

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

TERESA MARTINEZ, d/b/a
TIENDA LA MODERNA
304 SOUTH WAPATO AVENUE
WAPATO, WA 98951

LICENSEE

LICENSE NO. 076321

LCB NO. 23,585
OAH NO. 2010-LCB-0013

FINAL ORDER OF THE BOARD

The above entitled matter coming on regularly before the Board, and it appearing that:

1. An administrative hearing was held on July 21, 2010 at the licensee's timely request.
2. The Liquor Control Board's Complaint dated January 4, 2010 alleged that on or about May 15, 2009 the licensee or an employee(s) of the licensee, sold or supplied liquor to a person apparently under the influence of liquor on the licensed premises in violation of RCW 66.44.200 and/or WAC 314-16-150.
3. A hearing was held on July 21, 2010, before Administrative Law Judge Deborah Fiander in Yakima, WA. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine and the Licensee, Teresa Martinez, appeared and represented herself.
4. On September 17, 2010 Administrative Law Judge Deborah Fiander entered her Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint.
5. A petition for review was timely filed by the licensee.

FINAL ORDER OF THE BOARD
TERESA MARTINEZ, d/b/a
TIENDA LA MODERNA
LICENSE 076321
LCB NO. 23,585

6. A reply to the petition was filed by the Enforcement Division.

7. The Board finds that the Petition for Review should not be granted, and the additional evidence the Licensee asks the Board to consider will not be considered. The Licensee knew about the result of the Wapato Municipal Court hearing involving Ms. Cortez in December, 2009, yet did not attempt to submit the hearing record during the administrative hearing. The Board also finds the Declaration of Georgina Avelas lacks credibility. The Licensee was on notice as of August 3, 2009, that the Board intended to pursue the sale to Mr. Gilbert as a violation. In her Petition for Review, the Licensee states that she "had to go to great lengths" to locate Ms. Avelas. She apparently was unable to do so during the nearly 12 months between receiving the AVN and the date of the administrative hearing in July, yet was able to locate her and have her sign a declaration three days after the date of the ALJ's Initial Order sustaining the Board's complaint.

The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE; IT IS HEREBY ORDERED that that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order heretofore made and entered in this matter be, and the same hereby are, AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board, except that Finding of Fact No. 26 is modified to read that Ms. Chavez had "unsupervised access" to the log.

IT IS HEREBY ORDERED that the liquor license privileges granted to Teresa Martinez, d/b/a Tienda La Moderna, 304 South Wapato Avenue, Wapato, Washington, License Number 076321, are hereby CANCELLED.

DATED at Olympia, Washington this 2 day of November, 2010.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster

Ruthann Kuwaga

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the

effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).



Washington State
Liquor Control Board

November 2, 2010

Teresa Martinez
d/b/a Tienda La Moderna
304 S Wapato Ave
Wapato, WA 98951-1347

Brian Considine, AAG
GCE Division, Office of Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

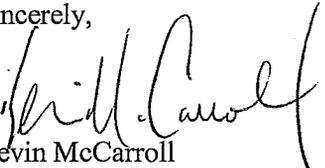
RE: FINAL ORDER OF THE BOARD
LICENSEE: Teresa Martinez
TRADE NAME: Tienda La Moderna
LOCATION: 304 S Wapato Ave, Wapato, WA 98951-1347
LICENSE NO. 076321-4D
AVN NO. 4F9135A
LCB HEARING NO. 23,585
OAH NO. 2010-LCB-0013
UBI: 601 314 518 001 0002

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Final Order in the above referenced matter.

If you have any questions, please contact me at (360) 664-1602.

Sincerely,


Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Beth Lehman, Licensing, WSLCB
Amber Harris, Enforcement, WSLCB
Spokane and Pasco Enforcement and Education Divisions, WSLCB

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3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 TERESA MARTINEZ
6 d/b/a TIENDA LA MODERNA
7 304 S WAPATO AVE
8 WAPATO, WA 98951-1347

9 LICENSEE

10 LICENSE NO. 076321-4D
11 AVN NO. 4F9135A

LCB NO. 23,585
OAH NO. 2010-LCB-0013

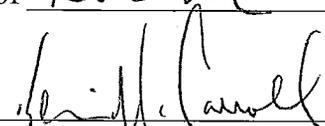
DECLARATION OF SERVICE BY
MAIL

12 I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-
13 referenced matter to be served on all parties or their counsel of record by US Mail Postage
14 Prepaid via Consolidated Mail Service for Licensees; by Campus Mail for the Office of
15 Attorney General, on the date below to:

16 TERESA MARTINEZ
17 d/b/a TIENDA LA MODERNA
18 304 S WAPATO AVE
19 WAPATO, WA 98951-1347

BRIAN CONSIDINE, ASSISTANT
ATTORNEY GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
MAIL STOP 40100

20 DATED this 2nd day of November, 2010, at Olympia, Washington.

21
22 
23 Kevin McCarroll, Adjudicative Proceedings Coordinator
24
25
26

DECLARATION OF SERVICE BY
MAIL

1

Washington State Liquor Control Board
3000 Pacific Avenue SE
PO Box 43076
Olympia, WA 98504-3076
(360) 664-1602

RECEIVED

SEP 23 2010

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD
**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

In the Matter of:

Teresa Martinez Lara dba
Tienda La Moderna

LICENSEE

STATE OF WASHINGTON)
) ss.
COUNTY OF YAKIMA)

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent.

DATED at Yakima, Washington, this 17th day of September, 2010.

