

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **M&M MASSAGE, LLC**, a Washington
4 Limited Liability Company,

HEX2023-015
(CA #500183521)

5 **Appellant,**

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER

6 **v.**

7 **CITY OF TACOMA**, a Washington
8 Municipal corporation, through its
9 Finance Department, Tax & License
10 Division,

Respondent.

11 **THIS MATTER** came on for hearing before JEFF H. CAPELL, the Hearing
12 Examiner for the City of Tacoma, Washington, (the “City”), on June 29, 2023.¹ Appellant
13 M&M Massage, LLC (“Appellant” or “MMM”) was represented at the hearing by Attorney
14 Michael T. Zoretic of Zoretic Law, PLLC. The City’s Finance Department, Tax & License
15 Division (“T&L”) was represented by Deputy City Attorney Debra A. Casparian.

16 Ying Li testified through a court certified Mandarin Chinese interpreter on MMM’s
17 behalf and no other witnesses testified for the Appellant. Jessie Wilde Suendermann, T&L
18 Compliance Officer, and Danielle Larson, T&L Manager, testified for the Respondent.² All
19 testimony was taken under oath and penalty of perjury. Exhibits were admitted and
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21 ¹ Effective October 10, 2022, State and City in-person meeting restrictions were lifted, however, both parties agreed to holding the hearing in this matter solely in virtual format via Zoom. This hearing was conducted over Zoom with no cost to any participant with video, internet, and telephonic access. Remote video capability allowed Appellant witness Ying Li to testify from Colorado.

² After first introduction, parties and witnesses may be referred to by last name only.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
DECISION AND ORDER

1 reviewed.³ Based upon the evidence presented, the Hearing Examiner makes the following:

2 **FINDINGS OF FACT**

3 1. This appeal concerns MMM’s business operations in the city of Tacoma at 6532
4 Pacific Ave., Tacoma WA 98408 (the “Business Premises”). *Suendermann Testimony; Ex. A-*
5 *1.*

6 2. MMM applied for a City business license on February 24, 2021, and that license
7 was issued for “Massage” as MMM’s stated “Business Activity” on or around February 28,
8 2021 (the “License”). *Ex. A-1.*

9 3. The City summarily suspended the License on March 7, 2023, “[d]ue to
10 unlicensed operations resulting in hazardous conditions to life and property.” *Suendermann*
11 *Testimony; Ex. A-2, Ex. R-2, Ex. R-3.*⁴ The suspension came about after Suendermann
12 inspected the Business Premises on February 22, 2023, believing she had observed violations
13 that were sufficient grounds for the March 7, 2023 summary suspension.⁵ *Id.*

14 4. Suendermann has worked for the City for 26 years and she has been a Tax and
15 License compliance officer for the majority of that tenure. She has substantial experience

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19 ³ At the close of the hearing, the Examiner gave the parties’ legal counsel the opportunity to submit legal
20 authorities on the issue of whether suspicions and inferences can satisfy the preponderance of the evidence burden
21 of proof applicable in this proceeding, with a deadline of July 7, 2023. Submissions were received from
Appellant’s counsel on July 3, 2023, and for the City’s counsel on July 7, 2023.

⁴ It was unclear from any testimony at the hearing how MMM’s “unlicensed operations” would result in
“hazardous conditions to life and property” the licensing violation notwithstanding.

⁵ It is noted here that the March 7, 2023 summary suspension and the facts it was based on are not at issue here,
and therefore, any facts that were relied on in issuing this first summary suspension do not need to be “found” or
substantiated by the Examiner as part of this appeal. The March 7, 2023 summary suspension is relevant to this
appeal though, if for no other reason, as procedural background leading to the later suspension that is appealed
here.

1 inspecting massage businesses in the city of Tacoma,⁶ and she has inspected MMM’s
2 Business Premises on multiple occasions, including on November 5, 2022, on January 24,
3 2023, on February 22, 2023 (already mentioned above), and on the date in question here,
4 April 25, 2023.⁷ On several of these visits, violations were identified and citations issued. *Id.*

5 5. On her several visits to the Business Premises Suendermann has directly
6 witnessed the following:

- 7 (a) MMM being open at the Business Premises after 10:00 pm;
- 8 (b) Women (and men) quickly leaving the Business Premises upon
9 Suendermann’s arrival;⁸
- 10 (c) Women being present at the Business Premises and appearing to be
11 employees, but not having a license to be a massage therapist;
- 12 (d) The business appearing to be open and operating when no licensed
13 massage therapist is present on the Business Premises;
- 14 (e) Giving the appearance of operation during business hours (cars present),
15 but with the “Open” sign off, only to turn the “Open” sign back on a short
16 time later as people were exiting the Business Premises;
- 17 (f) Women who are not licensed as massage therapists coming out of
18 massage rooms from behind closed doors;

18 ⁶ Suendermann testified at some length regarding there being what she called “two camps” of massage businesses
19 in Tacoma—one camp being reputable massage businesses, and the other being sketchier. She testified about the
20 business practices and appearances of both camps. Suendermann’s subsequent testimony included a handful (but
21 certainly nowhere near all) of the sketchy camp’s practices being observed at the Business Premises. That
notwithstanding, for the present appeal, the only action/activity upon which the summary suspension in question
was based was the allegation of unlicensed individuals performing massage services.

⁷ Suendermann testified that she had inspected MMM nine times. It was unclear from testimony, however, whether
all nine of those inspections were at the 6532 Pacific Ave. location. Further testimony showed that MMM operates
at another location in the City and that T&L treats this other location as distinct from the Pacific Ave. location,
even requiring a separate business license for it to operate, while still aware that both locations are owned and
operated by the same business entity, M&M Massage, LLC.

⁸ On one instance, however, two women who were outside, re-entered the Business Premises upon seeing
Suendermann arrive.

1 (g) Apparent MMM employees taking payment for services seemingly
2 before services are provided, and taking payment from massage rooms rather
than at the front counter of the Business Premises; and

3 (h) Rooms in the Business Premises that appeared to be set up for sleeping,
4 some with beds and some with sleeping bags, and apparent MMM
5 employees looking as if they had recently been sleeping by appearing
groggy. *Suendermann Testimony; Ex. R-2 ~ Ex. R-5.*

6 6. On April 25, 2023, on the specific inspection that led to the summary
7 suspension being appealed here, Suendermann arrived at the Business Premises and observed
8 two women working, one a licensed massage therapist (“LMT”) and the other being Ying Li,
9 a non-LMT, and Appellant’s chief witness at the hearing. *Suendermann Testimony; Ex. R-5.*

10 7. In addition, Suendermann observed the following specifically on her April 25,
11 2023 visit to the Business Premises:⁹

12 (a) Two men and two women were already present at the Business
13 Premises, with two more presumed customers walking in;

14 (b) One presumed customer left the Business Premises “quickly” as
Suendermann was arriving;

15 (c) Ying Li came out of a room in the Business Premises from behind a
16 closed door dressed in the same uniform as the LMT who was present at the
time in another room. Li had a customer’s credit card in hand and proceeded
17 to the business’s card reader at the front desk, ran the card, and returned a
receipt back to the customer;

18 (d) This same customer then exited the room wearing a bathrobe and was
19 presumed to have taken a shower because water was heard running,
afterwards returning to the room;

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21 ⁹ Suendermann visited the Business Premises again on April 28, 2023, in order to serve the notice of summary
suspension dated that same day and based on the April 25, 2023 visit. There was some testimony from both Li and
Suendermann about what happened that day, but none of what was testified to was the basis for the summary
suspension that is being appealed here. This testimony centered around the City allegation that people (Ying Li in
particular) were living at the Business Premises, but again, that allegation was not asserted as a basis for the
April 28, 2023 summary suspension, nor was it proved by a preponderance in the Examiner’s opinion in any event.
As a result, the Examiner makes no finding regarding the April 28, 2023 visit.

1 (e) On confronting Ying Li, she was reluctant to give Suendermann her ID
2 at first, but ultimately handed over her Colorado driver's license for
inspection. *Id.*

3 Suendermann never saw Ying Li or any other non-LMT actually perform massage services at
4 the Business Premises on April 25, 2023. Suendermann based her conclusion that Li, a non-
5 LMT, was performing such services without a license on her overall experience inspecting
6 massage businesses in Tacoma and on her supposition that because the one LMT present on
7 April 25, 2023 was with another customer, Ying Li must have therefore been performing
8 massage services on the other customer from whom Ying Li had taken payment. *Id.*

9 8. Ying Li testified that she worked at the Business Premises for around one
10 week,¹⁰ part time, on a fill-in basis at the request of her friend Mei who often drove her to
11 work at MMM.¹¹ Her duties included customer reception and cleaning. She testified that on
12 April 25, 2023, she was only receiving payment from the customer Suendermann saw her
13 with, and that she performed no massage services for MMM at the Business Premises on
14 April 25, 2023, or at any time during her tenure with MMM. She further testified that all
15 women working at the Business Premises were required to wear the same uniform that both
16 she and the LMT were wearing on April 25, 2023. She has since returned to Colorado and is
17 pursuing work in a restaurant there.

