion for summary disposition be DENIED.
2. The Department's motion for summary disposition be GRANTED.
3. The Department's motion for attorney's fees and costs be DENIED.
4. The Respondent's motion for attorney's fees and costs be DENIED.

Dated: December 3, 1993.

STEVE MIHALCHICK
Administrative Law Judge

MEMORANDUM

Hinter-Weisman is a licensed wholesaler of cigarettes doing business throughout the State of Minnesota. Among the retailers supplied by Minter-Weisman are Food-N-Fuel, Inc. and Byerly Foods, Inc., which sell the cigarettes at retail. After an investigation by the Department, the Department issued a warning letter to Minter-Weisman citing it for violating the Minnesota Unfair Cigarette Sales Act (MUCSA), Minn. Stat. 325D.30-.42, by offering and paying rebates, concessions, or discounts on cigarette sales to retailers.

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp*, 378 N.W.2d 63, 66 (Minn.App. 1985); Minn.R.Civ.P. 56.03 (1984). Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500(K).

In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case that no material issues of fact remain for hearing. *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. *Minnesota Mutual Fire and Casualty v. Companv v. Retrum*, 456 N.W.2d 719, 723 (Minn.App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. *id.*; *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn.App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

The non-moving party is entitled to the most favorable view of the evidence. *Foley v. Allard* 427 N.W.2d 647, 649 (Minn. 1988). In this case, there is no dispute as to the essential facts surrounding Minter-Weisman's pricing practices. For retailers who purchase an adequate quantity of

cigarettes, a credit on the amount due is afforded that retailer's account in the following month. This practice is a rebate or discount as those terms are used in MUCSA.

With the facts surrounding the alleged violation undisputed, the only question is which party prevails when the facts are applied to the law. The MUCSA establishes a wholesale cigarette legal price for each wholesaler, below which cigarettes cannot be sold. Minn. Stat. 325D.33, subd. 1. This legal price is established by adding the cost of the cigarettes to a cost of doing business. The "cost of doing business" is presumed to be a certain percentage of the cost of the cigarettes unless a wholesaler demonstrates that it has an actual cost, as defined by the statute, lower than the presumed cost. A wholesaler may sell below its legal cost in a trade area to meet the price of another wholesaler having a lower legal cost. In no event can a wholesaler sell below the lowest established cost in a trade area.

Minn. Stat. 325D.33, subd. 3 prohibits wholesalers from offering "a rebate in price, to give a rebate in price, to offer a concession of any kind or to give a concession of any kind in connection with selling cigarettes."

Discounts are included in the definition of "rebate."

The Department argues that the discounts given by Minter-Weisman in its wholesale sales of cigarettes to retailers violate the prohibition against discounts under Minn. Stat. 325D.33, subd. 3. Minter-Weisman argues that the statute is ambiguous in its application and interprets the statute to mean that only discounts which put the wholesale cost of cigarettes below the statutory floor are prohibited. In support of this position, Minter-Weisman cites Minn. Stat. 325D.33, subd. 4, which states:

Subd. 4. Wholesaler to preserve copies of invoices. Every person who sells cigarettes to persons other than the ultimate consumer shall prepare for each sale itemized invoices showing the seller's name and address, the purchaser's name and address, the date of sale, and all prices and discounts and shall keep legible copies of them for one year from the date of sale.

Minter-Weisman maintains that the requirement in subpart 4 that invoices must contain "all prices and discounts" means that some discounts are allowed. The conflict between subdivision 4 and the express prohibition against discounts in subdivision 3 is resolved, in Minter-Weisman's analysis, by interpreting subdivision 4 to mean "rebates not below a minimum price are permissible." Respondent's Summary Disposition Memorandum, at 18.

The Department's long-standing interpretation of MUCSA is in accord with Respondent's position on this issue. MUCSA was amended in 1987 to prohibit wholesaler rebates or discounts. Laws of Minnesota 1987, Chap. 268, Art. 13 secs. 40-53. Only in October, 1992, did the Department issue a news release to all cigarette wholesalers which stated "all rebates, credits, or other concessions ... violate the Unfair Cigarette Sales Act." Hoyum Affidavit Attachment. Between 1987 and October, 1992, the Department has used the net price (invoice price less discount) as the measure of whether MUCSA was violated.² Minter-Weisman asserts that any interpretation of MUCSA must defer to this long-standing agency interpretation.

1/ Neither party has discovered any legislative history discussing the intent of the Legislature in amending MUCSA.

2/ In April, 1993, the Department proposed, to an industry group, an amendment to the rebate prohibition in Minn. Stat. 325D.32, subd. 4 that would have added "whether or not the resulting price will be less than a legal price." Clauson Deposition, Volume I, at 131. Since that language was not introduced in the Legislature there is no conclusion to be drawn as to the Legislature's intent.