Cary Campbell
Representative, Office of Administrative Hearings

OAH NO. 2010-LCB-0013
NO. 23,585

NOTICE TO PARTIES

The attached administrative law judge's findings of fact, conclusions of law and initial order are not effective until a final order of the Washington State Liquor Control Board is issued.

All parties hereto shall have twenty (20) days from the date of service of these proposals to file petition for review as provided by RCW 34.05.464 and WAC 314-29. Petition for Review shall be filed in triplicate with the Liquor Control Board, 3000 Pacific Avenue S.E., P.O. Box 43076, Olympia, WA 98504-3076. Replies to petition for review shall be filed with the Board within ten (10) days of the date of service of petition for review as provided by WAC 314-29. The petition for review must be received on or before October 7, 2010. One copy of the petition for review or replies must also be served upon all other parties of record, or their attorneys, with proof of service as required by WAC 314-29.

After reviewing the entire record including the petition for review, replies, briefs and legal arguments, if any, the board will affirm, reverse or modify these proposals by a final order of the board.

The administrative law judge's proposed decision provides for the Board's Complain in this matter be Sustained. On a date to be established in the Board's Final Order, the license privileges of Teresa Martinez, dba Tienda La Moderna, under License No. 076321, shall be cancelled.

RECEIVED

SEP 23 2010

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

In the Matter of:

Teresa Martinez Lara dba
Tienda La Moderna

Appellant.

OAH Docket No. 2010-LCB-0013
LCB Case No. 23,585

PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
INITIAL ORDER

STATEMENT OF THE CASE

On August 3, 2009, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice (AVN) Number 4F9135A to Tienda La Moderna. In its notice, the Board alleged that on May 15, 2009, the licensee sold or served alcohol to an apparently intoxicated person in violation of RCW 66.44.20. The notice proposed imposition of a cancellation of the licensee's liquor license. The licensee made a timely request for hearing.

On January 4, 2010, the Board issued a formal complaint, alleging that "On or about May 15, 2009, the above-named Licensee, or an employee(s) thereof, did sell or supply liquor to a person apparently under the influence of liquor contrary to RCW 66.44.200 and/or WAC 314-16-150."

Administrative Law Judge, Deborah Fiander, conducted this hearing in Yakima, Washington, at the Office of Administrative Hearings. The licensee, Teresa Martinez, appeared and represented herself. The Washington State Liquor Control Board ("Board") was represented by Assistant Attorney General Brian Considine. Liquor Control Board Officer Gabriel Ramos and Wapato Police Department Officer Mike Deccio testified on behalf of the

Board. Maria Estela Cortez testified on behalf of the licensee.

The proceedings were interpreted by Jose Chavez, Centerpoint Language Services (509) 457-2870.

Based upon the record presented, the undersigned Administrative Law Judge makes the following Findings of Fact:

FINDINGS OF FACT

1. Teresa Martinez is the licensee and owner of Tienda La Moderna located at 304 South Wapato Avenue in Wapato, in Yakima County, Washington, Liquor License No. 076321. The licensee is licensed to sell liquor at the licensed premises in this matter.

2. On May 15, 2010, at approximately 1:00 p.m., Wapato Police Officer Michael Deccio was traveling eastbound on Third, in Wapato. He had stopped at the stop light at the intersection of Third and South Wapato. Tienda La Moderna is located on South Wapato. From the intersection, where Officer Deccio was stopped, he was approximately 75 feet from the entrance of the licensee's business.

3. While Officer Deccio was stopped at the intersection of Third and South Wapato he observed a male, Shawn C. Gilbert, date of birth September 17, 1971, walking out from the alcove in front of Tienda La Moderna at 304 South Wapato Avenue. He also observed Mr. Gilbert holding a brown paper bag that appeared to contain at least two 40-ounce bottles of beer.

4. Officer Deccio had encountered Mr. Gilbert approximately one hour prior to observing him exit Tienda La Moderna and knew he was highly intoxicated. Officer Deccio has approximately 12 years of experience with the Wapato Police Department. He is certified to

administer breath alcohol (BAC) tests and is trained in what to observe and detect when observing an individual who may be intoxicated. Officer Deccio has observed thousands of intoxicated individuals during his employment with the Wapato Police Department.

5. Officer Deccio parked his patrol car, at an angle, in the intersection of Third and South Wapato. He exited his vehicle and walked directly toward Mr. Gilbert. Mr. Gilbert continued to proceed across the street.

6. Officer Deccio observed Mr. Gilbert to be staggering as he walked. Officer Deccio stopped Mr. Gilbert on the side of the street across from Tienda La Moderna. As Officer Deccio spoke to Mr. Gilbert he observed Mr. Gilbert's eyes, which were bloodshot and sleepy-looking. Mr. Gilbert was also swaying back and forth, side to side, and in small circles. Mr. Gilbert smelled of alcohol and spoke with a very distinct slur.

7. Officer Deccio could see two 40-ounce Old English 800 bottles of beer and a 16-ounce can of beer in Mr. Gilbert's bag. The licensee does not dispute that Tienda La Moderna is the only business that sells 40 ounce bottles of Old English 800 in that area of town.

8. Officer Deccio asked Mr. Gilbert if he had just purchased the beer. Mr. Gilbert responded that he had just purchased the beer. Officer Deccio asked Mr. Gilbert where he bought the beer. Mr. Gilbert pointed at Tienda La Moderna and stated that was where he had purchased the beer. Officer Deccio asked him who sold him the beer and Mr. Gilbert replied, "Maria."

