

IN THE MATTER OF	*	BEFORE THE
Two Farms, Inc. t/a Royal Farms		
15 Hanover Road	*	BOARD OF APPEALS
Baltimore, MD 21236		
		OF BALTIMORE COUNTY
Two Farms, Inc. t/a Royal Farms	*	
406 Bowleys Quarters Road	*	
Baltimore, MD 21220		
Two Farms, Inc. t/a Royal Farms	*	
2410 E. Joppa Road	*	
Baltimore, MD 21234	*	
	*	
Re: Tobacco Enforcement Citations for	*	
For Distribution of Tobacco Products	*	
and/or Paraphernalia to a Minor	*	Case Nos. CBA-17-025
	*	CBA-17-026
	*	CBA-17-027

* * * * *

OPINION

These cases come before the Board as Record Appeals from three (3) Code Enforcement Hearings on November 30, 2016 and the Administrative Law Judge’s (“ALJ”) Findings of Fact and Conclusions of Law dated January 13, 2017, 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 March 7, 2017. Judah Fuld, Esquire of Bouland and Brush, LLC appeared on behalf of Royal 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 17-025 – 15 Hanover Road, Baltimore, MD 21236.

The transcript indicates that on November 2, 2016 at approximately 5:30 pm, Health Enforcement Officer ("HEO") Marvin Collins and an unidentified Tobacco Compliance Assistant ("TCA") entered the Royal Farms store at 15 Hanover Road in Baltimore County to verify compliance regarding the sale of tobacco to minors. Prior to their entrance, the HEO verified that the TCA had a State-Issued ID, verified the date of birth shown thereon as 11/3/99, and checked to see if the picture on the ID was that of the TCA. (T. 11/30/16, at 61, 66, 78). The ID showed that the TCA was under the age of 18 years. (*Id.*) The HEO had the TCA empty his/her pockets, and place any belongings therefrom into the truck in which they travelled. (*Id.* at 61).

HEO Collins then provided the minor assistant with ten dollars to begin the transaction and followed the TCA into the store. (*Id.* at 61-62). According to the HEO, the TCA went to the counter, while the HEO stood approximately 7-10 feet to the left of the minor. The HEO testified he could "clearly observe," but could not hear the transaction from his position. (*Id.* at 62,77). He stated that he saw the store clerk request and look at the TCA's I.D., and then return the ID and sell the tobacco product to the minor. (*Id.* at 62, 80). Per the HEO, the clerk did not use any scanning equipment to verify the ID during the transaction. (*Id.* at 80). Royal Farms' counsel proffered the testimony of a Royal Farms' corporate employee, Dottie Mears, that employees of

this store suspected during this time period that the store scanner was not working properly and that the day after this incident, discovered that to be the case. (*Id.* at 84-85).

When the TCA exited the store, the HEO took the cigarettes from the TCA (County Ex. 1), placed them in a bag, and inscribed the bag with information regarding the sale and the store. (T. 11/30/16 at 63). The HEO then wrote the Citation Notice, returned to the store, and gave the Citation to store manager Trevor Vecchio, along with educational instruction geared toward properly assessing an individual's age. (*Id.* at 63-65; County Ex. 2).

The ALJ heard closing arguments from counsel regarding entrapment, and the non-appearance of the TCA at the hearing. Royal Farms' counsel also argued that the HEO was not familiar with the latest security features of the state-issued IDs to assist him in determining whether the TCA's ID was legitimate. In his Opinion, the ALJ found that there was no entrapment. He also concluded that the TCA's appearance and testimony at the hearing is unnecessary given the HEO's testimony and the County's concern for the safeguarding of the minor's identity. (ALJ Findings of Fact and Conclusions of Law, 1/13/17, at 3-4). The ALJ further concluded that given the testimony that the HEO observed the store clerk look at the ID showing that the TCA was a minor but nonetheless sold the minor cigarettes, the HEO's lack of familiarity with the most recent ID security features was not meaningful. (*Id.* at 4). The operational condition of the scanner also was not material since the clerk still had the correct date on the ID itself and looked directly at that ID. (*Id.* at 5). The ALJ imposed a civil penalty of \$500.00.

Case No.: CBA 17-026 – 406 Bowleys Quarters Road.

