



# Board of Appeals of Baltimore County

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August 11, 2016

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RE: *In the Matter of: Two Farms, Inc. t/a Royal Farms*  
Case Nos.: CBA-16-043; CBA-16-044; CBA-16-045; CBA-16-046; and CBA-16-049

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number. If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Krysundra "Sunny" Cannington  
Administrator

KLC/tam  
Enclosure  
Duplicate Original Cover Letter

c: Two Farms, Inc. t/a Royal Farms  
Lawrence Stahl, Managing Administrative Law Judge  
Stephen Anderson, Health Enforcement Officer/Health and Human Services  
Fahad Chughtai, Health Enforcement Officer/Health and Human Services  
Marvin Collins, Health Enforcement Officer/Health and Human Services  
Nick Palmere, Health Enforcement Officer/Health and Human Services  
Brooks Miller, Health Enforcement Officer/Health and Human Services  
Vicki Pfannenstien, Prevention and Tobacco Services Manager/Health and Human Services  
Gregory Wm. Branch, M.D., MBA, CPE, FACP, Director/Health and Human Services  
Nancy C. West, Assistant County Attorney/Office of Law  
Michael E. Field, County Attorney/Office of Law

IN THE MATTER OF	*	BEFORE THE
Two Farms, Inc. t/a Royal Farms	*	BOARD OF APPEALS
3611 Roland Avenue	*	OF
Baltimore, MD 21211	*	BALTIMORE COUNTY
Re: Tobacco Enforcement Citations for	*	Case Nos. CBA-16-043
For Distribution of Tobacco Products	*	CBA-16-044
and/or paraphernalia to a minor	*	CBA-16-045
	*	CBA-16-046
	*	CBA-16-049

\* \* \* \* \*

**OPINION**

This matter comes before the Board of Appeals for Baltimore County (the “Board”) as a Record Appeal from Code Enforcement Hearings on February 10, 2016 and April 6, 2016 of the Administrative Law Judge’s (“ALJ”) Findings of Fact and Conclusions of Law dated April 15, 2016 and April 25, 2016, regarding Tobacco Enforcement Citations at five (5) Royal Farms locations in Baltimore County in Violation of Baltimore County Code Article 13, Title 12, Section 13-12-101 *et seq.*, for the distribution of tobacco products and/or paraphernalia to a minor.

A hearing was held before this Board on June 16, 2016. H. Dean Boland, Esquire appeared on behalf of Two Farms, Inc. t/a Royal Farms (“Royal Farms”). Assistant County Attorney, Renee Phillips-Farley, appeared on behalf of Baltimore County.

**Evidence**

As this case comes before the Board as a Record Appeal, the Board’s review of the ALJ’s decisions is solely based on the record from the February 10, 2016 and April 6, 2016 Code Enforcement Hearings and the oral argument presented before this Board.

Case No.: CBA 16-043 – 2410 East Joppa Road.

The transcript indicates that on February 20, 2016 at 11:30 am, Health Enforcement Officer (“HEO”) Steven Anderson and an unidentified Tobacco Compliance Assistant (“TCA”) were working together to verify compliance by the Royal Farms regarding the sale of tobacco to minors at 2410 East Joppa Road.

The HEO verified that the TCA had a State-Issued ID and inspected it to make sure that it was not faded or tampered. (T. 4/6/2016, p. 11). The HEO followed the TCA into the Royal Farms store and stood directly behind the TCA. (*Id.*) The HEO recalled that the Clerk in the store was named ‘Alicia’ and that there was a repairman working on a lottery machine. (*Id.*)

The HEO testified that the TCA asked to purchase ‘Dutch Master, chocolate cigarillos.’ (*Id.*) The HEO testified that he was right behind the TCA while the transaction occurred; he could oversee and hear the sale being made. (T. 4/6/2016, p. 12). The Clerk asked for ID, looked at it and gave it back. (T. 4/6/2016, p. 11- 12).

When the TCA exited the store, the HEO took the cigarillos and wrote the citation. (T. 4/6/2016, p. 12). The HEO re-entered the store and served it on the store manager, Mr. Offertutor. (*Id.*) Given that this was a first-time offense for this location, the ALJ imposed a fine of \$500.00. (T. 4/6/2016, p. 12).

