

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

MARION MICHELLE MACKKEY-
MARCUM d/b/a WEST RICHLAND
MUNICIPAL GOLF COURSE

4000 FALLON DR
WEST RICHLAND, WA 99352-5050

LICENSEE

LICENSE NO. 353625-4F
AVN NO. 4J1195A

LCB NO. 23,890
OAH NO. 2011-LCB-0077

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 December 7, 2011, alleging that on July 14, 2011 the above-named Licensee, or employee(s) thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1), and that on or about July 14, 2011, the above-named Licensee, or an employee thereof, was without the required Mandatory Alcohol Server Training Permit contrary to WAC 314-17-025.
2. The Licensee made a timely request for a hearing.

FINAL ORDER OF THE BOARD
LCB NO. 23,890
WEST RICHLAND MUNICIPAL GOLF
COURSE
LICENSE 353625

3. A hearing was held on July 10, 2012 and July 11, 2012 in Kennewick, Washington before Administrative Law Judge Mark H. Kim with the Office of Administrative Hearings.
4. At the hearing, the Licensee Marion Michelle Mackey-Marcum appeared and represented herself. The Education and Enforcement Division of the Board appeared and was represented by Assistant Attorney General Marisa E. Broggel.
5. On August 9, 2012, Administrative Law Judge Mark H. Kim entered his Initial Order in this matter, which affirmed the Complaint and reduced the monetary penalty associated with the violation of WAC 314-17-025 to \$250.00.
6. The Education and Enforcement Division filed a Petition for Review of the Initial Order, objecting to the reduction of the penalty for violation of WAC 314-17-025. No response was received from the Licensee.
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; IT IS HEREBY ORDERED that the Administrative Law Judge's Initial Order is AFFIRMED and adopted as the Final Order of the Board.

IT IS ALSO ORDERED that the liquor license privileges granted to Marion Michelle Mackey-Marcum d/b/a West Richland Municipal Golf Course, License No. 353625, are hereby suspended for a term of ten (10) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of seven-hundred and fifty dollars (\$750.00) due within 30 days of this order. If timely payment is not received, then suspension will take place at 11:00 a.m. on Friday, November 30, 2012 until 11:00 a.m. on Monday, December 10, 2012. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

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

DATED at Olympia, Washington this 25TH day of SEPTEMBER 2012.

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

September 26, 2012

Marion Michelle Mackey-Marcum
d/b/a West Richland Municipal Golf Course
4000 Fallon Dr
West Richland, WA 99352-5050

Marisa E. Broggel, 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: Marion Michelle Mackey-Marcum

TRADE NAME: West Richland Municipal Golf Course

LOCATION: 4000 Fallon Dr, West Richland, WA 99352-5050

LICENSE NO. 353625-4F

ADMINISTRATIVE VIOLATION NOTICE NO: 4J1195A

LCB HEARING NO. 23,890

OAH NO. 2011-LCB-0077

UBI: 600 584 137 001 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.

The applicable monetary penalty is due by October 26, 2012 or suspension will take place on the dates indicated in the order. The address for payments is WSLCB, P.O. Box 43085, Olympia, WA 98504-3085. Please label the check with your License Number and Administrative Violation Notice Number listed above. If you have any questions, please contact me at (360) 664-1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Spokane and Pasco Enforcement and Education Divisions, WSLCB
Teresa Young, 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:

LCB HEARING NO. 23,890
OAH NO. 2011-LCB-0077

5 MARION MICHELLE MACKEY-
6 MARCUM d/b/a WEST
7 RICHLAND MUNICIPAL GOLF
8 COURSE
4000 FALLON DR
WEST RICHLAND, WA 99352

DECLARATION OF SERVICE BY
MAIL

9 LICENSEE

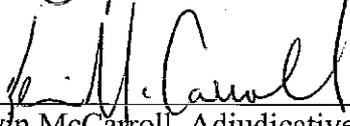
10 LICENSE NO. 353625-4F
11 AVN NO. 4J1195A

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 applicants and licensees, by campus mail for state
15 offices, on the date below to:

16
17
18 MARION MICHELLE MACKEY-
19 MARCUM
d/b/a WEST RICHLAND MUNICIPAL
20 GOLF COURSE
4000 FALLON DR
21 WEST RICHLAND, WA 99352-5050

OFFICE OF THE ATTORNEY GENERAL
MAIL STOP 40100, GCE DIVISION
MARISA E. BROGGEL, ASSISTANT
ATTORNEY GENERAL

22
23 DATED this 26th day of September, 2012, at Olympia, Washington.