9. Officer Deccio asked Mr. Gilbert to submit to a preliminary breath test (PBT). Initially, Mr. Gilbert only pretended to blow into the device, which resulted in an apparent inaccurate reading. Officer Deccio re-administered the test. Upon second try, Mr. Gilbert

sucked air rather than blowing into the device. Officer Deccio advised Mr. Gilbert that he was aware that Mr. Gilbert was not blowing into the machine correctly. Mr. Gilbert blew into the device a third time and blew into the device correctly. When Mr. Gilbert blew into the device correctly the device registered Mr. Gilbert's breath alcohol content as .191%.

10. Officer Jacob Murphy, who had subsequently arrived at the scene, assisted Officer Deccio in escorting Mr. Gilbert across the street back to Tienda La Moderna. While outside Tienda La Moderna the officers and Mr. Gilbert could see the clerk, Maria E. Cortez inside Tienda La Moderna. Ms. Cortez made eye contact with the officers while they were outside the store with Mr. Gilbert. Mr. Gilbert pointed at Maria E. Cortez and told the officers that she was the one who had sold him the beer.

11. Officer Deccio issued Mr. Gilbert an infraction for purchase or consumption of liquor by an intoxicated person.

12. Officer Deccio entered Tienda La Moderna and asked Ms. Cortez if she had just sold Mr. Gilbert the beer that he had had in his possession. Ms. Cortez acknowledged that Mr. Gilbert had been in the store and attempted to buy beer. She reported, however, that she refused to sell him the beer because he was intoxicated.

13. Officer Deccio issued Ms. Cortez a citation (Number 13891) for sale to an intoxicated person. The owner of Tienda La Moderna and licensee, Teresa Martinez, was not present at any time during the incident.

14. Officer Deccio requested that a copy of his report be forwarded to the Washington State Liquor Control Board.

15. Liquor Control Board Officer Gabriel Ramos received Officer Deccio's referral

regarding the sale of liquor to an intoxicated person on May 15, 2009. On May 19, 2009, Officer Ramos interviewed both Ms. Martinez and Ms. Cortez at Tienda La Moderna.

16. During the interview, Ms. Cortez told Officer Ramos that Mr. Gilbert had entered the premises a little after 1:00 p.m. on May 15, 2009, and was obviously intoxicated. She stated that he tried to buy beer but she refused to sell it to him.

17. Ms. Martinez gave Officer Ramos the May 15, 2009 receipt tape from the store's register. When Ms. Martinez gave Officer Ramos the register tape, she told him that there was a half-hour difference between "real time" and the time that was on the receipt.

18. Officer Ramos asked Ms. Martinez and Ms. Cortez how much the licensee charged for a 40-ounce bottle of Old English 800. They told him that the store charged \$2.49. He also asked how much how much the licensee charged for a 16-ounce can of beer and they stated \$2.19.

19. The May 15, 2009 register receipt tape reflects one sale consisting of two items in the amount of \$2.49 and one item in the amount of \$2.19, for a total charge of \$7.17. The register tape reflects that this sale occurred at 12:34 p.m. However, based on Ms. Martinez's contemporaneous representation to Mr. Ramos that the register's clock was approximately 30 minutes different from real time, the sale would have occurred at approximately 1:04 p.m.

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20. The history of Administrative Violation Notices (AVNs) for Teresa Martinez dba

Tienda La Moderna, License No. 076321 is as follows:

Date of Violation	AVN Number	Date AVN issued	Code Cited	Proposed Penalty	Resolution
12/15/07	4F7349A	12/20/07 (Exhibit 4, page 4)	WAC 314-16-150(2) Allowing an apparently intoxicated person to possess or consume alcohol on a licensed premises.	5 day suspension or \$500.00 fine	Paid \$500.00 fine 12/31/2007 (Exhibit 4, page 11)
6/18/08	4F8170A	8/15/08 (Exhibit 4, page 15)	RCW 66.44.200 Sale to an apparently intoxicated person	5 day suspension or \$2,500.00 fine	5 day suspension (Exhibit 4, pages 19-20)
9/11/08	4F8255A	10/8/08 (Exhibit 4, page 23)	RCW 66.44.200 Sale to persons apparently under the influence of liquor	10 day suspension or \$5,000.00 (Exhibit 4, page 24)	Licensee Agreed to pay \$5,000.00 fine pursuant to Stipulated Settlement Agreement and Final Order (Exhibit 4, pages 35 to 39)
10/23/08	4F8297A	11/14/08 (Exhibit 4, page 44)	RCW 66.44.200 Sale to persons apparently under the influence of liquor		Converted to a Written Warning (Exhibit 4, pages 53 to 59)

21. At hearing, Ms. Cortez acknowledged that on May 15, 2009, at approximately 1:00 pm, Mr. Gilbert entered Tienda La Moderna and attempted to purchase some beer. She reports, however, that she refused to sell beer to Mr. Gilbert on May 15, 2009 because she could tell that he was intoxicated. Ms. Cortez further reported that recalled selling the two 40-

ounce bottles of beer and a 16-ounce can of beer reflected in the 1:04pm transaction on the register tape to a Native American woman who entered Tienda La Moderna after Mr. Gilbert left.

22. Ms. Martinez argues that individual who purchased the beer at issue was a Native American woman named Georgie or Georgina. She argues that the Native American woman must have purchased the beer for Mr. Gilbert. In support of her argument, Ms. Martinez presented a piece of lined notebook paper with handwritten entries of various alleged dates, names, tribal enrollment numbers and sales amounts. She explained that the document is her record of sales to Native Americans who purchase items in her store.