Case No.: CBA 16-044 – 898 South Marlyn Avenue

The transcript reflects that on February 5, 2016 at 1:40 pm, HEO Fahad Chughtai and an unidentified TCA were working together to verify compliance by the Royal Farms at 898 South Marlyn Avenue regarding the sale of tobacco to minors.

Specifically, the HEO testified that, prior to entering this Royal Farms location, the HEO verified that the TCA had a valid State of Maryland issued ID, no other ID on his person, and asked the TCA if he had any tobacco products on his person. (T. 4/6/2016, p. 83). He also gave the TCA money to attempt to purchase cigarettes. (*Id.*) The HEO asked the TCA to turn his front pockets inside out to make sure that there was nothing in them. (T. 4/6/2016, p. 88). The TCA showed the HEO his wallet which contained only the State-issued ID and no other ID. (*Id.*) When the TCA entered the store, the HEO testified that he was right behind the TCA when the TCA asked for 'Dutch Master' chocolate cigarettes. (T. 4/6/2016, pp. 83-84). The Clerk at the store asked him for ID but did not scan the ID into the computer. (T. 4/6/2016, p. 84).

The TCA pulled his wallet from his right rear pocket and showed the Clerk the ID. (T. 4/6/2016, p. 84). After the purchase was made, the TCA exited the store with the HEO following. (*Id.*) The HEO took the Dutch Master cigarettes (County Ex. 1) and the ID from the TCA and wrote the citation (County Ex. 2). The HEO reentered the store and served the citation on the manager whose first name was 'Barbara.' (T. 4/6/2016, p. 84).

The County also presented a prior Order from the ALJ dated February 23, 2016 showing a prior violation by this store of sale of tobacco to a minor. (County Ex. 3). There was an objection raised at that hearing as well as the April 6, 2016 hearing by Counsel for Royal Farms that the County failed to serve the owner of Royal Farms pursuant to 13-12-105(e)(3)(iii). As a result of the lack of service, Royal Farms never received the Citation and did not appear at the February 23, 2016 hearing. Notwithstanding this, the ALJ imposed a fine of \$1,000.00 because it was a subsequent violation. (T. 4/6/2016, p. 96).

Case No.: 16-045 – 9620 Belair Road.

The transcript reflects that on March 12, 2016 at 11:40 am, HEO Marvin Collins and an unidentified TCA were working together to verify compliance by the Royal Farms at 9620 Belair Road regarding the sale of tobacco to minors.

Specifically, the HEO testified that, prior to entering this Royal Farms location, the HEO verified that the TCA had a valid State of Maryland issued ID, no other ID on her person, and asked the TCA if she had any tobacco products on her person or money in her pockets. (T. 4/6/2016, p. 59). The HEO also asked the TCA to turn their pocket inside out to see if there were any tobacco products. (*Id.*) He also gave the TCA \$20.00 to attempt to purchase the cigarettes. (*Id.*) The HEO also asked the TCA to turn her front pockets inside out to make sure that there was nothing in them. (*Id.*)

When the TCA entered the store, she asked for a box of 'Marlboro Red' cigarettes. (*Id.*) The cashier at the store was the manager named Josh Thompson. Mr. Thompson asked the TCA for ID and examined it. (*Id.*) The HEO testified that he was standing 5 feet to the right of where the sale was completed. (T. 4/6/2016, p. 60). The HEO testified that the TCA pulled the ID out of her wallet which she had in a pocket book and that the ID was not inside of a plastic cover in the wallet. (T. 4/6/2016, p. 68-69).

After the purchase was made, the TCA exited the store with the HEO following. (*Id.*) The HEO took the Marlboro Red box (County Ex. 1) and the ID from the TCA and wrote the citation (County Ex. 2). Approximately 12–15 minutes later, the HEO reentered the store and served the citation on Mr. Thompson. (T. 4/6/2016, p. 61, 67). The HEO showed Mr. Thompson the ID of the minor and specifically the language on the ID which reads that the minor would not be 18 not that date. (*Id.*) The HEO testified that the ID had a photo of the TCA on it. (T. 4/6/2016, p. 67).

