

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In The Matter Of the Hearing Of:

JOHN JOHNSON
134 VALENTINE CT
PACIFIC, WA 98047-1368

AN INDIVIDUAL

OAH NO. 2008-LCB-0049
LCB NO. T-503

FINAL ORDER OF THE BOARD

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

1. A formal hearing was held on September 8, 2009 at the licensee's timely request regarding an Administrative Violation Notice issued on July 31, 2008.

2. On January 21, 2009 the Board issued a Complaint alleging that on July 30, 2008 the above-named individual sold/supplied tobacco to a person under the age of eighteen (18) in violation of RCW 26.28.080 and RCW 70.155.100(3).

3. At the hearing the Education and Enforcement Division of the Board was represented by Assistant Attorney General Cindy Evans and the Individual, John Johnson, represented himself.

4. On September 30, 2009 Administrative Law Judge Christy Gerhart Cufley entered her Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint.

5. No exceptions were filed by the parties

6. 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, so that the individual, John Johnson, shall be subject to a monetary penalty of one fifty dollars (\$50.00) due within 30 days of this order. Failure to comply with the terms of this Order will subject the Licensee to further disciplinary action.

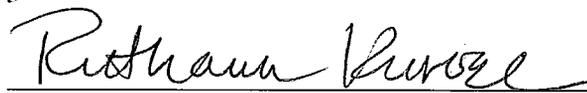
Payment should be sent to:

Washington State Liquor Control Board
Enforcement Division, Tobacco Violations Coordinator
PO Box 43085
Olympia, WA 98504-3085

DATED at Olympia, Washington this 8 day of December, 2009.

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).

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

In the Matter of:

JOHN JOHNSON
134 VALENTINE CT.
PACIFIC, WA 98047

RECEIVED

SEP 30 2009

INDIVIDUAL

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

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

DATED at Seattle, Washington, this 30th day of September, 2009.

Shataneh Wulfa
Representative, Office of Administrative Hearings

OAH NO. 2008-LCB-0049
NO. T-503

NOTICE TO PARTIES

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

All parties hereto shall have twenty (20) days from the date of service of these proposals to file exceptions as provided by RCW 34.05.464 and WAC 314-29. Exceptions shall be filed in triplicate with the Liquor Control Board, 3000 Pacific Avenue S.E., P.O. Box 43076, Olympia, WA 98504-3076. Replies to exceptions shall be filed with the Board within ten (10) days of the date of service of exceptions as provided by WAC 314-29. The exceptions must be received on or before **October 30, 2009.** One copy of the exceptions or replies must also be served upon all other parties of record, or their attorneys, with proof of service as required by WAC 314-29.

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

The administrative law judge's proposed decision provides for payment of a monetary penalty. The monetary penalty would be based upon the formula shown in the administrative law judge's proposed order.

DO NOT SEND PAYMENT AT THIS TIME. In the event the board adopts the administrative law judge's recommended monetary penalty, payment should be made at that time by cashier's or certified check only.

RECEIVED

DEC 04 2009

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

IN THE MATTER OF:

John Johnson
134 Valentine Court
Pacific, WA 98047

Individual.

OAH DOCKET NO. 2008-LCB-0049
Agency Case No. T-503

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

STATEMENT OF THE CASE

On July 31, 2008 the Washington State Liquor Control Board issued a Notice of Board Action on Violation to John Johnson, 134 Valentine Court, Pacific, in King County, Washington. In its Notice, the Board alleged that on July 30, 2008 the licensee sold tobacco or tobacco products to a minor contrary to RCW 26.28.080. The Notice proposed imposition of a monetary penalty in the amount of fifty dollars (\$50). The individual, Mr. Johnson, made a timely request for a hearing. On October 10, 2008 the Board issued a formal Complaint alleging that "on or about July 30, 2008, the above-named Individual, sold/supplied tobacco to a person under the age of eighteen (18), contrary to RCW 26.28.080 and WAC 314-10-050." (Exhibit 1).

On January 21, 2009 the Board issued an Amended Complaint identical in all respects to the original complaint with the exception that the reference to WAC 314-10-050 was deleted and instead substituting reference to RCW 70.155.100(3).¹

Pre-hearing telephone conferences were held and pre-hearing orders were issued on June 15, 2009 and August 27, 2009.

