

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

In The Matter Of the Hearing Of:

W.S. STORE CORPORATION  
d/b/a WENATCHEE SPECIALTY STORE  
1210 N WENATCHEE AVE, UNIT K  
WENATCHEE, WA 98802

LICENSE NO. (UBI) 6028744720010001  
TVN: 4H9090A

OAH No. 2009-LCB-0027  
LCB No. T-509

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 October 5, 2009 at the licensee's timely request regarding an Administrative Violation Notice issued on March 31, 2009.
2. On June 9, 2009 the Board issued a Complaint alleging that on March 31, 2009 the Licensee, or employee(s) thereof, sold and/or allowed to be sold tobacco products to a person under the age of eighteen (18), in violation of RCW 26.28.080 and RCW 70.155.100.
3. At the hearing the Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine. The Licensee appeared and was represented by Warren Chin, Attorney at Law.
4. On December 4, 2009 Administrative Law Judge Ralph Bolong entered his Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint, but

reduced the statutory penalty from \$100 to \$50, finding that the Licensee's training program and history of successful compliance checks were mitigating circumstances.

5. The Education and Enforcement Division of the Board timely filed a Petition for Review of the Initial Order, noting technical errors in the citations used by the administrative law judge, and asserting that the "mitigating circumstances" cited by the administrative law judge were not sufficient to warrant a reduction in the statutory penalty.

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,

The Board adopts the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order, with the following additions, modifications, and deletions:

A. The Board does not adopt Conclusion of Law No. 4, as it refers to WAC 314-10-080, which does not apply to this matter, and the Complaint did not charge a violation of this rule.

B. The Board does not adopt the last sentence of Conclusion of Law No. 6.

C. The Board does not adopt Conclusion of Law No. 7, but substitutes the Conclusion of Law No. 7 set out below.

D. The Board modifies Conclusion of Law No. 5 to delete the reference to WAC 314-10-080. The final sentence of Conclusion of Law No. 5 ends with a period following the citation to RCW 28.28.080.

E. The Board adopts the following as an additional Finding of Fact No. 9:

Finding of Fact No. 9. The Licensee, Mr. Shim, does not directly supervise or train the clerks in the Wenatchee Store, as he resides in Bellevue, WA. He did not personally train, or supervise the training of, Ms. Tompkins, and has no direct knowledge of the training she received. Despite Ms. Vance's knowledge that Ms. Tompkins had no prior experience in retail sales, she left Ms. Tompkins unsupervised in the store on her first day of work, and prior to Ms. Tompkins receiving any formal training, such as the Board's RLTS program.

F. The Board adopts the following language as Conclusion of Law No. 7:

7. The Board acknowledges that the Licensee has no record or prior tobacco violations for sales to underage persons within the prior two years, and has successfully completed prior compliance checks conducted by Board staff within the previous three years at this location. However, although the Licensee asserts that he personally trains his managers, in this case, the facts establish that a new employee, with no prior retail experience, was left without supervision on the premises after less than one full day of on-the-job training, and no other training in avoiding sales to underage persons. The lack of training is evidenced by the fact that the sale occurred in this instance, and the employee's statement that she simply forgot about the requirement to check identification. Accordingly, the Board concludes that there are insufficient mitigating circumstances to reduce the statutory monetary penalty in this case, and the statutory penalty of a \$100 fine should be assessed.

Based on the foregoing, NOW THEREFORE the Board enters the following:

#### ORDER

The Complaint is sustained, and W.S. Store Corporation d/b/a Wenatchee Specialty Store located at 1210 N Wenatchee Ave Unit K, in Wenatchee, Washington shall be subject to a monetary penalty

of one hundred dollars (\$100.00) due on or before March 5, 2010. 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 7 day of February, 2010.