The transcript reflects that on November 3, 2016 at approximately 4:40 pm, HEO Nick Palmere and an unidentified TCA were working together to verify compliance by Royal Farms regarding the sale of tobacco to minors at 406 Bowleys Quarters Road in Baltimore County. (T. 11/30/16, at 7). The HEO testified that prior to entering this Royal Farms location, he checked the TCA's government-issued ID, examined the picture on the ID against the TCA's face and determined that the date of birth on the ID (10/29/99) reflected that the TCA was under the age of 18. (*Id.* at 7-8, 11). The County placed into evidence a copy of that ID. (*Id.* at 35, County Ex. 3). The HEO also made sure that the TCA did not have any tobacco, had the TCA empty his or her pockets, supplied the TCA with money and followed the minor TCA into the store as part of the attempt to purchase tobacco products. (*Id.* at 7, 18).

The TCA entered the store, and the HEO testified that he was in the vicinity to hear and see the transaction between the clerk and the TCA. (*Id.* at 8). According to HEO Palmere, the store clerk asked the TCA for ID, then sold a pack of cigarettes to the TCA. (*Id.* at 8, 32). The HEO was not sure if the clerk used a scanner to check the ID. (*Id.* at 32).

After the purchase was made, the TCA and HEO exited the store and returned to their vehicle. The HEO retrieved the tobacco product from the TCA and placed it in a package (County Ex. 1), wrote a Citation (County Ex. 2), and returned to the store to issue the Citation. (*Id.* at 8-10). Counsel for Royal Farms proffered the testimony of Royal Farms that at some undetermined time, they learned (without notice from the state) that company scanners are not able to read properly newer state-issued IDs because of changes to the IDs. (T. at 39-40, 44). Subsequently, Royal Farms agent Dottie Mears testified that the Respondent became aware of the scanner problem on that same date, November 3, 2016. (*Id.* at 54).

The ALJ heard Royal Farms' arguments regarding the entrapment defense and the absence of testimony by the TCA. Ultimately, and for the reasons noted above, the ALJ rejected those arguments and imposed a fine of \$500.00. (ALJ Opinion, 1/13/17, at 5).

Case No.: CBA 17-027 – 2410 E. Joppa Road

The transcript reflects that on October 19, 2016 at approximately 5:00 pm, HEO Nick Palmere and an unidentified TCA were working together to verify compliance by Royal Farms regarding the sale of tobacco to minors at 2410 E. Joppa Road in Baltimore County. (T. 11/30/16 at 90). The HEO testified that prior to entering this store, the HEO checked that the TCA had a valid State of Maryland issued ID which indicated that the TCA was under the age of 18 years, (born on 12/23/99), and checked the picture on the ID against the TCA's appearance. (*Id.* at 90. 103). The HEO also furnished the TCA with money and checked to ensure the TCA did not possess any tobacco. (*Id.* at 90).

The TCA then entered the store and the HEO followed, positioning himself a few feet behind the TCA. (*Id.* at 90-91). The HEO stated that he saw the TCA approached the register and heard the TCA ask for a tobacco product. (*Id.* at 91,99). According to HEO Palmere, the store clerk did not ask for ID. (*Id.*). The clerk sold a pack of cigarettes to the TCA. (*Id.* at 91, 100). After the purchase was made, the TCA exited the store with the HEO following. (*Id.* at 91). The HEO took the cigarettes from the TCA (County Ex. 1) and wrote the Citation (County Ex. 2). (*Id.* at 91-92.). The HEO testified further that this was a second offense for this store, and so the Citation was in the amount of \$1,000.00 (T. at 91-92). The HEO returned to the store, issued the Citation and explained the tobacco laws. (*Id.* at 94).

The ALJ heard the arguments regarding entrapment and the need for the TCA's testimony. The ALJ determined that a civil penalty was warranted and because it was a second offense, imposed a civil penalty in the amount of \$1,000.00. (ALJ Opinion, 1/13/17 at 5).

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 ALJ's written findings and final order. (*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.

Id. Title 12 of the BCC sets forth a statutory scheme governing the distribution of tobacco products to minors, and states as follows:

§ 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.