24
25 
Kevin McCarrall, Adjudicative Proceedings Coordinator

26
DECLARATION OF SERVICE BY
MAIL

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

RECEIVED

MAILED

SEP 14 2012

AUG 09 2012

Office of Administrative Hearings
Spokane

Liquor Control Board
Board Administration

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

In The Matter Of:

MARION MICHELLE MACKEY-MARCUM
dba WEST RICHLAND MUNICIPAL
GOLF COURSE,

Licensee/Respondent.

OAH Docket No.: 2011-LCB-0077

Agency No.: 23,890

INITIAL ORDER

RECITALS

A hearing in the above-entitled matter was conducted on July 10, 2012 and July 11, 2012 at Kennewick, Washington, before Mark H. Kim, Administrative Law Judge with the Washington State Office of Administrative Hearings. The Licensee, Marion Michelle Mackey-Marcum dba West Richland Municipal Golf Course appeared and represented herself. Marisa E. Broggel, Assistant Attorney General, appeared and represented the Washington State Liquor Control Board, Education and Enforcement Division ("Board or LCB"). The Board's Exhibits 1 through 12 and the Licensee's Exhibits A through H were admitted into the record. The evidentiary record was left open until July 20, 2012 to allow the Licensee the opportunity to submit proof of previous mandatory alcohol server training ("MAST") permit testing. The hearing record closed on July 27, 2012.

The following witnesses were called by the Board and offered testimony:

1. Marie Reddout, LCB Education and Enforcement Officer.
2. Caine Hilario, LCB Education and Enforcement Officer.
3. **UnderAgeOp** LCB Investigative Aide.
4. **UnderAgeOp** LCB Investigative Aide.
5. Kim Sauer, LCB MAST Program Coordinator.

The following witnesses were called by the Licensee and offered testimony:

1. Marion Michelle Mackey-Marcum, Owner of West Richland Municipal Golf Course.

2. Tishina Dunlap, Bartender for West Richland Municipal Golf Course.
3. Nikki Sherman, Bartender/Server for West Richland Municipal Golf Course.
4. Robyn Curtis, Patron of West Richland Municipal Golf Course.

ISSUE

1. Whether the Licensee or an employee thereof sold and/or served alcohol to a person under the age of twenty-one?
2. Whether the Licensee was operating without a valid MAST permit?
3. If there is/are violation(s), what is/are the proper penalties?

BASED ON THE EVIDENCE IN THIS MATTER, THE UNDERSIGNED MAKES THE FOLLOWING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER:

FINDINGS OF FACT

1. The Licensee in this matter is Marion Michelle Mackey-Marcum dba West Richland Municipal Golf Course located in West Richland, Washington. Ms. Marion Michelle Mackey-Marcum is the owner of West Richland Municipal Golf Course and the license holder.
2. In addition to the golf course, the Licensee operates a restaurant and lounge on the premises.
3. The Licensee operates under license no. 353625 issued by the Washington State Liquor Control Board ("LCB" or "Board").
4. The Licensee's premises include a lounge which is restricted to persons twenty-one (21) years or older.
5. The Licensee was open and operating in its current location on July 14, 2011.
6. On July 14, 2011 LCB Officers Marie Reddout and Caine Hillario were performing compliance checks for the Board. These compliance checks included employing minors¹ as investigative aides ("IA") who were charged with the task of entering an establishment and attempting to purchase alcohol.

¹ The reference to "minor" in this decision is regarding a person under the age of twenty-one years of age.

7. Officers Reddout and Hilario performed a compliance check at the Licensee's premises on July 14, 2011 using IAs UnderAgeOp and UnderAgeOp both employed by the Board.

8. On July 14, 2011, UnderAgeOp was eighteen (18) years old with a birthdate of November 17, 1992, and UnderAgeOp was twenty (20) years old with a birthdate of May 11, 1991.

9. Upon arrival at the Licensee's premises, Officers Reddout and Hilario remained in their vehicle in the parking lot while IAs UnderAgeOp and UnderAgeOp entered the premises through the lounge entry. Officer Hilario maintained contact with IA UnderAgeOp through a live cell phone call which continued during the time the IAs were inside the lounge.

