

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

MONG SU CHONG
d/b/a KING'S MARKET
12923 MARTIN LUTHER KING JR
WAY S
SEATTLE, WA 98178-4611

LICENSEE

LICENSE NO. 354069-2L
AVN 2M0331C

LCB NO. 23,794
OAH NO. 2011-LCB-0010

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated February 16, 2011, alleging that on or about November 27, 2010, the Licensee offered for sale a product that combines beer, strong beer, or malt liquor with caffeine, after November 17, 2010, contrary to WAC 314-20-022.
2. The Licensee made a timely request for a hearing.
3. A hearing took place on May 6, 2011 before an administrative law judge with the Office of Administrative Hearings.
4. Myong Su Chong d/b/a King's Market, appeared and represented himself. Assistant Attorney General Brian Considine represented the Education and Enforcement Division of the Board.
5. On July 5, 2011, Administrative Law Judge Jason H. Grover entered his Findings of Fact, Conclusions of Law, and Initial Order sustaining the complaint.
6. No Petition for Review was received.
7. 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;

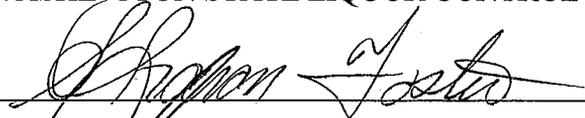
FINAL ORDER OF THE BOARD
LCB NO. 23,794
KING'S MARKET
LICENSE 354069-2L

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Initial Order for case 23,794 is adopted.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,794 is sustained. A monetary penalty in the amount of two hundred fifty dollars (\$250.00) in connection with this matter was received from the Licensee on July 27, 2011. No additional penalty is due.

DATED at Olympia, Washington this 9TH day of August, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD





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**

August 11, 2011

Mong Su Chong
d/b/a King's Market
12923 Martin Luther King Jr Way S
Seattle, WA 98178-4611

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: Mong Su Chong
TRADE NAME: King's Market
LOCATION: 12923 Martin Luther King Jr Way S, Seattle, WA 98178-4611
LICENSE NO. 354069-2L
ADMINISTRATIVE VIOLATION NOTICE NO: 2M0331C
LCB HEARING NO. 23,794
OAH NO. 2011-LCB-0010
UBI: 601 191 891 002 0001

Dear Parties:

Please find the enclosed Declaration of Service by Mail and a copy of the Final Order of the Board 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: Tukwila Enforcement and Education Division, WSLCB
Amber Harris, WSLCB

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3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 MONG SU CHONG
6 d/b/a KING'S MARKET
7 12923 MARTIN LUTHER KING JR
8 WAY S
9 SEATTLE, WA 98178-4611

10 LICENSEE

11 LICENSE NO. 354069
12 AVN NO. 2M0331C

LCB NO. 23,794
OAH NO. 2011-LCB-0010

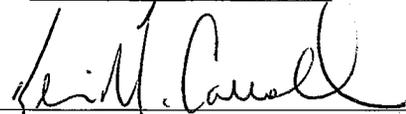
DECLARATION OF SERVICE BY
MAIL

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

18 MONG SU CHONG
19 d/b/a KING'S MARKET
20 12923 MARTIN LUTHER KING JR WAY S
SEATTLE, WA 98178-4611

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

21
22 DATED this 11th day of August, 2011, at Olympia, Washington.

23
24 
25 Kevin McCarroll, Adjudicative Proceedings Coordinator
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DECLARATION OF SERVICE BY
MAIL

RECEIVED

JUL 13 2011

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

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

IN THE MATTER OF:

**MYONG SU CHONG
d/b/a KING'S MARKET,**

12923 Martin Luther King Jr. Way S.
Seattle, WA 98178

LICENSEE

LICENSE NO. 354069
AVN No. 2M0331C

Docket No. 2011-LCB-0010

Agency No.: 23,794

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

I. ISSUES

1.1 Whether the Licensee offered a caffeinated alcoholic beverage for sale on November 27, 2010 in violation of WAC 314-20-022 (as modified by emergency rule) which prohibits such sale after November 17, 2010.

II. ORDER SUMMARY

2.1 The Licensee offered a caffeinated alcoholic beverage for sale on November 27, 2010 in violation of WAC 314-20-022 (as modified by emergency rule) which prohibits such sale after November 17, 2010. The Board's Complaint issued February 16, 2011 is **SUSTAINED**.

2.2 On a date to be established in the Board's Final Order, the license privileges of Myong Su Chong dba King's Market, under License No. 354069, shall be suspended for a period of five (5) days. In lieu of a license suspension, the Licensee may pay a

civil monetary penalty in the amount of Two Hundred Fifty Dollars (\$250.00).

