

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF

M&T ENTERPRISES, INC. d/b/a
SIFTON STOP N SHOP
13412 NE 4th PLAIN ROAD
VANCOUVER, WA 98683-5243

LICENSEE

LICENSE NO. (UBI) 6010613120010001
TVN 23915

OAH NO. 2008-LCB-0048

LCB NO. T-505

FINAL ORDER OF THE BOARD

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

1. A formal hearing was held on May 7, 2009 at the timely request of the Licensee for a hearing on the Amended Complaint issued by the Liquor Control Board on January 21, 2009.
2. The Complaint alleged that on August 18, 2008, the above-named Licensee, or employee thereof, sold and/or allowed to be sold tobacco products to a person under the age of eighteen, in violation of RCW 26.28.080 and RCW 70.155.100. The Complaint sought the standard penalty of a \$1,000 fine and a six months license suspension for a third violation as required by RCW 70.155.100(2)(a)(iii).
3. At the hearing the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg and the Licensee was represented by Thomas Phelan, Attorney at Law.
4. On November 25, 2009, Administrative Law Judge Janet L. Schneider (ALJ) entered Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint and the sanction requested.

5. The Licensee, through its attorney, filed a Petition for Review of the Initial Order, dated December 9, 2009 and received by the Board on December 11, 2009. The Education and Enforcement Division, through Assistant Attorney General Brian J. Considine, filed a timely reply to Licensee's Petition for Review.

6. The Board affirms and adopts the ALJ's findings of fact. The above findings and the Board's consideration of the entire record of this matter, which includes the totality of the evidence presented during the hearing result in the following:

CONCLUSIONS:

1. The Board hereby agrees with, and adopts, the ALJ's Conclusions of Law Nos. 1-6.
2. The Board rejects Licensee's argument in the Petition for Review that it should be estopped from imposing the full penalty imposed by statute for this violation. A prior error by the Board or its staff in not requiring the licensee to serve a six month suspension for the violation the Licensee committed on March 17, 2008 (the third violation within a two year period at that time) does not provide a basis for the licensee to receive the same penalty for the current violation. RCW 70.155.100 (9) allows the Board to impose a lesser sanction if mitigating circumstances are found, or to impose a more severe sanction if aggravating circumstances are found.
3. The Board concludes the ALJ did not err in omitting a finding that Deborah Ellsworth testified that she made a mistake in reading the age of the individual's identification, as there is no requirement that the sale be made intentionally, only that the sale was made.
4. The Board concludes that the ALJ did not err in allowing evidence of a violation occurring shortly before the two year look-back period to be included in the record. Although RCW 70.155.100 provides for a minimum penalty of \$1000 and a six month suspension for a third violation within a rolling two year period, it is appropriate for the Board to consider the timing of

prior violations as potential aggravating factors. Although the ALJ did consider the timing of the prior violations, the Initial Order did not impose the penalty for a fourth violation within a two year period, and the Board does not seek to impose such a sanction in this Order. The Board also concludes there are no mitigating circumstances under RCW 70.155.100 (9) such that the statutory penalty should be reduced.

NOW THEREFORE; IT IS HEREBY ORDERED that that the ALJ's Findings and Fact and Conclusions of Law are hereby adopted as the final decision of the Board. The Board's complaint is SUSTAINED and a penalty of \$1000 fine, plus a six month license suspension is imposed. The Licensee previously paid the \$1,000 fine and although the Board staff requested that the payment be refunded to the Licensee, the refund was not processed. Therefore, the Board will credit the Licensee with payment of the \$1,000 fine, and the Licensee must serve a six month license suspension in addition to the fine. The suspension shall be served from February 4, 2010 through August 3, 2010.

DATED at Olympia, Washington this 29 day of December, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster
Ruthann Kurose

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, 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

December 31, 2009

Thomas C. Phelan, Attorney for Licensee
904 Esther St
Vancouver, WA 98660-3026

M & T Enterprises, Inc., Licensee
d/b/a Sifton Stop N Shop
13412 NE 4th Plain Rd
Vancouver, WA 98682-5243

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

RE: Final Order of the Board
Licensee: M & T Enterprises, Inc.
Trade Name: Sifton Stop N Shop
Location: 13412 NE 4th Plain Rd, Vancouver, WA 98682-5243
LCB No. T-505
OAH No. 2008-LCB-0048
Administrative Violation Notice No. 23915
License No. (UBI): 601 061 312 001 0001

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 monetary penalty of \$1000.00 was received on 8/29/2008. The applicable suspension dates are indicated in the final order.

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

Sincerely,


Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (3)

cc: Tacoma and Olympia Enforcement and Education Divisions, WSLCB
Monika Taylor, Tobacco Violations Coordinator, WSLCB

1
2
3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 M & T ENTERPRISES, INC.
6 d/b/a SIFTON STOP N SHOP
7 13412 NE 4TH PLAIN RD
8 VANCOUVER, WA 98682-5243

LCB NO. T-505
OAH No. 2008-LCB-0048

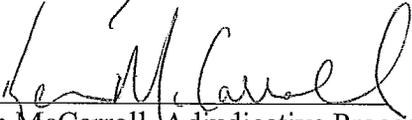
DECLARATION OF SERVICE BY
MAIL

9 LICENSEE

10 LICENSE NO. (UBI):
11 601 061 312 001 0001

12 I declare under penalty of perjury under the laws of the state of Washington that on
13 December 31, 2009, I served a true and correct copy of the FINAL ORDER OF THE BOARD
14 in the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage
15 prepaid, to all parties or their counsel of record.