When questioned by the ALJ, the HEO stated that while Mr. Thompson initially stated that the minor was 18, he did not state that the ID shown to him by the HEO was not the ID he had seen earlier. (*Id*).

Mr. Thompson also testified. He stated that the TCA held onto her wallet while presenting it to him and that the ID was still in the plastic cover. (T. 4/6/2016, p. 71). In Mr. Thompson's opinion, she appeared to be over 18. (*Id*). He further stated that he entered the date of birth into the computer and the computer allowed the sale. (*Id*).

Case No.: CBA 16-046 – 2700 Taylor Avenue.

The transcript indicates that on March 1, 2016 at 5:59 pm, HEO Nick Palmere and an unidentified Tobacco Compliance Assistant ("TCA") were working together to verify compliance by the Royal Farms regarding the sale of tobacco to minors at 2700 Taylor Avenue.

The HEO verified that the TCA had a State-Issued ID and gave the TCA money to purchase tobacco. (T. 4/6/2016, p. 47). The HEO followed the TCA into the Royal Farms and stood 12-15 away from the TCA. (*Id*). The TCA asked to purchase a pack of 'Marlboro Red shorts.' (*Id*). The TCA removed the license from her wallet and handed it to the cashier. (T. 4/6/2016, p. 47, 52-53). The Clerk looked at it and gave it back. (*Id*). The HEO testified that he observed everything but does not remember whether the Clerk scanned the ID into the computer. (T. 4/6/2016, p. 47-48).

When the TCA exited the store, the HEO took the cigarettes (County Ex. 1) and wrote the citation. (County Ex. 2). The HEO re-entered the store and served it on the store manager. (T. 4/6/2016, p. 48-49). Given that this was a first-time offense for this location, the ALJ imposed a fine of \$500.00. (T. 4/6/2016, p. 57).

Case No.: CBA 16-049 – 504 Edmonson Avenue.

At a hearing before the ALJ on February 10, 2016, Counsel for the parties agreed to proceed by way of a proffer by the County as to the facts, rather than have the witnesses testify.

With regard to the Royal Farms located at 504 Edmonson Avenue, the County proffered that on December 23, 2015 at 5:20 p.m., HEO Brook Miller and an unidentified TCA were working together to verify compliance by the Royal Farms regarding the sale of tobacco to minors at that location.

The HEO verified that the TCA had a valid State of Maryland issued ID and no tobacco products on his person. (T. 2/10/2016, p. 8). The HEO also gave the TCA money to purchase the cigarettes. (*Id.*) The HEO personally observed the Clerk sell Newport cigarettes to the TCA after asking for ID from the TCA. (*Id.*) The County indicated that the citation was served on the Clerk. (*Id.*)

The County entered the cigarettes (County 1), the Citation (County 2) and three (3) prior pleadings (County 3, 4 and 5). County 3 was a Failure to Appear for a Hearing on September 16, 2015 at which point a \$500.00 fine was imposed. County 4 was an Order for a Failure to Appear again at the September 16, 2015 hearing for which a \$1,100.00 fine was imposed. County 5 was another Failure to Appear on September 16<sup>th</sup>, for which a \$1,500.00 fine was imposed.

After the proffer was made, Counsel for Royal Farms made a Motion that service on the Clerk was improper under BCC 13-12-105(e)(iii). (T. 2/10/2016, p. 40-44).

### **Standard of Review**

Appeals from Code Enforcement hearings are limited to the record created before the Administrative Law Judge. That record includes all exhibits and other papers filed with the

Administrative Law Judge, and the written findings and final order of the Administrative Law Judge (*Baltimore County Code* §3-6-303 (“BCC”).

In deciding a code enforcement appeal, under BCC, § 3-6-304, the Board of Appeals may:

- (i) Remand the case to the Hearing Officer,
- (ii) Affirm the final order of the Hearing Officer, or
- (iii) Reverse or modify the final order if a finding, conclusion, or decision of the Code Official or Hearing Officer:

- 1. Exceeds the statutory authority or jurisdiction of the Code Official or Hearing Officer;
- 2. Results from an unlawful procedure;
- 3. Is affected by any other error of law;
- 4. Subject to paragraph (2) of this section, is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
- 5. Is arbitrary or capricious.