Agency interpretations should be given deference where the law is ambiguous or uncertain. However, an agency can recognize where it has misapplied a law and alter its conduct accordingly. In the Matter of the Contested Case of Mary T. Associates, Inc. v. Department of Human Services, C9-93-823, Finance and Commerce (Minn.App. October 22, 1993)(unpublished opinion). Further, an agency interpretation is not entitled to deference where the law is unambiguous. REM, Inc.-Y. Department of Human Services, 382 N.W.2d 539, 542 (Minn.App. 1986); See Also Buhs v. State, Dept. of Public Welfare, 306 N.W.2d 127 (Minn. 1981).

MUCSA refers to rebates and discounts from manufacturers in calculating the "cost to wholesaler." Minn. Stat. 325D.32, subds. 10(a3) and 10(b). The statute distinguishes between manufacturers and wholesalers. The statute also distinguishes between wholesalers and retailers. Minn. Stat. 325D.33, subd. 3, makes rebates from wholesalers unlawful. Subdivision 4 requires any person making sales of cigarettes (other than retail sales) to prepare invoices of those sales. Those invoices must contain, Intera Alia, prices and discounts. Minn. Stat. 325D.33, subd. 4.

Minter-Weisman asserts that subdivision 4 renders subdivision 3 ambiguous since subdivision 4 requires discounts and rebates to be on invoices and subdivision 3 prohibits wholesalers from offering discounts. However, subdivision 4 does not apply only to wholesalers. "Every person" who makes cigarette sales other than at retail includes manufacturers selling to wholesalers. For that class of sellers, discounts are not prohibited. See Minn. Stat. 325D.32, subds. 10(a) and 10(b). Examining the plain language of the statute, there is no conflict between subdivisions 3 and 4. Where no conflict exists, it is inappropriate to create a conflict to interpret the statute. Lenz v. Coon Creek Watershed District, 153 N.W.2d 209 (Minn. 1967). Since the plain language of the statute prohibits wholesalers from offering rebates, any interpretation of the statute by the Department is not entitled

to deference. Without considering any affirmative defenses, Minter-Weisman has violated Minn. Stat. 325D.33, subd. 3, by giving rebates in its prices to retailers.

Minter-Weisman asserts that two other sections of MUCSA, Minn. Stat. 325D.37 and 325D.38, support its position that rebates or discounts by wholesalers are permitted. Minn. Stat. 325D.37 allows a wholesaler to sell cigarettes below its cost to meet the price of a competitor. However, that statute does not state rebates or discounts may be given. The express language of the statute allows the wholesaler to "advertise, offer to sell, or sell cigarettes at a price Minn. Stat. 325D.37. The language of that statute does not support an assertion that some wholesaler rebates or discounts to the price of cigarettes set by a wholesaler are allowed.

I/ While there are instances when manufacturers and manufacturers representatives fall under the definition of "wholesaler" (Ilk Minn. Stat. 325D.32, subd. 4), the express use of the term "manufacturer" in the wholesaler cigarette cost calculation demonstrates that the inclusion of manufacturers in the definition is intended to cover situations where the manufacturer is acting as a wholesaler, not selling to a wholesaler.

No rebates or discounts are mentioned in Minn. Stat. 325D.38. That statute affects what evidence may be admitted into evidence to determine if violations of MUCSA have occurred. The statute renders cost surveys competent evidence and requires admission of evidence that the price set in a transaction was a fictitious price. Minn. Stat. 325D.38 does not support the assertion that wholesaler rebates are allowed under MUCSA.

Minter-Weisman urges that the prohibition against rebates and discounts be found unconstitutional as being impermissibly vague. Constitutional questions on the validity of statutes are left to the courts. *Neeland V. ClearWater Memorial Hospital*, 257 N.W.2d 366 (Minn. 1977); *Starkweather v. Blair*, 245 Minn. 371, 71 N.W.2d 869 (1955). The statutory prohibition against rebates is stark in its clarity. No such rebates are allowed. The remaining statutory provisions reveal a pattern of regulation which is not unduly complicated or difficult to understand. As discussed above, the asserted conflicts in the statute disappear when the entire statute is considered. Minn. Stat. 325D.33, subd. 3 is not impermissibly vague.

The lack of definitions for the terms "rebate in price," "concession," or "discount" is cited as rendering the statute unconstitutionally vague. Respondent's Summary Disposition Memorandum, at 46. The evidence is undisputed, however, that Minter-Weisman sold cigarettes at a stated price and one month later issued the customer a "credit memo" reducing the amount the customer was required to pay for the cigarettes. Whether this practice is defined as a "rebate" or a "discount" is irrelevant. The practice is clearly prohibited by Minn. Stat. 325D.33, subd. 3.