16 DATED this 31st day of December, 2009, at Olympia, Washington.

17 
18 Kevin McCarroll, Adjudicative Proceedings Coordinator

19 THOMAS C. PHELAN, ATTORNEY FOR
20 LICENSEE
21 904 ESTHER ST
22 VANCOUVER, WA 98660-3026

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

23 M & T ENTERPRISES, INC., LICENSEE
24 d/b/a SIFTON STOP N SHOP
25 13412 NE 4TH PLAIN RD
VANCOUVER, WA 98682-5243

26
DECLARATION OF SERVICE BY
MAIL

RECEIVED

NOV 30 2009

MAILED

NOV 24 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

In the Matter of:

M & T Enterprises, Inc.
dba Sifton Stop N Shop

13412 NE 4th Plain RD.
Vancouver, WA 98682

Licensee

License No. 353701

OAH No.: 2008-LCB-0048

LCB No.: T - 505

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

Liquor Control Board

STATEMENT OF THE CASE

On August 25, 2008, the Washington State Liquor Control Board (hereinafter Board) issued a Notice of Board Action on Tobacco Violations to M & T Enterprises Incorporated doing business as Sifton Stop N Shop at 13412 NE 4th Plain Road, Vancouver, Washington. In its Notice, the Board alleged that on August 18, 2008, the Licensee, or an employee thereof, sold tobacco to a person under the age of eighteen (18) contrary to RCW 26.28.080. In its Notice, the Board proposed that the license of the Licensee be suspended for 6 months and that the Licensee pay a civil monetary fine in the amount of one thousand dollars (\$1,000.00).

The Licensee made a timely request for hearing.

Pursuant to notice duly given, an administrative hearing was held before Janet L. Schneider, Administrative Law Judge, in the Liquor Control Board Enforcement Office, 12501 NE 99th Street, Suite A-100, Vancouver, Washington on the 7th day of May 2009. The Washington State Liquor Control Board was represented by Brian Considine, Assistant Attorney General, with witnesses; Lt. Marc Edmonds, Liquor Control Board Enforcement Officer; Almir Karic, Liquor Control Board

Enforcement Officer; and D.I., minor Investigative Aid. (The investigative aid is identified by her initials in this decision to protect her identity because she is a minor.) Thomas Phelan, Attorney at Law, appeared to represent the Licensee. Thomas Ranck, owner; Deborah Ellsworth, former sales clerk; Dortha Rabel, Manager at Sifton Stop N Shop; David Miller, Clark County Deputy Sheriff; and Sam Nigro, Director of Loss Prevention Group, appeared as witnesses for the Licensee.

The hearing record was held open to receive a written response to the Licensee's claim of equitable estoppel against imposing the six (6) month suspension from Mr. Considine and the Licensee's rebuttal. The hearing record closed June 8, 2009.

The administrative law judge, having considered the entire record in this proceeding, including the arguments of the respective representatives, now enters the following findings of fact.

FINDINGS OF FACT

1. At all times material hereto, M & T Enterprises, Inc., a Washington corporation, has been the holder of a retailer's license to sell tobacco products in Washington, unique business identification (UBI) number 601061320010001, while doing business as Sifton Stop N Shop located at 13412 NE 4th Plain Road, Vancouver, Washington. Sifton Stop N Shop is owned by Thomas Ranck.
2. The Board operates a continuous program of tobacco compliance checks wherein operatives under the age of eighteen years attempt to purchase tobacco products from retail tobacco vendors. Each of these compliance checks is supervised by a liquor enforcement officer or police officer. If an operative who is under the age of eighteen years is able to purchase a tobacco product from a licensed retail tobacco vendor, the Board, acting through a liquor control agent, may issue a tobacco violation notice to the business making the sale.
3. On August 18, 2008, the Board conducted tobacco compliance checks in Clark County under the supervision of Liquor Enforcement Lieutenant Marc Edmonds and Liquor Enforcement Officer

Almir Karic. The operative under the age of eighteen years who was assigned to attempt to purchase a tobacco product from a licensed retail vendor was D. I., who was born January 16, 1992, and was sixteen (16) years of age. D. I. has the appearance of a female at or near her chronological age of sixteen years. D. I. had taken no steps to make herself look older than her true age. On August 18, 2008, D. I. had a Washington Intermediate Driver's License on her person when she entered the Sifton Stop N Shop.

4. On August 18, 2008, at approximately 12:55 PM, D. I. entered Sifton Stop N Shop at 13412 NE 4th Plain Road, Vancouver, Washington. D. I. went directly to the counter where cigarette products are available for sale to the public. The counter was attended by Deborah Ellsworth, an experienced sales clerk. D. I. requested a Single Stick cigarette. Deborah Ellsworth asked D.I. to produce a card of identification. D. I. gave Ms. Ellsworth her driver's license. Deborah Ellsworth looked at D. I. 's driver's license and offered D.I. a Single Stick cigarette. D. I. tendered payment in the amount of \$0.75 for the Single Stick cigarette. Deborah Ellsworth accepted the payment from D. I. and allowed her to leave the Sifton Stop N Shop with the Single Stick cigarette.