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

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February 2, 2010

Warren Chin, Attorney for Licensee  
600 N 85<sup>th</sup> Street, Ste C101  
Seattle, WA 98103-3870

WS Store Corp  
d/b/a Wenatchee Specialty Store  
PO Box 3115  
Issaquah, WA 98027-0140

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: W.S. Store Corporation**

**Trade Name: Wenatchee Specialty Store**

**Location: 1210 N Wenatchee Ave, Unit K, Wenatchee, WA 98802**

**LCB No. T-509**

**OAH No. 2009-LCB-0027**

**Administrative Violation Notice No. 22922-4H9090A**

**License No. (UBI): 6028744720010001**

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.

**Please send payment to the mailing address in the Final Order and 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,

A handwritten signature in black ink that reads "Kevin McCarroll".

Kevin McCarroll  
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Spokane and Wenatchee Enforcement and Education Divisions, WSLCB  
Monika Taylor, Tobacco Violations Coordinator, WSLCB

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

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2  
3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 W.S. STORE CORPORATION  
6 WENATCHEE SPECIALTY STORE  
7 1210 N WENATCHEE AVE, UNIT K  
8 WENATCHEE, WA 98802

LCB NO. T-509  
OAH No. 2009-LCB-0027

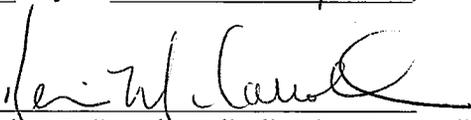
DECLARATION OF SERVICE BY  
MAIL

9 LICENSEE

10 LICENSE NO. (UBI):  
11 6028744720010001

12 I declare under penalty of perjury under the laws of the state of Washington that on  
13 February 2, 2010, I served a true and correct copy of the FINAL ORDER OF THE BOARD in  
14 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 2<sup>nd</sup> day of February, 2010, at Olympia, Washington.

17  
18   
19 Kevin McCarroll, Adjudicative Proceedings Coordinator

20 WARREN CHIN, ATTORNEY FOR  
21 LICENSEE  
22 600 N 85<sup>TH</sup> STREET, STE C101  
23 SEATTLE, WA 98103-3870

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

24 WS STORE CORP  
25 d/b/a WENATCHEE SPECIALTY STORE  
26 PO BOX 3115  
ISSAQUAH, WA 98027-0140

DECLARATION OF SERVICE BY  
MAIL

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

**In the Matter of:**

**WS Store Corporation dba  
Wenatchee Specialty Store**

**Licensee**

**UBI No. 60287447200100001**

**OAH Docket No. 2009-LCB-0027**

**LCB Case No. T-509**

**INITIAL ORDER**

**STATEMENT OF THE CASE**

On March 31, 2009, the Washington State Liquor Control Board (LCB) issued a Notice of Board Action on Tobacco Violation to W.S. Store Corp., d/b/a Wenatchee Specialty Store, Wenatchee, Washington. In this Notice, the Board alleged that on or about March 31, 2009, that the Licensee, or an employee thereof, had violated the provisions of RCW 26.28.080 by selling or providing tobacco to a person under the age of eighteen (18) years of age. The Notice of Board Action set forth a proposed civil monetary penalty in the amount of \$100.00 for a first violation. The Licensee made a timely request for hearing.

This matter came on for telephonic conference hearing before Randolph F. Bolong, Administrative Law Judge, Office of Administrative Hearings, in Yakima, Washington, on October 5, 2009.

At hearing, the Board was represented by Brian Considine, Assistant Attorney General. The Licensee appeared and was represented by Warren Chinn, Attorney at Law. Robert Knowles, LCB Enforcement Officer, and L.G., the Minor Operative in this case, appeared as a witnesses

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BOARD ADMINISTRATION

for the Board. Giacomo Shim, Owner of the Licensee's business, and Tina Vance, Manager, appeared as witnesses for the Licensee.

Based upon the evidence presented, the undersigned Administrative Law Judge enters the following Findings of Fact:

### **FINDINGS OF FACT**

1. The Licensee, W.S. Store Corp., d/b/a Wenatchee Specialty Store, is a retail business outlet operating in Chelan County, Washington. At all times relevant to this decision, the Licensee has operated as a beer and wine specialty shop selling products, including tobacco products pursuant to a cigarette retailers license which is a part of its Uniform Business Identifier License No. 602 874 472 001 0001 and liquor license number 085450.