III. HEARING

- 3.1 **Administrative Law Judge:** Jason H. Grover
- 3.2 **Appellant:** Myong Su Chong dba King's Market, appeared and represented himself
- 3.3 **Agency:** Washington State Liquor Control Board's Education and Enforcement Division ("Board")
 - 3.3.1 **Department Representative:** Brian Considine, Assistant Attorney

General

- 3.3.2 **Department Witnesses:** Officer Joshua Bolender, Liquor Control Board
- 3.4 **Exhibits:** The Board's Exhibits 1 through 4 were admitted at the time of hearing
- 3.5 **Date of Hearing:** May 6, 2011

IV. FINDINGS OF FACT

I find the following facts more probable than not under the preponderance of the evidence standard:

- 4.1 The Licensee, Myong Su Chong dba King's Market (Licensee), operates a market located at 12923 Martin Luther King Jr. Way S., Seattle, Washington. The premises is licensed by the Board for the sale of beer and wine for off-premises consumption pursuant to License No. 354069.
- 4.2 The citation in the present case was issued on November 27, 2010, following a premises compliance check conducted by WSLCB Officer Joshua Bolender on the Licensee. Officer Bolender has almost three years experience as an officer. He

Licensee. Officer Bolender has almost three years experience as an officer. He attended the police academy and successfully completed field training with a field training officer.

4.3 The purpose of a compliance check is to ensure that licensees are compliant with the rules and regulations of the Washington State Liquor Control Board.

4.4 On November 27, 2010 at approximately 8:44 PM, Officer Bolender entered the Licensee's premises. As part of the compliance check, he looked for signage and tobacco stamps. He also checked to determine if the licensee was selling to apparently intoxicated persons or minor, or was selling banned drinks.

4.5 When Officer Bolender checked the display cooler, he observed several cans of two banned alcohol energy drink products: Four Loko Maxed Grape (10% Alcohol) and Four Loko Maxed Citrus (10% Alcohol). These products are malt beverages with added caffeine, ginseng and taurine.

4.6 Based on his observations, Officer Bolender issued an Administrative Violation Notice to Myong Su Chong dba King's Market (Exhibit 1). It was served on Mr. Chong on November 27, 2010 in the presence of Korean-speaking officer John Jung. Mr. Chong signed the AVN acknowledging receipt.

4.7 At hearing, Mr. Chong denied receiving notice of the emergency rule until November 29, 2010. Mr. Chong testified that the distributor salesman told him that he had to pull all cans of Four Loko beer, which he did. Mr. Chong testified that he did not pull the Four Maxed because it had a different name, and he did not realize that the Four Maxed product contained caffeine and was also banned.

4.8 This violation would be the Licensee's first violation of this type within a two-year period.

V. CONCLUSIONS OF LAW

5.1 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, 314-16, and 314-29 WAC.

5.2 As the holder of a liquor license, the licensee, Myong Su Chong dba King's Market, 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 chapters 314-11, 314-16, and 314-29 WAC. 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.

5.3 WAC 314-20-022 provides, "No product that combines beer, strong beer, or malt liquor with caffeine, guarana, taurine, or other similar substances which are commonly referred to as "alcohol energy drinks" may be imported into the state, produced, manufactured distributed, sold or offered for sale by a licensed retailer in the state of Washington after November 17, 2010."

5.4 The Licensee does not dispute that on November 27, 2010, the enforcement office found in the Licensee's display cooler located on the licensed premises, several cans of two banned alcohol energy drink products for sale, as detailed in the foregoing Findings of

Fact. The Licensee does not dispute that these products are malt beverages that contain added caffeine, ginseng and taurine. Therefore, those elements of the offense have been established.

5.5 Under WAC 314-11-015, Licensees are responsible for the operation of their licensed premises in compliance with the liquor laws and rules of the board (Title 66 RCW and Title 314 WAC). Any violations committed or permitted by employees will be treated by the board as violations committed or permitted by the licensee.

5.6 In the present case, the Licensee argues that he was not aware that the Four Maxed products contain caffeine or that they were banned because he did not receive a copy of the emergency WAC rule 314-20-022 until November 29, 2010.

5.7 RCW 34.05.350 sets forth the requirements for emergency rules. It provides:

(1) If an agency for good cause finds:

(a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest;

(b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule;
or

(c) In order to implement the requirements or reductions in appropriations enacted in any budget for fiscal years 2009, 2010, or 2011, which necessitates the need for the immediate adoption, amendment, or repeal of a rule, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the fiscal needs or requirements of the agency,

the agency may dispense with those requirements and adopt, amend, or repeal the rule on an emergency basis. The agency's finding and a concise statement of the reasons for its finding shall be incorporated in the order for adoption of the emergency rule or amendment filed with the office of the code reviser under RCW 34.05.380 and with the rules review committee.