10. Prior to entering the premises, each IA carried a personal wallet containing their Washington State driver licenses and money given to them by the Board to be used in purchasing alcohol as part of the compliance check. Each IA was dressed in street clothes and did not alter their appearance.

11. Inside the premises, IAs UnderAgeOp and UnderAgeOp each took a seat at the bar. They were not asked to produce any identification at the entry to the lounge. Within a few minutes they were approached by Tishina Dunlap, employee/bartender for the Licensee. Ms. Dunlap asked the IAs for their identification and asked if they were twenty-one years old. The IAs gave their driver licenses to Ms. Dunlap. The IAs confirmed that they were of drinking age to Ms. Dunlap. Ms. Dunlap reviewed the IAs' driver licenses. Thereafter, IA UnderAgeOp ordered two beers, one for each IA. Ms. Dunlap returned with two bottles of beer, Rolling Rock and Blue Moon, opened the bottles and placed the bottles in front of the IAs.

12. IA UnderAgeOp communicated that the sale of the beers occurred to Officer Hilario through the live cell phone call. Then both IAs exited the premises when Officers Reddout and Hilario entered the premises.

13. After entering the premises, Officer Reddout first approached Ms. Dunlap and informed her that she had served two minors. Officer Reddout then requested Ms. Dunlap for her identification and Mandatory Alcohol Server Training ("MAST") permit. Ms. Dunlap was only able to produce her personal identification and advised Officer Reddout that her MAST permit was on file with her employer. Officer Reddout asked Ms. Dunlap to go get Ms. Marcum.

14. Ms. Marcum came to the lounge and was informed by Officer Reddout that Ms. Dunlap had served alcohol to minors. Officer Reddout also requested to see Ms. Marcum's MAST permit. Ms. Marcum was unable to produce her MAST permit to Officer Reddout. Officer Reddout instructed Ms. Marcum to obtain her MAST permit within one week.

15. On July 18, 2011, Officer Reddout researched the LCB's MAST checker database to determine whether Ms. Marcum possessed a MAST permit. Officer Reddout did not find a current MAST permit for Ms. Marcum.

16. On July 18, 2011, Officer Reddout issued to the Licensee an Administrative Violation Notice ("AVN") 4J1195A. The AVN lists two violations. The AVN states the basis for the first violation as: "(WAC 314.29.020 Public Safety) Sale or Service to Minor," and also references Revised Code of Washington ("RCW") 66.44.270(1). The AVN states the basis for the second violation as: "(WAC 314.29.025 Public Safety) Employee Under Legal Age or Without Required Mandatory Alcohol Server Training Permit."

17. The AVN was served on the Licensee on July 28, 2011. The Licensee filed an appeal of the AVN on August 18, 2011.

18. On December 07, 2011, the Board issued its Complaint against the Licensee arising from the AVN and the events in question. The Complaint charged the Licensee with violating the Washington State Liquor Act laws and regulations alleging the following:

(1) That on or about July 14, 2011, the above-named Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1).

(2) That on or about July 14, 2011, the above-named Licensee, or an employee thereof was without the required Mandatory Alcohol Server Training Permit contrary to WAC 314.17.025.

19. The Licensee has not had any previous similar violations as stated in the AVN or Complaint.

20. The Licensee has been licensed by the Board since 1993 as a spirits/beer/wine establishment. Her business has been open since 1990. In December 2008, the Licensee's business was destroyed by a fire. All of her business records were destroyed in the fire.

21. The Licensee reopened her business in 2009, and her restaurant and bar lounge opened in a permanent structure in April 2011. In May 2011, Officer Reddout performed an inspection of the licensed premises. After discussion of whether the Licensee possessed a valid MAST permit, Officer Reddout researched the Board's records and discovered that the Licensee did not have a MAST permit. She advised the Licensee of her findings and the Licensee agreed to obtain a MAST permit.

22. The Licensee asserts at hearing that she had attempted to take the MAST testing

on-line but due to her computer illiteracy she was unable to successfully complete the MAST permitting process.

23. After the July 14, 2011 incident and on July 15, 2011, the Licensee completed the MAST permitting process.

24. A MAST permit may be obtained by a Board approved provider who administers a training class and an examination. Provider's offer in-person services and online services. Upon an applicant's successful completion of the MAST test, the applicant is eligible to receive the MAST permit. If the training and test are taken in person, the permit is given to the applicant that day. If the training and test are taken online, the permit is sent to the applicant by regular U.S. mail. In either case, the provider has thirty (30) days to report an applicant's successful completion of the MAST training class and test to the Board. MAST permits are valid for five years.

