

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In The Matter Of the Hearing Of:

KNOCK OUT, INC
d/b/a STAR MART
2517 NE ANDRESEN RD
VANCOUVER, WA 98661

LICENSEE

UBI NO. 6017338680010002

LCB NO. T-518
OAH NO. 2010-LCB-0030

FINAL ORDER OF THE BOARD

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

1. On June 11, 2010 the Board issued a Complaint alleging that on February 3, 2010 the above-named Licensee, sold/supplied tobacco to a person under the age of eighteen (18), contrary to RCW 26.28.080 and is subject to the penalties set out in RCW 70.155.100(3) and (4).
2. The Licensee made a timely request for a hearing.
3. An administrative hearing was held on January 25, 2011.
4. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Cindy Evans and Attorney at Law David E. Gregerson appeared and represented the Licensee.
5. On February 4, 2011, Administrative Law Judge Robert C. Krabill entered his Amended Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the

Complaint and reduced the original penalty from \$1000 and a six-month suspension of the tobacco license privileges to a \$500 monetary penalty and three-month suspension.

6. A timely Petition for Review was filed by the Enforcement Division of the Board. The Licensee did not file a response to the Petition for Review.

7. The Initial Order is adopted, and modified, as follows: The Board adopts the prefatory language on pages 1 and 2 of the Initial Order without change. The Board adopts the first paragraph under the FINDINGS OF FACT on page 2. The Board adopts Findings of Fact Nos. 1 through 7, and 9 through 17, modifies Findings of Fact Nos. 8 and 18, and adopts Finding of Fact No. 19.

8. Finding of Fact No. 8 is modified to delete the last sentence. Mr. Vue, as an employee of the Clark County Health Department, may have the power to administer some type of violation notice to premises within his jurisdiction, but does not have the authority to issue administrative violation notices on behalf of the Liquor Control Board.

9. Finding of Fact No. 18 is modified to read as follows:

18. The Licensee received another administrative violation notice on December 18, 2008, for a second violation of RCW 26.28.080, sale of tobacco to a minor. Exhibit 7, p. 22. An employee clerk, Lucas Reed, sold the tobacco to the minor in that case. The licensee requested an administrative hearing, which was scheduled to be held on November 3, 2009. The licensee did not appear for the hearing, and the licensee was declared to be in default. On December 3, 2009, the Board entered a Final Order sustaining the complaint, and imposed a penalty of \$300.00. The Licensee did not appeal this order, and paid the monetary penalty on December 31, 2009.

10. The Board adopts Conclusions of Law Nos. 1 through 4 of the Initial Order, but substitutes the following for Conclusion of Law No. 5:

5. The licensee provides tobacco sales training to new employees, and testified that he disciplines clerks who violate RCW 26.80.080. He also provides a cash register that reminds clerks to check birthdates and calculates ages for them, and the location has successfully passed several compliance checks during the 24 months at issue. However, Mr. Bains himself has previously been proven to have sold tobacco to minors within this time period, and this is the third violation for which he has been ticketed within 24 months. Therefore, despite the Licensee's testimony about his policies and training, either he has not adequately impressed on his staff that they must comply with his policies, or his policies are not effective. The cash register system invites bypass, and the violation itself shows his training is only somewhat effective. Therefore, the Board finds no reason to mitigate the penalty below the statutorily prescribed sanction of \$1000.00, plus a six month suspension of the license privileges, in accord with RCW 70.155.100(2)(a)(iii).

ORDER

The entire record in this proceeding having been reviewed by the Board, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE,

IT IS HEREBY ORDERED 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, adopted as Findings of Fact, Conclusions of Law and Final Order of the Board, except as modified in this Final Order, so that the above-named Licensee Knock Out Inc d/b/a Star Mart located at 2517 NE Andresen Road in Vancouver, Washington shall be subject to a monetary penalty of one-thousand dollars and a six-month suspension of its tobacco license privileges. IT IS HEREBY FURTHER ORDERED THAT payment shall be made to the Board no later than June 27, 2011. The suspension of Tobacco sales privileges shall commence on July 1, 2011 and continue to December 28, 2011.

Failure to comply with the terms of this Order will subject the Licensee to further disciplinary action.