2. On March 31, 2009, Officer Robert Knowles, was conducting compliance checks of tobacco selling establishments within his jurisdiction with the assistance of L.G., an operative aged 16 at that time. Compliance checks are performed in a "controlled buy" situation by an underaged person who enters a licensed establishment and attempts to purchase a tobacco product. L.G. had been instructed to request cigarettes and pay for her purchase. She was trained to dress in an age appropriate manner. Her Washington State Instruction Permit stated that she would be "age 18 on 05-11-2011"; however, she did not have identification with her when she entered the store. If L.G. was asked for identification, she was instructed to say that she forgot her identification in the car and to walk out.

3. Prior to L.G. entering the Licensee's premises, Officer Knowles verified that L.G. did not have any fake identification, did not have cigarettes on her, and verified the amount of cash that

she had for the purchase. He observed the minor operative enter the Wenatchee Specialty Store at approximately 1:00 p.m. L.G. entered the store, asked for Camel cigarettes, received the cigarettes, paid for the product and exited the premises. She was not asked her age or for identification. After exiting the store, she promptly reentered the vehicle and produced a pack of Camel Filter cigarettes that she had purchased for \$5.75 and the change from the transaction.

4. Officer Knowles entered the Wenatchee Specialty Store and contacted the female clerk on duty, Robin Tompkins. He observed more than one compliance certificate and saw "a large amount" of signs posted that notified patrons that they needed proper identification and had to be age eighteen. After identifying himself, Officer Knowles asked if she had sold cigarettes to the Minor Operative without verifying age through identification. Ms. Tompkins verified that she had sold the product and had not asked for identification. Officer Knowles advised her that L.G. was underaged and that he was going to issue a Tobacco Violation Notice. The manager, Tina Vance, returned during Officer Knowles' contact with Ms. Tompkins. Officer Knowles issued a Notice of Board Action on Tobacco Violation, number 22922, to the Licensee at that time.

5. This tobacco product was sold to the Minor Operative by Robin Tompkins. March 31, 2009 was Ms. Tompkins' first day on the job and she had started at approximately 7:45 a.m. for trial training. She was receiving training from Ms. Vance and had observed Ms. Vance perform identification checks for approximately five or more purchases that morning. Ms. Vance told Ms. Tompkins to "i.d. heavily". After approximately three hours, Ms. Tompkins was allowed to operate the cash register and properly performed one transaction requiring an

identification check. Ms. Vance left soon after to get change at the bank for the business. When Ms. Vance returned, Ms. Tomplins was receiving the Board citation.

6. At hearing, the Licensee did not disagree that the violation at issue herein did in fact occur. However, the Licensee argued that facts exist which would justify mitigation of the proposed \$100.00 civil monetary penalty pursuant to RCW 70.155.100(9).

7. At hearing, Tina Vance, acknowledged that she was the manager on duty that day and did not dispute that Ms. Tompkins had sold the tobacco product to Minor Operative L.G. Ms. Vance informs all employees that no one under the age of eighteen is allowed in the store and that identification must be checked for anyone under the age of thirty. If they have no identification, the patron is told to leave. She specifically instructed Ms. Tompkins on this policy. When she asked Ms. Tompkins why she had not checked the patron's identification, Ms. Tompkins said she forgot.

8. Mr. Shim testified that he has instituted strong policy to prevent underage purchases. He has posted proper signs inside and outside his stores. He informs his employees to check identification every time, and personally trains his managers not to sell products to underage persons. His businesses have been visited previously by Board Operatives and received compliance certifications verifying that they have not been sold tobacco products. He has received five to six compliance certifications in the last three years at the Wenatchee Specialty Store evidencing that his business has been in compliance with efforts to verify patrons' identification prior to sale, and has eight to ten certifications at his other business verifying his efforts.