(2) An emergency rule adopted under this section takes effect upon filing with the code reviser, unless a later date is specified in the order of adoption, and may not remain in effect for longer than one hundred twenty days after filing. Identical or substantially similar emergency rules may not be adopted in sequence unless conditions have changed or the agency has filed notice of its intent to adopt the rule as a permanent rule, and is actively undertaking the appropriate procedures to adopt the rule as a permanent rule. This section does not relieve any agency from compliance with any law requiring that its permanent rules be approved by designated persons or bodies before they become effective.

[Emphasis added].

5.8 RCW 34.05.362 sets forth the requirements for post-adoption notice of rules. It provides:

Either before or within two hundred days after the effective date of an adopted rule that imposes additional requirements on businesses the violation of which subjects the business to a penalty, assessment, or administrative sanction, an agency identified in RCW34.05.220(6) shall notify businesses affected by the rule of the requirements of the rule and how to obtain technical assistance to comply. Notification must be provided by e-mail, if possible, to every person identified to receive the postadoption notice under RCW 34.05.220(6).

The notification must announce the rule change, briefly summarize the rule change, refer to appeal procedures under RCW 34.05.330, and include a contact for more information. Failure to notify a specific business under this section does not invalidate a rule or waive the requirement to comply with the rule. The requirements of this section do not apply to emergency rules adopted under RCW 34.05.350.

[Emphasis added].

5.9 In the present case, WAC 314-20-022 was adopted as an emergency rule to protect the public health, safety and welfare from the risks of alcoholic energy drinks. Failure to notify the Appellant of the emergency rule did not invalidate the rule or waive the requirement that the Appellant comply with it under RCW 34.05.362. Furthermore, because this was an emergency rule post-adoption notice was not required by RCW 34.05.362. Finally, even if post-adoption notice were an issue to be considered here, the Liquor Control Board is not subject to post-adoption requirements under RCW 34.05.220(6).

5.10 Based on the foregoing analysis, specific notice to the Licensee of the rule change was not required. The lack of notice does not relieve the Licensee of his responsibility to comply with the rules of the Liquor Control Board or excuse the violation in this case.

5.11 Violation of WAC 314-0-022 is a "group two - regulatory violation". See WAC314-29-015 & WAC 314-29-025. The standard penalty in this matter for a first violation of WAC 314-20-022, is a five day suspension of the Licensee's liquor license. In lieu of license suspension, the Licensee is afforded a monetary penalty option in the amount of \$250.00. WAC 314-29-025.

5.12 In the matter of penalties, the role of the Administrative Law Judge is to draw the Board's attention to those aggravating or mitigating circumstances which the Board may wish to consider in deciding whether to deviate from the standard penalty established by regulation. Examples of mitigating or aggravating circumstances are set forth at WAC 314-29-015(4).

5.13 WAC 314-29-015(4) provides that penalty schedules are meant to serve as guidelines. Based on mitigating or aggravating circumstances, the liquor control board may impose a different penalty than the standard penalties outlined in these schedules. Mitigating circumstances that may result in fewer days of suspension and/or a lower monetary option may include demonstrated business policies and/or practices that reduce the risk of future violations.

5.14 In the present case, the emergency rule had only been in effect ten days. The Licensee tried to comply with the rule based on information that he received from his distributor. However, he received incomplete information and, as a result, he did not remove all of the alcoholic energy drinks from his display case. These facts should be considered mitigating factors and should be considered by the Board when imposing its penalty in accordance with WAC 314-29-025.

VI. INITIAL ORDER

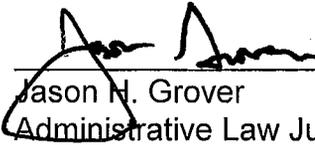
From the foregoing Conclusions of Law, NOW THEREFORE:

6.1 The Licensee offered a caffeinated alcoholic beverage for sale on November 27, 2010 in violation of WAC 314-20-022 (as modified by emergency rule) which prohibits such sale after November 17, 2010. The Board's Complaint issued February 16, 2011 is **SUSTAINED**.

6.2 On a date to be established in the Board's Final Order, the license privileges of Myong Su Chong dba King's Market, under License No. 354069, shall be suspended for a period of five (5) days. In lieu of a license suspension, the Licensee may pay a civil

monetary penalty in the amount of Two Hundred Fifty Dollars (\$250.00).

SERVED on the date of mailing.



Jason H. Grover
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO PARTIES

Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the liquor control board within twenty (20) days of the date of service of the initial order. RCW 34.05.464, WAC 10-08-211 and WAC 314-42-095.

The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and
- (iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within ten (10) days after service of the petition for review, any of the other parties may file a response to that petition with the liquor control board. WAC 314-42-095(2)(a) and (b). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten (10) days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).