Payment should be sent to:

**Washington State Liquor Control Board
PO Box 43085
Olympia, WA 98504-3085**

DATED at Olympia, Washington this 24 day of May, 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**

May 25, 2011

David E. Gregerson, Attorney for Licensee
415 E 17th Street
Vancouver, WA 98663-3423

Knock Out Inc.
d/b/a Star Mart
1520 SE 87th Ct
Vancouver, WA 98664-2871

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

**RE: FINAL ORDER OF THE BOARD
ADMINISTRATIVE VIOLATION NOTICE NO. 31418-1L0041A
LICENSEE: Knock Out Inc.
TRADE NAME: Star Mart
LOCATION: 2517 NE Andresen Dr, Vancouver, WA 98661-7313
LCB HEARING NO. T-518
OAH DOCKET NO. 2010-LCB-0030
UBI: 6017338680010002**

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,

A handwritten signature in black ink, appearing to read "Kevin McCarroll".

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
Amber Harris, Tobacco Violations Coordinator, WSLCB

PO Box 43076, 3000 Pacific Ave. SE, Olympia WA 98504-3076, (360) 664-1602
www.liq.wa.gov

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3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 KNOCK OUT INC.
6 d/b/a STAR MART
7 2517 NE ANDRESEN DR
8 VANCOUVER, WA 98661-7313

9 LICENSEE

10 UBI NO. 6017338680010002

OAH NO. 2010-LCB-0030
LCB NO. T-518

DECLARATION OF SERVICE BY
MAIL

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

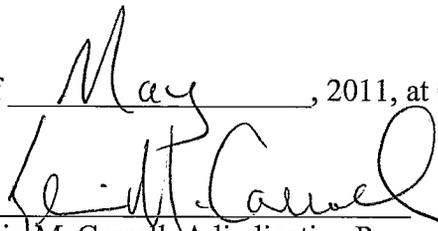
16 KNOCK OUT INC.
17 d/b/a STAR MART
18 1520 SE 87TH CT
VANCOUVER, WA 98664-2871

CINDY EVANS, ASSISTANT ATTORNEY
GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
MAIL STOP 40100

19 KNOCK OUT INC.
20 d/b/a STAR MART
21 2517 NE ANDRESEN DR
VANCOUVER, WA 98661-7313

DAVID E. GREGERSON, ATTORNEY FOR
LICENSEE
415 E 17TH STREET
VANCOUVER, WA 98663-3423

22 DATED this 25th day of May, 2011, at Olympia, Washington.

23
24 
25 Kevin McCarroll, Adjudicative Proceedings Coordinator
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

FEB 07 2011

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

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

In the Matter of:

HARKANWAL BAINS,
Knock Out, Inc. d/b/a Star Mart
1520 SE 87th Circle
Vancouver, WA 98664

LICENSEE

UBI NO. 6017338680010002

OAH Docket No. 2010-LCB-0030

LCB Case No. T-518

AMENDED
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND INITIAL ORDER

This Amended Findings of Fact, Conclusions of Law and Initial Order is being issued due to a clerical error. The "Notice to Parties" was not included in the Order issued February 3, 2011.

Administrative Law Judge Robert C. Krabill, conducted an administrative hearing in this matter at the Vancouver Field Office of the Office of Administrative Hearings, 5300 MacArthur Blvd., Ste. 100, Vancouver, Washington on January 25, 2011. The issues presented were (1) whether Harkanwal Bains and Knock Out Inc. d/b/a Star Mart, (the "Licensee") furnished tobacco to a person under 18 years on February 3, 2010; and (2) if so, what the penalty should be. See Administrative Violation Notice, February 10, 2010, Exhibit 1.

Cindy Evans, Assistant Attorney General, appeared and represented the Washington Liquor Control Board (the "Board"). David E. Gregerson appeared and represented the Licensee.

On June 11, 2010, the Board issued a complaint in LCB Case No. T-518 against the Licensee under RCW 26.28.080. That complaint charged the Licensee as follows, "...on or about February 3, 2010, the above named Licensee, sold/supplied tobacco to a person under the age of eighteen (18),

contrary to RCW 26.28.080 and is subject to the penalties set out in RCW 70.155.100(3) and (4)." Complaint for LCB Case No. T-518, June 11, 2010.