25. On July 14, 2011 at the time of the compliance check by Officers Reddout and Hilario, the Licensee did not have a valid MAST permit.

CONCLUSIONS OF LAW

Jurisdiction

1. There is jurisdiction to hear and issue a decision in this matter pursuant to Revised Code of Washington (RCW) 34.05 and Washington Administrative Codes (WAC) 314-42-051 and 314-42-095(1).

2. The administration of RCW Title 66 "is vested in the Liquor Control Board." RCW 66.08.020. Specifically, the Liquor Control Board is charged with the task of adopting rules to carry out the provisions of RCW Title 66. RCW 66.08.0501. Additionally, the Liquor Control Board may employ Enforcement Officers, who have the power to enforce the penal provisions of Title 66. RCW 66.44.010(4). Finally, the Board has the authority to suspend or revoke a license. RCW 66.24.010(3)(a).

3. Licensees are responsible for operating the licensed premises in compliance with all liquor laws and rules contained within Title 66 RCW and Title 314 WAC. WAC 314-11-015(1)(a). Licensees are responsible for the conduct of its employees and patrons at all times they are on the licensed premises. WAC 314-11-015(3). Any violations committed by the Licensee's employees will be considered as having been permitted or committed by the Licensee. WAC 314-11-015(1)(a).

Service to Minors

4. With respect to patrons, it is prohibited conduct "for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years...." RCW 66.44.270(1). The Board has promulgated a regulation consistent with this law. "Per

RCW 66.44.270, licensees or employees may not supply liquor to any person under persons under twenty-one....” WAC 314-11-020(1).

5. In the present matter, it is clear that the IAs **UnderAgeOp** and **UnderAgeOp** under twenty-one years of age on July 14, 2011. It is also undisputed that IA **UnderAgeOp** was permitted to order two alcoholic beers. The beers were opened and placed in front of the IAs by Ms. Dunlap, an employee of the Licensee. Ms. Dunlap accepted payment for the two beers. Accepting payment for the beers constitutes “selling” and placing the beers on the bar in front of the I.A.’s constitutes “giv[ing] or otherwise supply[ing] liquor to a person under the age of twenty-one years,” in violation of RCW 66.44.270(1). The absence of qualifying language in the RCW such as “intend” or “knowingly” indicates a strict liability standard whereby completion of the prohibited act is sufficient to establish a violation, regardless of one’s intent or belief. Therefore, evidence suggesting Dunlap asked for the identification of each I.A. and orally questioned them as to their age is not controlling when, by a preponderance of the evidence, it is clear that beer was ordered and placed in front of each I.A., and payment remitted for the purchase. Therefore, it is concluded that the Licensee violated RCW 66.44.270(1) because her employee served alcohol to a person under age twenty-one.

MAST Permit

6. With respect to serving and selling alcohol, “...a licensee or an employee must have his or her class 12 or 13 permit on the retail licensed premise and one form of identification.” WAC 314-17-025(1)(a)-(b). Specifically, a class 12 permit is required for anyone who “manages a retail licensed premises licensed to sell alcoholic beverages for on-premises consumption, [or] sells, mixes, or draws from a dispensing device alcoholic beverages for on-premises consumption.” WAC 314-17-015(1)(a)-(b). A class 13 permit is required for one who “opens or pours wine or beer...” *Id.* at subsection (5)(c). A class 12 permit holder can perform any duties approved for a class 13 permit holder. *Id.* at subsection (3).

7. Here, it is clear that the Licensee did not have a MAST permit available for visual inspection at the time of the compliance check. Further, it is undisputed that the licensee falls into the managerial category discussed in WAC 314-17-015, and was required to have a MAST permit. Therefore, the Licensee in this matter violated WAC 314-17-015 by not having a valid MAST permit on July 14, 2011.

Penalties

8. Violations of RCW 66.44.270/WAC 314-11-020 are considered “group one violations” and assessed a civil penalty according to WAC 314-29-020. The penalty for a first violation of RCW 66.44.270/WAC 314-11-020 is a monetary penalty of \$500.00 or a five day suspension of the liquor license.

Violation 1 listed in AVN 4J1195A is the Licensee’s first offense of this kind.