23. The licensee's store is located within the exterior boundaries of the Yakama Nation Reservation. Yakama tribal members who purchase items on the reservation are exempt from state sales tax, but the state requires her to keep a record of her tax-exempt sales.

24. Ms. Martinez argues that a Native American purchased the beer for \$7.17 on May 15, 2009, because sale was not assessed any sales tax. The licensee further argues that because Mr. Gilbert is not a Native American and the \$7.17 sale was not taxed, Mr. Gilbert could not have been the individual who purchased the beer. but are exempt from state sales tax. She acknowledges, however, that the May 15, 2009 tax exempt log conflicts with her May 15, 2009 register tape.

25. The May 15, 2009 register tape reflects that the next sale after the \$7.17 sale was in the amount of \$4.98 and was also tax exempt. The handwritten tax exempt record, however, reflects two additional tax exempt sales before the \$4.98 sale, one in the amount of

\$1.89 and the second in the amount of \$3.58.

26. However, neither \$1.89 or \$3.58 sale is reflected on the May 15, 2009 register tape. Ms. Martinez offered no explanation as to why, if the two records were accurate, one record would reflect two sales following the \$7.17 sale that do not appear in the other record. She agreed that if there were sales reflected on the tax exempt log, the same sales should also be reflected on the register tape. Ms. Martinez also acknowledged that Ms. Cortez, the employee who allegedly sold the beer to Mr. Gilbert, had full and supervised access to the handwritten log subsequent to the May 15, 2009 citation.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to chapters 66.44, 34.12, and 34.05 RCW, and chapters 10-08, 314-11, and 314-12 WAC.

2. As a licensed retail seller of alcohol, the licensee is subject to the jurisdiction of the Washington State Liquor Control Board. The license is subject to the conditions and restrictions imposed by Title 66 RCW and WAC 314-12. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an administrative law judge pursuant to chapter 34.12 RCW. A proper hearing was provided in this case.

3. RCW 66.44.200(1) prohibits the sale of liquor to any person apparently under the influence of liquor. The definition of liquor includes beer. RCW 66.04.010(19). WAC 314-11-035 further provides:

Per RCW 66.44.200, licensees or employees may not supply liquor to any person apparently under the influence of liquor, or allow an apparently intoxicated person to possess or consume liquor on the licensed premises.

4. Chapter 314-11 WAC sets forth general requirements for liquor licenses (WAC 314-11-005) and outlines the responsibilities of a liquor licensee (WAC 314-11-015).

5. WAC 314-16-150(1) provides:

(1) No retail licensee shall give or otherwise supply liquor to any person under the age of twenty-one years, either for his/her own use or for the use of his/her parent or of any other person; or to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person under the said age or in said condition to consume liquor on his/her premises, or on any premises adjacent thereto and under his/her control.

6. There are problems with the reliability of the hand-written tax exempt record maintained by the licensee in this case. RCW 34.05.461(4) states:

(4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

7. The licensee is unable to explain or reconcile the conflicting information between her May 15, 2009 register tape and the hand-written tax-exempt record that she presented at hearing. It, therefore, cannot be concluded that the licensee's handwritten tax exempt record, is a reliable document or the type of evidence that a reasonably prudent person would rely upon in the conduct of their affairs. Therefore, the handwritten tax exempt log cannot be relied

upon to support Ms. Cortez's self-serving testimony that she sold the beer at issue to a Native American woman and not Mr. Gilbert.

8. The undersigned, having carefully considered and weighed all the evidence including the demeanor and motivations of the parties, the reasonableness of the testimony, and the totality of the circumstances presented, concludes that Ms. Cortez's testimony, that she did not sell alcohol to Mr. Gilbert, lacks credibility.

9. It is further concluded that Mr. Gilbert was intoxicated at the time that Ms. Cortez sold the beer to him. Officer Deccio has prior training and experience in detecting individuals who are under the influence. He observed Mr. Gilbert exiting the licensee's establishment in possession of two 40 ounce cans of Old English 800 and one 16 ounce can of beer. Officer Deccio observed Mr. Gilbert's actions and immediately noticed discernible physical actions consistent with those of an individual under the influence of alcohol. Additionally, Officer Deccio's observations were confirmed by the test results of the portable breathalyser. He concluded Mr. Gilbert was intoxicated.

10. The owner, Ms. Martinez was not present at the time of the incident. There was no testimony presented from Mr. Gilbert. Therefore, the testimony of Officer remains credible and is not rebutted.

11. As the licensee, Tienda La Moderna is responsible for ensuring that alcohol is not sold to intoxicated or apparently intoxicated persons.

12. The preponderance of credible evidence establishes that Ms. Cortez, the employee of the licensee, sold liquor (beer) to an apparently intoxicated person, Mr. Gilbert, on May 15, 2009, in violation of RCW 66.44.200(1) and WAC 314-11-035.

13. The penalty schedule for violation of RCW 66.44.200 is set forth in WAC 314-29-020, in relevant part, as follows:

Group 1 violations against public safety. Group 1 violations are considered the most serious because they present a direct threat to public safety. Violations beyond the first violation do not have a monetary option upon issuance of a violation notice. The liquor control board may offer a monetary option in lieu of suspension days based on mitigating circumstances as outlined in WAC 314-29-015(4).