5. After she left the store, D. I. gave the Single Stick cigarette to Officer Almir Karic.

6. Officer Karic took D. I. 's driver's license and the Single Stick cigarette and entered the Sifton Stop N Shop and spoke to the owner and Deborah Ellsworth.

7. When confronted with the sale of the Single Stick cigarette to a person under eighteen years of age, Deborah Ellsworth broke into tears, admitted that she sold the tobacco product to D. I., an underage person, and stated "This is the first time I have sold to a minor in the 18 years that I have worked here."

8. The Officers reviewed the Board's record of its operating history and determined that Sifton Stop N Shop had two recorded violations for having made the sale of a tobacco product to a person

under the age of eighteen years within two years: Tobacco Violation Notice case No. 24056 issued June 12, 2007 and Tobacco Violation Notice case No. 23906 issued on March 17, 2008. Tobacco Violation Notice case No. 24056 was settled through a Settlement Conference where a compromise was reached by the parties wherein a \$200.00 penalty was paid by the Licensee. Tobacco Violation Notice case No. 23906 was closed after the Licensee paid the penalty fine of \$1,000.00. The Board's records also showed a third violation issued on August 10, 2006, just over one week outside of the two year look back period. On August 25, 2008, Liquor Enforcement Officer Almir Karic issued a tobacco violation notice to the licensee. The tobacco violation notice advised the Licensee that the penalty for this violation was a \$1000.00 fine and a 6 month Suspension.

9. On August 27, 2008, Mr. Ranck, the agent for the Licensee, signed the Notice of Board Action on Tobacco Violation requesting both a settlement conference and a formal administrative hearing.

10. On or about August 29, 2008, the General Ledger Accounts Receivable Department of the Liquor Control board received a one thousand dollar (\$1,000.00) check from Mr. Ranck. On September 30, 2008, Mr. Considine, Assistant Attorney General representing the Board, spoke to Mr. Ranck after being informed that Mr. Ranck had sent in the one-thousand dollar (\$1,000.00) check. Mr. Ranck confirmed that he sent in the check as payment for the alleged violation of August 18, 2008. Mr. Considine informed Mr. Ranck that the penalty for a third time violation of the sale of tobacco to a minor was a \$1,000.00 monetary penalty and a six (6) month suspension. Mr. Ranck explained that he could not afford a six (6) month suspension. Mr. Considine asked Mr. Ranck if he wished to pursue a hearing in this matter and Mr. Ranck confirmed he wanted a hearing.

11. On October 2, 2008, Mr. Considine advised the Liquor Control Board to refund the \$1,000.00 it received from Mr. Ranck on this alleged violation because the Licensee wanted a hearing in this matter.

12. On October 6, 2008, Mr. Considine spoke to Mr. Ranck and advised Mr. Ranck that the Board would not settle this case for less than a six (6) month suspension. Mr. Ranck was informed that this matter would proceed to a hearing and that he should be receiving a refund of his \$1,000.00 check sometime in the near future.

13. The Board had not refunded the \$1,000.00 to Mr. Ranck at the time of the hearing.

14. Thomas Ranck, owner of the licensed premises, testified that his business does not intend to sell age restricted products to underage persons. Both Ms. Rabel and Ms. Ellsworth testified that Mr. Ranck instructs his employees to check identification cards when selling tobacco and alcohol. Ms. Ellsworth asserted she made a mistake and simply misread D. I. 's driver's license. Mr. Ranck further testified that he recently installed a machine to read identification cards to prevent this type of error in the future. He asserted that the penalty for this violation will cause his business to go bankrupt. Deborah Ellsworth has left his employment.

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

CONCLUSIONS OF LAW

1. It is unlawful for any person to sell or give or permit to be sold or given to any person under the age of eighteen years of age any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form. RCW 26.28.080.

2. The evidence in this case clearly establishes that on August 18, 2008, the Licensee, acting through an employee, sold a cigarette, a tobacco product, to a person under the age of eighteen years from the Sifton Stop N Shop in violation of RCW 26.28.080. The Board has consistently held that licensees are responsible for the operation of their licensed premises in compliance with the laws and rules of the Board.

3. The Liquor Control Board may suspend or revoke a retailer's license held by a business at any location, or may impose a monetary penalty as set forth in subsection (2) of this section, if the liquor control board finds that the licensee has violated RCW 26.28.080. RCW 70.155.100(1).

4. Where a statute makes it an offense to do a particular thing, and is silent concerning the intent with which the thing is done, a person commits the offense when he or she does the forbidden thing, even if he or she has no evil or wrongful intent beyond that which is implied from doing the prohibited act. By making the sale of a tobacco product to a person under the age of eighteen years, Deborah Ellsworth committed an act forbidden by RCW 26.28.080 while employed at the Sifton Stop N Shop, a licensed cigarette retailer.

