

**Department of Health and Human Services  
DEPARTMENTAL APPEALS BOARD  
Appellate Division**

1701 Express, Inc. d/b/a Citgo  
Docket No. A-19-117  
Decision No. 2979  
December 9, 2019

**FINAL DECISION ON REVIEW OF  
ADMINISTRATIVE LAW JUDGE DECISION**

1701 Express, Inc. d/b/a Citgo (Respondent) appeals the June 27, 2019 initial decision of an Administrative Law Judge (ALJ) imposing a No-Tobacco-Sale Order (NTSO) against Respondent for a period of 30 consecutive calendar days for six repeated violations of the Federal Food, Drug, and Cosmetic Act (Act), 21 U.S.C. § 301 et seq., and its implementing regulations, over a period of 36 months. *1701 Express, Inc. d/b/a Citgo*, DAB TB4019 (2019) (ALJ Decision). The ALJ issued his decision regarding an administrative complaint (Complaint) filed by the Center for Tobacco Products (CTP) of the Food and Drug Administration (FDA) in which CTP alleged that during an FDA inspection on September 28, 2017, Respondent's staff 1) sold a package of Marlboro Gold Pack cigarettes to a person younger than 18 years of age and 2) did not verify, by means of photographic identification (photo ID) containing a date of birth, that the purchaser was 18 years of age or older. The Complaint also alleged that Respondent previously sold tobacco products to a minor and failed to verify the age of a purchaser by photo ID on March 15, 2015, March 26, 2016, and January 14, 2017. The ALJ concluded that the evidence of record supported the allegations in the Complaint and provided a basis for the 30-day NTSO.

For the reasons explained below, we affirm the ALJ Decision.

**Applicable Law**

The Family Smoking Prevention and Tobacco Control Act (TCA) amended the Act and instructed the Secretary of Health & Human Services (Secretary) to promulgate regulations restricting the sale, distribution, access, and promotion of cigarettes and smokeless tobacco to protect children and adolescents. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31 (June 22, 2009). The Act, as amended, prohibits any act “with respect to . . . [a] tobacco product . . . held for sale . . . after shipment in interstate commerce” that results in the product being “misbranded” and

authorizes the FDA to impose certain remedies against any person who intentionally violates that prohibition. 21 U.S.C. §§ 331(k), 333. A tobacco product is misbranded if distributed or offered for sale in any state in violation of regulations issued under section 387f(d) of the Act. *Id.* § 387c(a)(7)(B). Congress authorized the Secretary to adopt regulations that impose “restrictions on the sale and distribution of a tobacco product, including restrictions on the access to, and the advertising and promotion of, the tobacco product” as appropriate to protect public health. *Id.* § 387f(d). Congress also directed the Secretary to establish CTP within the FDA to implement the tobacco products provisions of the Act. *Id.* § 387a(e).

The regulations adopted by the Secretary provide that “[n]o retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age.” 21 C.F.R. § 1140.14(a)(1). They also require retailers “to verify by means of photographic identification containing the bearer’s date of birth that no person purchasing the [tobacco] product is younger than 18 years of age,” except that “[n]o such verification is needed for any person over the age of 26[.]” *Id.* § 1140.14(a)(2).

CTP may seek to impose civil money penalties (CMPs) against “any person who violates a requirement of [the Act] which relates to tobacco products . . . .” 21 U.S.C. § 333(f)(9). CTP may also seek to impose an NTSO (alone or in addition to a CMP) when it finds “that a person has committed repeated violations of restrictions promulgated under section 387f(d) . . . at a particular retail outlet . . . .” *Id.* § 333(f)(8). “Repeated violations” is defined as “at least 5 violations of particular requirements over a 36-month period at a particular retail outlet that constitute a repeated violation. . . .” TCA § 103(q)(1)(a); *see also* FDA Civil Money Penalties and No-Tobacco-Sale Orders For Tobacco Retailers: Guidance for Industry (December 2016) at 3, 5-6 (December 2016 Guidance), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/civil-money-penalties-and-no-tobacco-sale-orders-tobacco-retailers-revised>.