### Decision

#### I. The Entrapment Defense.

We first address Royal Farms’ claim that Baltimore County entrapped its employees into selling tobacco to the TCAs in each of the above referenced cases. Entrapment is an affirmative defense involving two elements: (1) the Government’s inducement of the crime, and (2) the defendant’s absence of predisposition to commit the crime. Sparks v. State, 91 Md. App. 35, 57 (1992); Moore v. State, 195 Md. App. 695, 734 (2010). “Entrapment occurs when a police officer or government agent induces the commission of a crime by one who, except for the government’s enticement, solicitation or persuasion, would not have committed the crime.” Sparks, 91 Md. App. at 64 (citations omitted).

The defense typically is permitted in the context of a criminal proceeding and courts throughout the nation are divided on whether the defense also is available in a civil, administrative proceeding. In those states permitting the use of the entrapment defense in administrative

proceedings, its use has most often been approved in quasi-criminal proceedings involving significant actions such as the revocation of medical or dental licenses or license suspension for the operation of a liquor store. See City of Atlanta Gov't v. Smith, 228 Ga. App. 864 (Ga. Ct. App. 1997) (defense may be permitted where a professional licensee is in danger of losing his or her license, but it is generally not available in civil cases, including attorney disciplinary proceedings); Fumusa v. Arizona State Bd. of Pharmacy, 545 P.2d 432, 434 (Ariz. Ct. App. 1976) (entrapment defense available in an administrative proceeding involving potential loss of one's professional or business license); Patty v. Board of Medical Examiners, 508 P.2d 1121 (Cal. 1973) (“the majority of decisions of other states have recognized entrapment as a defense in administrative proceedings in which revocation or suspension of a license to practice a profession, trade, or business is at issue.”).

The appellate courts in Maryland have not issued a definitive holding on the availability of the entrapment defense in an administrative proceeding. In Grohman v. State, 258 Md. 552 (1970), cited by both parties, the court permitted the application of the defense in a criminal contempt proceeding. However, the court noted that “we are of the opinion that the gravamen of this contempt is criminal in substance and although this is not a criminal proceeding, we can see no logical or fair reason why the defense of entrapment should not be available to one so accused.” Id. at 556. (See also Harford County Education Assn. v. Bd. of Education, 281 Md. 574 (1977) (court considered an entrapment defense in a criminal contempt proceeding).

The case before the Board does not involve a criminal contempt proceeding, nor is it criminal in nature.<sup>1</sup> Nevertheless, assuming, *arguendo*, that the entrapment defense is viable in administrative proceedings regarding civil citations for tobacco sales violations, Appellants had the burden to produce competent evidence to establish inducement. See Kamara v. State, 184 Md. App. 59, 78 (2009). The court in Kamara discussed the nature of inducement, stating that

An inducement by its very nature, contemplates more than a request and an affirmative response. It embraces, as well, the indispensable notion of an effective catalytic agent. It is more than a solicitation. It is more even than a successful solicitation. It also requires something by way of the unresisted bait or the effective precipitating agent that actually seduced an otherwise virtuous person from the paths of righteousness into the ways of the ungodly. It involves that sort of "grave threat," "fraud," or "extraordinary promise[.]" . . . It requires, in a word, a catalyst.

Kamara, 184 Md. App. at 77.

Just providing an opportunity for wrongful conduct is not enough:

It is generally recognized that the defense of entrapment is not available to an accused where the enforcement officer or his agent acted in good faith for the purpose of discovering or detecting crime and merely supplied the opportunity for the commission of the crime to one who had the requisite criminal intent.