18 9. The Examiner finds all witnesses materially credible. Inconsistencies were
19 present in the testimony of both side's witnesses, but not regarding the material facts
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21 ¹⁰ One of a few inconsistencies on which the City focused was that Li testified she worked at MMM for only a few days, or about a week, while in the written statement she submitted she said she worked there in the winter and spring of 2023. City cross-examination on this point seemed to devolve into mutual misunderstanding between the witness and the City's counsel and was more or less abandoned.

¹¹ Li had no other information for Mei than her first name stating she was a friend of a friend.

1 necessary to decide this appeal.¹² The Examiner finds that these inconsistencies do not rise to
2 the level where the Examiner should/must find any witness not credible. Different
3 conclusions can be, and were drawn about what was happening at MMM from the undisputed
4 material facts leaving the Examiner to make the legal determination set forth in the
5 Conclusions of Law below.

6 10. Any conclusion of law herein which may be more properly deemed or
7 considered a finding of fact is hereby adopted as such.¹³

8 Based upon the foregoing Findings of Fact, the Hearing Examiner makes the
9 following:

10 CONCLUSIONS OF LAW

11 1. The Hearing Examiner has jurisdiction over this appeal under Tacoma
12 Municipal Code (TMC) 1.23.050.B.9 and TMC 6B.10.145.D. The proceedings are conducted
13 *de novo*. TMC 1.23.060.

14 2. As the party seeking enforcement of the April 28, 2023 summary suspension,
15 the City has the burden of proof to establish that the violation(s) giving rise to the suspension
16 occurred/was/were committed by a preponderance of the evidence and therefore, that the

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19 ¹² Listing the inconsistencies in both side's testimony/written submissions does not seem to have any particular
20 value to the decision rendered herein. Memories are imprecise for most humans. The City's chief witness relied
21 heavily on notes during the hearing in an effort to be more precise with the recall of events, but even then there
were inconsistencies between written submissions and testimony and within the testimony itself. Most of the
inconsistencies on the other side were between Li's sworn testimony at the hearing and the declaration submitted as
an Appellant exhibit. Given Li's presence at the hearing and her testimony there, the Examiner does not give much
credence to the declaration in any event. Fortunately, the material facts presented by both sides are not at odds.
The facts Suendermann testified to regarding her conclusion on unlicensed massage services and Li's own
testimony did not differ materially, but the two witnesses' testimony regarding what was actually happening at the
time do.

¹³ The abbreviations "FoF for "Finding(s) of Fact" and "CoL" for "Conclusion(s) of Law" may be used herein
after.

1 City’s decision to issue and then uphold (at the informal hearing held May 3, 2023) Tax &
2 License’s issuance of a summary suspension against MMM was correct. *TMC*
3 *6B.10.140.A.10.*

4 3. Somewhat strangely, TMC 6B.10.145 titled “Summary suspension – Appeal.” is
5 silent on the burden of proof before the Hearing Examiner on appeal. The Examiner
6 concludes that the burden of proof rests with the City for a number of reasons. First, this
7 proceeding involves the Appellant’s due process right as the suspended holder of a City
8 business license. Normally, the enforcing party that seeks to take away a life, liberty or
9 property (as here) interest bears the burden of showing that such an action is justified.
10 Second, most TMC enforcement proceedings follow the just-mentioned paradigm and put the
11 burden of proof on the City. Third, and most closely on point is TMC 6B.10.140, which is a
12 related/immediately preceding provision of the TMC titled “Denial or revocation – Appeal.”
13 At subsection A.10 it states: “If a licensee appeals such a *suspension*, revocation, or denial of
14 a license under this subsection, the violation must be proved by a preponderance of the
15 evidence;...” [Emphasis added.] Although in the section seemingly dealing with denials
16 and/or revocations, this provision mentions and applies to license suspensions by its own
17 words, and the Examiner applies it in the present case. There is no cognizable reason for the
18 burden of proof in TMC 6B.10.140 proceedings to be any different than under TMC
19 6B.10.145.