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

BCC § 13-12-101 *et. seq.*

Decision

I. The Entrapment Defense.

Prior to addressing the merits, 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. Royal Farms argues that Baltimore County entrapped store employees into selling tobacco to the TCAs in each of the above referenced cases. As we previously noted, 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 ALJ did not address the question of the applicability of the entrapment defense in these administrative proceedings and we refer to our prior discussion of this issue in the cases noted above. However, assuming arguendo that the defense is applicable in the type of administrative hearing at issue, the ALJ concluded that Royal Farms was not entrapped by these compliance procedures. We agree. There was no wrongful inducement at play here. 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 ALJ also noted in his Opinion that Royal Farms holds itself out to the public as a business selling tobacco products as an ongoing activity. (ALJ Findings at 3). The ALJ stated further that in this situation, 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.” (*Id.*).

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

Royal Farms next takes issue with the fact that the minor TCAs do not appear at the administrative hearings, arguing that the County’s case impermissibly relies on hearsay, and deprives Royal Farms of the ability of a due process right to cross-examine the TCAs and confront adverse testimony. According to the company, the TCAs’ absence also deprives Royal Farms to explore such issues as the TCAs’ compensation, actual age, status, and possible bias.

This Board addressed comparable issues 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 set forth therein for our decision on this issue is also incorporated here. As discussed in that decision, although the minor TCAs do not appear at the hearing, the evidence regarding the compliance operation is introduced by way of the HEOs who *are* present at the hearing and available for cross examination, not upon any out of court statements by the TCAs. The respective HEOs involved in each of the transactions at issue testified as to the procedures they undertook before a TCA was sent into one of the Royal Farms’ stores. These steps include them verifying that each of the TCA’s Maryland ID was valid, that the TCA was under the age of 18, and that the TCA’s ID reflected that he/she was under the age of 18.¹ The HEOs also testified that they checked to ensure that the TCAs’ pockets were empty and that the TCAs had no tobacco products on them

¹ The TCA ID used in at least the transactions in Case 17-026 (Bowleys Quarters) and 17-025 (Hanover Road) also contained an express statement on the ID notifying a viewer of the ID that the ID holder was under the age of 18 until a certain date. (T. at 34, 78-79; County Ex. 3).

when they entered the store. The HEOs further attested that they were within hearing and/or sight distance of the TCA and the clerk when the transactions at issue occurred, and related to the court what *they* observed regarding the transaction and the sale of the tobacco product to the minor TCA.

Royal Farms had the opportunity to, and did in fact cross-examine the HEOs regarding the procedures, transactions, what they saw, where they were in relation to the TCA and the clerk, and what they heard and/or observed. And unlike the situation in *Matter of 25-24 Café Concerto Ltd. v. New York State Liq. Auth.*, 65 A.D.3d 260, 881 N.Y.S.2d 427, N.Y. App. Div. Lexis 5255 (App. Div. 2009), cited by Royal Farms, the HEOs in each of these three cases personally observed the violation taking place. The Citations and violations are based upon these observations, not the HEOs' surmises.

Further, even if hearsay was involved, as the Board previously noted, "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) (emphasis in original). See *Motor Vehicle Admin. v. Karwacki*, 340 Md. 271, 285 (1995) (the adjudicator in an administrative hearing may consider hearsay evidence if reliable). These hearings do not involve loss of life, liberty or property, the procedures in place afford sufficient protection in this type of administrative proceeding, and the likely probative value of requiring additional testimony by the TCA is not only minimal but would entail additional burdens upon the County and the individuals. These factors all suggest that the HEOs' sworn testimony may provide an adequate basis for the ALJ's decision. See *Maryland Dep't of Human Resources*, at 596.

The ALJ also highlighted the need for the protection and safe-guarding of the minors' identities. The Board agrees that the safety of the minor and non-disclosure of his or her identity

is paramount to Baltimore County's testing program and to the County's continuing ability to recruit minors for this important task.

Royal Farms presented little or no evidence that truly 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 posited various hypothetical situations or actions by TCAs such as using a fake ID that the HEOs were not trained to discern, but failed to offer any testimony that such a situation took place, or would have affected the outcome if it did occur. In fact, in one situation, the clerk failed to even ask for ID, so the use of a fake ID would not have mattered in the slightest. While Royal Farms also implied that a TCA might have a financial motive to induce a tobacco sale, it failed again to support this notion with any testimony or evidence that the County utilizes such incentives or compensates a TCA based upon the number of violations the TCA may have effected. The Board thus agrees with the ALJ and finds no error in his decision that the TCAs' presence was not required at these hearings.