A person is entitled to a hearing before a NTSO is entered. 21 U.S.C. § 333(f)(8). The Act does not specify the duration of an NTSO but does specify the factors that must be considered in determining the length of an NTSO: “the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.” *Id.* § 333(f)(5)(B). CTP policy guidelines establish 30 calendar days as the maximum NTSO duration CTP will seek for a retailer’s first NTSO. *See* Determination of the Period Covered by a No-Tobacco-Sale Order and Compliance With an Order (August 2015) at 4 (FDA Guidance), available at <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/determination-period-covered-no-tobacco-sale-order-and-compliance-order>.

A respondent dissatisfied with an ALJ decision may appeal that decision (to which the regulations refer as the “initial decision”) to the Departmental Appeals Board. 21 C.F.R. §§ 17.45, 17.47. The Board “may decline to review the case, affirm the initial decision or decision granting summary decision (with or without an opinion), or reverse the initial decision or decision granting summary decision, or increase, reduce, reverse, or remand any civil money penalty determined by” the ALJ. *Id.* § 17.47(j).

## Case Background<sup>1</sup>

### 1. The Complaint and Hearing

On April 10, 2018, CTP served a Complaint (dated April 9, 2018) on Respondent seeking to impose a 30-calendar-day NTSO for “six repeated violations” of the Act and its implementing regulations within a 36-month period. Complaint ¶ 1. The Complaint alleged that on September 28, 2017, an FDA-commissioned inspector inspected Respondent’s retail establishment and found the following violations of the Act and regulations: 1) selling tobacco products to a minor in violation of 21 C.F.R. § 1140.14(a)(1) and 2) failing to verify that the purchaser was 18 years of age or older by means of photo ID containing a date of birth in violation of 21 C.F.R. § 1140.14(a)(2)(i). *Id.* ¶ 6. The Complaint specifically alleged that during that inspection, “a person younger than 18 years of age was able to purchase a package of Marlboro Gold Pack cigarettes” “at approximately 4:07 PM” and that “the minor’s identification was not verified before the sale.” *Id.*

The Complaint also noted that the Civil Remedies Division had closed two prior CMP actions on similar violations – selling tobacco products to a minor and failing to verify the age of the purchaser by photo ID – on March 15, 2015 and March 26, 2016 (first action) and on January 14, 2017 (second action). ALJ Decision at 4; Complaint ¶¶ 8-10.<sup>2</sup> Respondent “expressly waived its right to contest” those violations in subsequent CTP actions. Complaint ¶¶ 9-10; ALJ Decision at 4; CTP Exs. 2, 4.

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<sup>1</sup> The factual findings stated here are taken from the ALJ Decision and the administrative record. We make no new findings of fact, and the facts stated are undisputed unless we indicate otherwise.

<sup>2</sup> CTP labeled each violation that occurred on March 15, 2015 as an “original violation” and each violation that occurred on March 26, 2016, January 14, 2017, and September 28, 2017 as a “repeated violation” for the purposes of an NTSO. *See* Complaint ¶ 1 (and the table that follows). CTP sent a warning letter on the March 15, 2015 violation; the Complaint set out six repeated violations as of the September 28, 2017 inspection (two on each violation date after March 15, 2015). *Id.*

On May 2, 2018, Respondent filed an Answer to the Complaint. CRD Docket (Dkt.) Entry 3. The parties filed pre-hearing briefs, lists of proposed witnesses and exhibits, and numbered exhibits. Among CTP's exhibits is the written direct testimony of Inspector Harris. CTP Ex. 5. Respondent offered the written direct testimony of its owner, Fadel Bazzi.<sup>3</sup>