The parties received due notice of the time and the place of the administrative hearing. Of the eight proposed exhibits, all eight were admitted in their entirety. Six witnesses gave testimony, (1) [REDACTED], former volunteer youth operative; (2) Long Vue, health educator, Clark County Public Health Department; (3) Lt. Mark Edmonds, Liquor Control Board; (4) Ofc. Almir Karic, Liquor Control Board; (5) Jeremy Rubbelke, Star Mart clerk; and (6) Harkanwal "Kamal" Bains, licensee.

FINDINGS OF FACT

Having considered the entire record, I find the following facts more probable than not under the preponderance of the evidence standard:

The Licensee's Business

1. At all times relevant, the Licensee held tobacco retailer's license number 364499 and was responsible for the premises known as Star Mart, which is located at 2517 NE Andressen Road, Vancouver, Washington.
2. Star Mart is a gas station and convenience store at a busy intersection. It keeps tobacco products in storage behind the clerk's counter, where the public cannot reach them. Customers must approach the clerk and request tobacco products. On February 3, 2010, around 2:45 PM, Jeremy Rubbelke was working as a clerk in the convenience store. He was working alone.

The Licensee's Prevention Efforts

3. The Licensee sells both tobacco and alcohol at Star Mart. Testimony of Harkanwal Bains. It provides tobacco compliance training to all new clerks. *Id.* Mr. Bains personally provides a one day training, and the Licensee provides an additional two days of training. *Id.* Clerk Jeremy Rubbelke received the tobacco compliance training from Mr. Bains. Testimony of Jeremy Rubbelke. After

completing training, clerks must sign a compliance contract. Testimony of Harkanwal Bains.

4. Star Mart uses cash registers that ask clerks to enter the customer's birthday when the clerk rings up a tobacco product. Testimony of Jeremy Rubbelke. The case register will not allow the clerk to close the transaction without responding to the question. *Id.* The clerk can respond either by entering the birthdate or by pressing the "enter" key without entering the birthdate. *Id.*

5. The Licensee terminates clerks who sell tobacco to minors. Testimony of Harkanwal Bains. It retained Mr. Rubbelke, so he would be available as a witness at the hearing. *Id.*

6. Except for the present violation notice and two previous violation notices discussed below, the Board has not issued any other liquor or tobacco violation notices to the Licensee. Testimony of Harkanwal Bains. On several occasions, the Board has issued Star Mart Compliance Appreciation Certificates for refusing to sell tobacco to minors. Testimony of Harkanwal Bains; Testimony of Ofc. Almir Karic; Compliance Appreciation Certificate, August 18, 2008, Exhibit 8. It might have received more had the Board stopped issuing Compliance Appreciation Certificates.

Youth Operative

7. Long Vue works as a health educator for the Clark County Public Health Department. One of his main duties is performing tobacco compliance checks. The Board partners with the Washington Department of Health to perform tobacco compliance checks, and the Department of Health contracts with local agencies including the Clark County Public Health Department to perform the checks.

8. Mr. Vue recruits and trains volunteer youth operative to perform tobacco compliance checks. Volunteer youth operatives are under 18. They carry only

their genuine drivers licenses and the buy money Mr. Vue provides. Operatives make no effort to appear older. They enter licensed businesses and attempt to buy tobacco. If the clerk asks for identification, they present their true drivers licenses. If the clerk allows the sale, the operative uses the buy money to purchase the tobacco. Mr. Vue photographs the operative and the tobacco product. Ultimately, Mr. Vue issues administrative violation notices to clerks and businesses that sell tobacco to the operatives.

9. [REDACTED] was one of his volunteers. She was born on July 27, 1992, so she turned 18 on July 27, 2010. Before she turned 18, she participated in about fifty compliance checks, including about six that resulted in administrative violation notices.

10. [REDACTED] appears to be a young woman at the leading edge of adulthood. Her drivers license is oriented vertically, fairly depicts her, and states "AGE 18 ON 07-27-2010". Certified Color Copy of [REDACTED] Drivers License, July 2, 2009, Exhibit 5. In Washington, the Department of Licensing issues vertically oriented drivers licenses to minors under 18 years old, but it remains valid until the licensee's 22nd birthday. Testimony of Lt. Mark L. Edmonds. [REDACTED] possessed the very same drivers license on February 3, 2010, as she did at the time of hearing. Testimony of [REDACTED] Exhibit 5. It is not mutilated or difficult to read.