5. The remaining issue in this proceeding is the appropriate penalty for violation of the law cited above. The Board had the authority to establish an appropriate penalty as a matter of its discretion. Specifically, RCW 70.155.100, grants the Board the authority to suspend or revoke the license. Under RCW 70.155.100(2)(iii), the maximum penalty for a third violation of RCW 26.28.080 within a two year period carries a monetary penalty of one thousand dollars **and** suspension of the license for a period of six months. (Emphasis added). For its third tobacco violation within a two year period, almost its fourth within a two year period, the imposing of a monetary penalty and suspension of its' license under RCW 70.155.100(2)(a)(iii) against M & T Enterprises, Inc., doing business as Sifton Stop N Shop, is deemed to be in the public interest.

6. In regard to the Licensee's argument that the Department is stopped from imposing the six (6) month license suspension based on the legal theory of equitable estoppel because the Board accepted a \$1,000.00 check, the undersigned concludes that the Board is not stopped from imposing the six (6) month license suspension. For equitable estoppel to apply, the Licensee had to have a reasonable belief that the payment of the \$1,000.00 fine portion of the penalty noted on the Notice of

Board Action on Tobacco Violation would satisfy the full penalty which is stated to be a \$1,000.00 fine and a six month suspension. In this case, the Licensee had no reason to believe that paying the \$1,000.00 fine would prevent the six month suspension because Mr. Considine specifically advised Mr. Ranck on two separate occasions that the State would not settle for less than the six month suspension in this matter because of the history of violations. Because the Licensee had no reason to believe that paying the one thousand dollar (\$1,000.00) fine would prevent the six (6) month suspension, equitable estoppel does not apply to this case.

From the foregoing conclusions of law, NOW THEREFORE,

INITIAL ORDER

IT IS HEREBY ORDERED That in the public interest and for a third violation of RCW 26.28.080 within two years there shall be and hereby is imposed upon M & T Enterprises, Inc., doing business as Sifton Stop N Shop a monetary fine in the amount of one thousand dollars (\$1,000.00) and a six (6) month license suspension to sell tobacco.

DATED and mailed at Vancouver, Washington, this 24th day of November, 2009.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS



Janet L. Schneider
Administrative Law Judge
5300 MacArthur Blvd, Suite 100
Vancouver, WA 98661
Telephone: (360) 690-7189 or 1-800-243-3451
FAX: (360) 696-6255

RECEIVED

DEC 3 1 2008

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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

In the Matter of:)	OAH No.	2008-LCB-0048
)	LCB No.	T-505
)		
M&T Enterprises, Inc.,)		
dba Sifton Stop N Shop,)		
)		
)	PETITION FOR REVIEW	
Licensee.)		
)		
License No. 353701)		
_____)		

COMES NOW the Licensee, by and through his attorney, Thomas C. Phelan, and hereby moves the Liquor Control Board for an order to request the Liquor Control Board reverse the initial Order in this case, particularly the proposed six (6) month suspension, based upon all evidence set forth in the record and considered by the Hearing Officer, for the reasons that follow hereafter:

EXCEPTIONS TO INITIAL ORDER

Licensee takes exception to the following Findings of Fact:

1. Finding of Fact No. 7 omits reference to the portions of the record where Deborah Ellsworth testified before the Hearing Officer that she made a mistake in reading the age of the individual and did not knowingly sell to an underage person.

2. In Finding of Fact No. 8, the Licensee takes exception to the finding by the Hearing Officer that the Board's record included a violation that was outside the two (2) year look back period. Exception was taken to this part of the record during the hearing.

3. Licensee takes exception to all Conclusions of Law, particularly that portion that finds that when a statute is silent as to intent, the person commits an offense when he or she "does the forbidden thing" even absent evil intent. Specifically, Licensee submits that at a minimum, some level of intent is required to invoke the provisions of this statute, particularly when invoking the harsh remedies set forth by the Board and in the initial Order. This remedy is draconian considering that the owner of the business did not conduct the sale and has by all evidence taken appropriate steps to insure that sales of cigarettes to minors did not take place. In fact, the employee involved in the sale at issue was a long-time employee who was devastated after she realized the mistake she had made and the potential penalty to her employer. She later quit. In past violations, employees were terminated and all employees were educated on sales to minors.

4. Furthermore, Licensee takes exception to Conclusion of Law No. 5, specifically finding that reference to almost fourth violation "within a two (2) year period" and the conclusion that imposition of the six (6) month suspension and monetary penalty is deemed to be in the public interest. Licensee submits that the public interest is not served by imposing a penalty that may in fact cause an ongoing established

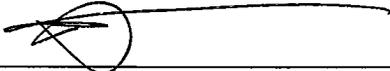
business to cease operating due to the sale of a single cigarette. Evidence was submitted that shows the Licensee's employee made an honest mistake and Licensee took several positive steps to prevent errors such as this occurring in the future. As an example, Licensee purchased equipment that would help take the guess work out of reading licenses, thus minimizing or eliminating the prospects of future mistakes.

5. Licensee takes exception to the failure of the Hearing Officer to apply the doctrine of equitable estoppel, as set forth in Conclusion of Law No. 6. Licensee did have a reasonable basis to believe that the payment of the \$1,000 fine would resolve the matter, as the Department had previously accepted a \$1,000 payment for an alleged third violation within a two (2) year period, creating justifiable reliance by Mr. Ranck that the Board had accepted the \$1,000 payment previously accepted by the Board. (See Finding of Fact No. 10 and No. 13).