In its pre-hearing brief, Respondent admitted that its clerk failed to verify the age of a purchaser of tobacco products “by means of identification containing the purchaser’s date of birth on September 28, 2017 at 4:07 p.m.” Resp. Pre-Hearing Br. at 3 (“Yes, it’s true that Respondent failed to verify the identification and age of one purchaser . . .”). Respondent, however, asserted that it had an “audio recording” (submitted as Respondent’s Exhibit 9)<sup>4</sup> of the September 28, 2017 transaction during which the purchaser allegedly stated that she<sup>5</sup> was “eighteen years of age.” *Id.* at 2. Respondent argued that a 30-day NTSO was not “appropriate or warranted” “in light of the seriousness of the violation and when considering [CTP]’s role in misrepresenting the individual’s age at the time of the sale.” *Id.* at 3-4. Respondent stated that, since “[t]obacco sales account for a substantial portion” of its income, an order prohibiting the sale of tobacco would cause it to “suffer substantially in regard to its ability to conduct business and pay its bills as they come due.” *Id.* at 4. Respondent also described the actions it has taken “[u]pon receiving notice of the alleged offenses” to prevent future violations, including terminating the employment of the on-duty clerk, installing a new

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<sup>3</sup> The record includes two declarations of Mr. Bazzi, both marked as Respondent’s Exhibit 1. Mr. Bazzi’s attorney signed the first declaration “[o]n behalf and with the authority of” Mr. Bazzi, on November 26, 2018. CRD Dkt. Entry 22. Mr. Bazzi signed the second declaration (submitted as an attachment to Respondent’s motion for leave to supplement its pre-hearing exchange (CRD Dkt. Entry 26) on December 11, 2018. Paragraphs 1 through 12 of both declarations include identical statements; Mr. Bazzi gave additional testimony in the second declaration, paragraphs 13 through 16. Neither declaration includes certification language that conforms to 21 C.F.R. § 17.37(b) (permitting direct testimony in the form of a “written declaration submitted under penalty of perjury”), which the ALJ cited in his May 10, 2018 pre-hearing order, page 5. CTP did not object to the admission of any of Respondent’s exhibits. *See* Hearing Transcript at 5-6. The ALJ did not reject or exclude either declaration.

<sup>4</sup> The ALJ described Respondent’s Exhibit 9 as an “excerpt of an audio tape that allegedly records the transaction at issue.” ALJ Decision at 4. Respondent’s Exhibit 9 is a video/audio recording which includes a four-frame image from what appears to be security camera footage of a retail establishment. One frame shows what appears to be the cashier counter area; a person who fits the description of the clerk given in Inspector Harris’s narrative report, CTP Ex. 7, at 1, is standing behind the counter, but the frame does not capture the counter area at a wide enough an angle to show who if anyone is standing on the other side of the counter. The image shows a date-and-time stamp of “9/28/2017” and “16:11:11,” about four minutes after the time Inspector Harris stated the September 28, 2017 inspection took place. CTP Ex. 5, at 2.

<sup>5</sup> CTP’s evidence does not disclose the minor’s gender. We refer to the minor using “she” or “her” only because Respondent refers to the minor purchaser as female.

point-of-sale system that requires the clerk to manually enter a tobacco purchaser's date of birth, adopting a "zero tolerance policy in regard to identifying tobacco purchasers and selling to minors," retraining employees on the procedures for selling tobacco products, and placing "additional placards" at the retail establishment. *Id.* at 2-3.

On February 14, 2019, the ALJ held a hearing by telephone during which he admitted the parties' exhibits in the absence of any objections. ALJ Decision at 1; Hearing Transcript at 5-6. Respondent cross-examined Inspector Harris (Hearing Transcript at 6-17), and CTP questioned Inspector Harris on redirect examination (*id.* at 17-19).

