

**BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>TENNESSEE ALCOHOLIC BEVERAGE COMMISSION,</b>	)	
	)	
<b>Petitioner,</b>	)	<b>ADP Case No. 33.04-235163J</b>
	)	
<b>v.</b>	)	
	)	
<b>LOOKOUT WINERY, INC.,</b>	)	
	)	
<b>Respondent.</b>	)	

**LOOKOUT WINERY’S (PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF  
LAW**

Administrative Judge Elizabeth Cambron, assigned by the Tennessee Secretary of State, Administrative Procedures Division (the “APD”) to sit on behalf of the Tennessee Alcoholic Beverage Commission (the “TABC”) this contested case in Nashville, Tennessee, on April 29, 2024, via Webex. The hearing addressed the allegations contained in the NOTICE OF HEARING filed on September 15, 2023, pertaining to an alleged sale of wine to a minor by Lookout Winery, Inc. (“Lookout”) on August 10, 2023, through Mrs. Nouhaa Bordogna (“Bordogna”). Commission Counsel, Samantha Dotson, represented the TABC, and Christopher W. Cardwell and Ginna W. Burrell represented Lookout. At the close of the hearing, several post-hearing deadlines were set, including the requirement that each party submit an Initial Order of Findings of Fact and Conclusions of Law on June 10, 2024. Now, based on the review of the testimony, exhibits, and entire record, I determine, for the reasons stated below, that the Petitioner has not met its burden of proof to show that Respondent sold wine to a person under twenty-one (21) years of age. Accordingly, Petitioner’s assessment of a five thousand dollar (\$5,000) civil penalty is **DENIED**.

## FINDINGS OF FACT

- Lookout is a TABC licensed winery located in Guild, Tennessee. (TR 14:2-10).
- Lookout is a winery and pizza restaurant that sells wine it produces onsite by the bottle. (TR 128:10-18). They do not serve it by the glass, nor do they serve beer or other alcoholic beverages. (TR 129:2-9).
  - The TABC is responsible for the regulatory licensing and enforcement of compliance for wineries, as well as other establishments in Tennessee that manufacture, distribute, or sell spirits and/or wine pursuant to Tenn. Code Ann. § 57-4-201 (a)(1).
  - On August 10, 2023, at approximately 4:30 PM, Special Agent Jacqueline Mercier (“Mercier”) and an undercover confidential informant (the “CI”) who was under the age of twenty-one (21) entered Lookout Winery to conduct a minor compliance check (the “Compliance Check”) on behalf of the TABC. (TR 26:5-14).
    - At the time of the Compliance Check, Bordogna worked for Lookout at the location where it offers adults over the age of twenty-one (21) free tastings of its wine to assist them choose which wine(s) they wish to purchase. (TR 38:2-7; 133:2-7).
    - Upon entering Lookout, Bordogna greeted Mercier and the CI, and asked how she could help them. (TR 38:2-7; 133:2-7). Mercier responded that she was looking to buy a bottle of wine because she was going to her parents’ home or her father’s home for dinner. (TR 38:5-7; 133:12).
    - After Mercier stated her reason for purchasing wine, Bordogna asked if she (not she and the CI, just she) was looking for a red or white. (TR 133:14-15). Mercier stated that she was not sure, so Bordogna asked what her father intended to serve for dinner to help Mercier select an appropriate wine. (TR 38:8-13; 78:4-5; 133:14-17).

- After Mercier told Bordogna that her father was cooking steaks, Bordogna offered Mercier a sample of two (2) red wines. (TR 40:18-25; 41:1-7). One was the Italian Trio, the other was a cabernet. (TR 133:21-25; 134:1).

- After tasting a thimble size sample of both wines, Mercier verbally informed Bordogna that she wished to purchase the Italian Trio. (TR 41:2-5; 78:6-22; 134:2-7). At this time, Bordogna moved to the register and, after “ringing up” the wine Mercier chose, informed Mercier that the price of the wine was \$39.50. (TR 134:14-18). Mercier verbally approved moving forward with her purchase of the wine by stating “okay”. (TR 134:14-18).

