



Board of Appeals of Baltimore County

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October 11, 2016

Renee Phillips-Farley, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse, Second Floor
400 Washington Avenue
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Judah Fuld, Esquire
Boulard & Brush, LLC
201 North Charles Street, Suite 2400
Baltimore, Maryland 21201

RE: *In the Matter of: Two Farms, Inc. t/a Royal Farms*
Case Nos.: CBA-16-053; CBA-17-001; CBA-17-002; and CBA-17-005

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,

A handwritten signature in cursive script that reads "Sunny Cannington Ham".

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
Warren Cooper, Health Enforcement Officer/Health and Human Services
Donnell Newton, Health Enforcement Officer/Health and Human Services
Stephen Anderson, 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
Two Farms, Inc. t/a Royal Farms
3611 Roland Avenue
Baltimore, MD 21211

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case Nos. CBA-16-053
CBA-17-001
* CBA-17-002
CBA-17-005

Re: Tobacco Enforcement Citations for
For Distribution of Tobacco Products
and/or paraphernalia to a minor

* * * * *

OPINION

These cases come before the Board as Record Appeals from three (3) Code Enforcement Hearings on May 18, 2016, June 28, 2016 and July 27, 2016 and from the Administrative Law Judge's ("ALJ") Findings of Fact and Conclusions of Law dated May 24, 2016, July 8, 2016 and July 29, 2016, regarding Tobacco Enforcement Citations at three (3) 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 on the record was held before this Board on September 27, 2016. Judah Fuld, Esquire of Bouland and Brush, LLC 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 above referenced Enforcement Hearings and the oral argument presented before this Board.

CBA 16-053 – 8803 Philadelphia Road, Baltimore, MD 21237.

The transcript indicates that on March 22, 2016 at 5:21 pm, Health Enforcement Officer (“HEO”) Warren Cooper 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 8803 Philadelphia Road in Baltimore County.

The HEO verified that the TCA had a State-Issued ID and verified by looking at the ID that it had not been altered. (T. 5/18/2016, p. 9). The ID showed that the TCA was under the age of 18 years. (T. 5/18/2016, p. 24). The HEO had the TCA empty his/her pockets, place all belongings into a plastic bag and lock the bag in the car. *Id.* The TCA was provided currency to make the transaction and was instructed, when making the transaction, to reveal the ID and money so that the HEO could observe these items. *Id.*

The HEO followed the TCA into the Royal Farms store and stood at the counter to the left of the TCA. *Id.* The TCA placed an order for a box of Marlboro Red Short 100s. The HEO recalled that the Clerk asked for the ID and then sold the tobacco product to the minor. (T. 5/18/2016, p. 10).

When the TCA exited the store, the HEO took the cigarettes (County Ex. 1) and change from the TCA and wrote the citation (County Ex. 2). *Id.* The HEO re-entered the store and served it on the store manager, Ms. Janet Williams. *Id.* The HEO recalled that the manager had indicated that the clerk should have scanned the item but she did not. (T. 5/18/2016, p. 11). The citation indicates that the clerk looked at the ID and still sold tobacco products to a minor. (County Ex. 2).

The ALJ heard two (2) Motions from counsel for Royal Farms in regard to entrapment and the non-appearance of the TCA at the hearing. The ALJ denied both Motions. Given that this was

a first-time offense for this location, the ALJ imposed a fine of \$500.00. (ALJ Opinion, 5/24/16, p.4).

Case No.: CBA 17-001 – 4308 Washington Blvd – 1st Offense.

The transcript reflects that on May 19, 2016 at 5:21 pm, HEO Donnell Newton and an unidentified TCA were working together to verify compliance by the Royal Farms regarding the sale of tobacco to minors at 4308 Washington Blvd. in Baltimore County.

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 which indicated that the TCA was under the age of 18 years, made sure that the TCA had no other tobacco products or anything else on his person and asked the TCA to put all belongings into the trunk of the car. (T. 6/28/2016, p. 6). He also gave the TCA \$10.00 to attempt to purchase cigarettes. (*Id.*)

When the TCA entered the store, the HEO testified that he stood right behind the TCA when the TCA asked for ‘Chocolate Dutch Master’ cigarettes. (T. 6/28/2016, p. 6). The Clerk grabbed the cigarettes and then asked the TCA for ID. (T. 6/28/2016, p. 7). The clerk looked at the ID and then attempted to scan it a couple of times. *Id.* After doing so, the clerk sold the tobacco product to the minor. *Id.*

After the purchase was made, the TCA exited the store with the HEO following. *Id.* The HEO took the Chocolate Dutch Master cigarettes (County Ex. 1) and wrote the citation (County Ex. 2). The HEO reentered the store and served the citation on the manager named ‘Jay’ who was also the clerk who sold the tobacco product. (T. 6/28/2016, p. 8-9).