On May 9, 2019, both parties filed post-hearing briefs. CRD Dkt. Entries 40, 41. In its post-hearing brief (Resp. Post-Hearing Br.), Respondent challenged the reliability of Inspector Harris's testimony, asserting that Inspector Harris did not have a full personal recollection of the inspection, and noting that Inspector Harris did not document that the clerk asked whether the purchaser was eighteen or any response that the purchaser may have given. Resp. Post-Hearing Br. at 1-3; *see also id.* at 4 ("[Inspector] Harris has no personal recollection as to any statements or responses made by the minor and appears to have been willfully ignorant by refusing to question the minor as to what was said at the time of the sale."). Respondent stated that when its clerk asked the purchaser whether she was eighteen, the purchaser responded that she was eighteen, "as evidenced by the clerk's statement, 'you good.'" *Id.* at 3; Resp. Ex. 9.

## 2. The ALJ Decision

On June 27, 2019, the ALJ issued his decision imposing a 30-day NTSO based on repeated violations of federal tobacco regulations over a 36-month period. Relying on the "credible" testimony of Inspector Harris and corroborating photographic evidence offered by CTP, the ALJ found that Respondent unlawfully sold tobacco products to a minor and failed to verify the purchaser's age by means of photographic identification on September 28, 2017. ALJ Decision at 4, 5. The ALJ further found that "[t]he evidence establishes that Respondent committed at least six repeated violations of tobacco sales regulations during the period beginning March 15, 2015 (original violations) and continuing through September 28, 2017." *Id.* at 5. The prior violations, the ALJ noted, were "administratively final." *Id.* at 4, 5.

The ALJ rejected Respondent's argument that the undercover minor misrepresented her age to "dup[e]" Respondent's clerk into making a prohibited sale, stating that "[t]here is nothing on the tape proving that the minor purchaser affirmatively misrepresented her age to be 18." *Id.* at 4. The ALJ also stated that, even if the minor had misrepresented her age to be 18, "that did not relieve the employee of his duty to request the purchaser's identification and to verify the purchaser's age from the identification." *Id.* at 4-5.

Having found that Respondent committed “at least six repeated” violations during the period from March 15, 2015 through September 28, 2017, the ALJ determined that the imposition of an NTSO for 30 consecutive calendar days is “reasonable.” *Id.* at 5. The ALJ also rejected Respondent’s arguments about the minor’s misrepresentation of her age and Inspector Harris’s less than reliable testimony, determining that they “serve as no basis to mitigate the remedy.” *Id.*

### **Standard of Review**

The standard of review for the Board on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record. 21 C.F.R. § 17.47(k). The standard of review on a disputed issue of law is whether the initial decision is erroneous. *Id.*

### **Analysis**

In its notice of appeal (NA) and brief (Resp. Br.), Respondent does not challenge the ALJ’s findings that Respondent violated 21 C.F.R. § 1140.14(a)(1) and (a)(2)(i) on September 28, 2017, which, together with the prior, admitted violations the ALJ stated were administratively final, result in six repeated violations of the tobacco regulations within a 36-month period. Instead, Respondent argues that the ALJ failed to consider “mitigating factors,” such as the steps Respondent has taken to prevent future violations, and “committed reversible error” in not “accepting” Mr. Bazzi’s “un-rebutted testimony” that the undercover minor misrepresented her age. NA at 1-2. Respondent asks us to “find[ ] that the undercover minor made a material misrepresentation regarding her age” and reduce the duration of the NTSO “based on Respondent’s mitigation and taking into account Respondent’s culpability and other factors as just[ice] requires.” Resp. Br. at 8. We reject Petitioner’s arguments and affirm the ALJ’s decision.

*I. The ALJ’s decision to impose a 30-day NTSO is supported by substantial evidence and free of legal error; we reject Respondent’s allegation of ALJ error or abuse of discretion in his assessment of the evidence.*

In setting the length of an NTSO, the Secretary considers “the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.” 21 U.S.C. § 333(f)(5)(B). When determining whether to impose, “compromise, modify, or terminate” an NTSO, the Secretary must “consider whether the retailer has taken effective steps to prevent violations of the minimum age requirements for the sale of

tobacco products.” TCA § 103(q)(1)(G), (F)(i)-(iv); *Kuma H. Mamie d/b/a 7-Eleven Store 22921A*, DAB No. 2877, at 7 (2018). The ALJ and Board “shall refer to the factors identified in the statute for purposes of determining the penalty amount.” 21 C.F.R. § 17.34(b). The ALJ and Board also “shall evaluate any circumstances that mitigate or aggravate the violation and shall articulate in their opinions the reasons that support the penalties and assessments imposed.” *Id.* § 17.34(a); *Vasudevay LLC, d/b/a Town News and Tobacco*, DAB No. 2746, at 4 (2016).