11. Mr. Vue selects licensed businesses randomly within geographic areas.

February 3rd Incident

12. Mr. Vue selected Star Mart for a compliance check on February 3, 2010. [REDACTED] served as his volunteer youth operative that day. [REDACTED] was dressed in a hoodie sweater and wore her hair in a ponytail. Photograph of [REDACTED] by Mr. Vue, February 3, 2010, Exhibit 3. She appeared to be a female close to her actual age.

13. Around 2:45 PM, Jeremy Rubbelke was the clerk on duty. Testimony of Jeremy Rubbelke. He stood behind the counter ringing up a line of customers.

██████████ entered the convenience store and got in the check out line.

Testimony of Jeremy Rubbelke. Mr. Vue followed her and stood in line several customers behind where he could observe the transaction between ██████████ and Mr. Rubbelke. Testimony of Long Vue.

14. When ██████████ reached the front of the line, she requested, "Marlboro Lights". Testimony of ██████████ Testimony of Jeremy Rubbelke. Mr.

Rubbelke suggested she choose Marlboro Special Blend cigarettes, because they were on sale. Testimony of Jeremy Rubbelke. ██████████ accepted his suggestion. Mr. Rubbelke requested her drivers license, ██████████ provided

it, and he inspected it. Compliance Check Report, Long Vue, February 3, 2010, Exhibit 2; Testimony of ██████████; Testimony of Jeremy Rubbelke. He did not ask her her birthday, and he bypassed the cash register's birthday request.

Exhibit 2; Testimony of Jeremy Rubbelke. ██████████ bought the pack of cigarettes for \$5.40. Exhibit 2.

15. ██████████ took the cigarettes outside. Mr. Vue photographed her holding the cigarettes. Exhibit 3; Testimony of Long Vue; Testimony of ██████████

██████████ He placed the cigarettes in a resealable plastic bag. Testimony of Long Vue; see *also* Photograph of Cigarettes, Long Vue, February 3, 2010, Exhibit 4. Then, he returned to Star Mart and confronted Mr. Rubbelke. Mr.

Rubbelke admitted to selling ██████████ the cigarettes, and he admitted not checking her birthday. Exhibit 2. Mr. Vue handed Mr. Rubbelke an

administrative violation notice for selling tobacco to a minor. Testimony of Long Vue. Mr. Rubbelke paid the fine, rather than contest the violation notice.

Testimony of Jeremy Rubbelke.

Administrative Violation Notice

16. Liquor Control Officer Almir Karic received Mr. Vue's Compliance Check Report. He reviewed the Licensee's violation history.
17. The Licensee received an administrative violation notice on March 17, 2008, for a first violation of RCW 26.28.080, sale of tobacco to a minor. Certified Copy of Licensee's Tobacco Violation History, August 2, 2010, Exhibit 7, p. 2. Mr. Bains personally sold the tobacco to the minor. Exhibit 7, pp. 2, 4, 6-8. The Licensee admitted the sale and the violation. Exhibit 7, pp. 6-8. It paid a reduced fine, and Mr. Bains agreed to attend a Responsible Liquor and Tobacco Sales class. *Id.*
18. The Licensee received another administrative violation notice on December 18, 2008, for a second violation of RCW 26.28.080, sale of tobacco to a minor. Exhibit 7, p. 22. An employee clerk, Lucas Reed, sold the tobacco to the minor. Exhibit 7, pp. 22. After an administrative hearing, the Board affirmed the violation notice, and the Licensee paid the \$300 fine. Exhibit 7, pp. 24, 27-29. The Licensee admitted the sale and the violation. Exhibit 7, pp. 6-8. It paid a reduced fine, and Mr. Bains agreed to attend a Responsible Liquor and Tobacco Sales class. *Id.*
19. Ofc. Karic determined that the standard penalty for a third violation in a 24 month period, \$1,000 fine and a 6 month suspension was the appropriate penalty. He created the Administrative Violation Notice. Testimony of Ofc. Karic; Administrative Violation Notice, February 10, 2010, Exhibit 1. And, he served the administrative violation notice in this matter on Mr. Rubbelke at Star Mart on February 10, 2010. Testimony of Ofc. Karic; Administrative Violation Notice, February 10, 2010, Exhibit 1. The Licensee timely requested an administrative hearing. Exhibit 1, p. 2.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the administrative law judge now enters the following conclusions of law:

Jurisdiction

1. Because Harkanwal Bains and Knock Out Inc. d/b/a Star Mart possess a tobacco retailer's license issued under RCW 82.24.510, the Washington State Liquor Control Board has jurisdiction over the Licensee's alleged violations of RCW 26.80.080 under RCW 70.155.100.