Rettman v. State, 15 Md. App. 666, 670 (1972). It also "is not objectionable for an officer of the law to lay a trap or unite with others to detect an offender." Baxter v. State, 223 Md. 495, 499 (1960). Absent such tactics as fraud, extreme pressure or badgering, the use of decoys or agents in the pursuit of investigating or exposing wrongful activity does not typically constitute inducement or entrapment. Courts in other states have agreed; they have declined to find "inducement" when the government uses a decoy or minor in an operation conducted for enforcement of a regulatory

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<sup>1</sup> Appellants were cited for violations under the Baltimore County Code for distribution of tobacco to a minor; that statute creates a civil, not criminal citation scheme. See Baltimore County Code §13-12-101 *et. seq.*

scheme. See One Way Fare v. Dep't of Consumer Prot., 96 Conn. App. 780, 785 (Conn. App. Ct. 2006) (citations omitted) (not entrapment when minor and police officers went to restaurant to determine whether the restaurant would sell alcohol to minor); Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., 7 Cal. 4th 561, 568, 869 P.2d 1163 (Cal. 1994) (“As a general rule, the use of decoys to expose illicit activity does not constitute entrapment, so long as no pressure or overbearing conduct is employed by the decoy; Roberts v. Illinois Liquor Control Com., 58 Ill. App. 2d 171, 179 (Ill. App. Ct. 1st Dist. 1965) (“It is well settled that where nothing more than a simple request to make an unlawful sale of an intoxicant appears, the fact that the solicitation was by a decoy, does not make the defense of entrapment available.”). “Indeed, if it were not for similar conduct on the part of the investigators employed by public authorities the convictions of persons notoriously guilty of offenses against the law would oftentimes be most difficult or impossible.” One Way Fare, 96 Conn. App. at 785.

In reviewing the decision below, the ALJ did not address the question of the applicability of the entrapment defense in this administrative proceeding but proceeded directly to the merits of the defense in the context of this enforcement scheme. The ALJ first noted that the County is “charged with seeing that activities . . . that are carried on are carried on in a proper, lawful way . . . to the benefit of the health of the citizens of the County.” He also noted that the County has the responsibility “to determine, on an ongoing and continuing basis, whether or not those entities so holding themselves out to the public, do in fact follow the rules, regulations and procedures that the law sets out.” (T. 4/6/2016, pp. 41-42). He concluded that “the County . . . is not entrapping the store.” (Id. at 43).

We agree with the ALJ’s conclusions. Further, Royal Farms produced no evidence to indicate that any HEO or any minor TCA threatened, lied, encouraged, badgered, coerced, tricked,

or in any way wrongfully induced Royal Farms' employees to sell the tobacco products to the TCAs. The evidence indicates instead that the decoys simply walked up to the counter and asked for a tobacco product. Under the case law, we find that just providing the opportunity is not entrapment or inducement. This is particularly so when the actions are pursuant to a civil regulatory scheme established for the protection of the health and welfare of County citizens.

Further evidencing the propriety of the testing scheme, Royal Farms itself conducts a similar program, the "mystery shop program," in which Royal Farms hires a company to conduct visits to individual stores with underage shoppers to check for employee compliance with alcohol or tobacco regulations. In fact, according to Royal Farms' loss prevention agent, Dottie Mears, the outside company does "the same thing that the Health Department does," using "[t]he same process as the Health Department uses." (T. 4/6/2016, pp. 23-24).

We find that there is a line between tricking, pressuring, or badgering a party to engage in wrongful activity, and simply presenting an opportunity to see whether one will commit such conduct. See Matthews v. United States, 485 U.S. 58, 66 (1988) ("evidence that government agents merely afforded an opportunity or facilities for the commission of the crime" does not warrant instruction on the entrapment defense). There is no evidence that the County crossed that line.<sup>2</sup>

## II. The Minor Tobacco Compliance Assistants' Failure to Testify In the Administrative Proceeding

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<sup>2</sup> In arguing that the County's attempts were "aggressively persistent," Appellants emphasize that in 2015, Royal Farms had a pass rate for tobacco compliance inspections of ninety percent (90%). (App. Memo. at 3). Given that the pass rate prior to the initiation of the County's program was approximately thirty percent (30%) (T. 4/6/2016, pp. 23-24), this strongly suggests that the program and the repeated checks, not merely Royal Farms' good intentions, have led to this improvement.