The FDA has developed NTSO guidelines, which the ALJ stated were “not written as regulations and are not, therefore, binding as a matter of law,” but nevertheless are persuasive and warrant deference. ALJ Decision at 3 (quoting FDA Guidance at 4 which states in part that the first NTSO will be for a maximum of 30 days). The FDA Guidance also states:

In determining whether to impose the NTSO or reduce the period of time FDA seeks to impose in the NTSO, FDA will generally consider whether a retailer has taken *effective* steps to *prevent* the sale of tobacco products in violation of the minimum age requirements, including:

- adopting and enforcing a written policy against sales to minors;
- informing its employees of all applicable laws;
- establishing disciplinary sanctions for employee noncompliance; and
- requiring its employees to verify age by way of photographic identification or electronic scanning device.

FDA Guidance at 3-4 (citing TCA § 103(q)(1)(G)<sup>6</sup> and Act § 303(f)(5) (emphasis added)).

Respondent argues that the ALJ erred or abused his discretion in imposing the NTSO because he did not consider the “un-rebutted mitigating factors” it took to prevent the unlawful sale of tobacco products to minors – steps it says are “exactly the type of efforts” the FDA’s guidelines expressly state will be considered to determine whether to “reduc[e]” the duration of an NTSO. Resp. Br. at 2, 6. Those steps, Respondent says, included installing a new point-of-sale system that requires the clerk to enter a purchaser’s date of birth or scan the ID before the transaction, retraining its employees, providing the employees with a written policy, terminating the employee who was on duty during the September 28, 2017 inspection, and placing additional placards around

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<sup>6</sup> The list of “effective steps” found in the FDA Guidance mirrors the list found in TCA § 103(q)(1)(F)(i)-(iv). The TCA requires the “Secretary, in determining whether to impose a no-tobacco-sale order . . . to consider whether the retailer has taken effective steps to prevent violations of the minimum age requirements for the sale of tobacco products, including the steps listed” in section 103(q)(1)(F). TCA § 103(q)(1)(G).

the retail establishment to deter illegal sales. Bazzi Decs., page 2. As corroborating evidence, Respondent submitted to the ALJ what appears to be an invoice, dated April 21, 2018, for the new point-of-sale system (Resp. Ex. 2), and undated photographs showing signage displayed around the retail facility regarding age restrictions for the sale of tobacco products (Resp. Exs. 3-8). Two photographs show a sign next to a register that states that an employee will “get fired” if the employee does not “check [the] ID of anyone that looks 35 or younger” and “input the birthdate of any tobacco purchaser into the system.” Resp. Exs. 4, 7. The sign also states, “We have a zero tolerance policy!” Resp. Exs. 4, 7.

Mr. Bazzi’s testimony does not establish that Respondent completed the reported steps to prevent unlawful sales of tobacco until long after the September 28, 2017 inspection. *See* Bazzi Decs., ¶¶ 6-12. The date on the invoice, April 21, 2018, Resp. Ex. 2, would indicate that the system was put in place after the inspection, in other words **only after** the Complaint in this matter was served. Respondent asserts that its efforts have “had a positive effect on preventing violating sales because no violations have been alleged since the most current violations.” Resp. Br. at 7. Respondent does not show that any inspection occurred during the period since the current violations were cited – either before or after the preventive steps were finally introduced.