9. At hearing, the Licensee's counsel argued that the circumstances in this case justify a mitigation of the standard penalty to support a warning but not a finding of violation in this matter.

Based upon the above Findings of Fact, the following Conclusions of Law are entered:

**CONCLUSIONS OF LAW**

1. As a holder of a retail tobacco license, W.S. Store Corp., d/b/a Wenatchee Specialty Store, is subject to the jurisdiction of the Washington State Liquor Control Board pursuant to RCW 82.24.500, 82.24.550(1), RCW 70.155.100, and RCW 70.155.110. Proceedings involving agency action are considered adjudicative proceedings under the Administrative Procedures Act, Chapter 34.05 RCW. The Board has the authority to assign such proceedings to an Administrative Law Judge pursuant to Chapter 34.12 RCW. A proper hearing was provided in this case.

2. RCW 26.28.080 states as follows:

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.

3. The Board has the authority to enforce the provisions of RCW 26.28.080 pursuant to the authority granted at RCW 70.155.100(1) which states:

(1) The liquor control board may suspend or revoke a retailer's license issued under RCW 82.24.510(1)(b) 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, 70.155.020, 70.155.030, 70.155.040, 70.155.050, 70.155.070, or 70.155.090.

4. The Board has also adopted as an administrative regulation Washington Administrative Code (WAC) 314-10-080 which provides that no person may sell or give or in any way provide tobacco products to any person under eighteen (18) years of age. The Board is further granted the authority to suspend or revoke a retailer's license for violation of the Board's administrative rules governing tobacco. WAC 314-10-110(1).

5. The facts in this case clearly establish, and the Licensee has agreed and stipulated, that on March 31, 2009, an employee of the Licensee did in fact sell a tobacco product to an individual who was under eighteen (18) years of age at the time. Accordingly, this tribunal concludes that the Licensee, or an employee thereof, has violated the provisions of RCW 26.28.080 and WAC 314-10-080.

6. Pursuant to RCW 70.155.100(2)(a)(i), the Liquor Control Board may impose sanctions against the Licensee for violation of RCW 26.28.080, which consists of a monetary penalty of \$100.00 for the first violation within any two-year period. The evidence in this matter establishes that the violation found to exist herein is the Licensee's first violation at this location within the prior two-year period. Pursuant to RCW 70.155.100(9), the Board is authorized to consider mitigating or aggravating circumstances in determining the appropriate penalty or sanction to be imposed. This statute specifically states that mitigating circumstances may include, but are not limited to, an exercise of due diligence by the retailer. The facts in this case establish that the Licensee's owner takes an active and vigorous role in ensuring that his employees understand the Licensee's "zero tolerance" policy with regard to the sale of tobacco products to minor individuals.

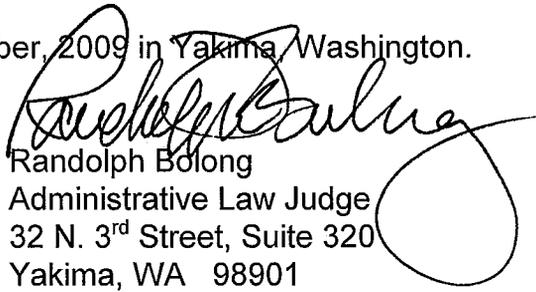
7. This tribunal concludes that the Licensee's strong emphasis on the checking of identification, and "large amount" of posting, evidenced by their extensive history of compliance certifications and no prior violations, and the short employment of the violating employee is appropriately considered a mitigating circumstance. However, this tribunal does not agree with the Licensee that the appropriate sanction or penalty in this matter is a warning with no finding that a violation has occurred. The facts in this case do establish that this short time employee was left without supervision, at which time she committed the violation. Accordingly, the tribunal concludes that it is appropriate to reduce, but not waive, the civil monetary penalty in this matter. This tribunal concludes that the civil monetary penalty should be assessed at \$50.00.