Violation Type	1st Violation	2nd Violation in a two-year window	3rd Violation in a two-year window	4th Violation in a two-year window
Sale or service to apparently intoxicated person: Sale or service of alcohol to, or permitting consumption or possession by, an apparently intoxicated person. RCW 66.44.200 WAC 314-16-150	5 day suspension or 7 day \$500 monetary option	suspension	30 day suspension	Cancellation of license

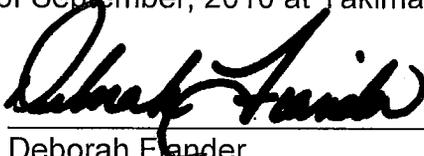
14. In the instant case, the May 15, 2009 violation is the licensee's fourth violation and Board's proposed penalty of cancellation of the licensee's license to sell liquor, is within the Board's authority under RCW 66.44.010 and reflects the standard penalty prescribed by WAC 314-12-300. There are no mitigating factors that would warrant deviating from the standard penalty.

Based upon the foregoing Conclusions of Law, NOW THEREFORE,

INITIAL ORDER

IT IS HEREBY ORDERED, That the Board's Complaint in this matter be SUSTAINED. On a date to be established in the Board's Final Order, the license privileges of Teresa Martinez, d/b/a Tienda La Moderna, under License No. 076321, shall be cancelled.

Dated and Mailed this 17th day of September, 2010 at Yakima, Washington.



Deborah Flander
Administrative Law Judge
Office of Administrative Hearings
32 North Third Street, Ste 320
Yakima, WA 98901

NOTICE TO PARTIES

Either the appellants, or the assistant attorney general may file a petition for review of the initial order with the liquor control board within twenty days of the date of service of the initial order. With notice to all parties the board may change the time for filing a petition for review of the initial order. The board may extend or shorten the filing time based on a voluntary stipulation of the parties or upon motion of a party that demonstrates a clear and convincing showing of exigent circumstances. The petition for review must: (i) Specify the portions of the initial order to which exception is taken; and (ii) Refer to the evidence of record which is relied upon to support the petition. Within ten days after service of the petition for review, any party may file a reply with the liquor control board and copies of the reply must be mailed to all other parties or their representatives at the time the reply is filed. WAC 314-42-095.

Copies mailed to:

Teresa Martinez Lara dba Tienda La Moderna., Appellant
Brian Considine, AAG
Pat Wilson Parmer, Chief,
Washington State Liquor Control Board, Department Representative
Centerpoint Language Services, 509-457-2870, Interpreter

TIENDA LA MODERNA
TERESA MARTINEZ (OWNER)
304 SOUTH WAPATO AVENUE
WAPATO, WASHINGTON 98951
BUSINESS (509) 877-6421
CELL (509) 961-8933

RECEIVED
OCT 04 2010
LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

September 29th, 2010

State of Washington
Liquor Control Board
P.O. Box 43076
Olympia, WA 98504-3076

**RE: OAH NO. 2010-LCB-0013
NO. 23,585
Petition for Review**

Dear Sir/Madam:

The purpose of this correspondence is that the above referenced Petition for Review is filed to point out the following discrepancies based on the Initial Order dated September 17th, 2010.

- 1: Officer Michael Deccio could not have observed Mr. Gilbert coming out of the alcove of "Tienda La Moderna" if he was East bound and stopped on West 3RD Street and South Wapato Avenue. There is a building located at the corner. 302 South Wapato Avenue, "Panaderia La Colmena", that building would block his entire view of anyone leaving or entering, "Tienda La Moderna"!
- 2: At the Bench Trial of Maria E. Cortez on December 3RD, 2009, Officer Deccio testified that he did not observe Mr. Gilbert leave or enter, "Tienda La Moderna" Officer Deccio was unable to identify Mr. Gilbert and the Honorable Judge Michael Everttt found Ms. Cortez not guilty of selling liquor to an intoxicated individual.
- 3: At the Administrative Law Hearing on July 20th, 2010, Officer Michael Deccio blatantly lied to Administrative Law Judge Deborah Fiander by testifying that he saw Mr. Gilbert leaving the store, after he lied about not being able to identify Mr Gilbert at the December 3RD, 2009 bench trial of Maria E. Cortez!

- 4: I was able to track down the woman that did purchase the alcoholic beverages for Mr. Gilbert, Ms. Georgina "Georgie" Avelas. I had to go to great lengths to locate her. I have a notarized Declaration from her stating that she was in fact the person that purchased the alcoholic beverages in question!.
- 5: I want Officer Michael Deccio investigated for abuse of authority! He abuses his power of authority, he has harassed me and a number of other Latino members of the community, he has now targeted me and my family! He has harassed members of the Yakama Indian Nation. He follows them when they leave my store and makes them dump out any liquor they have in their possession, even if the container is still sealed! He has even told some of my regular customers, that he will not let up until he shuts me down and runs me out of town!

Thank you for your time in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Teresa Martinez".