A violation of a person's right to equal protection is alleged by Minter-Weisman in the enforcement of MUCSA by the Department. This claim is based on the fact that the Department has not tried to enforce the prohibition against wholesaler rebates in situations where the rebate did not put the final price below the statutory price floor. The elements of a violation of equal protection are a failure to treat similarly situated persons similarly and the motivation of the government's choice of a person for enforcement is made in bad faith or for improper motives. *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984).

Numerous other wholesalers have been identified by Minter-Weisman as having violated, to a greater or lesser extent, the prohibition against

rebates or discounts. None of these other wholesalers have received a warning letter or other adverse action taken against them. Minter-Weisman asserts that there is "no logical reason" for the Department's selection of Respondent to initiate an adverse action. Respondent's Summary Disposition Memorandum, at 49. However, in its next sentence, Minter-Weisman provides a logical reason, that is, the Department was changing its position on MUCSA and the Department knew that Minter-Weisman would fight the change. Id. There is no constitutional infringement on Minter-Weisman's rights for the Department to proceed with a "test case." To hold otherwise would eliminate the possibility that agencies could alter their positions on issues, absent massive enforcement efforts. While Minter-Weisman has identified several suspect classifications which apply, there is no evidence that the Department is proceeding with this enforcement action on the basis of those classifications. While Minter-Weisman may complain of being "singled out," that alone does not substantiate a claim of selective enforcement.

Equitable estoppel is asserted as a basis for dismissing the Department's letter of warning in this matter. To obtain equitable estoppel, a party must show that the other party made representations which were reasonably relied upon and will cause harm if the estoppel is not granted. *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985)(citing *Northern Petrochemical Co. v. United States Fire Insurance Co.*, 277 N.W.2d 408, 410 (Minn. 1979)). When estoppel is sought against the government, the harm to the party must be balanced against the harm to the public interest if the estoppel is granted.

There is no doubt that the Department has previously interpreted the MUCSA to prohibit only those rebates or discounts which put the wholesale price of cigarettes below the statutory price floor. A party may reasonably rely on a governmental agency's interpretation, but such reliance does not confer a right to estop the agency's later actions. In the *Matter of Westling Manufacturing, Inc.*, 442 N.W.2d 328, 334 (Minn.App. 1989). The warning letter in this matter was issued in June, 1993. Minter-Weisman was previously advised that the Department considered rebates and discounts of any sort by a wholesaler to be in violation of MUCSA. That prior warning occurred in October, 1992. Reliance upon the Department's pre-October, 1992, interpretation is not reasonable in light of the Department's statements and the express language of the statute.

Even if reliance on the Department's prior position was deemed to be reasonable, wrongful conduct by the Department must be shown before any balancing between private and public harms is to commence. *Westling*, at 332-33. There is no wrongful conduct present in this matter. For some years, the Department has interpreted a statute as allowing a practice. The Department has reexamined that interpretation and concluded its prior interpretation was in error. After a direct notice to the affected parties and six months for those parties to act, the Department commenced an enforcement action. The Department's conduct is reasonable.

Assuming that Minter-Weisman were to show some wrongful conduct on behalf of the Department, the balancing between private and public harms still favors the Department. There is no benefit to be had for Minter-Weisman under this case other than to continue offering rebates or discounts. That conduct is expressly prohibited by statute. Minter-Weisman asserts that it will not be

able to compete with other wholesalers if it is required to cease offering discounts or rebates. This is not an excuse for illegal conduct. As the rebate or discount practice is demonstrated to be illegal, other wholesalers will be required to cease the practice also.

An erroneous interpretation by an agency is not a license to continue violating a statutory provision. Estoppel is not appropriate in this matter.

The new interpretation of Minn. Stat. 325D.33, subd. 3 is alleged by Minter-Weisman to be an interpretive rule for which the Department must follow the rulemaking procedures of the Minnesota Administrative Procedures Act (APA), Minn. Stat. chap. 14. Respondent's Summary Disposition Memorandum, at 55. The APA defines "rule" as "every agency statement of general applicability and future effect Minn. Stat. S 14.02, subd. 4. Minter-Weisman cites In the Matter of the Contested Case of Ebenezer Society v. Minn. Dept. of Human Services, 433 N.W.2d 436 (Minn.App. 1988), as requiring agencies to adopt rules when longstanding interpretations change.

In Ebenezer Society the agency was interpreting its own rules. In this matter, there is no "agency statement." The only statement made is by the Legislature in adopting Minn. Stat. 325D.33, subd. 3. That statement stands on its own and prohibits the conduct engaged in by Minter-Weisman, regardless of the Department's opinion on, or rules related to, this subject. There is no basis for requiring an agency to adopt rules restating a statute. See In Re Peoples Natural Gas Co., 389 N.W.2d 903, 906 (Minn. 1986)(citing Cable, Communications Board v. Nor-West Cable, 356 N.W.2d 658, 667 (Minn. 1984)). The Department has not violated the APA in changing its interpretation of MUCSA without rulemaking.