Based upon the foregoing Conclusions of Law, NOW THEREFORE,

**INITIAL ORDER**

IT IS HEREBY ORDERED, That the Board's Notice of Board Action on Tobacco Violation shall be SUSTAINED. On a date to be established in the Board's Final Order, the Licensee shall be required to pay a civil monetary penalty in the amount of fifty dollars (\$50.00).

Dated and Mailed this 4<sup>th</sup> day of December, 2009 in Yakima, Washington.

  
Randolph Bolong  
Administrative Law Judge  
32 N. 3<sup>rd</sup> Street, Suite 320  
Yakima, WA 98901  
(509) 575-2147  
1-800-843-3491  
Fax: (509) 454-7281

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LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

W.S. STORE CORPORATION d/b/a  
WENATCHEE SPECIALTY STORE

1210 North Wenatchee Ave.  
Unit K  
Wenatchee, WA 98802-6707,

LICENSEE.

UBI NO. 6028744720010001

OAH NO. 2009-LCB-0027

LCB NO. T-509

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 BRIAN J. CONSIDINE, 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 (ALJ) Randolph Bolong, on December 4, 2009, in the above-captioned case.

**I. PROCEDURAL BACKGROUND**

On June 9, 2009, the Board issued a Complaint to the Licensee, W.S. Store Corporation, d/b/a Wenatchee Specialty Store, alleging that on or about March 31, 2009, the Licensee and/or an employee thereof, sold, and/or allowed to be sold, tobacco products to a person under eighteen years of age, contrary to RCW 26.28.080 and RCW 70.155.100.

1 This case was heard and considered by the ALJ through a telephonic hearing on October  
2 5, 2009. After a full evidentiary hearing, the ALJ entered Findings of Fact, Conclusions of Law,  
3 and Initial Order on December 4, 2009. In his Initial Order, the ALJ correctly sustains the  
4 Board's Complaint; however, the court's Findings of Facts omit important information and its  
5 conclusions incorrectly apply the law with the facts. Additionally, the ALJ incorrectly finds  
6 mitigating circumstances and orders a reduced penalty of a fifty dollar (\$50) monetary penalty.  
7 The standard penalty for this violation is a one hundred dollar (\$100) monetary penalty. While  
8 the ALJ correctly sustains the Complaint, Enforcement respectfully takes exception to the Initial  
9 Order of the ALJ, and asks the Board to: find the Licensee or an employee thereof, sold, and/or  
10 allowed to be sold, tobacco products to a person under eighteen years of age, contrary to RCW  
11 26.28.080 and RCW 70.155.100, and order the Licensee to pay a \$100 monetary penalty for this  
12 violation.

## 13 II. DISCUSSION

14 Pursuant to WAC 314-29-010(4)(b), any party, upon receipt of a proposed order, may file  
15 exceptions within twenty days of service of the order. The reviewing officer (including the  
16 agency head reviewing an initial order) "shall exercise all the decision-making power that the  
17 reviewing officer would have had to decide and enter the final order had the reviewing officer  
18 presided over the hearing[.]" RCW 34.05.464(4). Therefore, the Washington State Liquor  
19 Control Board is not bound by the ALJ's Conclusions of Law in the Initial Order.

## 20 III. FINDINGS OF FACT

### 21 A. Finding of Fact No. 8.

22 The ALJ failed to include evidence that Mr. Shim resides in Bellevue, Washington, and  
23 that he does not personally train the clerks at the Wenatchee store. Instead, he only trains and  
24 interacts with the Licensee's managers at the store. This evidence should be included because  
25 the Licensee argued that the training given to its employees warrants a mitigated penalty.  
26

1 **B. Finding of Fact No. 7.**

2 The ALJ failed to include evidence that Ms. Vance testified that she was aware that the  
3 new employee, Ms. Tompkins, had no experience in retail sales, but she still allowed the  
4 employee to be alone in the store on her first day of work. This evidence should be included  
5 because the Licensee argued that the training given to its employees warrants a mitigated  
6 penalty.