Teresa Martinez

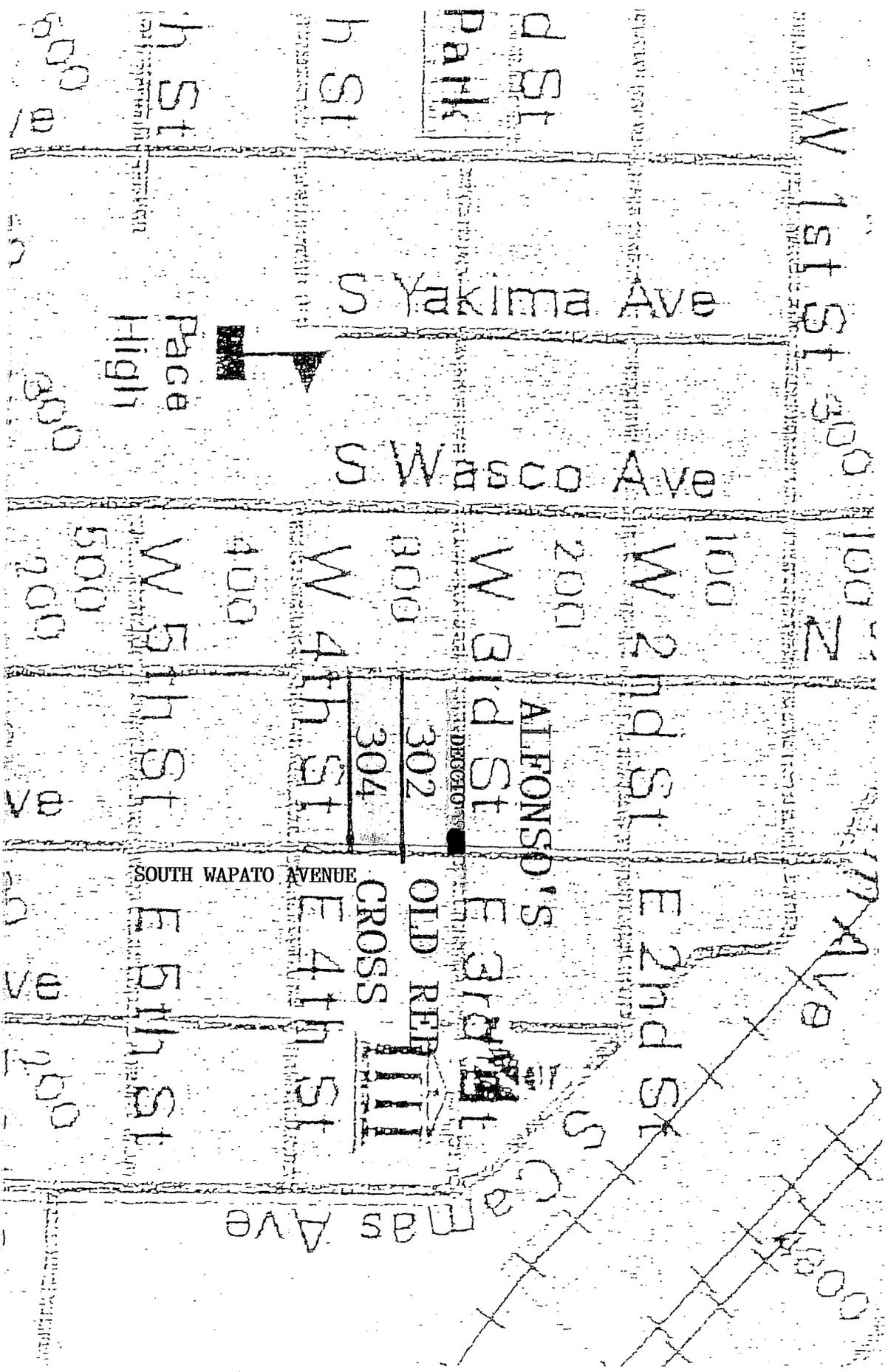
Enclosure(s): Copy of Bench Trial "CD"
Copy of Notarized Declaration of Georgina "Georgie" Avelas
Copy of City Map

Time	Case #	Note
9:22:29 AM		martinez
9:22:35 AM		maldonado
9:23:02 AM		smartlowit s
9:23:58 AM		barney christine
9:33:17 AM		cloud j
10:03:17 AM		hudson anne
10:49:26 AM		andy joey
10:49:31 AM		guzman
10:49:34 AM		gardee
10:52:12 AM		miller
11:05:05 AM		torres
11:10:03 AM		ellenwood
11:20:48 AM		brooks
11:37:15 AM		johnson
1:33:38 PM		valdovinos rivera r
1:39:36 PM		artzpe omar
1:41:09 PM	everett	valencia clemente
1:51:49 PM		barney natasha
1:53:15 PM		landin ortega francisco
2:04:16 PM		flores
2:04:20 PM		hunt melinds @sum
2:04:32 PM		lopez stephany
2:06:14 PM		spilar
2:28:17 PM		benson
2:35:39 PM		vela
2:35:41 PM		hernandez daniel
2:41:36 PM		elwell terry
2:50:41 PM		guterrez
3:11:36 PM	bench trial	cortez maria

3:11:52 PM	prosecutor	opening statements
3:12:39 PM	interpreter	zenaida garibay
3:12:52 PM	def atty	opening statements
3:14:30 PM	prose	witness officer deccio
3:14:40 PM	sworn	by judge everett
3:15:45 PM	pros	witness off deccio
3:17:42 PM	judge	witness
3:18:35 PM	def atty	obj
3:18:48 PM	pros	
3:18:54 PM	judge	pointing not here say
3:19:23 PM	def atty	
3:19:27 PM	pro	witness
3:19:39 PM	def	obj
3:19:42 PM	pro	w
3:21:41 PM	DEF	OBJECT TO STATEMENT OF GILBERT
3:21:51 PM	JUDGE	
3:21:55 PM	PRO	
3:21:58 PM	JUDGE	
3:22:19 PM	PRO	
3:22:45 PM	DEF ATTY	WIT OFF DECCIO
3:26:04 PM	JUDGE	
3:26:08 PM	P	CITY RESTS
3:26:37 PM	P	
3:27:44 PM	DEF ATTY	
3:28:43 PM	JUDGE	
3:28:48 PM	PRO	OFFICER DECCIO
3:29:58 PM	DEF ATTY	
3:30:47 PM	JUDGE	DENIED DEF MOTION/INTERPRETER ZENAIDA GARIBAY
3:31:05 PM	DEF ATY	WITNESS MARIA CORTEZ
3:31:32 PM	JUDGE	SWORN