The matter came on for hearing by telephone pursuant to due and proper notice at Seattle, Washington, on September 8, 2009 before Christy Gerhart Cufley, Administrative Law Judge, Office of Administrative Hearings.²

¹The provisions of WAC 314-10-050 were repealed effective October 31, 2008; arguably this provision was still in effect at the time the initial Complaint was issued on October 10, 2008.

²The hearing was originally scheduled before another administrative law judge. That ALJ was unexpectedly unavailable on the date of hearing. Rather than postpone the matter, a substitution of ALJs was made with no objections noted by either party.

PROPOSED
FINDINGS OF FACT,
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AND INITIAL ORDER

Office of Administrative Hearings
600 University St., Suite 1500
Seattle, WA 98101-1126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

At the hearing the individual appellant, John Johnson, appeared *pro se* (representing himself); The Education and Enforcement Division of the Washington State Liquor Control Board ("Board" hereafter) was represented by Cindy Evans, Assistant Attorney General. Liquor and Tobacco Enforcement Officer Diana Peters, and Minor Investigative Aide "C.R." appeared to provide witness testimony on behalf of the Board.³

Based upon the evidence presented, the undersigned administrative law judge makes the following:

FINDINGS OF FACT

1. JLS Retail Group LLC dba Pacific ARCO, located at 401 Ellingston Road, Pacific, in King County, Washington, is the licensed premises in this matter, and is licensed to sell tobacco products at the licensed premises.
2. On July 30, 2008 the Board conducted a compliance check of various licensees (including the individual appellant herein) in King County, Washington. A compliance check is a supervised attempt to purchase tobacco by a person under the age of eighteen (18) years. Compliance checks are performed in different locations throughout King County on a regular basis. The goal of the program is to check all licensed establishments to ensure compliance with the prohibition that tobacco products not be sold or furnished to minors. The program also has a stated goal of educating retailers regarding their responsibilities and the legal requirements related to the sale of tobacco products.
3. Diana Peters has been employed by the Liquor Control Board since 2005, and has been a Liquor and Tobacco Enforcement Officer for the past two and one-half years. She routinely supervises compliance checks and follows a standard process for each compliance check performed. She photographs the minor prior to commencing the compliance check, conducts a pat-down to ensure the minor carries nothing but his/her identification, money provided by the officer, and a cell phone for emergency use. The minor investigative aides are instructed to attempt to purchase cigarettes, to present their identification if requested, and, if a successful transaction occurs, to leave the store immediately and give directly to Officer Peters any products purchased, receipt, and monetary change received. The minor investigative aides are instructed to then immediately complete a Washington State Liquor Control Board Liquor Compliance Check Sale Form detailing the transaction.
4. On July 30, 2008, Officer Peters followed the standard process outlined above. She took photographs of the minor investigative aide (identified as "C.R.") prior to commencement

³The minor investigative aide is identified by initials only to protect his privacy rights.

of the compliance check. C.R. did nothing to make himself appear older or to alter his appearance from that present on his photo identification. Officer Peters verified that C.R. had nothing on his person except his cell phone, his Washington Instruction Permit, and a \$10 bill she provided to him.

5. Officer Peters and fellow Officer Vinh Huong⁴ provided transportation of C.R. from his residence to the subject premises on July 30, 2008.

6. C.R. entered the store, presented his Washington Instruction Permit to the lone clerk on duty for examination, received the Permit returned from the clerk, tendered money to the clerk for the purchase of a package of Marlboro Lights cigarettes for \$5.72, received the cigarettes and monetary change, and exited the store.

7. The Washington Instruction Permit in C.R.'s possession and shown to the clerk on July 30, 2008 contains a vertical photograph of C.R., and indicates he will be "AGE 18 ON 08-05-2009." (Exhibit 5, Exhibit 6). Vertical photographs are utilized on driving permits and licenses for individuals under the age of 21 years; horizontal photographs are utilized once the individual attains the age of 21 years. The photograph of the individual pictured on the Permit is identical to the photographs taken by Officer Peters of C.R. at his residence on July 30, 2008 prior to conducting the compliance check at the subject premises. (Exhibit 3).