Service of Liquor to Underage People

2. RCW 26.80.080 forbids supplying tobacco products to a minor under 18 years old. RCW 26.80.080. "Tobacco product" means any product that contains tobacco and is intended for human use. RCW 70.155.010(6). It includes cigarettes. Tobacco licensees and their employees must require identification from any tobacco customer that could reasonably be a minor. RCW 70.155.090(1).

3. When a licensee violates RCW 26.80.080, the Board may impose a fine and/or a license suspension, in its discretion. RCW 70.155.100(2)(a). For a third violation within a 24 month period, the Board may impose a "monetary penalty of one thousand dollars" and a six month suspension. RCW 70.155.100(2)(a)(iii). It may also impose a fine against non-licensees who violate RCW 26.80.080 under RCW 70.155.100(3). However, the Board may impose a different penalty based on the presence of mitigating or aggravating factors. RCW 70.155.100(9). Mitigating circumstances specifically include "due diligence" by the licensee. *Id*

February 3rd Incident

4. On February 3, 2010, Mr. Rebbelke supplied tobacco to a minor, while acting as an employee agent for Star Mart. His act of supplying tobacco to a minor violated RCW 26.80.080. Because Mr. Rebbelke acted as an agent for the

Licensee, the Licensee also violated RCW 26.80.080. Because this violation was the Licensee's third violation in the 24 months beginning March 17, 2008, the standard penalty is a \$1,000 monetary penalty and a six month suspension under RCW 70.155.100(2)(a)(iii).

Mitigating Factors

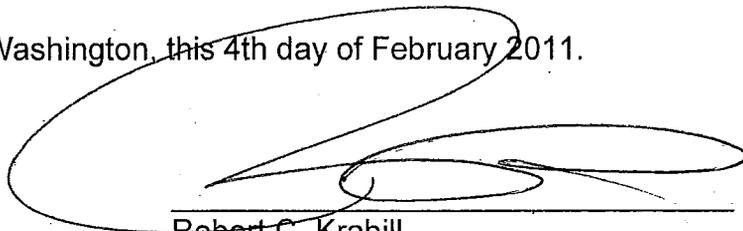
5. Here, the employer provides new employees extensive tobacco sales training. It disciplines clerks who violate RCW 26.80.080. It has a cash register system that reminds clerks to check birthdates and calculates age for them. And, it has successfully passed several other tobacco compliance checks during the 24 months at issue. Unfortunately, the Board has caught the employer, including Mr. Bains himself, violating RCW 26.80.080 three times in the 24 months beginning March 17, 2008. The Licensee's training, employee discipline, cash register system, and partial success in complying with RCW 26.80.080 mitigate the violation in this case. The Board presented no aggravating factors. With some mitigating factors and no aggravating factors, the standard penalty for a third violation should be reduced. Because the cash register system invites bypass and the training is only somewhat effective, the Licensee has not shown so much diligence that he could not have shown more. Therefore, a serious sanction remains appropriate. After a 50% discount from the standard penalty for mitigating factors, the Licensee's tobacco retailer's license shall be suspended for three months, and it shall pay a monetary penalty of \$500.

INITIAL ORDER

1. The Board's complaint number T-518 dated June 11, 2010 is **SUSTAINED**.
2. On a date to be established in the Board's Final Order, the tobacco retailer's license privileges granted to Harkanwal Bains Knock Out, Inc. d/b/a Star

Mart tobacco retailer's license 364499, shall be suspended for three months, and it shall pay a monetary penalty of \$500.

DATED at Olympia, Washington, this 4th day of February 2011.



Robert C. Krabill
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 and 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 (10) ten 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 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.