Therefore, the proper penalty would be either a five day suspension of the liquor license or a monetary penalty of \$500.00. The undersigned finds that the appropriate penalty for violation of RCW 66.44.270 for the Licensee in this case is \$500.00.

9. Violations of WAC 314-17 are considered to be "group 2 regulatory violations" and are assessed a civil penalty according to WAC 314-29-025. The penalty for a first violation of WAC 314-17 is a five day suspension of the liquor license or a monetary penalty of \$500.00.

10. Violation 2 listed in AVN 4J1195A is the Licensee's first offense of this kind. Therefore, the appropriate penalty would be either five day suspension or a monetary penalty of \$500.00. However, the penalty schedule serves as a guideline and the penalty may be reduced upon a showing of mitigating factors. See WAC 314-29-015(4).

11. Here, three are mitigating factors to reduced the Licensee's penalty for violation of WAC 314-17-025. The preponderance of the evidence in this case leads this Tribunal to conclude that the Licensee made a good faith effort to complete the online MAST permit training and test in on our around June 2011 after being notified by Officer Reddout that there was no record of her holding a valid MAST permit. These efforts show that the Licensee was attempting to gain the required permit. Furthermore, the Licensee successfully completed the MAST permit training and test immediately after the compliance check. Therefore, it is concluded that the actions of the Licensee are mitigating factors which "demonstrate[s] business policies and/or practices that reduce the risk of future violations." See WAC 314-29-015(4)(a). Accordingly, the Licensee's penalty for violation of WAC 314-17-025 should be reduced to \$250.00.

ORDER

NOW THEREFORE, IT IS ORDERED that:

The Liquor Control Board's Complaint number 23,890 dated December 07, 2011, and its associated Administrative Violation Notice AVN 4J1195A issued on July 18, 2011, is hereby affirmed. The Licensee violated RCW 66.44.270(1) and WAC 314-17-025. The penalty for violation of RCW 66.44.270(1) is \$500.00. The penalty for violation of WAC 314-17-025 is reduced to \$250.00.

DATED this 9th day of August, 2012.



MARK H. KIM
Administrative Law Judge
Office of Administrative Hearings

Appeal Rights

Either the licensee or permit holder or the assistant attorney general may file a petition for the 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.

CERTIFICATION OF MAILING IS ATTACHED

CERTIFICATE OF MAILING

The undersigned certifies that true copies of the foregoing document(s) were served from Spokane, Washington by First Class US Mail, postage prepaid on the date indicated below upon the following:

Licensee/Respondent

Marion Michelle Mackey-Marcum
dba West Richland Municipal Golf Course
4000 Fallon Drive
West Richland, WA 99353-5050

Department Representative

Marisa Broggel, AAG
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

Agency

Washington State Liquor Control Board
3000 Pacific Avenue
P.O. Box 43076
Olympia, WA 98504-3076

Dated this 9th day of August, 2012.



Elaine Hanks, Legal Secretary
Office of Administrative Hearings

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AUG 29 2012

Liquor Control Board
Board Administration

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

MARION MICHELLE MACKKEY-
MARCUM d/b/a WEST RICHLAND
MUNICIPAL GOLF COURSE

4000 FALLON DRIVE
WEST RICHLAND, WA 99353-5050

LICENSEE

LICENSE NO. 353625
AVN NO. 4J1195A

OAH NO. 2011-LCB-0077
LCB CASE NO. 23,890

ENFORCEMENT DIVISION'S
PETITION FOR REVIEW OF THE
INITIAL ORDER

The Washington State Liquor Control Board's Education & Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and MARISA E. BROGGEL, Assistant Attorney General, and pursuant to RCW 34.05.464 and WAC 314-29-010, submits the following exceptions to the Initial Order issued by Administrative Law Judge Mark H. Kim (the ALJ) on August 9, 2012, in the above-captioned matter.

I. PROCEDURAL BACKGROUND

On December 7, 2011, the Liquor Control Board (Board) issued a complaint to the Licensee, Marion Michelle Mackey-Marcum d/b/a West Richland Municipal Golf Course (Licensee) alleging that: (1) On or around July 14, 2011, the Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1); and (2) On or about July 14, 2011, the above-named

1 Licensee, or an employee thereof, was without the required Mandatory Alcohol Server Training
2 Permit contrary to WAC 314.17.025. The complaint was issued after the Licensee's employee,
3 bartender Tishina Dunlap, sold liquor to two (2) minor investigative aides (IAs) employed by
4 Enforcement and under the direction of Enforcement, during a compliance check at the
5 Licensee's premise. Initial Order, Findings of Fact (FFs) 6-12 (attached as Exhibit A).