Respondent cites no authority suggesting that the mere absence of additional violations (or at any rate, observed violations) reduces Respondent’s culpability for the September 28, 2017 violations, which the ALJ correctly determined had occurred. *See Three Star Market, Inc. d/b/a Three Star Market*, DAB No. 2906, at 11 (2018) (rejecting the argument that the retailer should be given “substantial credit” for the lack of subsequent violations). If any steps were taken before September 28, 2017, they evidently were *not* effective to prevent unlawful sales since Respondent admittedly made unlawful sales before and on September 28, 2017. *Zoom Mini Mart, Inc.*, DAB No. 2894, at 17 (2018) (upholding the ALJ’s finding that steps a retailer took were not “mitigating” because they were not “effective” at preventing the sale of tobacco products to minors).

In reviewing the NTSO, the ALJ expressly considered the nature, circumstances, and gravity of violations, and in particular, the history of violations, which are factors set out in the statute. *See* ALJ Decision at 2-3 (quoting 21 U.S.C. § 333(f)(5)(B)). The ALJ noted that Respondent is a repeat violator, which committed “at least six repeated violations” between March 15, 2015 and September 28, 2017. *Id.* at 4, 5. The ALJ observed that “multiple civil money penalties have not deterred Respondent from” violating the law, and that “something other than a civil money penalty” – meaning an NTSO – “is needed here.” *Id.* at 5. The ALJ imposed the NTSO “because, if for no other reason, the public needs to be insulated from Respondent’s business practices for a



reasonable period of time.” *Id.* The ALJ considered the NTSO’s effect on Respondent’s ability to continue to do business,<sup>7</sup> but found that, generally, “the need to protect the public outweighs the adverse effects that an NTSO may have on an individual retailer’s business, especially in light of the fact that imposition of this remedy is reserved only for those retailers who demonstrate indifference to the requirements of law.” *Id.* at 4. Respondent does not challenge any of these ALJ findings, or assert that the ALJ gave improper weight to any factor in determining an appropriate remedy.

The ALJ also rejected Respondent’s arguments that Inspector Harris’s less-than-reliable testimony and the minor purchaser’s alleged misrepresentation of her age “mitigate the remedy.” *Id.* at 5. Respondent now argues that the ALJ should have found that the minor purchaser misrepresented her age and reduced the duration of the NTSO based on such a finding, but did not consider, among other things, Inspector Harris’s less-than-reliable testimony. Resp. Br. at 8. Respondent’s argument is, in essence, an argument disputing the ALJ’s assessment of evidence. It is well-settled that the Board defers to the ALJ’s assessment of the evidence, including credibility to be accorded to witness testimony, absent a compelling reason for not doing so. *Atty’s Parti Expo, Inc., d/b/a Parti Expo*, DAB No. 2925, at 7 (2019). Respondent offers no compelling reason why we should not defer to the ALJ’s assessment of the evidence, with which we fully agree. In any event, we would also agree with the ALJ that Respondent did not prove that the minor purchaser misrepresented her age. ALJ Decision at 5. (We address this separately below.)

To the extent that the ALJ did not expressly discuss all of Respondent’s claims of mitigation, we find no harm since we conclude that such steps as may have eventually been taken do not compel a reduction in the NTSO period. *See* 21 C.F.R. § 17.48. The number of violations here support the 30-day NTSO. *See* FDA Guidance at 3, 4 (stating that the FDA will seek an NTSO when there are at least five violations representing the second or subsequent violation of a particular requirement within 36 months, with the first NTSO for a maximum of 30 calendar days). While the FDA Guidance does not, as the ALJ recognized, have the force of law, it presents a reasonably calibrated regime of escalating responses to repeated violations. Respondent bears the burden to prove any defense or mitigation by a preponderance of the evidence. 21 C.F.R. § 17.33(c). Given the full circumstances here, including the belated measures that Respondent reports taking, we agree with the ALJ’s assessment that the period sought by the CTP is appropriate.