8. Officers Peters and Huong observed the entire transaction through a storefront window. They were unable to hear any conversation, but Officer Peters observed the entire transaction unobstructed as described above.

9. Upon exiting the store, Officer Peters escorted C.R. to her vehicle and as he began completing paperwork, she entered the store. She spoke with the male clerk on duty at the time, identified herself as an officer, advised the clerk that there had been a violation, and requested his identification. She identified the clerk who made the sale of one package of Marlboro Lights cigarettes to the minor investigative aide (C.R.) as the appellant, John Johnson. She declined the request of Mr. Johnson to inspect the identification presented by C.R. because of concerns regarding protecting the safety of minor investigative aides. Although the address on the copies of C.R.'s identification were redacted, the actual permit utilized at the time of the transactions contains his name and address and is unmodified when presented by the minor investigative aides.

⁴Officer Huong is no longer employed by the Board.

10. Immediately following the sale and after giving to Officer Peters the cigarettes, receipt for purchase, and monetary change, C.R. completed a Liquor Compliance Check Sale Form setting forth in writing a description of the subject transaction. (Exhibit 6).

11. Officer Peters subsequently returned to her office and checked computer records for any prior history of violations for the establishment (including the licensee as well as the individual appellant). She subsequently prepared a Notice of Board Action on Tobacco Violation, and issued a copy to the owner on July 31, 2008 who indicated he would notify Mr. Johnson. (Exhibit 1).

12. This is the first violation notice received by the Individual, Mr. Johnson. The Board also issued a citation to the licensee.⁵

13. The appellant denies that he was the clerk making the subject sale on July 30, 2008, denies working on that date, and alleges he was out of town. He asserts he was out of town on that date, and was provided an opportunity to submit after-filed exhibits documenting his allegations (specifically, airline information and time cards). To date, no documentation from the appellant has been received.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to chapters 26.28, 70.155, 82.24, 34.12, and 34.05 RCW, and chapters 10-08 and 314-10 WAC.

2. As a seller of tobacco, the individual appellant is subject to the jurisdiction of the Washington State Liquor Control Board pursuant to RCW 82.24.500, RCW 82.24.550(1), RCW 70.155.100, and RCW 70.155.110. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an administrative law judge pursuant to Chapter 34.12 RCW. A proper hearing was provided in this case.

3. Even prior to the enactment of chapter 70.155 RCW, it was unlawful to "sell or give, or permit to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form." RCW 26.28.080. That same

⁵It is believed that such was the third similar violation occurring within the prior two years and that a civil monetary penalty of one thousand dollars (\$1,000) and a six-month prohibition against the sale of any tobacco products was assessed.

proscription was found in WAC 314-10-050. The Board has the statutory authority to enforce RCW 26.28.080 and chapter 70.155 RCW.

4. The provisions of RCW 26.28.080 state:

Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor.

It shall be no defense to a prosecution for a violation of this section that the person acted, or was believed by the defendant to act, as agent or representative of another.

5. The provisions of RCW 70.155.100(3) provide as follows:

The liquor control board may impose a monetary penalty upon any person other than a licensed cigarette retailer if the liquor control board finds that the person has violated RCW 26.28.080...

6. The provisions of RCW 70.155.100(4) provide the Board with authority to assess a civil monetary fine of fifty dollars (\$50) for the first violation of RCW 26.28.080, and one hundred dollars (\$100) for each subsequent violation.

7. In applying the above to the case at hand, the undersigned first notes that resolution of the issues in this case depends in large part upon the credibility of the testimony presented by individuals at the hearing. The testimony presented by the parties was contradictory with respect to material facts regarding the alleged violation at issue. The appellant was provided an opportunity to provide documentary evidence to support his allegation that he was out of town and not working at the subject premises on July 30, 2008. As of the date of the publication of this decision, he has failed to do so. The credibility of the appellant's testimony was dubious during the hearing; his failure to provide the documents as indicated further cements the conclusion that his testimony lacks any credibility. The undersigned need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the persuasive evidence be clear, cogent, and convincing. The trier of fact need only determine what most likely happened.