Royal Farms next takes issue with the fact that in the cases before the ALJ, the minor TCAs “did not appear at the proceeding, but rather their hearsay statement and actions were introduced by way of the HEOs who appeared at the hearing.” (App. Memo. at 6-7). Royal Farms argues that it was therefore deprived of the right to confront adverse testimony. Royal Farms contend further that the County has wrongfully refused to provide information regarding the TCAs recruitment and compensation, and that such information could bear on the TCAs’ bias and ability to perform the tasks.

Rules of Evidence generally are more relaxed in administrative proceedings than in court proceedings. “It is hornbook law that hearsay evidence, if reliable, is admissible at administrative proceedings.” Motor Vehicle Admin. v. McDorman, 364 Md. 253, 262 (2001). Para v. 1691 Limited Partnership, 211 Md. App. 335 (2013) (it is well-settled that administrative agencies are not bound by technical common law rules of evidence). In fact, credible and probative hearsay statements “may form the sole basis for the agency's decision.” Redding v. Prince George's Cty., 263 Md. 94, 110 (1971), cert. denied, 406 U.S. 923 (1972). The concern is whether the relaxed rules are applied in an arbitrary or oppressive manner that deprives a party of a right to a fair hearing. See Travers v. Baltimore Police Dep't, 115 Md. App. 395, 412 (1997) (unavailability of alleged victim not fatal to claim where testimony of officer was probative and reliable). As a constitutional matter, “procedural due process does not prevent an agency from supporting its decision wholly by hearsay, if there is underlying reliability and probative value.” Maryland Dep't of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 595 (1989).

The County did not produce any of the minor TCAs in the hearings below. However, the County did produce the respective HEOs for each of the store citations. Those HEOs testified as to the procedures they undertook before a TCA was sent into one of the Royal Farms’ stores.

These steps include verifying that their Maryland ID was valid, that the TCA was under the age of 18 and that the ID reflected that, and that the TCA had nothing else in his or her pockets. (See, e.g., T. 4/6/2016, pp. 11, 47, 59, 83). The HEOs also testified that they were within hearing and/or seeing distance of the TCA and the Clerk when the transaction at issue occurred, that they observed the transaction and the sale of the tobacco product to the minor TCA, and that they followed the TCA out of the store immediately after the transaction to retrieve the product and write up the citation. *Id.* at 11-12, 47-48, 59-60, 83-84. Royal Farms had the opportunity and did cross-examine the HEOs regarding the procedures, transactions, what they saw, where they were in relation to the TCA, and anything else Royal Farms wished to challenge.

Royal Farms argued that this was insufficient and that they were entitled to examine the TCAs also. In response, the ALJ noted that “everything the TCA could testify to, how old they were, what they had in their pockets when they went in, what they did when they went in, and what others did to them can be provided by the TCA, but can also be provided by the [HEO].” (*Id.* at 51-52). The ALJ further observed that the HEOs “do not lose sight of the TCA from the time he or she is checked for tobacco products, given money to make the sale; and not only is checked to see that they are in fact under 18, but that they have the State-issued ID . . . that shows that the person is under 18.” (T. 2/10/2016, p. 49).

The ALJ subsequently concluded the HEOs are close enough to see what happens and are thus able to testify as to the essence of the violation, which is the giving of the ID, the return of the ID and the selling of the product, and that “the case is made by the testimony of the HEO.” (T. 4/6/2016, pp. 50-51). According to Judge Stahl, it does not matter even if the TSA quietly told the clerk there was no need to look at his ID or that the TSA was over 18 because the clerk has the responsibility to demand and perform an accurate check of an ID. (*Id.* at 52). It is the HEO’s

observations, not the TCA's report, that form the basis of the citation. (2/10/2016, Findings of Fact and Conclusions of Law at 2).