6 Immediately after Ms. Dunlap sold liquor to the minor IAs, Enforcement made contact
7 with Ms. Dunlap and with the Licensee, Ms. Mackey-Marcum (Licensee). During this contact,
8 Liquor Enforcement Officer Marie Reddout asked the Licensee to produce her Mandatory
9 Alcohol Server Training (MAST) permit. FF 14. The Licensee was unable to produce a MAST
10 permit upon Officer Reddout's request, because she did not have a MAST permit. *Id.*

11 This matter was heard and considered by the ALJ during a full evidentiary hearing in
12 Pasco, Washington, on July 10 and July 11, 2012. On August 9, 2012, the ALJ entered Findings
13 of Fact, Conclusions of Law and Initial Order in this matter. In the Initial Order, the ALJ
14 sustained the Board's Complaint by finding that both violations occurred. *See* Initial Order
15 Conclusions of Law (CL) 4 -7. The ALJ endorsed the standard penalty for the violation of
16 RCW 66.44.270(1) (sale to a minor); however, for the violation of WAC 314-11-020(2), the ALJ
17 endorsed a reduction of the standard penalty from \$500 to \$250 based upon mitigating factors.
18 *See* CL 8-11. Enforcement respectfully takes exception to the ALJ's Conclusion of Law 11
19 wherein the ALJ concludes that there are mitigating factors in this matter that support a reduction
20 in penalty.

21 II. DISCUSSION

22 Pursuant to WAC 314-29-010(4)(b), any party, upon receipt of a proposed order, may file
23 exceptions within twenty days of service of the order. The reviewing officer (including the
24 agency head reviewing an initial order) "shall exercise all the decision-making power that the
25 reviewing officer would have had to decide and enter the final order had the reviewing officer
26

1 presided over the hearing [.]” RCW 34.05.464(4). Therefore, the Washington State Liquor
2 Control Board is not bound by the ALJ’s Initial Order.

3 **A. The ALJ Correctly Sustains The Complaint, But Incorrectly Concludes That**
4 **Mitigating Factors Support A Substantial Reduction In The Standard Penalty For**
5 **A First Violation Of WAC 314-17-025**

6 In the Initial Order, the ALJ correctly sustained Enforcement’s Complaint as to each
7 violation. *See* CL 4-7. Specifically, the ALJ found that, on or around July 14, 2011, the
8 Licensee or an employee(s) thereof sold and/or served liquor to a minor, in violation of
9 RCW 66.44.270(1), a first violation of this type in a twenty-four month period. CL 5¹. The ALJ
10 also concluded that the Licensee was without the required Mandatory Alcohol Server Training
11 permit in violation of WAC 314-17-025, a first violation of this type within a twenty-four month
12 period. CL 7. Enforcement takes exception to the ALJ’s conclusion that there are mitigating
13 factors supporting a reduction in the penalty for this violation.

14 Pursuant to WAC 314-29-030, a Licensee or employee thereof being without the required
15 MAST permit is a Group Two regulatory violation, for which the standard penalty is a monetary
16 penalty of five hundred dollars (\$500) or a suspension of the liquor license for five (5) days.
17 Pursuant to WAC 314-29-025, the Board may impose a different penalty than the standard
18 penalty based on the presence of mitigating circumstances. WAC 314-29-025(4)(a). Mitigating
19 circumstances may include “demonstrated business policies and/or practices that reduce the risk
20 of future violations.” *Id.* Examples include having a liquor/alcohol sales and service policy;
21 ensuring that there is a signed acknowledgment of the alcohol policy on file for each employee,
22 and having an employee training plan that includes annual training on liquor laws and rules. *See*
23 *Id.*

24 In the Initial Order, the ALJ cites as mitigating factors 1) the Licensee’s “good faith
25 effort to complete the online MAST permit training and test in or around June 2011”; and 2) that

26 ¹ As to the violation of RCW 66.44.207(1), the ALJ concluded that this is the Licensee’s first violation of this type
in a twenty-four month penalty, and that the appropriate penalty is the standard penalty of \$500. Initial Order, CL 8.