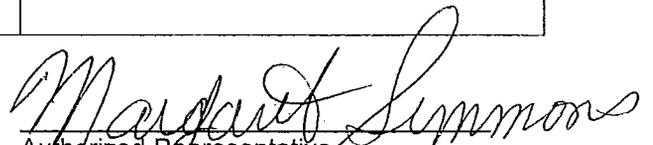
The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

Certificate of Service – OAH Docket No. 2010-LCB-0030

I certify that true copies of this document were served from Olympia, Washington on the following as indicated.

Address: Harkanwal Bains Knock Out Inc., d/b/a Star Mart 1520 SE 87 th Circle Vancouver, WA 98664	First Class US Mail
Tel: Fax:	
Address: David E. Gregerson, Attorney at Law Gregerson & Langsdorf, P.S. 415 E 17 th St Vancouver, WA 98663	First Class US Mail
Tel: Fax:	
Address: Cindy Evans, AAG Office of the Attorney General – GCE Division PO Box 40100 Olympia, WA 98504-0100	First Class US Mail
Tel: Fax:	
Address: Kevin McCarroll Adjudicative Proceedings Coordinator Washington State Liquor Control Board PO Box 43076 Olympia, WA 98504-3076	First Class US Mail
Tel: Fax:	
Address:	
Tel: Fax:	
Address:	
Tel: Fax:	

Date: February 4, 2011.



Authorized Representative
Office of Administrative Hearings

Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402
Tel: (253) 476-6888 • Fax: (253) 593-2200

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MAR 08 2011

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

HARKANWAL BAINS,
KNOCK OUT INC., d/b/a
STAR MART

2517 NE ANDRESEN RD
VANCOUVER, WA 98661-7313

LICENSEE

UBI NO. 6017338680010002

OAH NO. 2010-LCB-0030
LCB NO. T-518

ENFORCEMENT'S PETITION
FOR REVIEW OF THE
AMENDED INITIAL ORDER

The Washington State Liquor Control Board's Enforcement and Education Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and CINDY EVANS, Assistant Attorney General, and pursuant to RCW 34.05.464 and WAC 314-29-010, submits the following exceptions to the Initial Order issued on February 4, 2011, by Administrative Law Judge (ALJ) Robert C. Krabill.

I. BACKGROUND

On June 11, 2010, the Washington State Liquor Control Board (Board) issued a Complaint to the Licensee, Harkanwal Bains, Knock Out Inc., d/b/a Star Mart, alleging that on or about February 3, 2010, the Licensee and/or an employee thereof, sold, and/or allowed to be sold, tobacco products to a person under eighteen years of age, contrary to RCW 26.28.080 and RCW 70.155.100.

1 An Administrative hearing was held on January 25, 2011. On February 3, 2011, ALJ
2 Robert Krabill entered Findings of Fact, Conclusions of Law, and Initial Order. The ALJ entered
3 Amended Findings of Fact, Conclusions of Law, and Initial Order (hereinafter "Amended Initial
4 Order") on February 4, 2011.¹ On February 11, 2011, Enforcement filed a motion to extend the
5 filing time for Petition for Review to allow for the review of the Office of Administrative
6 Hearings audio recording of the hearing. Enforcement's Motion to Extend the Time for Filing a
7 Petition for Review was granted by the Board on February 15, 2011.

8 The ALJ's Amended Initial Order correctly sustains the Board's Complaint. However, the
9 Findings of Fact contain errors and the Conclusions of Law incorrectly apply the law to the facts.
10 Additionally, the ALJ incorrectly finds mitigating circumstances and orders a reduced monetary
11 penalty of five hundred dollars (\$500) and a three (3) month license suspension.² While the ALJ
12 correctly sustains the Complaint, Enforcement respectfully takes exception to the Amended Initial
13 Order of the ALJ, and asks the Board to uphold the finding that the Licensee or an employee
14 thereof, sold, and/or allowed to be sold, tobacco products to a person under eighteen years of age,
15 contrary to RCW 26.28.080 and RCW 70.155.100, and order the Licensee to pay a one-thousand
16 dollar (\$1,000) monetary penalty and impose a six month license suspension for this third tobacco
17 violation within a two year period.

18 II. ANALYSIS

19 Pursuant to WAC 314-42-095(2)(a), any party, upon receipt of an initial order, may file
20 exceptions within twenty days of service of the order. The reviewing officer "shall exercise all
21 the decision-making power that the reviewing officer would have had to decide and enter the final
22 order had the reviewing officer presided over the hearing[.]" RCW 34.05.464(4). Accordingly,
23 the Board is not bound by the ALJ's Conclusions of Law in the Amended Initial Order.