The Board agrees with the ALJ and finds no error in his decision as to whether the TCA's presence was required at these hearings. Royal Farms presented no evidence that called into question the veracity or reliability of the HEOs' testimony or their observations as to the actions resulting in the violations, or that challenges the ALJ's credibility determinations. The HEOs relied on their own observations and checks, rather than out of court statements by the TCAs, and Royal Farms was able to cross examine the HEOs. While Royal Farms suggested hypothetical situations or actions by TCAs which might have called into question whether the TCAs used trickery to induce a sale – such as hiding a different, fake ID in their purse or on their body to give to the clerk - they failed to offer any testimony that any clerk highlighted a discrepancy between the ID the TCA presented and that which the HEO showed after the prohibited sale.

In fact, the County's attorney and the ALJ specifically pursued this possibility with one of Royal Farms' own witnesses who had made a wrongful sale, but the employee did not in any way suggest any such discrepancy or duplicity. (T. 4/6/2016, pp. 73-74). Moreover, it does not seem as if a TCA would have any incentive to surreptitiously present a fake ID to solicit a sale, especially when the TCA knows the HEO will check for any other ID or tobacco products and that such a discovery could lead to termination of employment. In addition to all these reasons, the ALJ also stated his concern regarding the protection and safe-guarding of the minors' identities. The ALJ presented Royal Farms with ample opportunity to cross examine adverse witnesses and "good cause" as to why the minor TCAs were not required to testify. The Board will not reverse that finding.

III. Service of the Citation upon the 504 Edmonson Avenue Store.

BCC §13-12-105(e)(2)(iv) states that: “[t]he Health Officer shall serve the citation on the owner by posting the citation on the property, sending the citation by first class mail, or hand delivering the citation to the owner on a form prescribed by the Health Officer.” The Code defines “owner” to mean “a person engaged in the business of selling or otherwise distributing tobacco products for commercial purposes.” BCC §13-12-101(e).

It is undisputed that citations for the Royal Farms store at Edmonson Avenue were served upon either a store clerk or a manager/assistant manager who were employed by Royal Farms. Testifying on Royal Farms’ behalf, Dottie Mears stated that Royal Farms’ corporate office never received a copy of any of the Edmonson Avenue citations. (T. 2/10/16 at 22). The County did not offer any testimony or evidence to establish that the citations were in any fashion mailed or delivered to the corporate office.

Royal Farms argues that delivering the citation to a store clerk or even a store manager does not meet the statutory requirements. In particular, Royal Farms maintains that any hand-delivery is required to go to the store “owner” and not simply a clerk or other store employee. The County contends that the service upon the clerk was sufficient as the clerk is Appellants’ agent and the stores rarely have owners on site.

The ALJ ruled that a citation given to the store clerk suffices to meet the statutory requirements. According to the ALJ, the provision allowing posting of the citation at the premises also encompasses giving it to some employee at the property, and that in fact, handing it to an employee is a stronger type of service than posting. (T., 2/10/2016, pp. 46-47). He also stated that an agent is defined as a person entrusted to act for another’s business, that as a practical matter, cigarette-selling businesses rarely have the owner on site, and that various clerks and cashiers “are

clearly agents of the owner of the business cited.” (Findings of Fact and Conclusions of Law at 2-3). He concluded that a tobacco sale citation may properly be served on the owner or representative of the owner, including any employee present at the time of the alleged violation.” (*Id.* at 3).

The Board finds that this legal conclusion is in error. BCC §13-12-105(e)(2)(iv) requires the County to serve the citation “on the owner” by posting it on the property, sending it by first class mail or hand delivering the citation “to the owner.” “Owner” is further defined as a person engaged in the business of selling tobacco products for commercial purposes. BCC §13-12-101(e).

Throughout this Title, the law distinguishes between an “owner” and other persons who might distribute tobacco products. For instance, BCC, §13-12-103.1, regarding verification of age, requires “each owner or other distributor” to verify a purchaser’s age. Section 13-12-105 speaks to penalties for violation of the statute: there are separate provisions for violations by “an owner” and those by “any other person who violates” the statute. Compare §13-12-105(a) and 13-12-105(b). Other sections of the statute provide for enforcement if “an owner or an employee or agent of the owner” violates a provision. §13-12-105(e)(2). Similarly, section 105(e)(3)(ii) states that a citation shall describe the violation, including a reference to the code provision “the owner or the owner’s employee or agent” has allegedly violated. Section 105(e)(6)(ii) states that “all references to the ‘violator’ shall be deemed to refer to the “owner or person who has received” a citation.