7 **IV. CONCLUSIONS OF LAW**

8 **A. The ALJ Correctly Sustains The Complaint, But Conclusions Of Law Nos. 4 And 5**  
9 **Are Incorrect**

10 In the Initial Order, the ALJ concluded that the Licensee violated RCW 26.28.080 *and*  
11 WAC 314-10-080 when he found the Licensee sold tobacco products to a minor. In Conclusion,  
12 of Law 4, the ALJ found that WAC 314-10-080 applies in this matter by stating it provides that  
13 “no person may sell or give or in any way provide tobacco products to any person under eighteen  
14 (18) years of age.” However, this is an incorrect reading of WAC 314-10-080.

15 WAC 314-10-080 provides: “[n]o person, including parents or legal guardians or persons  
16 under 18 years of age may authorize any minor to purchase or obtain tobacco products.” The  
17 plain meaning of 314-10-080 prohibits minors from being authorized to purchase tobacco, but it  
18 does not prohibit the sale of tobacco to minors.<sup>1</sup> Thus, the authority prohibiting sale of tobacco  
19 products to minors is RCW 26.28.080. Additionally, In Conclusion of Law 5, the ALJ finds that  
20 the Licensee violated RCW 26.28.080 and WAC 314-10-080. However, WAC 314-10-080 does  
21 not apply to this matter, and the Licensee should not be found to have violated this rule.

22 Thus, the Board should make a finding that WAC 314-10-080 does not apply in this  
23 matter and that the Licensee’s sale of tobacco to a minor violates RCW 26.28.080.

24  
25  
26 <sup>1</sup> WAC 314-10-050 was the rule prohibiting the sale of tobacco products to minors, but it was repealed in September 30, 2008.

1 **B. The ALJ Incorrectly Concludes That A Mitigated Penalty Is Warranted In**  
2 **Conclusion Of Law No. 7**

3 The ALJ incorrectly concludes that a mitigated penalty is appropriate in this case. *See*  
4 Conclusion of Law at ¶7. The evidence presented by the Licensee did not warrant a mitigated  
5 penalty, and the standard penalty of one hundred (\$100) should be reinstated against the  
6 Licensee. In his Initial Order, the ALJ cites to RCW 70.155.100(9) as the basis for mitigation.  
7 Specifically, he finds that “the Licensee’s strong emphasis on the checking of identification and  
8 ‘large amount’ of posting, evidenced by their extensive history of compliance certifications, no  
9 prior violations, and the short employment of the violating employee” are all mitigating factors.  
10 *See Id.* at ¶7. However, the Licensee did not present sufficient evidence to support this finding.

11 RCW 70.155.100(9) states:

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

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

25 At the hearing, the Licensee argued that it exercised due diligence and did everything  
26 possible to prevent the sale from occurring; however, the evidence submitted during the hearing  
was not sufficient to show that its actions were diligent enough to prevent the sale from  
occurring. The ALJ and Licensee cite to its strong emphasis on checking identifications, no

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<sup>2</sup> Enforcement argued this definition at hearing, but the ALJ excluded it from his Conclusions of Law.

1 previous violations, the “large amount of posting,” the short employment of the employee who  
2 sold the tobacco product, and the receipt of compliance certificates as examples of its due  
3 diligence and the basis for mitigation. *See* Findings of Fact Nos. 5, 6, 7, and 8; Conclusions of  
4 Law No. 7. However, this argument is unpersuasive and the evidence does not warrant  
5 mitigation of the penalty.

6 The Licensee is required to not sell tobacco products to persons under eighteen (18) years  
7 of age under RCW 26.28.080 and RCW 70.155.100, and it is required, under RCW 70.155.020,  
8 to post signs informing customers of the prohibition of tobacco sales to minors. The argument  
9 that the Licensee is following the law, and has received certificates for merely complying with  
10 the law should not be considered a mitigating circumstance.