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<sup>7</sup> Respondent submitted its financial statement for a three-month period (August-October 2018). Resp. Ex. 10. The statement appears to indicate that Respondent operated at a net loss in August. *Id.* at 2. Mr. Bazzi mentions the statement, but does not explain how it supports mitigation in consideration of Respondent’s ability to do business. Second Bazzi Dec. ¶ 16. Evidently Respondent operated with net profits in September and October, as it did during the three-month period overall. Also, based on the figures shown, tobacco sales apparently did not account for a “substantial” portion of Respondent’s business (or revenue) for the period in question.

The ALJ's conclusion that a 30-day NTSO is "reasonable" (ALJ Decision at 5) is consistent with the applicable authorities and is supported by the evidence.

*II. Respondent did not prove that the minor misrepresented her age; even assuming it had, it does not address how misrepresentation would reduce its culpability for the unlawful sale.*

Respondent asserts that the ALJ abused his discretion "in determining that the minor did not misrepresent her age to Respondent's employee." Resp. Br. at 7 (emphasis removed). Also, it asserts, failing to find affirmative misrepresentation of age is error because Respondent *has* proven misrepresentation. *Id.* at 2. Respondent asks the Board to now find misrepresentation of age and consider it "when fashioning a penalty." *Id.* at 7.

Respondent misreads the ALJ's analysis to the extent it maintains the ALJ found the minor did not misrepresent her age. The ALJ did not expressly make a factual finding about misrepresentation of age. Rather, the ALJ stated only that Respondent "did not prove" that the minor misrepresented her age. ALJ Decision at 5. The ALJ stated the following about the recording (purportedly of the relevant transaction) on which Respondent relies:

I find Respondent's evidence to be unpersuasive. The tape excerpt records the employee asking someone whether he/she is 18, followed by a brief period of silence, and the employee's verbal statement: "you good." R. Ex. 9 at 9:14:38-9:15:01. There is nothing on the tape proving that the minor purchaser affirmatively represented her age to be 18.

*Id.* at 4. The ALJ's statement is accurate. Nothing in the recording indicates that the purchaser misrepresented her age.

Respondent argues that the ALJ did not consider Mr. Bazzi's declarations, which, according to Respondent, are "unrebutted" evidence that the minor misrepresented her age. Resp. Br. at 7-8. In both declarations, ¶¶ 4 and 5, Mr. Bazzi stated that he "reviewed the audio recordings from the business location and was able to confirm that the individual misrepresented her age to [his] clerk" and, "[a]s a direct result of this misrepresentation, the clerk sold cigarettes" to that individual. In his second declaration, ¶ 15, Mr. Bazzi stated that the audio recording (meaning its exhibit 9) is a recording of the transaction at issue "identifying the voice of the individual who misrepresented her age" to the clerk.

Respondent attempts to prove that the minor purchaser misrepresented her age to the clerk who purportedly relied on that misrepresentation in making the sale<sup>8</sup> by having its owner simply attest to his “confirmation” of misrepresentation based on his review of the recording. The attempt fails because the video/recording on which Mr. Bazzi relies as the basis for his “confirmation” of misrepresentation does not include *any* such evidence. Indeed, no voice that could be the minor purchaser’s voice is ever heard on the recording at all. The video does not show anything (such as a gesture or facial expression) that a clerk could have reasonably interpreted to mean that the purchaser was indicating that he or she was 18 or older. We thus question on what basis Mr. Bazzi could have “confirmed” misrepresentation and the clerk’s reliance on it. Mr. Bazzi does not state that he witnessed the exchange between the clerk and the purchaser or otherwise has a basis of direct, personal knowledge about the transaction; he states only that he “confirmed” misrepresentation based on his review of the recording *after he received a notice from CTP about the violation*. Bazzi Decs., ¶ 4. In contrast, Inspector Harris, whose testimony the ALJ found credible, stated that he entered Respondent’s retail facility “moments after” the minor; had a “clear, unobstructed view of the sales counter and [the minor]”; and observed the minor purchase cigarettes from an employee without presenting any identification to the employee. CTP Ex. 5 ¶¶ 7, 8.