III. The Scanner's Inability to Properly Detect Whether the ID Presented Indicated an Age-Appropriate Customer

Throughout these hearings, Royal Farms proffered testimony that at certain points during the time periods in question, the scanners they used to assist the store in determining a customer's age were not working because of a change to the state-issued IDs. (T. at 40, 53-55). Regardless of the clerks' use of a scanner, or the scanner possibly malfunctioning because of the change to the IDs, the stores are still responsible for manually checking the ID of any individual under the age of 26. *See* BCC §13-12-103.1(a), (b). As the ALJ stated, and this Board agrees, Royal Farms' "computer system being inadequate to the task does not relieve the clerk from the

responsibility to follow the law, whether an ID is scanned by the computer or read by the clerk.”
(ALJ Findings at 5).

Conclusion

Baltimore County law requires that each store selling tobacco is required to “verify by means of photographic identification containing the bearer’s date of birth that no person purchasing a tobacco product . . . is a minor.” BCC §13-12-103.1 (a). The issue here is thus clearcut: whether the stores in question failed to properly verify by photographic ID the TCAs’ ages, and consequently sold tobacco products to minors possessing state-issued IDs indicating that the individual was under the age of 18. In each of the situations at issue, the TCA had such an ID; the store clerk failed to either ask for that ID, or failed to properly determine that the purchaser’s age as set forth on the ID was less than 18. This failure is more disturbing given that some of the IDs specifically state on the ID exactly when the individual is under the age of 18. The stores were not entrapped into selling the products to the minors. The wrongful sales were not excused by the scanners’ possible malfunctions. And the conclusions were based on the reliable, unrebutted testimony by the enforcement officers who checked the TCAs’ IDs, ensured that the TCAs did not have any tobacco products on their persons before they went into the stores, and were close enough to observe and/or hear the transactions in which Royal Farms sold the tobacco products to minors.

For all the above reasons, the ALJ’s decisions in Case Nos: CBA-17-025, CBA-17-026, and CBA-17-027 shall be affirmed.

ORDER

THEREFORE, IT IS THIS 21st day of March, 2017, by the Board of Appeals of Baltimore County,

ORDERED, that the decision set forth in the Administrative Law Judge's Findings of Fact and Conclusions of Law dated January 13, 2017 with regard to the Royal Farms store located at 15 Hanover Road, Case No. CBA-17-025, be and the same is hereby **AFFIRMED**; and it is further

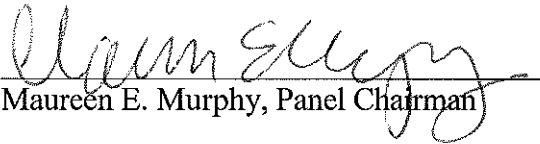
ORDERED, that the decision set forth in the Administrative Law Judge Findings of Fact and Conclusions of Law dated January 13, 2017 with regard to the Royal Farms store located at 406 Bowleys Quarters Road, Case No. CBA-17-026, be and the same is hereby **AFFIRMED**; and it is further


ORDERED, that the decision set forth in the Administrative Law Judge Findings of Fact and Conclusions of Law dated January 13, 2017 with regard to the Royal Farms store located at 2410 E. Joppa Road, Case No. CBA-17-027, be and the same is hereby **AFFIRMED**.

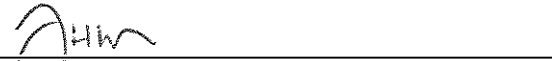
In the Matters of: Two Farms, Inc. T/A Royal Farms
Case numbers: CBA-17-025, CBA-17-026, and CBA-17-027

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, Panel Chairman


Meryl W. Rosen


James H. West



Board of Appeals Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

March 21, 2017

Renee Phillips-Farley, Assistant County Attorney
Baltimore County Office of Law
The Historic Courthouse, Second Floor
400 Washington Avenue
Towson, Maryland 21204

Judah Fuld, Esquire
Bouland & 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-17-025; CBA-17-026; and CBA-17-027

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".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: Dave Winterling, Asst. Director, LP & RM/Two Farms, Inc. t/a Royal Farms
Lawrence Stahl, Managing Administrative Law Judge
Marvin Collins, Health Enforcement Officer/Health and Human Services
Nicholas Palmere, 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