3:31:45 PM	JUDGE	NOT REQUIRED TO TESTIFY
3:32:37 PM	DEF ATTY	WIT CORTEZ
3:39:26 PM	PRO	WIT CORTEZ
3:41:12 PM	JUDGE	W
3:42:18 PM	JUDGE	REDIRECT
3:42:25 PM	DEF ATTY	W OFF DECCIO
3:43:30 PM	PRO	W OFF DECCIO
3:43:44 PM	JUD	SUSTAIN
3:43:51 PM	PRO	W DECCIO
3:44:12 PM	DEF	RESTIT
3:44:17 PM	CLOSING	CITY
3:45:46 PM	CLOSING	DEFENSE
3:47:55 PM	J	PROS
3:49:26 PM	JUDGE	
3:49:58 PM		FINDING OF NOT GUILTY
3:50:36 PM	MORN DOCK	ISAACS
3:54:15 PM		GEORGE LEELYN

DECCIO TRAVELLING EAST BOUND ON WEST 3RD STREET, STOPPED AT THE INTERSECTION OF SOUTH WAPATO AVENUE.
302 SOUTH WAPATO AVENUE, "PANADERIA LA COLMENA".
304 SOUTH WAPATO AVENUE, "TIENDA LA MODERNA".
SOUTH WAPATO AVENUE.
DECCIO'S PATROL CAR.



RECEIVED

OCT 08 2010

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

TERESA MARTINEZ LARA d/b/a
TIENDA LA MODERNA

304 SOUTH WAPATO AVE.
WAPATO, WA 98951-1347

LICENSEE

LICENSE NO. 076321
AVN NO. 4F9135A

LCB NO. 23,585

ENFORCEMENT'S RESPONSE
TO LICENSEE'S PETITION FOR
REVIEW

The Enforcement and Education Division (Enforcement) of the Washington State Liquor Control Board (Board), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, hereby responds to TERESA MARTINEZ LARA d/b/a TIENDA LA MODERNA's (Licensee) Petition for Review (Petition) in the above-captioned matter.

I. STANDARD OF REVIEW

Any party in an administrative action may file a petition for review of the initial order pursuant to RCW 34.05.464 and WAC 314-29-010(4). A party filing a petition for review must specify the portions of the initial order to which exception is taken and refer to evidence in the record on which the party relies to support the petition. WAC 314-29-010(4). The reviewing officer (including the agency head reviewing an initial order) "shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final

1 order had the reviewing officer presided over the hearing[.]” RCW 34.05.464(4). A party
2 filing a petition for review must specify the portions of the initial order to which exception is
3 taken and refer to evidence in the record on which the party relies to support the petition.
4 WAC 314-29-010(4). Pursuant to 314-29-010(4)(b)(iv) copies of the petition for review must
5 also be mailed to all the other parties at the time the reply is filed. Any party, upon receipt of
6 exceptions, may file a reply to the exceptions within ten days of service of the exceptions.
7 WAC 314-29-010(4)(b)(iv).

8 II. BACKGROUND

9 On August 3, 2009, Enforcement served the Licensee, Teresa Martinez Lara d/b/a
10 Tienda La Moderna, with an Administrative Violation Notice (AVN) stating that her business
11 sold liquor to an apparently intoxicated person on May 15, 2009. On January 4, 2010, the
12 Board issued a formal complaint to the Licensee alleging that on or about May 15, 2010, the
13 Licensee, and/or employee thereof, did sell or supply liquor to a person apparently under the
14 influence of liquor, contrary to RCW 66.44.200 and WAC 314-16-150. Enforcement sought a
15 cancellation pursuant to WAC 314-29-020 for a fourth violation of this type within a two-year
16 period.

17 The case was heard by ALJ Deborah Fiander in Yakima, Washington, on July 21, 2010.
18 After a full hearing on the merits, the ALJ entered her Findings of Fact, Conclusions of Law,
19 and Initial Order on September 17, 2010. The ALJ sustained the Board’s complaint and
20 entered an Initial Order cancelling the Licensee’s liquor license. Included with the ALJ’s
21 initial order were two notices informing the Licensee that it could file a petition for review
22 pursuant to Title 314 WAC. *See* Notice to Parties; Initial Order, p. 12. The Initial Order also
23 informed the Licensee of what she must include in a petition for review, pursuant to WAC
24 314-42-095. *See* Initial Order, p. 12. The Licensee timely filed exceptions to the ALJ’s Initial
25 Order, but did not properly serve her exceptions on Enforcement. Regardless, the Licensee’s
26

1 exceptions lack the force and merit necessary to overcome the reasoned Initial Order by the
2 ALJ, which is supported by the law and evidence.