The ALJ heard two (2) Motions from counsel for Royal Farms in regard to entrapment and the non-appearance of the TCA at the hearing. The ALJ denied both Motions. Given that this was

a first-time offense for this location, the ALJ imposed a fine of \$500.00. (ALJ Opinion, 7/8/16, p.3).

Case No.: CBA 17-001 – 4308 Washington Blvd – 2nd Offense.

The transcript reflects that, five (5) days after the County issued the citation on May 19, 2016 to the Royal Farms store at 4308 Washington Blvd., on May 24, 2016 at 4:08 pm, HEO Stephen Anderson and an unidentified TCA were working together to verify compliance by the Royal Farms regarding the sale of tobacco to minors at 4308 Washington Blvd. in Baltimore County.

Specifically, the HEO testified that, prior to entering this Royal Farms location, the HEO had the TCA empty his pockets and place all belongings into a plastic bag and locked the bag in the trunk of his car. (T. 6/28/2016, p. 37). The HEO verified that the TCA had a valid State of Maryland issued ID which indicated that the TCA was under the age of 18 years. *Id.* The HEO recalled asking the TCA to keep the ID in his front pocket. *Id.* The HEO testified that the TCA was a male who looked 17 or 18 years old without facial hair. (T. 6/28/2016, p. 46). The TCA was given \$10.00 to purchase the tobacco. (T. 6/28/2016, p. 38).

When the TCA entered the store, the HEO testified that the TCA stood in line behind 3 or 4 people. *Id.* The HEO was observing from a snack display. *Id.* As the TCA moved up in line, the HEO was in a location at the lottery machine counter to observe the transaction. *Id.* The HEO testified that he was within 10 ft. of the transaction and that he could hear the conversation. (T. 6/28/2016, p. 41). The TCA asked for a pack of 'Newport' cigarettes. *Id.* The clerk did not ask for ID and made the sale. *Id.*

After the purchase was made, the TCA exited the store with the HEO following. *Id.* The HEO took the Newport cigarettes (County Ex. 1) and wrote the citation (County Ex. 2). *Id.* The

HEO also specifically recalled that too much change (\$1.00) was given to the TCA by the Clerk. *Id.* The HEO reentered the store and served the citation on the Acting Shift Leader named 'Christine Andrews' along with the \$1.00 change. (T. 6/28/2016, p. 38-39).

The ALJ heard two (2) Motions from counsel for Royal Farms in regard to entrapment and the non-appearance of the TCA at the hearing. The ALJ denied both Motions. A third Motion was made by Counsel for Royal Farms as to the reasonableness of the County issuing a second citation at the same store within 5 days of the first citation. The ALJ denied that Motion on the basis that the ALJ was not in a position to decide what period of time was reasonable for the HEOs to inspect various businesses throughout Baltimore County. (T. 6/28/2016, p. 57-61). Given that this was a second offense for this location, the ALJ imposed a fine of \$1,000.00. (ALJ Opinion, 7/8/16, p.3).

Case No.: 17-005 – 1010 Eastern Avenue.

The transcript reflects that on July 6, 2016 at 1:15 pm, HEO Stephen Anderson and an unidentified TCA were working together to verify compliance by the Royal Farms regarding the sale of tobacco to minors at 1010 Eastern Avenue in Baltimore County.

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 and that the TCA was under the age of 18 years. (T. 7/27/16, p. 4). The TCA was a female who was wearing a red t-shirt and jeans and looked under the age of 27. (T. 7/27/16, pp. 8, 18). She did not have a pocketbook or a book bag. *Id.* The HEO also asked the TCA to turn her pockets inside out and to place all of their belongings into a plastic bag which was locked in the trunk of the car. (T. 7/27/16, p. 4). He also gave the TCA \$5.00 to attempt to purchase the cigarettes. *Id.*

When the TCA entered the store, she got in line and another customer got in line behind the TCA. *Id.* The HEO testified that he then got in line behind the other customer. *Id.* The TCA ordered a box of Black and Mild single cigarillos. *Id.* The clerk whose name was 'Kevin' did not ask for ID but rang up the sale. (T. 7/27/16, p. 4-5).

After the purchase was made, the TCA exited the store with the HEO following. *Id.* The HEO took the box of Black and Mild single cigarillos (County Ex. 1), the change and wrote the citation (County Ex. 2). The HEO reentered the store and served the citation on Mrs. Litz. (T. 7/27/16, p. 6).

The ALJ heard two (2) Motions from counsel for Royal Farms in regard to entrapment and the non-appearance of the TCA at the hearing. The ALJ denied both Motions. Given that this was a first-time offense for this location, the ALJ imposed a fine of \$500.00. (ALJ Opinion, 7/29/16, p.3).