8. After careful review of the record, including consideration of the parties' demeanor, motivation, and logical persuasiveness of the testimony presented, the undersigned concludes the preponderance of credible evidence establishes that John Johnson, an individual clerk and employee of the licensee, sold tobacco products (a package of Marlboro Lights

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

cigarettes) to a person under the age of eighteen years (a minor investigative aide, "C.R.") on July 30, 2008 at the subject premises.

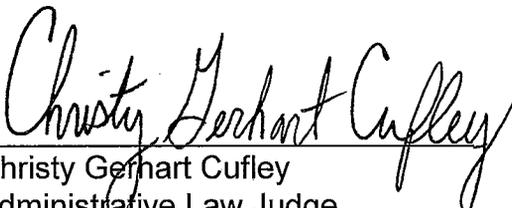
9. The Board may suspend or revoke a retailer's license held by a business at any location, or may impose a monetary penalty if it finds that the licensee has violated RCW 26.28.080. The standard penalty against an individual for selling tobacco in violation of RCW 26.28.080 is fifty dollars (\$50) with an option of attending an identification class sponsored by the Board for the first violation within a two year period. RCW 70.155.080(2)(a)(i). There is no evidence of prior violations. Accordingly, the individual is ordered to pay a civil monetary penalty in the amount of fifty dollars (\$50) on the date to be set by the Board in its final order.

From the foregoing conclusions of law, NOW THEREFORE,

INITIAL ORDER

The Board's Notice of Board Action on Violation is sustained. The Individual, John Johnson, King County, Washington, Seattle shall pay a monetary penalty in the amount of fifty dollars (\$50) as directed by the Board on a date as specified upon issuance of a final order.

Dated at Seattle, Washington this 30th day of September, 2009.


Christy Gernhart Cufley
Administrative Law Judge
Office of Administrative Hearings

A copy of the Proposed Findings of Fact, Conclusions of Law, and Initial Order was mailed on September 30, 2009 to the following parties and representatives:

John Johnson
134 Valentine Court
Pacific, WA 98047

Cindy Evans
Assistant Attorney General
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
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Office of Administrative Hearings
600 University St., Suite 1500
Seattle, WA 98101-1126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

Barb Cleveland
Executive Assistant
Office of Administrative Hearings
PO Box 42488
Olympia, WA 98504-2488

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

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

DATED at Seattle, Washington, this 30 day of September, 2009.



Representative, Office of Administrative Hearings

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

Office of Administrative Hearings
600 University St., Suite 1500
Seattle, WA 98101-1126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135



**Washington State
Liquor Control Board**

December 11, 2009

John Johnson
134 Valentine Ct
Pacific, WA 98047-1368

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*

Location of Violation: Pacific Arco, 401 Ellington Rd, Pacific, WA 98047

LCB No. T-503

OAH No. 2008-LCB-0049

Administrative Violation Notice No. 13329

Dear Parties:

Enclosed please find a 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 January 11, 2010. Please send payment to the mailing address in the Final Order and label the check with the Administrative Violation Notice Number listed above.

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: Tukwila Enforcement and Education Division, WSLCB
Monika Taylor, Tobacco Violations Coordinator, WSLCB

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WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

JOHN JOHNSON
134 VALENTINE CT
PACIFIC, WA 98047-1368

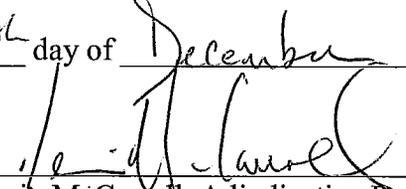
LCB NO. T-503
OAH No. 2008-LCB-0049

DECLARATION OF SERVICE BY
MAIL

AN INDIVIDUAL

I declare under penalty of perjury under the laws of the state of Washington that on December 11, 2009, I served a true and correct copy of the FINAL ORDER OF THE BOARD in the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage prepaid, to all parties or their counsel of record.

DATED this 11th day of December, 2009, at Olympia, Washington.


Kevin McCarron, Adjudicative Proceedings Coordinator

JOHN JOHNSON
134 VALENTINE CT
PACIFIC, WA 98047-1368

CINDY EVANS,
ASSISTANT ATTORNEY GENERAL
GCE DIVISION, OFFICE OF THE
ATTORNEY GENERAL
1125 WASHINGTON STREET SE
PO BOX 40100
OLYMPIA, WA 98504-0100