- Mercier testified that, after sampling the wines and verbally choosing to purchase the Italian Trio, she asked if her choice was okay with the CI. (TR 79:3-6, 19-25, 80:1-2). However, neither the CI nor Bordogna recalled Mercier asking this question. (TR 110:21-24; 134:20-25).

- All witnesses agree that Bordogna did not offer or serve any wine to the CI. (TR 78:1-2; 139:23-25; 140:1-8). Further, Mercier and Bordogna agree that the CI did not ask or otherwise seek to purchase the wine from Bordogna. (TR 58:23-25; 111:1-16). Consistent with their unified testimonies, the CI has no recollection of any conversations with Bordogna. (TR 110:21-24; 134:4-13).

- After Mercier expressed her desire to purchase the bottle of Italian Trio, Bordogna pulled that bottle of wine from the shelf and then turned her back to Mercier as she walked to the other side of the tasting area to get a bag for the wine. (TR 135:15-17). After placing the bottle of wine in a bag, Bordogna returned to register (where she previously “rang up” Mercier’s purchase) to retrieve the receipt and placed the bag containing the wine and the receipt on the bar in front of Mercier (who had stepped one to two feet away from where she sampled the wines

and chose which wine to purchase while using her mobile telephone). (TR 13:20-25; 112:11-25; 113:1-13; 136:22-23; 138:1-2, 14-18).

- There were forty dollars (\$40.00) on the counter near where Mercier tasted the wines and where Bordogna placed the bottle of wine in front of her. (TR 138:14-18; 139:2-11). Bordogna testified that she did not see who placed the money there, but assumed it was Mercier as she is the one who sampled the wines, determined which wine she wished to purchase, and then verbally approved the wines' purchase. (TR 138:19-21). No witness challenged the reasonableness of this assumption.

- Bordogna and the CI testified that the CI placed the money on the counter. (TR 111:17-24; 139:2-11), but Mercier testified that she could not recall where the money was placed. (TR 83:4-24; 84:1-7). However, Mercier and the CI admitted having no knowledge of whether Bordogna saw (or should have seen) the CI doing so (TR 84:1-7; 111:17-24; 112:1-10). Indeed, both Bordogna and the CI testified that Bordogna's back was turned to them when the CI placed the money on the counter. (TR 111:17-24; 112:1-10; 139:6-11). Mercier testified that she could not recall if Bordogna's back was turned at the time (TR 83:9-13).

- Despite having no knowledge of whether Bordogna saw the CI place money on the counter, Mercier testified that she backed a few feet away from the counter (while utilizing her mobile telephone) so that Bordogna would see that the money came out of the CI's wallet and hand the bottle to him. (TR 81:3-6). However, this is not what happened. (TR 112:6-15; 139:6-10). When Bordogna placed the wine on the counter, she did not hand the bottle to the CI. (TR 113:10-14). Rather, she placed the bottle of wine directly in front of Mercier (TR 112:20-25; 113:1-14; 138:7-18).

- After placing the bottle of wine in front of Mercier, Bordogna took the money off the counter, went to the register, and returned with fifty cents (\$.50) in change. As Bordogna continued talking on her mobile telephone, Bordogna handed the change to the CI, whose hand was hand extended to receive it. (TR: 113:15-22; 139:6-11).

- After handing the change to the CI, Bordogna turned to answer a phone call (TR 149:1-5). The CI picked the bottle up off the counter (TR 113:23-25) and Mercier and the CI exited Lookout together. (TR 114:1-9; 148:19-25).

- Several minutes after Mercier and the CI exited Lookout's premises, another TABC agent entered Lookout to inform Bordogna of the charges against her and issued a criminal citation for sale of alcohol to a minor. (TR 149:6-23).

- The TABC promulgated numerous policies and procedures to follow when it conducts a minor compliance operation, some of which are in evidence as **Exhibits 7** and **8**. The reason for these policies and procedures is to ensure the safety of the TABC's participants, to give those being charged by the TABC access to available evidence, and to ensure that the facts and evidence lead to a valid charge. (TR 56:1-8). Adherence to its own policies and procedures is critical to maintaining the integrity and standardization of the TABC's operations. (TR 55:11-24).