REFERENCE TO EVIDENCE OF RECORD SUPPORTING PETITION

Licensee submits the entire record must be considered because all portions are relevant to the decision as to what sanction should be imposed.

Respectfully submitted this 9th day of December, 2009.



THOMAS C. PHELAN, WSBA# 11373
Attorney for M&T Enterprises, Inc.,
dba Sifton Stop N Shop, Licensee

December 9, 2009

RECEIVED
DEC 11 2009
LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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

RE: **Petition for Review**
LCB No. T-505
OAH No. 2008-LCB-0048

To Whom It May Concern:

Enclosed please find Licensee's Petition for Review of the decision of the Administrative Hearing Judge rendered in this matter.

Very truly yours,



Thomas C. Phelan
Attorney at Law

TCP/srh
Enclosure

cc: Brian Considine, Assistant Attorney General (w/enc.)

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2009, I served a copy of Licensee's Petition for Review on the following-named party, by mailing a true copy thereof, via U.S. Mail, to said party, at said party's last-known address, as follows:

Brian Considine
Assistant Attorney General
Office of the Attorney General
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

Signed at Vancouver, Washington this 9th day of December, 2009.


Sonia Huddleston
Legal Assistant

RECEIVED

DEC 21 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

IN THE MATTER OF:

M&T ENTERPRISES, INC d/b/a SIFTON
STOP N SHOP

13412 NE 4TH PLAIN RD.
VANCOUVER, WA 98682

LICENSEE

UBI NO. 6010613120010001

OAH NO. 2008-LCB-0048
NO. T-505

ENFORCEMENT DIVISION'S
REPLY TO LICENSEE'S
PETITION FOR REVIEW

The Enforcement and Education Division (Enforcement) of the Washington State Liquor Control Board (Board), by and through its attorneys, ROBERT M. MCKENNA, Attorney General and BRIAN J. CONSIDINE, Assistant Attorney General, hereby responds to M&T Enterprises, Inc. d/b/a Sifton Stop N Shop (Licensee) Petition for Review (Petition).

Enforcement asserts that the Licensee's Petition lacks the force and merit necessary to overcome the reasoned opinion of the Administrative Law Judge (ALJ). The Initial Order issued by the ALJ is fully supported by the evidence in the record and the law and should be affirmed by the Board.

I. STANDARD OF REVIEW

Any party in an administrative action may file a petition for review of the initial order pursuant to RCW 34.05.464 and WAC 314-29-010(4). A party filing a petition for review

1 must specify the portions of the initial order to which exception is taken and refer to evidence
2 in the record on which the party relies to support the petition. WAC 314-29-010(4). In
3 reviewing findings of fact, reviewing officers “shall give due regard to the presiding officer’s
4 opportunity to observe the witnesses.” RCW 34.05.464(4).

5 **II. BACKGROUND**

6 On August 25, 2008, Enforcement served the Licensee, M&T Enterprises, Inc. d/b/a
7 Sifton Stop N Shop, with an Administrative Violation Notice (AVN) stating that it sold
8 tobacco products to a minor on August 18, 2008, and that the penalty for the violation is a one
9 thousand dollar (\$1000) monetary penalty and a six (6) month suspension of its right to sell
10 tobacco products. On October 10, 2008, the Board issued a formal complaint to the Licensee
11 alleging that on or about August 18, 2008, the Licensee, and/or employee thereof, sold and/or
12 allowed to be sold tobacco products to a person under the age of eighteen (18), in violation of
13 RCW 26.28.080. Enforcement sought a standard penalty of a one thousand dollar (\$1000)
14 monetary penalty and a six (6) month suspension of the Licensee’s tobacco license as this was
15 the Licensee’s third violation of this type within a two-year period.

16 The case was heard by ALJ Janet L. Schneider in Vancouver, Washington, on May 7,
17 2009. After a full hearing on the merits, the ALJ entered her Findings of Fact, Conclusions of
18 Law, and Initial Order on November 24, 2009. The ALJ sustained the Board’s complaint and
19 entered an Initial Order ordering imposing one thousand dollar (\$1000) monetary penalty and a
20 six (6) month suspension of the Licensee’s tobacco license. The Licensee timely filed
21 exceptions to the ALJ’s Initial Order.

22 **III. ALJ’S FINDINGS OF FACT**

23 The Licensee’s exceptions to ALJ Schneider’s factual findings should be rejected.¹
24 The Licensee’s exceptions are irrelevant to the ALJ’s decision and/or are not supported.

25 _____
26 ¹ It is also noted that no exceptions were filed to many of the ALJ’s Findings. Those Findings, then,
remain unchallenged by the Licensee and will not generally be addressed any further.