24
25 ¹ The Amended Initial Order was issued due to a clerical error. The "Notice to Parties" was not included in the
Order issued on February 3, 2011.

26 ² The standard penalty for a third violation in a two year period is a one thousand dollars (\$1,000) monetary penalty
and a six (6) month suspension.

1 **A. Findings Of Fact**

2 **1. Finding of Fact Nos. 8 and 15**

3 The ALJ states in findings of fact 8 and 15 that the Administrative Violation Notice
4 (AVN) was issued by Mr. Long Vue, Clark County Public Health Department employee. *See*
5 Amended Initial Order, pp. 4, 5. However, the record establishes that Officer Karic of the Liquor
6 Control Board issued the AVN. *See* Exhibit 1, AVN No. 31418.

7 **2. Finding of Fact No. 18**

8 The ALJ incorrectly characterizes the outcome of the Licensee's second administrative
9 violation that occurred on December 18, 2008 (AVN 1K8352B/21181) as a *settlement*. *See*
10 Amended Initial Order, p. 6. The record establishes that the Licensee failed to appear at the
11 scheduled hearing and the Board entered a Final Order on December 3, 2009, pursuant to the
12 ALJ's Order of *Default*. *See* Certified copy of tobacco violation history, Exhibit 7, pp. 27-29.

13 **B. Conclusions Of Law**

14 **1. The ALJ correctly sustains the Complaint, but Conclusions of Law Nos. 1, 2,**
15 **3, 4, And 5 cite to an incorrect statute**

16 In the Conclusions of Law section of the Amended Initial Order, ALJ Krabill repeatedly
17 cites to RCW 26.80.080. *See* Amended Initial Order pp. 7-8. However these citations are
18 erroneous, as there is no such statute. Enforcement assumes that ALJ Krabill intended to
19 reference RCW 26.28.080 (Selling or giving tobacco to minor -- Belief of representative capacity,
20 no defense -- Penalty).

21 **2. The ALJ incorrectly concludes that a mitigated penalty is warranted in**
22 **Conclusion Of Law No. 5**

23 The ALJ incorrectly concludes that a mitigated penalty is appropriate in this case. *See*
24 Conclusion of Law No. 5. The evidence presented by the Licensee did not warrant a mitigated
25 penalty, and the standard penalty of one thousand (\$1,000) and a six month suspension of the
26 Licensee's tobacco license should be imposed.

1 In his Initial Order, the ALJ cites to RCW 70.155.100(9) as the basis for mitigation.
2 Specifically, he finds that “the Licensee’s training, employee discipline, cash register system, and
3 partial success in complying with RCW 26.80.080 mitigate the violation in this case.” *See Id.* at
4 No. 5. However, the Licensee did not present sufficient evidence to support this finding.

5 Pursuant to RCW 70.155.100(9), “[t]he liquor control board may reduce or waive either
6 the penalties or the suspension or revocation of a license, or both, as set forth in this chapter
7 where the elements of proof are inadequate or where there are mitigating circumstances.” The
8 statute does not provide an exclusive list of mitigating circumstances, but rather provides that
9 “[m]itigating circumstances may include, but are not limited to, an exercise of due diligence by a
10 retailer....” RCW 70.55.100(9). Thus, the Board has discretion to reduce or waive a penalty if
11 there are mitigating circumstances, and one example of a possible mitigating factor is the exercise
12 of due diligence by the Licensee. Although there is no statutory definition of due diligence,
13 Black’s Law Dictionary defines due diligence as “the diligence reasonably expected from, and
14 ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an
15 obligation. *Black’s Law Dictionary*, 488 (8th rev. ed. 2004).

16 During the hearing, Mr. Bains argued that he did everything possible to prevent the sale of
17 tobacco to a minor from occurring. However, the evidence submitted during the hearing does not
18 support that conclusion.

19 In concluding that mitigation was appropriate, the ALJ relied, in part, upon the Licensee’s
20 stated emphasis on training of new employees. During the hearing, Mr. Bains testified that he
21 conducts the initial training of all new employees. However, the evidence also established that on
22 March 17, 2008, Mr. Bains, himself, sold tobacco to a minor. *See Conclusion of Law No. 5*;
23 Exhibit 7, Certified copy of tobacco violation history for Star Mart, at pages 2 - 4; and January 25,
24 2011 Hearing DVD (Hearing DVD) at hour 1:55:28 – 1:56:37.