- The TABC violated several of their policies during the minor compliance check at Lookout. (TR 56:13-25; 57:1, 11-20; 110:8-20; 111:17-20; 115:9-19).

- TABC Policies & Procedures 3-2-11.1, Minors Used for Law Enforcement F. provides that, unless necessary equipment is unavailable, the case agent will equip the CI with a body transmitter to record every purchase attempt and requires the TABC to preserve the recordings as evidence for future hearings. (**Exhibit 7**). Despite this policy, Mercier and the CI

admitted they used no such recording devices and made no such recording when conducting the minor compliance check at Lookout. (TR 56:13-25; 57:1, 11-20; 65:1; 68:6-8; 111:14-20; 115:9-19).

- TABC Policies & Procedures 3-2-11.1, Minors Used for Law Enforcement L., requires the TABC prepare a supplemental report about the minor compliance check to submit that report to the Chief Law Enforcement Officer (“CLEO”) each time an attempt is made to purchase alcohol, whether the operation is successful or not. (**Exhibit 7**). The information in this report should follow a debriefing of the CI that is to take place immediately after the purportedly illegal transaction to record the events as they occurred, while memories of the event are fresh. (TR 66:20-25; 84:21-24; 85:1-8; 117:18-25; 118:1-10). The report should describe the selling party’s contact with the juvenile, statements made by the CI, and any other information relevant to the CI’s purchase or the attempt to purchase. (**Exhibit 7**).

- No debrief of the CI occurred in this matter. (TR 68:6-8; 65:1). Further, the TABC created no supplemental report, even though there was no valid reason for not doing so. (TR 64:23-25; 65:1).

- TABC Policies & Procedures 3-2-11.1, Minors Used for Law Enforcement I. 2.a., states that:

- a full-time sworn law enforcement officer of this or another agency will accompany or precede the juvenile into every on-premises location to witness attempted purchases and procedures followed by location employees; and
- the minor will request and pay for each purchase.

(**Exhibit 7**).

- In the minor compliance check at bar, there is no evidence of the CI requesting to purchase Lookout’s wine. Rather, Mercier sampled two of Lookout’s wines, verbally chose the

wine she desired to purchase, and verbally consented to the price of that bottle of wine. (TR 133:21-25; 134:1-18). Indeed, the CI's only participation in purchasing the bottle of wine was to surreptitiously place money on the counter when Bordogna's back was turned and extend his hand for change while Mercier talked on her mobile telephone. (TR 111:14-20; 113:15-22; 139:6-11).

- TABC Policies & Procedures 3-2-11.1, Minors Used for Law Enforcement D. 1, states that a CI must wear the same clothes to court that he/she wore when the purchase was made. (**Exhibit 7**). At the hearing of this matter, the CI did not wear the clothes he wore on the date of the purchase and testified that no one told him to. (TR 110:8-20).

### **CONCLUSIONS OF LAW**

- The burden of proof required by the Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies Chapter 1360-04-01(3) is a preponderance of the evidence. This means the charging party must prove its case by the greater weight of the evidence or that, according to the evidence, the conclusion sought by the party with the burden of proof is the more probable conclusion. Placing less than a dollar in change in the outstretched hand of a CI does not meet this burden.

- The Tennessee Alcoholic Beverage Commission is tasked with the licensing and enforcement of any establishment in Tennessee that manufactures, distributes, or sells alcoholic beverages pursuant to Tenn. Code Ann. § 57-4-201 (a)(1).

- Lookout Winery, Inc. is a winery licensed pursuant to § 57-3-207(b). Pursuant to § 57-3-207(f), wineries are authorized to serve samples and sell bottles at retail. Tenn. Code Ann. § 57-3-406(d)(1) states that no retailer shall make or permit to be made any sales of alcoholic beverages or beer to minors. Additionally, Tenn. Code Ann. § 57-4-203 (b) (1)

(A) prohibits any licensee from selling, furnishing, disposing of, or giving alcoholic beverages to giving, or causing alcoholic beverages to be sold, furnished, disposed of, or given, to any person under twenty-one (21) years of age.