1 “Findings of fact by an administrative agency are subject to the same requirement as are
2 findings of fact drawn by a trial court.” *Weyerhaeuser v. Pierce Licensee*, 124 Wn.2d 26, 35-
3 36, 873 P.2d 498 (1994) (quoting *State ex rel. Bohon v. Department of Pub. Serv.*, 6 Wn.2d
4 676, 694, 108 P.2d 663 (1940); *State ex rel. Duvall v. City Coun.*, 64 Wn.2d 598, 602, 392
5 P.2d 1003 (1964)). Formal findings of fact serve multiple purposes. They inform the parties
6 of those portions of the record on which the trier of fact relied in reaching the decision, and the
7 basis for that decision. *Weyerhaeuser*, 124 Wn.2d at 35-36. Factual findings also help to
8 ensure that the trier of fact fully and properly dealt with all of the issues of the case before
9 rendering a decision. *Id.* Finally, they aid in meaningful judicial review of the decision. *Id.*;
10 *Boeing Company v. Gelman*, 102 Wn. App. 862, 871, 10 P.3d 475 (2000) (citations omitted).

11 The purpose of factual findings is not to restate every fact elicited during the hearing –
12 the transcript of proceedings serves that purpose. “Findings must be made on matters ‘which
13 establish the existence or nonexistence of determinative factual matters ...’.” *Weyerhaeuser*,
14 124 Wn. 2d at 35-36. It is the role of the trier of fact, rather than the attorneys, to determine
15 which facts have been established by the evidence. *Hering*, 13 Wn. App. at 192.

16 **A. Exception to Finding of Fact No. 7**

17 The Licensee argues the ALJ omitted reference to Deborah Ellsworth’s testimony that
18 she made a mistake and did not knowingly sell tobacco to a minor. Petition at ¶1 The ALJ is
19 not required to enter all findings. *Weyerhaeuser*, 124 Wn. 2d at 35-36. Moreover, whether the
20 employee made a mistake or knowingly sold is irrelevant to whether the Licensee’s actions,
21 through its employees, rose to the level of a violation of RCW 26.28.080. Therefore, the
22 ALJ’s Finding of Fact No. 7 accurately reflects the record and should be adopted by the Board.

23 **B. Exception to Finding of Fact No. 8**

24 Licensee takes exception to this finding of fact by arguing that the violation on August
25 10, 2006, was outside of the two (2) year violation period. Petition at ¶2. However, the
26 Licensee provides no support or analysis illustrating the deficiency in this finding of fact.

1 Nevertheless, this finding is material to the extent that it goes to the Licensee's contention that
2 the penalty should be mitigated because it exercised due diligence when it sold tobacco to a
3 minor on August 18, 2008. Therefore, the ALJ's Finding of Fact No. 8 accurately reflects the
4 record and should be adopted by the Board.

5 IV. ALJ'S CONCLUSIONS OF LAW

6 A. Exceptions to Conclusion of Law No. 5

7 **1. The Licensee takes exception to the ALJ's reference that this violation was**
8 **almost a fourth violation within a two-year period.**

9 The Licensee takes exception to the ALJ's reference to the fact that this violation was
10 "almost its fourth within a two-year period," but it does not provide any basis for this
11 exception. See Petition at ¶4. WAC 314-42-095 requires the Licensee to refer to the evidence
12 of record when stating an objection. Since the Licensee does not provide a basis for its
13 exception to the ALJ's reference to an "almost fourth violation," this portion of Conclusion of
14 Law No. 5 is an accurate conclusion of law, is fully supported by the record, and should be
15 adopted by the Board.

16 However, assuming for the sake of argument that the Licensee did properly present its
17 exception, its argument would still fail. The ALJ does reference a fourth violation in
18 Conclusion of Law No. 5, but this reference is not improper because the ALJ does not use it as
19 an aggravating factor or as evidence to impose a penalty for a fourth violation instead of the
20 penalty for this third violation. Thus, Conclusion of Law No. 5 is an accurate conclusion of
21 law and is fully supported by the record and should be adopted by the Board.

22 **2. The Licensee takes exception to the ALJ's conclusion that the six (6) month**
23 **suspension and \$1,000 monetary penalty is appropriate and deemed to be**
24 **in the public interest.**

25 The Licensee takes exception to the ALJ's proposed penalty because it believes that the
26 public interest is not served by imposing a penalty that may cause an established business to
cease operating due to the sale of a single cigarette. Petition at ¶4. The Licensee supports this

1 assertion by stating the Licensee's employee made an honest mistake and that the Licensee
2 took several positive steps to prevent the violation from occurring in the future. This argument
3 is unpersuasive. *Id.*

4 RCW 70.155.100(2)(iii) states that a third violation of RCW 26.28.080 within a two-
5 year period is "a monetary penalty of one thousand dollars [\$1000] and suspension of the
6 license of a period of six [6] months." This penalty was set by the legislature in 1993 and it
7 has been unchanged since the statute's enactment. *See* RCW 70.155.100. The legislature
8 could change this penalty if it thought the penalty was not in the public interest; however, it has
9 not done so. Thus, the standard penalty imposed by the ALJ is appropriate. The ALJ clearly
10 considered all the evidence and arguments of the parties and did not find the circumstances
11 warranted a penalty other than the standard violation. Thus, Conclusion of Law No. 5 is an
12 accurate conclusion of law and is fully supported by the record and should be adopted by the
13 Board.