25 The ALJ also cited to the Licensee’s employee discipline as a basis for mitigation. *See*
26 *Conclusion of Law No. 5*. The sales clerk and Mr. Bains testified about the Licensee’s employee

1 discipline policies. According to their testimony, employees must sign a contract that informs
2 them that the employee will be fired after the first offense of selling tobacco to a minor.
3 Respectively, *See* Hearing DVD at hour 1:38.08 – 1:40:00; and Hearing DVD at hour 1:55:28 –
4 1:56:37. However, neither written policies nor copies of the employees’ contracts were provided
5 at hearing. Moreover, Mr. Bains also acknowledged that he did not fire the sales clerk who sold
6 on this occasion, as required by his alleged discipline policies and employee contracts, so that the
7 clerk would be available to testify at the administrative hearing. *See* Hearing DVD at hour
8 1:59:30 – 2:01:15. This self-serving and undocumented testimony on employee discipline is
9 unpersuasive and does not warrant mitigation of the penalty. Additionally, the Licensee could
10 have subpoenaed any dismissed sales clerk to testify at a hearing.

11 Finally, the ALJ pointed to the stores’ cash register system and Mr. Bains’ “*partial*
12 *success*” at complying with RCW 26.28.080 as mitigating factors. *See* Conclusion of Law No. 5
13 (emphasis added). However, neither provides a basis for mitigation under the facts of this case.
14 During the hearing, the sales clerk testified that he suspected [REDACTED] was underage from the
15 time she entered the premises. Notwithstanding this well-founded “suspicion,” which should
16 have been significantly strengthened by [REDACTED] presentation of a vertical identification,
17 the clerk failed to enter the birth date given on the vertical driver’s license into the cash register,
18 thereby overriding the safety-feature built into the cash register system. *See* Hearing DVD at
19 hour 1:40:06 – 1:41:57. The ALJ questioned the clerk to confirm that the clerk carded the Youth
20 Operative, was provided with identification that showed she was underage and then bypassed the
21 cash register safeguard. *See* Hearing DVD at hour 1:43:59 – 1:44:31.

22 The Licensee produced only one exhibit at hearing, a compliance appreciation certificate
23 awarded during the two year period in question. *See* Exhibit 8. Although the compliance
24 appreciation certificate reflected that the Licensee had, indeed, passed one compliance check
25 within the preceding two year period, the evidence established that during the same period, the
26 Licensee *failed three* documented tobacco compliance checks. *See* Exhibit 8 and Exhibit 7,

1 Certified copy of tobacco violation history for Star Mart, pages 1. This equates to a 75 percent
2 failure rate. This can hardly be characterized as even "partial success" at complying with
3 RCW 28.26.080 or as a mitigating factor warranting a reduction in penalty.

4 The Licensee is required to not sell tobacco products to persons less than eighteen (18)
5 years of age under RCW 26.28.080 and RCW 70.155.100. The argument that the Licensee is
6 attempting to follow the law and has received one documented certificate for merely complying
7 with the law should not be considered mitigating circumstances.

8 III. CONCLUSION

9 At hearing, Enforcement demonstrated by a preponderance of the evidence, through the
10 sworn testimony of a trained liquor enforcement officer and a minor investigative aide, that the
11 Licensee sold tobacco to a minor. The standard penalty for a third violation of RCW 26.28.080
12 and RCW 70.155.100 is one thousand dollars (\$1,000) and a six month suspension of their license
13 to sell tobacco products. Without the standard penalty, the Board will not have sufficient
14 incentives to control violations of its laws and rules. Therefore, the Enforcement Division
15 respectfully requests that the Initial Order not be adopted in this matter, that the Complaint be
16 sustained, and a one thousand dollar monetary penalty (\$1,000) and six month suspension of the
17 Licensee's tobacco license be imposed.

18 DATED this 8 day of March, 2011.

19 ROBERT M. MCKENNA
20 Attorney General

21
22 CINDY EVANS, WSBA #27309
23 Assistant Attorney General
24 Attorneys for the Washington State Liquor
25 Control Board Enforcement Division
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