1 the Licensee completed the MAST permit training “immediately after the compliance check.”
2 CL 11. The ALJ concludes that the Licensee demonstrated “business policies and/or practices
3 that reduce the risk of future violations. *See* WAC 314-29-015(4)(a).” *Id.* For the reasons
4 discussed below, Enforcement objects to the ALJ’s conclusion that the above factors constitute
5 mitigating circumstances that support a reduction in the Licensee’s penalty for the instant
6 violation.

7 **1. There is insufficient evidence in the record to support a reduction in the**
8 **penalty based on “the Licensee’s good faith effort to complete the online**
9 **MAST Permit training...in June 2011.”**

9 The record does not support the ALJ’s conclusion that the Licensee “made a good faith
10 effort” to complete the required training and test to obtain her MAST permit in or around June
11 2011.” CL 11. The ALJ appears to base this conclusion upon the Licensee’s assertion at hearing
12 that she had “attempted to take the MAST testing online but due to her computer illiteracy she
13 was unable to successfully complete the permitting process.” FF 22. However, Finding of
14 Fact 22 is unsupported by the record. In fact, other than the Licensee’s testimony that she tried
15 to obtain a MAST Permit in June but had computer trouble², nothing in the record supports this
16 finding. Rather, the record shows the Licensee’s lack of cooperation with Enforcement and no
17 good faith effort to comply with the MAST permit requirement until *after* the compliance check
18 on July 14, 2011.

19 The record shows that in May 2011, Liquor Enforcement Officer Marie Reddout
20 discussed with the Licensee the requirement that the Licensee obtain and be able to produce for
21 inspection a valid MAST permit. FF 21. The Licensee, failing to have a valid MAST permit at
22

23 ² It should also be noted that the Licensee’s Witness and Exhibit List filed on or around May 29, 2012 (attached as
24 Exhibit B), contains a conflicting statement about an earlier attempt to obtain a MAST Permit. Licensee writes, “I
25 had tried to take (the test) once before in May and passed it but (it) would not print.” *See* Licensee’s Witness and
26 Exhibit List p. 1. The ALJ makes no finding as to this statement. The record does not support the Licensee’s
testimony; in fact, the record refutes this statement. *See* Administrative Hearing Audio Recording (Audio)
testimony of Kim Sauer, 7/10/12 at approx. 3:03:50 (no record of permit for Licensee prior to 7/14/11); Audio
7/10/12 at approx. 3:11:00 (no record of registration attempts by Licensee prior to 7/14/11). *See also* Enforcement’s
Exhibit 12.

1 that time, expressed understanding that a MAST permit was required, and agreed to obtain a
2 MAST permit. FF 21. However, on July 14, 2011, when Officer Reddout conducted a
3 compliance check at the Licensee's premise, the Licensee still did not have a MAST permit.
4 FF 25, CL 7. Testimony of Officer Reddout and Kim Sauer, MAST Permit Coordinator for
5 Liquor Control Board Licensing Division, supports this finding. *See* Administrative Hearing
6 Audio Recording (Audio) testimony of Officer Reddout, 7/10/12 at 1:20:18-1:31:00; *and see*
7 Audio testimony of Kim Sauer, 7/10/12 at 3:03:50-319:30.

8 In fact, the record shows that during the compliance check contact on July 14, 2011, the
9 Licensee told Officer Reddout that she hadn't had any time to get a permit. *See* Audio, 7/10/12
10 at 1:40:05-1:40:50. Likewise, the record demonstrates that the Licensee's first and only MAST
11 permit on record was obtained after the compliance check on July 14, 2011³. *See* Audio
12 testimony of Kim Sauer, 7/10/12 at 3:03:50 and at 3:18:15-3:23:38:18. The look-back period on
13 Licensing's database is five and one-half (5 ½) years, during which time there is no record that
14 the Licensee ever attempted to undergo the MAST course, completed the course, passed the
15 required exam, or otherwise attempted to obtain a MAST permit. *Id.* at 3:03:50-3:23:24.

16 Likewise, the Licensee was unable to provide any additional evidence to support her
17 testimony that she tried to obtain a permit in June 2011. When questioned about this, the
18 Licensee admitted she had no documentary evidence of having taken the online MAST test in
19 June 2011, and did not remember details about the process. *See* Audio, 7/10/12 at 1:40:49. The
20 Licensee did not recall how she paid for that course or how much it cost ("I'm sure I did [have to
21 pay for it]...either credit card or bank account, I imagine... [My employee] set it up for me...I
22 don't know that stuff.") *See* Audio testimony of Marion Michelle Mackey-Marcum, 7/10/12 at
23 1:42:56. The ALJ even left the record open until July 27, 2012 (more than two weeks after the
24 close of the hearing) expressly to provide the Licensee with time to find and submit

25 _____
26 ³ Ms. Sauer testified that Licensing recorded issuance of a MAST permit to the Licensee on August 2, 2012, after receiving notification from provider Number One Alert that the Licensee completed an online training course and passed the required test on July 15, 2012 at about 2:15 a.m.