11 Furthermore, the Licensee presented testimony from its President, Giacomo Shim, and  
12 the manager of the store, Tina Vance, as support for mitigating the penalty. Mr. Shim’s  
13 testimony is unconvincing considering it was self-serving, and mostly hearsay because he lives  
14 in Bellevue, Washington, and was not at the licensed premises the day of the violation.  
15 Additionally, Ms. Vance’s testimony does not support mitigation because she testified that the  
16 new employee received no training before her first day and the new employee was allowed to  
17 operate the register after three hours of being on the job even though she was aware that the new  
18 employee had no experience in retail sales. *See* Finding of Fact No. 5. Then, after working the  
19 register for only a couple hours on her first day of work, Ms. Vance left the employee alone to  
20 run the store while she ran some errands. *Id.* Consequently, the new employee failed to check  
21 the minor investigative aide’s identification—the simplest precautionary step—before selling the  
22 tobacco product to the minor. *See* Finding of Fact No. 3.

23 Therefore, the Licensee’s argument fails because it did not ask for the minor’s  
24 identification as required by RCW 70.155.090.<sup>3</sup> Additionally, a couple hours of training and  
25

26 <sup>3</sup> RCW 70.11.090(1) states: “Where there may be a question of a person's right to purchase or obtain tobacco products by reason of age, the retailer or agent thereof, *shall* require the purchaser to present any one of the

1 allowing an employee to run the register unsupervised on her first day of work is insufficient to  
2 show that the Licensee exercised due diligence in preventing this tobacco sale to occur.  
3 Accordingly, the Licensee did not exercise due diligence in this matter and the penalty should  
4 not be mitigated.

5 In addition, contrary to the ALJ's opinion, the new employee's short employment with  
6 the Licensee should cause the Licensee more scrutiny instead of providing a basis for mitigation.  
7 Licensees are responsible in ensuring that their licensed premises are in compliance with the  
8 liquor laws and rules of the Board, and any violation committed or permitted by an employee of  
9 the licensee will be treated as violations committed or permitted by the licensee. *See* RCW  
10 70.155.010; RCW 82.24.010. Therefore, the onus is on a licensee to take all reasonable steps to  
11 ensure that no violations of any kind are committed on its premises. This responsibility is placed  
12 on licensees, not just their employees, because they are in the best position to ensure their  
13 employees are properly trained, supervised, and do not sell tobacco to underage persons.

14 In this matter, common sense dictates that an unsupervised inexperienced employee on  
15 her first day of work is more likely to make an error than an employee that has given proper  
16 training, has more than a few hours of experience, and has proper supervision to ensure tobacco  
17 products are not sold to minors. The Licensee was not prudent in allowing the new employee to  
18 be unsupervised on her first day of work, and that carelessness led to the new employee selling  
19 tobacco to a minor. Therefore, the short employment of the violating employee is not a  
20 mitigating factor and it is not evidence that the Licensee exercised due diligence before it sold  
21 tobacco to a minor.

## 22 V. CONCLUSION

23 At hearing, Enforcement demonstrated by a preponderance of the evidence, through the  
24 sworn testimony of a trained liquor enforcement officer and a minor investigative aide that the  
25

26 following officially issued identification that shows the purchaser's age and bears his or her signature and  
photograph...." (Emphasis added).

1 Licensee sold tobacco to a minor. The standard penalty for a first violation of RCW 26.28.080  
2 and RCW 70.155.100 is one hundred dollars (\$100). The intent of WAC 314-29-020 is to  
3 provide a penalty scheme where the severity of the penalty will match the severity of the  
4 violation. Standard penalties for violation of RCW 66.44.310 and WAC 314-11-020  
5 appropriately punish the licensee for current conduct while attempting to prevent future  
6 violations of the same kind in the future. Without the standard penalty, the Board will not have  
7 sufficient incentives to control violations of its laws and rules. Therefore, the Enforcement  
8 Division respectfully requests that the Initial Order not be adopted in this matter, that the  
9 Complaint be sustained, and a one hundred dollar monetary penalty (\$100) be imposed because  
10 it is the appropriate penalty in this matter.

11  
12 DATED this 22<sup>nd</sup> day of December, 2009.

13 ROBERT M. MCKENNA  
14 Attorney General

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18 Assistant Attorney General  
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