14 **B. Exception to Conclusion of Law No. 6**

15 The Licensee takes exception to the ALJ's legal conclusion that equitable estoppel does
16 not apply in this matter. Petition at ¶6. The Licensee cites to Findings of Fact Nos. 10 and 13
17 as evidence that equitable estoppel should apply. *Id.* However, the record does not support the
18 Licensee's argument and the Licensee has failed to cite to any legal authority supporting its
19 contention that the ALJ's legal conclusion is incorrect.

20 The record shows that the licensee did send in a payment of one thousand dollars
21 (\$1000) shortly after receiving the AVN, and the licensee failed to recognize that the AVN
22 stated the penalty would be a one thousand dollar monetary penalty *and* a six (6) month
23 suspension. *See* AVN; Finding of Fact No. 10. As stated in Findings of Fact Nos. 10, 11, 12,
24 and the Declarations of Brian J. Considine (Considine Declaration), the Licensee's agent, Mr.
25 Thomas Ranck, was contacted about the one thousand dollar check and was informed that the
26 penalty included a six (6) month suspension. The Licensee's agent stated that the business

1 could not afford that long of a suspension, that he would not accept the suspension, and asked
2 for a hearing. *See* Finding of Fact No. 10; Considine Declaration. Mr. Ranck was then
3 informed that the matter would proceed to a hearing and his one thousand dollar (\$1000) check
4 would be refunded. *See* Finding of Fact No. 12; Considine Declaration. Thus, the record does
5 not support the Licensee's contention that it could reasonably believe that sending in the check
6 would resolve the matter.

7 Additionally, case law does not support the Licensee's contention that the Board is
8 barred by equitable estoppel from imposing a six (6) month suspension for this violation.
9 Equitable estoppel against the government is not favored. *Kramarevcky v. Department of*
10 *Social and Health Services*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). When equitable
11 estoppel is asserted against the government, a licensee asserting equitable estoppel must
12 establish five elements:

13 (1) a statement, admission, or act by the party to be estopped, which is
14 inconsistent with its later claims, (2) the asserting party acted in reliance upon
15 the statement or action, (3) injury would result to the asserting party if the other
16 party were allowed to repudiate its prior statement or action, (4) estoppel is
17 'necessary to prevent a manifest injustice, and (5) estoppel will not impair
18 government functions.

19 *Silverstreak, Inc. v. Washington State Department of Labor and Industries*, 159 Wn.2d 868,
20 887, 154 P.3d 891 (2007) *citing* *Kramarevcky*, 122 Wn.2d at 743. Each element must be
21 established by clear, cogent, and convincing evidence. *Id.*

22 Here, the Licensee cannot meet any of the elements for equitable estoppel by clear,
23 cogent, and convincing evidence. First, the record does not indicate that Enforcement has been
24 inconsistent in its desire to impose the standard one thousand dollar (\$1000) monetary penalty
25 and six (6) month suspension in this matter. The AVN clearly stated the penalty included a
26 suspension. When Enforcement discovered the Licensee sent in the one thousand dollar
(\$1000) check after it requested a hearing, Enforcement, through its counsel, contacted the
Licensee to inform its agent that a six (6) month suspension accompanied the one thousand

1 dollar (\$1000) monetary penalty. *See* Finding of Fact No. 10. The Licensee was then given a
2 chance to either accept the suspension or have its check refunded and have a hearing on the
3 violation. *Id.* The Licensee chose to not accept the penalty and requested a hearing, and the
4 hearing request was granted. *Id.* Therefore, Licensee's equitable argument fails because it
5 cannot establish the first element of equitable estoppel because it was consistently informed at
6 each stage in the process that the penalty for this violation would be a one thousand dollar
7 (\$1000) monetary penalty *and* a six (6) month suspension of its tobacco license. Furthermore,
8 the Licensee cannot establish any of the remaining elements since it has not shown an
9 inconsistency in the statements, actions, or admissions by Enforcement, and the ALJ's
10 Conclusion of Law No. 6 is an accurate conclusion of law and is fully supported by the record
11 and should be adopted by the Board.

12 **C. Exceptions to All Conclusions of Law**

13 The Licensee asserts a general exception to "all Conclusions of Law, particularly that
14 portion that finds that when a statute is silent as to intent, the person commits an offense when
15 he or she 'does the forbidden thing' even absent evil intent." Petition at ¶3. The Licensee
16 submits to the Board that some level of intent is required by RCW 26.28.080. However, the
17 Licensee has failed to cite to the portion of the record supporting this contention, as required
18 by WAC 314-42-095, and failed to cite to any legal authority to support its argument. *See Id.*
19 Therefore, the ALJ's Conclusions of Law are accurate, fully supported by the record, and
20 should be adopted by the Board.

21 However, if the Licensee had properly made an exception to all Conclusions of Law, it
22 failed to establish that intent is an element of RCW 26.28.080 and RCW 70.155.100, and that
23 the penalty should be mitigated under RCW 70.155.100(6).