20 4. “Preponderance of the evidence” means that the trier of fact is *convinced* that it
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1 preponderance must be found, of course, from the credible evidence presented.¹⁴ The
2 Examiner found above, and concludes here that neither sides' witnesses should be deemed
3 not credible despite any non-material inconsistencies in their evidence/testimony.

4 5. The preponderance of the evidence standard is at the low end of the spectrum
5 for burden-of-proof evidentiary standards in the U.S. legal system.¹⁵ Washington Pattern Jury
6 Instruction WPI 21.01 Meaning of Burden of Proof—Preponderance of the Evidence, offers
7 the following which is also instructive here:

8 When it is said that a party has the burden of proof on any proposition, or that any
9 proposition must be proved by a preponderance of the evidence, or the expression
10 “if you find” is used, it means that you must be persuaded, considering all the
evidence in the case [*bearing on the question*], that the proposition on which that
party has the burden of proof is more probably true than not true.

11 The Comments to that same instruction offer this:

12 The “more probably true than not true” definition set forth in this instruction is
13 generally accepted. See, e.g., *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768
(2005).

14 In *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857,
15 865 (2011), the court equated preponderance of the evidence or more likely than
not with “more than 50 percent.”

16 6. The party bearing it may meet this burden through direct or circumstantial
17 evidence.”¹⁶ Circumstantial evidence is considered on par with direct evidence.¹⁷

18 Circumstantial evidence is “evidence of facts or circumstances from which the existence or

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¹⁴ *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 268, 401 P.2d 982, 986 (1965).

20 ¹⁵ *In re Custody of C.C.M.*, 149 Wn. App. 184, 202-203, 202 P.3d 971, 980 (2009). Another somewhat recent case
21 referred to it thusly: “The lowest legal standard of proof [in the U.S. legal system] requires the proponent to prove
its case by a preponderance of the evidence.” *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d 1241,
1246-1247 (2006).

¹⁶ *In re Disciplinary Proceeding Against Jones*, 182 Wn.2d 17, 41-42, 338 P.3d 842, 854 (2014); *Sam v.*
Okanogan County Sheriff's Office, 136 Wn. App. 220, 229, 148 P.3d 1086 (2006).

¹⁷ *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321, 322 (2008) citing *State v. Delmarter*, 94 Wn.2d 634,
638, 618 P.2d 99 (1980).

1 nonexistence of other facts may be reasonably inferred from common experience.”¹⁸ “A trier of
2 fact may rely exclusively upon circumstantial evidence to support its decision.”¹⁹ “Whether or
3 not that evidence is sufficient to prove the *case* will depend on the evidence as a whole.”²⁰

4 7. In this appeal, the issue the City must prove by a preponderance of the evidence is
5 the violation upon which the City based its April 28, 2023 summary suspension. The City’s
6 May 22, 2023 Affirmation of Summary Suspension letter sets forth the basis for suspension as
7 being, “[d]ue to an inspection Tax & License Compliance Officers [conducted] which revealed
8 a massage therapist performing services at 6532 Pacific Ave. without a State of Washington
9 massage therapist license as required by Chapter 18.108.030 Revised Code of Washington.”

10 8. The confounding factor here is that there was no revelation of a non-LMT
11 performing massage services on this inspection, at least not directly. Suendermann did witness
12 everything recounted at Findings of Fact 6 and 7, but as already stated there, she did not
13 witness a non-LMT performing massage services. She surmised that such had to be happening
14 because the one LMT present “[w]as doing massage on another customer” with a second
15 customer in another room. *Ex. R-5, FoF 7*. This assumption seems somewhat analogous to
16 saying that because there are two people in exam rooms at the doctor’s office who have been
17 taken there by non-MDs (physician’s assistant, or whoever) and there is only one doctor
18 present, that therefore, other staff members must be performing medical treatment without the
19 proper credentials on the patient not yet attended by the licensed MD. Unfortunately, any of us

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¹⁸ *Id.*; *State v. O’Hara*, 167 Wn.2d 91, 107, 217 P.3d 756, 765 (2009).

¹⁹ *State v. Jackson*, 145 Wn. App. at 818.

²⁰ *In re F5 Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 241, 207 P.3d 433, 439 (2009). Emphasis in the original.