Minter-Weisman has moved for attorney's fees and costs, asserting that the Department's enforcement action was brought in bad faith. Minn. Stat. 549.21 is cited as a basis for such an award. That statute only relates to actions in a court of law, not an administrative proceeding. See In Re Holly Inn, 386 N.W.2d 305 (Minn.App. 1986). Minter-Weisman also cites Minn. Rule 1400.5500, items K and M as providing authority to award attorney's fees and costs. Minn. Rule 1400.5500, item K authorizes prehearing disposition of cases, where appropriate. Item M authorizes the administrative law judge to "do all things necessary and proper to do the foregoing" (meaning conduct prehearing matters). Neither of the items cited authorize an administrative law judge to award attorney's fees and costs. The process for requesting attorney's fees and costs is set out in the Equal Access to Justice Act (EAJA), Minn. Stat. 3.761 - 3.765. Any award of attorney's fees must be obtained under the EAJA, not by motion in this case.

The Department requests attorney's fees and costs through Rule 11 of the Minnesota Rules of Civil Procedure. Rule 11 permits attorney's fees and costs to be awarded when a party brings a frivolous motion or asserts a claim without a good faith factual basis. Minn. Rule 1400.6600 states in pertinent part:

In ruling on motions where parts 1400.5100 to 1400.8400 are silent, the judge shall apply the Rules of Civil Procedure for the District Court of Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding."

The contested case rules of the Office of Administrative Hearings are silent on awarding attorney's fees and costs. This does not mean, however, that Rule 11 is automatically available to administrative law judges. First,

Rule 11 must "promote a fair and expeditious proceeding." Rule 11 does not affect the fairness or expeditiousness of the proceeding. Rather, that rule serves as a penalty for improper conduct. As such, it arises out of the contempt power of the courts. Administrative tribunals have no contempt power. No agency, including the Office of Administrative Hearings, can obtain a power beyond its statutory authority by rule. Wallace v. Commissioner of Taxation, 184 N.W.2d 588, 594 (Minn. 1971); See All, Can Manufacturers Institute Inc. v State, 289 N.W.2d 416 (Minn. 1981).

Even if Rule 11 could be used in a contested case hearing, awarding attorney's fees and costs is inappropriate here. Respondent has raised legitimate issues and pursued them vigorously. Failing to win on issues is not the same as pursuing issues in bad faith. Given the uncertainty of the law as applied by the Department and the general practices followed in the cigarette wholesaler industry, it is no surprise that Respondent has pressed its case to every colorable issue. There has been no showing of bad faith by Respondent in this case.

The record on which this Order is based demonstrates that no relevant facts are in dispute and summary judgment is appropriate. The Respondent has offered rebates or discounts in violation of Minn. Stat. 3250.33, subd. 3. Therefore, Respondent's summary disposition motion should be DENIED and the Department's summary disposition motion should be GRANTED. The Administrative Law Judge is not authorized to award attorney's fees or costs under the APA. No application for attorney's fees or costs under the EAJA has been filed. Therefore, the motions for attorney's fees and costs should be DENIED.

S.M.M.

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of The
Check Cashing Place,
Inc., a Minnesota
Corporation

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

The above-entitled matter came on for hearing before Al Ian W. Klein, Administrative Law Judge, on December 3, 1992, in Minneapolis.

Appearing on behalf of Respondent Check Cashing Place, Inc. was William Franklin, who in turn was represented by Attorney Randall D. B. Tigue, 2620 Nicollet Avenue, Minneapolis, Minnesota 55408.

Appearing on behalf of the Department of Commerce was Michael A. Sindt, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101.

The record closed on January 21, 1993, upon receipt of the final memorandum.

Notice is hereby given that, pursuant to Minn. Stat. 14.61 the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Bert McKasy, Commissioner, Department of Commerce, 133 East Seventh Street, St. Paul, MN 55101.

STATEMENT OF Issues

Was the currency exchange operation at 1000 West Broadway in Minneapolis licensed and operated so that the Cease and Desist Order dated July 21, 1992 should be either made permanent, or vacated?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. William J. Franklin operated a furniture sales business at 1000 West

Broadway in Minneapolis from 1972 to 1992. This business operated under the names of Gamble's Furniture and Broadway Sales. Franklin also operated a check cashing service at the same location. In addition to this furniture operation, Mr. Franklin also operated a check cashing business at 505 East Lake Street in Minneapolis from 1987 to 1992.