Standard of Review

Appeals from Code Enforcement hearings are limited to the record created before the ALJ. That record includes all exhibits and other papers filed with the ALJ, and the written findings and final order of the ALJ (*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.

BCC – TITLE 12. - Distribution of Tobacco Products to Minors

§ 13-12-103. - Distribution to Minors.

- (a) Owner. An owner may not distribute to a minor:
 - (1) Any tobacco product;
 - (2) Tobacco paraphernalia; or
 - (3) A coupon redeemable for a tobacco product.
- (b) Other person. A person other than an owner may not:
 - (1) Buy for or sell any tobacco product to a minor; or
 - (2) Distribute tobacco paraphernalia to a minor.
- (c) No violation. A violation of this section has not occurred if the owner or other distributor:
 - (1) Examined the purchaser's or recipient's driver's license or another valid identification issued by a government entity or institution of higher education; and
 - (2) That license or other identification positively identified the purchaser or recipient of a tobacco product as at least 18 years of age.

§ 13-12-103.1. - Verification of Age.

- (a) Photographic identification. Each owner or other distributor shall verify by means of photographic identification containing the bearer's date of birth that no person purchasing a tobacco product or tobacco paraphernalia is a minor.
- (b) Not required for persons over 26. No such verification is required for any person over the age of 26.
- (c) Proof of age as defense. Proof that the owner or other distributor demanded, was shown, and reasonably relied upon proof of age shall be a defense to any action brought under this section.
- (d) Personal knowledge in lieu of verification. An owner or other distributor is not required to verify the age of the individual purchasing the tobacco product if the owner or other distributor has personal knowledge, whether from personal

acquaintance or from a previous demand for verification of age, that the purchaser is not a minor.

* * * *

§ 13-12-105. - Penalties and Enforcement.

(a) Penalty for owners.

(1) An owner who violates the distribution to minors provisions of § 13-12-103 of this title in any calendar year is subject to a civil penalty as follows:

- (i) \$500 for a first violation;
- (ii) \$1,000 for a second violation; and
- (iii) \$1,500 or suspension of all tobacco sales for one month or both for a third or subsequent violation.

(2) An owner who violates the product placement provisions of § 13-12-104 of this title in any calendar year is subject to a correction notice for a first violation and thereafter a civil penalty as follows:

- (i) \$500 for a second violation;
- (ii) \$1,000 for third violation; and
- (iii) \$1,500 for a fourth or subsequent violation.

(3) An owner who violates the identification check provisions of § 13-12-103.1 of this title in any calendar year is subject to a correction notice for a first violation and thereafter a civil penalty as follows:

- (i) \$100 for a second violation; and
- (ii) \$250 for a third or subsequent violation.

(4) An owner is liable for violation of this title committed by an employee or agent of the owner.

(b) Penalty for others. Any other person who violates any provision of this article is subject to a civil penalty of \$50 for the first violation and \$100 for any subsequent violations.

(c) Separate offenses. For purposes of this section, each separate incident at a different time and occasion is a violation.

(d) Enforcement. The Baltimore County Department of Health may adopt reasonable regulations, in accordance with the provisions of Article 3, Title 7 of the Code, to carry out the purposes of this title.

Decision

Prior to addressing the merits here, we incorporate herein our prior Opinion dated August 11, 2016 in case numbers CBA-16-043, CBA-16-044, CBA-16-045, CBA-16-046, and CBA-16-049, in its entirety as if fully set forth herein.

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 cases before the Board do not involve criminal contempt proceedings, nor are they criminal in nature.¹ Nevertheless, assuming, *arguendo*, that the entrapment defense is viable in administrative proceedings regarding civil citations for tobacco sales violations, Appellants had

¹ 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.*

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 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 four (4) decisions by the ALJ below, each decision is identical to the other in regard to the ALJ’s denial of the entrapment defense. While the ALJ did not address the question of the applicability of the entrapment defense in these administrative proceedings, he did directly address the merits of the defense in the context of this enforcement scheme. (See ALJ Opinions at p. 3).

The ALJ noted in each Opinion that because the business of selling tobacco products is an ongoing activity, it is the government’s responsibility to see that the rules and regulations applicable to those sales are followed and enforced. He concluded that: “the ongoing ‘testing’ of that compliance is not, by its very nature, entrapment.” (See ALJ Opinions, p. 3).

We agree with the ALJ’s conclusions. Further, while Royal Farms argues that the County’s actions amounted to “badgering” or “importuning,” there was no evidence demonstrating that the County undertook such overbearing action against any one store or clerk that would have pressured or induced a reasonable individual to violate the code. Nor was there evidence that the County visited any one store an excessive number of times in the two year period for which records were produced.