1 who have been to the doctor's office know this is not true. We simply have to wait our turn to
2 be seen by the doctor.

3 9. Suendermann and the City ultimately concluded that unlicensed massage services
4 were being performed based on circumstantial evidence and suppositions based thereon.

5 10. As stated above, circumstantial evidence is considered on par with direct
6 evidence. That does not mean, however, that they are the same in all respects, otherwise the
7 legal profession would not differentiate with the modifiers "circumstantial" and "direct." It
8 would all just be evidence. Concluding that a particular event occurred based on surrounding
9 circumstances is not the exact functional equivalent of directly witnessing something take
10 place. Had Suendermann directly seen Li, a non-LMT performing massage services, the City's
11 case would be open and shut.²¹

12 11. Further complicating matters for the City's being able to prove its case sufficiently
13 by a preponderance of circumstantial evidence²² is Li's testimony refuting the City's
14 supposition that non-licensed massage services were taking place. *FoF 8*. The City, of course,
15 was aware of this difficulty, given Li's explanation of what was happening and her denial that
16 she performed any massage services, and therefore the City argued that Li's testimony should
17 be found non-credible, and her denial disregarded. The Examiner has rejected this argument
18 (*FoF 9*). Li's explanation and denial were at least as plausible as the City's supposition(s).

21 ²¹ Likewise, if Li had not denied performing massage services, thereby rebutting the City's supposition, or there
were some other evidence corroborating the City's conclusion, such as a statement from the customer Li took
payment from stating that she had also performed massage services, the outcome here would have been different.
Suendermann was asked about questioning the customer, and she simply stated that they try to leave the customers
alone.

²² *In re F5 Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 241, 207 P.3d 433, 439 (2009).

1 28, 2023 is hereby conditionally lifted. That lifting, and MMM's return to business operations
2 at 6532 Pacific Ave., Tacoma WA 98408 are conditioned on the following:

- 3 1. All conditions imposed on MMM's operation by the City in its letter of
4 March 28, 2023, are reinstated with the reversal of the summary
suspension here;
- 5 2. In addition, all persons working as part of MMM's business
6 operations, whether employees or independent contractors²⁵ must be
7 provided a written copy of all conditions and will sign them as
8 acknowledged and agree to abide by them;²⁶
- 9 3. Non-LMT workers at MMM, whether employees or independent
10 contractors, must wear different clothing/uniforms than LMT massage
11 service providers.

12 **DATED** this 14th day of July, 2023.



13 **JEFF H. CAPELL, Hearing Examiner**

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²⁵ See Ex. R-2, in which Mark Stephens is recorded as stating that individuals working at MMM were independent contractors and not employees.

²⁶ Either the Appellant or T&L can produce a document containing all conditions imposed herein in a signable form. In the event that MMM creates such a form, it will submit a copy to the City for review and approval before presenting the same to its employees and/or independent contractors.

1 **RECONSIDERATION/APEAL OF EXAMINER'S DECISION**

2 **RECONSIDERATION:**

3 Any aggrieved person or entity having standing under the ordinance governing the matter, or
4 as otherwise provided by law, may file a motion with the Office of the Hearing Examiner
5 requesting reconsideration of a decision or recommendation entered by the Examiner. A
6 motion for reconsideration must be in writing and must set forth the alleged errors of
7 procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14
8 calendar days of the issuance of the Hearing Examiner's decision/recommendation, not
9 counting the day of issuance of the decision/recommendation. If the last day for filing the
10 motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be
11 the next working day. The requirements set forth herein regarding the time limits for filing of
12 motions for reconsideration and contents of such motions are jurisdictional. Accordingly,
13 motions for reconsideration that are not timely filed with the Office of the Hearing Examiner
14 or do not set forth the alleged errors shall be dismissed by the Hearing Examiner. It shall be
15 within the sole discretion of the Hearing Examiner to determine whether an opportunity shall
16 be given to other parties for response to a motion for reconsideration. The Hearing Examiner,
17 after a review of the matter, shall take such further action as he/she deems appropriate, which
18 may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code*
19 *1.23.140*)

11 **APEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:**

12 **NOTICE**

13 Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's
14 decision is appealable to the Superior Court for the State of Washington. Any court action to set
15 aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner shall be
16 commenced within 21 days of the entering of the decision by the Hearing Examiner, unless
17 otherwise provided by statute.