- While Tenn. Code Ann. § 39-15-413(1)(B) makes selling wine to minors a strict liability crime, it prohibits the minor from making statements intended to trick, mislead, encourage, or confuse the employee involved in the transaction. Here, the entire minor compliance check was designed to trick, mislead, and confuse Bordogna. Indeed, Mercier (not the CI) did all the talking with Bordogna including (after sampling two of Lookout's wines) verbally choosing the bottle to purchase and agreeing to its price.

- In support of Bordogna's belief that she sold the wine to Mercier, Bordogna placed the bagged bottle of wine in front of Mercier.

- Mercier stated that she and the CI were going to her parents for dinner. The CI remained silent. Bordogna offered samples of the wine only to Mercier, not the CI. After sampling both wines, Mercier chose the Bordogna Family Trio. The CI could not have selected the wine because he never tasted it. Mercier testified that she asked whether the wine was okay with the CI, but neither Bordogna, nor the CI had any recollection of this.

- After Mercier stepped away to allegedly take a call, she was only a few feet from where she was standing when she engaged in conversation with Bordogna and sampled the wine. Bordogna confirmed that Mercier was fine with the price without leaving her position at the register. Had Mercier been more than a few feet away, this would not have been possible. Mercier's distance from the transaction is not a material issue of dispute. Both the CI and Bordogna testified that she was a mere two to three feet. Mercier is the only one with a different recollection.



- As the CI admitted in his testimony, Bordogna's back was turned when he placed money on the counter. Since the CI and Bordogna had had almost no interaction throughout the process, Bordogna had no reason to think that Mercier was not the one paying for it. Had the CI handed her the money as intended by TABC Policies and Procedures, she may have been alerted to ask the minor for identification. The change owed back was minimal, so when Bordogna saw the CI with his hand extended, she placed approximately .50 cents in his hand.

- The obvious purpose of Tenn. Code Ann. § 39-15-413(1)(B), which specifically prohibits trickery, is to prevent law abiding citizens and business owners from being unfairly prosecuted for crimes and regulatory violations that they would not have committed but for the actions of the charging authority. This is clearly the intent of the similar TABC policy that requires the CI to request and pay for the alcohol as it is imperative to prove that the person who sold the alcohol to the minor did so on their own accord. The act of placing less than a dollar in change into the extended hand of a CI, who has not engaged with a salesperson, sampled wine, or requested to purchase wine, is not a sale to a minor, especially when the person who gave the change to the CI did not see the CI place money on the counter. By engaging in trickery and events designed to confuse Bordogna, the TABC violated statute and their own policies and procedures.

- While there are no Tennessee cases specifically on point, in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), the Supreme Court held that no showing of prejudice was required in certain circumstances when an agency violates its valid regulations. This reaffirmed its earlier decisions in *Vitarelli v. Seaton*, 359 U.S. 535 (1959) and *Service v. Dulles*, 354 U.S. 363 (1957). These cases involved regulations "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion."

*Id.* Like the regulations at issue in these cases, Mercier's undisputed testimony is that the TABC policies and procedures that she and others violated in this instance were promulgated, at least in part, to protect the public from overzealous TABC agents.

- To be clear, the TABC's failure to follow its policies to record minor compliance checks, debrief CIs after such events, and then create supplemental reports while relevant memories are fresh qualifies as spoliating evidence in violation of Tenn. R. Civ. P. \_\_\_, and causes this tribunal to infer that the facts recorded by those actions would not benefit the TABC's case against Lookout.

- In conclusion, due to the TABC's use of statutorily prohibited trickery and circumstances intended to confuse Bordogna, as well as multiple failures to adhere to policy and procedure, the TABC has not met its burden of proof.

- This Court orders that TABC citation number \_\_\_\_\_, is dismissed and no civil penalty is assessed.