3 III. DISCUSSION

4 The Licensee's Petition fails to specify the portions of the Initial Order to which
5 exception is taken, as required by WAC 314-42-095, and attempts to submit evidence that is
6 not a part of the record and was not offered at hearing. Specifically, she has failed to specify
7 the portions of the initial order to which exception is taken and has not referred to any evidence
8 in the record which she relies upon to support her Petition. WAC 314-42-095(2)(a)(i), (ii).
9 Therefore, the Licensee's exceptions to ALJ Fiander's factual findings should be rejected as
10 being unsupported. However, Enforcement will attempt to respond to the Licensee's
11 unsupported arguments.¹

12 A. Exceptions to Findings of Fact Nos. 2, 3, 5, and 6

13 The Licensee appears to argue that the record does not support Findings of Fact Nos. 2,
14 3, 5, and 6 because Officer Mike Deccio could not have watched Mr. Shawn Gilbert, the
15 apparently intoxicated person, exit the store. See Petition at ¶¶1-3. The Licensee attempts to
16 submit Exhibits that she did not offer at hearing to support her argument. Neither the Wapato
17 map nor the Wapato Municipal Court printout or audio recording were offered as, or entered
18 into, evidence at hearing and are not a part of the record in this matter. The Licensee had
19 ample time to prepare for the hearing and offer these exhibits during the hearing and failed to
20 do so. Their submission is now untimely and should not be considered by the Board.

21 Additionally, the information allegedly found in these exhibits does not contradict
22 Officer Deccio's testimony. Officer Deccio testified that he observed Mr. Gilbert walk out of
23 the alcove in front of the entrance to the Licensee's business. See Administrative Hearing
24 Audio Recording (Audio Recording), 00:51:50-00:52:25, 1:09:55-1:12:15, 1:16:40-1:16:46.

25
26 ¹ The Licensee does not appear to dispute most of the ALJ's Findings of Fact. Thus, those Findings of
Fact are not in dispute and will not be addressed any further.

1 Once Mr. Gilbert was outside of the business, Officer Deccio contacted him in the street and
2 was told by Mr. Gilbert that he purchased the alcohol in his possession from Maria Cortez at
3 the Licensee's business. *See* Audio Recording, 1:16:00-1:16:55. Therefore, based on the
4 record, the Licensee is mistaken in believing that Officer Deccio testified that he observed Mr.
5 Gilbert walk out of the entrance to the store and the ALJ's Findings of Fact accurately reflect
6 the record and should be adopted by the Board.

7 **B. Finding of Fact No. 26**

8 There is a typographical error in Finding of Fact Number 26. The last sentence reads,
9 "Ms. Martinez also acknowledged that Ms. Cortez, the employee who allegedly sold the beer
10 to Mr. Gilbert, had full and supervised access to the handwritten log subsequent to the May 15,
11 2009 citation." It appears that the ALJ meant to have the Finding of Fact read, "had full and
12 unsupervised access" based on Finding of Fact Number 13.

13 **C. Exceptions to Conclusions of Law Nos. 7, 8, and 9**

14 The Licensee appears to argue that the ALJ erred in determining that Ms. Cortez did
15 sell liquor to Mr. Gilbert, an apparently intoxicated person, and that her testimony was not
16 credible. *See* Petition at ¶4. The Licensee attempts to submit a Declaration from Georgina
17 Avelas to support her argument, but neither this declaration nor testimony from Ms. Avelas
18 was offered at the hearing to refute Officer Deccio and Officer Ramos' determination that Ms.
19 Cortez sold liquor to Mr. Gilbert, an apparently intoxicated person. The Licensee was well
20 aware of the allegations against her and had the opportunity to present Ms. Avelas as a witness
21 in this matter, but she chose not to do so. The submission of Ms. Avelas' declaration is now
22 untimely and should not be considered by the Board. Moreover, the timing of Ms. Avelas'
23 declaration is curious because it is being submitted to the Board after the Licensee became
24 aware that her own sales records from May 15, 2009, conflicted with each other and the only
25 employee who was in the store with Mr. Gilbert that day was Ms. Cortez and she has been
26 found to not be credible because she could not reconcile the fact that her testimony did not

1 support her contention that she did not sell liquor to Mr. Gilbert on May 15, 2009.² See
2 Findings of Fact Nos. 24, 25, 26; Conclusions of Law Nos. 6, 7, 8, and 9. Nevertheless, the
3 ALJ should be given deference in her opportunity to observe the witnesses under RCW
4 34.05.464(4) and the ALJ determined that Ms. Cortez was not credible and that her testimony
5 was self-serving and she sold the beer to Mr. Gilbert. The Licensee has not cited to any
6 authority in the record to support her argument and ALJ's conclusions of law are supported by
7 the record and the initial order should be adopted.

8 IV. CONCLUSION

9 At hearing, Enforcement demonstrated by a preponderance of the evidence, through the
10 sworn testimony of Officer Deccio of the Wapato Police Department, and Liquor Enforcement
11 Officer Ramos, that the Licensee sold liquor to a person apparently under the influence of
12 liquor on May 15, 2009. The Initial Order issued by the administrative law judge is fully
13 supported and should be affirmed by the Board. Therefore, the Enforcement Division
14 respectfully requests that the Initial Order be adopted in this matter, the complaint be sustained,
15 and the Licensee's liquor license be cancelled.

16 DATED this 8th day of October, 2010.

17
18 ROBERT M. MCKENNA
Attorney General

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20 
BRIAN J. CONSIDINE, WSBA #39517
Assistant Attorney General
Attorneys for Enforcement
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23

24
25 ² Licensing also notes that the Notary Public, Tony Guzman, notarizing Ms. Avelas' declaration is not an
26 impartial party to this matter since he was listed as a witness for the Licensee and his testimony was excluded as
being immaterial to this matter because he had no personal knowledge of the incident and his opinion of Officer
Deccio and/or the Licensee was not relevant. Additionally, the Licensee represented to the court that Mr. Guzman
"represents" her when she needs help with the legal system. See Audio Recording, 2:41:50-2:59:15.