We find that 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 - which is essentially a strict liability statute - and was established for the protection of the health and welfare of County minors and 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." (See Board Opinion, 8/11/16).

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). We find that there is no evidence that the County crossed that line.²

² 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.

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

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. This Board addressed that issue in our Opinion dated August 11, 2016 in cases numbered CBA-16-043, CBA-16-044, CBA-16-045, CBA-16-046, and CBA-16-049, and the basis for our decision on this issue is also incorporated here.

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), *certiorari 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. 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 wrote up the citation. 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 cross examining the HEO was insufficient and that it is entitled to also cross examine the TCAs. In response, the ALJ noted in each of his Opinions that the testimony of the HEO is more than sufficient to establish the county's allegation of the violation. The HEO testified that he placed himself in a position where he could clearly observe the transaction and violation. It is based upon those observations, not the “report” of the TCA, upon which the citation is based and issued.” (See ALJ Opinions, p. 3).³

³ We note that there generally is no Sixth Amendment right to confrontation in a civil, administrative proceeding. See *In re Adriana T.*, 208 Md. App. 545, 568 (2012); *Miller v. Dep't of Agric.* 168 Conn. 253, 257, 2016 Conn. App. LEXIS 349, *3 (Conn. App. Ct. 2016) (court rejected claim that the confrontation clause applied to an administrative proceeding because it was not a criminal prosecution); *Majdee Majed Nassar v. Tex. Alcoholic Bev. Comm'n.*, 2014 Tex. App. LEXIS 12524 (Ct. App. Tex. Nov. 20, 2014) (no right to confront witnesses in a license revocation administrative proceeding).

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. Royal Farms did not present any evidence that the scanners used in those stores was defective, thus allowing the transaction to proceed to completion. 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.

Moreover, this Board does not find that 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 safeguarding 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 and we find that the safety of the minor is paramount to Baltimore County's testing program.

III. Reasonableness as to Amount of Time between Inspections.

Finally, Royal Farms raised the issue before the ALJ that it was unfair for Baltimore County to return to the 4308 Washington Blvd. store within 5 days of issuing a citation. Because of this,

Royal Farms was found to be in violation and was subject to a fine of \$1,000.00 for a second offense.

The ALJ concluded that he was not in a position to decide what period of time was reasonable for testing. Rather, the issue before the ALJ was whether a certain violation occurred on a certain date. (T. 6/28/16, pp. 59-61). We agree. BCC §13-12-101 *et seq.* does not prohibit the HEOs from re-testing a business within a certain period of time. Further, it is not the jurisdiction of this Board to read into that statute a time period which we would find reasonable. The County Council has the legislative authority to restrict the time-period as it determines is necessary or not. The goal of the statute which we note is entitled “Distribution of Tobacco Products to Minors” is to prevent the sale or distribution of tobacco to minors on strict-liability basis. The HEOs are charged with inspecting businesses who hold licenses to sell tobacco products to make sure that those businesses are complying with the law. Toward that end, we find that the County’s testing of this location within five (5) days of the prior offense was not unreasonable.

Conclusion

For all of the above reasons, the decisions of the ALJ in Case Nos: CBA-16-053, CBA-17-001, CBA-17-002, and CBA-17-005 shall be affirmed.

ORDER

THEREFORE, IT IS THIS 11th day of October, 2016, by the Board of Appeals of Baltimore County,

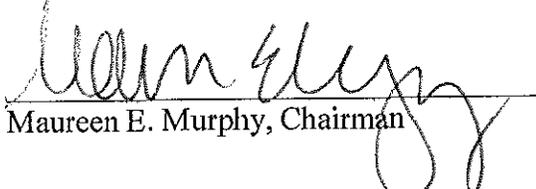
ORDERED, that the decision of the Administrative Law Judge dated May 24, 2016 with regard to the Royal Farms store located at 8803 Philadelphia Road, Case No: CBA-16-053, be and the same is hereby **AFFIRMED**; and it is further

ORDERED, that both decisions of the Administrative Law Judge dated July 8, 2016 with regard to the Royal Farms store located at 4308 Washington Blvd., Case Nos: CBA-17-001 and CBA-17-002, be and the same are hereby **AFFIRMED**; and it is further

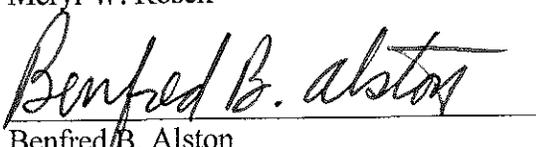
ORDERED, that the decision of the Administrative Law Judge dated July 29, 2016 with regard to the Royal Farms store located at 1010 Eastern Avenue, Case No: CBA-17-005, be and the same is hereby **AFFIRMED**.

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


Benfred B. Alston