These provisions strongly suggest that the County Council did not intend to lump together under the definition of ‘owner’ all who merely distribute tobacco on behalf of the business owner or work for the owner as its employee or agent. Rather, the County Council distinguished between those provisions applicable to an ‘owner’ and those applicable to one merely working on an owner’s behalf. When the Code means to broaden its net, it does so explicitly and refers not only to an owner, but to other distributors, including an employee or agent. The natural inference is

that, as the definitional section states, the owner is only the person “engaged in the business of selling or distributing tobacco for commercial purposes,” and not to those working on the owner’s behalf. In this case, Royal Farms is the registered owner of each location to whom citations were issued. The citations at issue also list Royal Farms as the “owner.” (Exhibit 2 as identified in February 10 Transcript.)

The BCC provides three options to properly serve a citation for selling tobacco to a minor. The County could have posted the citation at the property, sent the citation to Royal Farms by first class mail to its corporate address, or hand-delivered the citation to Royal Farms at the corporate address. Handing the citation to a clerk or manager, especially one who sold the tobacco to the minor, is not one of the options. Apart from violating the statute, a potential problem with such service is that a clerk receiving the citation fears he or she may be suspended or penalized for an infraction and may not forward the citation to the proper corporate authorities. Then, as here, the corporate owner has no knowledge of the alleged violation, has no notice of the hearing to which it is entitled, and is further penalized. A store manager, who may be wary of a violation by one of his or her employees, may be equally lax to disregard a citation received. Or, it may be that the citation simply gets lost in the day to day paperwork of the individual store and never come to the attention of the store “owner.” In short, simply handing the citation to a store employee does not meet the statutory requirements.

### Conclusion

For all of the above reasons, the citation in case number CBA-16-049 shall be dismissed for failure to properly serve the owner pursuant to BCC, §13-12-105(e)(3)(iii). The citations in case numbers CBA-16-043, CBA-16-044, CBA-16-045, and CBA-16-046 shall be affirmed.

**ORDER**

**THEREFORE, IT IS THIS** 11<sup>th</sup> day of August, 2016, by the Board of Appeals of Baltimore County

**ORDERED** that the decision of the Administrative Law Judge dated April 25, 2016 with regard to the Royal Farms store located at 504 Edmonson Avenue, Case No: CBA-16-049, be and the same is hereby **REVERSED**; and it is further

**ORDERED** that the decision of the Administrative Law Judge dated April 15, 2016 with regard to the Royal Farms store located at 2410 East Joppa Road, Case No: CBA-16-043, be and the same is hereby **AFFIRMED**; and it is further

**ORDERED** that the decision of the Administrative Law Judge dated April 15, 2016 with regard to the Royal Farms store located at 898 South Marlyn Avenue, Case No: CBA-16-044, be and the same is hereby **AFFIRMED**; and it is further

**ORDERED** that the decision of the Administrative Law Judge dated April 15, 2016 with regard to the Royal Farms store located at 9620 Belair Road, Case No: CBA-16-045, be and the same is hereby **AFFIRMED**; and it is further

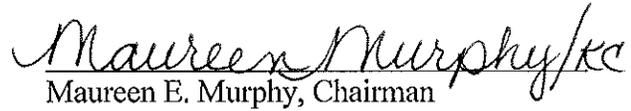
**ORDERED** that the decision of the Administrative Law Judge dated April 15, 2016 with regard to the Royal Farms store located at 2700 Taylor Avenue, Case No: CBA-16-046, be and the same is hereby **AFFIRMED**.

In the matters of: Two Farms Inc T/A Royal Farms

Case numbers: CBA-16-043, CBA-16-044, CBA-16-045, CBA-16-046, and CBA-16-049

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS  
OF BALTIMORE COUNTY**

  
Maureen E. Murphy, Chairman

  
Meryl W. Rosen

Jane M. Hanley was on the panel and agreed with the majority opinion. She was not reappointed to the Board and her last day with the Board of Appeals was June 30, 2016.