24 **1. The Licensee takes exception to the finding that a violation occurred**
25 **because it asserts that there has to be "intent" for the sale to occur.**

26 The Licensee takes exception to the ALJ's determination that a violation occurred

1 because it argues that “some level of intent is required” under RCW 26.26.080 and RCW
2 70.155.100. Petition at ¶3. RCW 26.28.080 and RCW 70.155.100 prohibit the Licensee from
3 selling, giving, or permitting selling or giving, of any tobacco products to any person under
4 eighteen (18) years of age. The plain language of RCW 26.28.080 and RCW 70.155.100
5 clearly indicate that a violation is committed if (1) a licensee; (2) sells, gives, or permits to be
6 sold or given; (3) tobacco products; (4) to a person under eighteen (18) years of age; (5) on the
7 licensed premises, and the record supports the ALJ’s conclusion that Enforcement proved each
8 element by a preponderance of evidence.

9 Additionally, the Licensee takes exception to the ALJ’s finding that the violation
10 occurred because the owner of the business did not sell the tobacco product to the minor.
11 Petition at ¶3. A licensee is responsible for the actions of its employees and a sale of tobacco
12 by an employee will be considered as a sale by the licensee. *See* RCW 70.155.010; RCW
13 82.24.010. Therefore, a licensee is accountable for the actions of its employees and it can be
14 held accountable when its employee sells tobacco to a minor.

15 As a result, the ALJ was correct that a violation occurred because the legislature did not
16 include an element of intent in either statute, and Enforcement must only show that the sale
17 occurred on the licensed premises for it to hold the Licensee accountable. Therefore, the
18 Conclusions of Law are an accurate, fully supported by the record, and should be adopted by
19 the Board.

20 **2. The Licensee takes exception to the ALJ’s proposed penalty in its third**
21 **exception because the ALJ did not consider mitigating factors.**

22 While not entirely clear, the Licensee seems to take exception to the ALJ’s legal
23 conclusion that the proposed penalty is inappropriate in this matter and the ALJ should have
24 mitigated the penalty to something less than the standard penalty of a one thousand dollar
25 (\$1000) monetary penalty and a six (6) month suspension of the Licensee’s tobacco license.
26 *See* Petition at ¶3. The Licensee appears to submit that mitigation is warranted because the

1 Licensee has “taken appropriate steps to [e]nsure that sales of cigarettes to minors does not
2 occur in the future;” the employee who made the sale in this matter quit; and the Licensee has
3 terminated every employee who previously sold tobacco to a minor and educated all
4 employees on sales to minors.” *Id.* However, the Licensee has failed to provide any basis as
5 to why these facts are mitigating factors.

6 RCW 70.155.100(9) states:

7 The liquor control board may reduce or waive either the penalties or the
8 suspension or revocation of a license, or both, as set forth in this chapter where
9 the elements of proof are inadequate or where there are mitigating
circumstances. Mitigating circumstances may include, but are not limited to, an
exercise of due diligence by a retailer....

10 When a statute is unambiguous, the courts should look to the plain meaning of the statute.
11 *Chelan County v. Nykreim*, 146 Wn.2d, 904, 926, 52 P.3d 1 (2002). Thus, the Board has
12 discretion to reduce or waive a penalty if there are mitigating circumstances. An example of a
13 possible mitigating factor is the exercise of due diligence by the Licensee. Additionally, there
14 is no statutory definition of due diligence; however, Black’s law dictionary defines due
15 diligence as “the diligence reasonably expected from, and ordinarily exercised by, a person
16 who seeks to satisfy a legal requirement or to discharge an obligation. *Black’s Law*
17 *Dictionary*, 488 (8th rev. ed. 2004).

18 Here, the Licensee submits that subsequent remedial measures taken to ensure that it
19 does not sell tobacco products to minors should be a mitigating factor. Specifically, the
20 Licensee references its installation of an identification reader that will “take the guess work out
21 of reading licenses.” Petition at ¶4. However, the Licensee’s agent, Thomas Ranck, testified
22 that these measures were taken after the violation occurred and after the Licensee realized he
23 would have his license suspended for six (6) months. Subsequent remedial measures are not
24 sufficient to mitigate a penalty because it does not show that the Licensee was diligent in
25 preventing the current violation from occurring. Additionally, mitigation is not warranted
26 because the Licensee’s actions ring hollow when compared with the fact that this is its third

1 violation in the last two years, fourth since August 10, 2006, and the last two violations
2 occurred within five months of each other.

3 Thus, the Licensee failed to show that the penalty should be mitigated under RCW
4 70.155.100(9) and the ALJ's Conclusions of Law are an accurate, fully supported by the
5 record, and should be adopted by the Board.

6 **V. CONCLUSION**

7 The Licensee's exceptions to the finding of facts and conclusions of law are
8 unsupported by the record. The Licensee's exceptions are unsupported by authority and
9 frequently lack substantial analysis or explanation. The Licensee's exceptions do not form
10 grounds for modification of the Initial Order. Accordingly, for the reasons set forth above,
11 Enforcement respectfully requests that the Board adopt and affirm the findings of fact and
12 conclusions of law set forth in the Initial Order of ALJ Schneider.

13
14 Respectfully submitted this 21st day of December, 2009.

15 ROBERT M. MCKENNA
16 Attorney General

17 
18 BRIAN J. CONSIDINE, WSBA #39517
19 Assistant Attorneys General
20 Attorneys for Washington State Liquor
21 Control Board Licensing and Regulation
22 Division
23 (360) 753-2711
24
25
26