1 “documentation related to the MAST testing performed in May/June 2011.” *See* Initial Order
2 Recitations at 1; ALJ’s Order to Submit Documents dated July 12, 2012 (attached as Exhibit C).
3 However, the Licensee submitted no documentation to bolster her testimony as to an earlier
4 attempt at obtaining a MAST permit, nor was this testimony supported by any of the Licensee’s
5 witnesses.

6 The record clearly shows that the Licensee was on notice about the MAST permit
7 requirement, but did nothing to obtain a MAST permit, and did not come into compliance as to
8 this requirement, until the Licensee was facing a violation notice and a penalty. Insofar as the
9 record does not support a finding that the Licensee made a “good faith attempt” to comply with
10 the requirement of obtaining a MAST permit at any time prior to July 14, 2012, this assertion
11 lacks credibility and should not be relied upon as a mitigating factor.

12 **2. That the Licensee completed the MAST permit training and test**
13 **“immediately after the compliance check” is not a mitigating factor that**
14 **supports a reduction in penalty, and is not an indication of “business policies**
15 **and/or practices that reduce the risk of future violations.”**

16 The ALJ concludes that another mitigating factor is that the Licensee “immediately”
17 began the process for obtaining a MAST permit after the July 14, 2011 compliance check.
18 CL 11. The record supports the ALJ’s finding that the Licensee started the testing process on
19 July 14, 2011 (albeit after the compliance check occurred), and finished the test in the early
20 morning hours of July 15, 2011. FF 23; *see also* Audio, 7/10/12 at 3:03:50-3:10:05. However,
21 this fact does not constitute a mitigating factor.

22 First, the Licensee has been on notice since at least May 2011 about the requirement that
23 the Licensee and all employees obtain a valid MAST permit. FF 21. The record further
24 indicates that the Licensee, by her own admission, has known about the MAST requirement
25 since its inception in 1997. *See* Audio testimony of Ms. Mackey-Marcum, 7/10/12 at 3:21:00 to
26 3:22:08. However, there is no record of the Licensee having attempted to complete the MAST
permit process nor obtaining a valid MAST permit until after the date of the violation. The

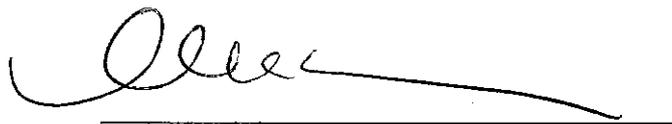
1 record shows that Officer Reddout specifically put the Licensee on notice about this requirement
2 more than two months before the violation date, but the Licensee took no discernable action to
3 correct the deficiency. The Licensee's lack of urgency to become compliant with the MAST
4 requirement reflects at best a lax attitude around compliance with liquor laws and rules, rather
5 than responsible and sound business practices. Furthermore, the Licensee did not present any
6 written business policies or plans to ensure that it remains compliant in the future. In fact, rather
7 than signaling a policy meant to "reduce risk of future violations," the Licensee's lack of
8 proactive response and failure to ensure compliance may well garner the opposite result.

9 III. CONCLUSION

10 The record in this matter does not support the conclusion that there are mitigating factors
11 present that should result in any reduction of the monetary penalty. There is nothing in the
12 record to support the argument that the Licensee took measures to prevent the violation from
13 occurring. There is nothing in the record to show that there were mitigating circumstances
14 related to the violation. Therefore, Enforcement respectfully requests that the Initial Order be
15 adopted in this matter in its sustaining of the Complaint, but requests the Board impose the
16 standard monetary penalty of five hundred dollars (\$500).

17 DATED this 29th day of August, 2012.

18 ROBERT M. MCKENNA
19 Attorney General

20 
21 _____
22 MARISA E. BROGGEL, WSBA #41767
23 Assistant Attorney General
24 Attorneys for Washington State
25 Liquor Control Board Enforcement Division
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