We also note, as the ALJ did, that there is a brief period of silence between the clerk’s questioning about the purchaser’s age and the words “you good,” Resp. Ex. 9, which we can reasonably presume (and Respondent does not dispute) were spoken by the clerk. In light of this, and Inspector Harris’s testimony that the minor purchased the cigarettes without presenting identification, it was reasonable for the ALJ to infer that the clerk did not ask the purchaser for identification to verify that she could legally buy tobacco before simply saying “you good” and making the sale.

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<sup>8</sup> “[G]ood faith reliance on the presentation of a false government issued photographic identification that contains a date of birth does not constitute a violation if the retailer has taken effective steps to prevent such violations, including” “adopting and enforcing a written policy against sales to minors . . . .” December 2016 Guidance at 7 (quoting TCA § 103(q)(1)(F)). Thus, FDA’s guidelines contemplate that misrepresentation, and reasonable reliance on it, could be a defense under certain circumstances. Inspector Harris did testify that undercover minors are instructed to tell the truth when asked about their age or whether they have identification. CTP Ex. 5, at 2; Hearing Transcript at 12. Here, however, there is no evidence that the minor actually lied about her age or did anything else that could have misled the clerk. Since we have no evidence that the clerk even asked the minor for identification, Respondent has no basis for asserting *reliance* on purported misrepresentation in response to the question. Bazzi Decs., ¶ 5; Resp. Br. at 4 (asserting reliance in stating that the sale occurred “as a direct result of the misrepresentation”). Further, good-faith reliance (even if established, which it is not here) is only a defense when the retailer has taken *effective* steps to *prevent* violations, which Respondent clearly did not do before September 28, 2017.

Respondent seeks to undercut the written direct testimony of Inspector Harris because he could not later recall (on cross-examination at hearing) certain details about the transaction apart from his report. Resp. Br. at 7, 8. This attempt, too, fails. Inspector Harris's written direct testimony, given under penalty of perjury, is based on his contemporaneous documentation of the September 28, 2017 inspection about which he has direct personal knowledge. See CTP Ex. 5 (Inspector Harris's declaration); CTP Exs. 7 and 8 (reports to which Inspector Harris referred in his declaration, ¶ 10). The ALJ found Inspector Harris's testimony, as corroborated by other evidence offered by CTP, credible. Respondent gives us no compelling reason to disagree with the ALJ's assessment of that testimony.

Respondent also seeks to infer from CTP's choice not to cross-examine Mr. Bazzi that CTP waived any opportunity to question the basis for Mr. Bazzi's assertion that he effectively confirmed the minor's "misrepresentation" of age. Resp. Br. at 7-8. Thus, Respondent treats Mr. Bazzi's declarations, coupled with the recording, as "unrebutted" evidence of affirmative misrepresentation. *Id.* at 2, 7. We reject this argument. As we stated earlier, the evidence on which Respondent relies simply does not include what Respondent asserts it does. Respondent, under 21 C.F.R. § 17.33(c), bears the burden to prove any affirmative defense or mitigating factor by a preponderance of the evidence. The key evidence of its affirmative defense of misrepresentation of age by CTP's minor purchaser is the Respondent's own recording itself. The recording contains no misrepresentation of age. That fact is not changed by the owner's testimony that he "confirmed" misrepresentation based on his review of the recording, since the ALJ and the Board have heard the recording itself.

In any event, even were we to find that Respondent proved that the undercover minor misrepresented her age to its clerk, which Respondent has not proven, Respondent has not shown why that would mitigate the violations or warrant a reduction of the duration of the NTSO. The onus is on Respondent to comply with the provisions of the Act and regulations. To that end, Respondent is responsible for ensuring that its employees follow steps as necessary for compliance with those authorities. As the ALJ noted, and we agree, even if the minor had misrepresented her age to the clerk, it would "not relieve the employee of his duty to request the purchaser's identification and to verify the purchaser's age from the identification." ALJ Decision at 4-5. Respondent failed to do so on September 28, 2017.

**Conclusion**

We affirm the ALJ Decision.

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Susan S. Yim  
Presiding Board Member