

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF

SWANSON TAV LLC
JACK-SONS - INC
JACK-SONS SPORTS BAR
432 S 48TH AVE
YAKIMA, WA 98908-3407

LICENSEE

LICENSE NO. 074679

LCB NO. 22,768

OAH NO. 2008-LCB-0012

FINAL ORDER OF THE BOARD

I. BOARD'S CONSIDERATION

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

1. A formal hearing was held on August 12, 2008 at the licensee's timely request for a hearing in relation to the Liquor Control Board's Complaint dated January 23, 2008.
2. The Complaint alleged that on June 16, 2007 the licensee or employee(s) thereof, allowed an apparently intoxicated person to possess and/or consume liquor on the licensed premises in violation of WAC 314-16-150.
3. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Jennifer Elias and the Licensee was represented by attorney Lou V. Delorie.
4. On October 9, 2008 Administrative Law Judge Chris Blas entered his Findings of Fact, Conclusions of Law and Initial Order in this matter which held the licensee "did not violate WAC 314-16-150 on June 16, 2007" and further held the licensee was not subject to any penalty in this matter.

5. A Petition for Review was filed timely by the Enforcement Division specifically taking exception to the ALJ's determination to apply WAC 314-42-070 to determine the violation of WAC 314-16-150 charged in the complaint did not occur.
6. A reply in opposition to the Enforcement Division's Petition for Review and request to adopt the ALJ's initial order was filed timely by the Licensee.
7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises hereby enters the following Findings of Fact, Conclusions of Law and Final Order.

II. FINDINGS OF FACT

1. On June 16, 2007 between 12:30 and 1:30 a.m. three Liquor Enforcement Officers (LEOs), Sergeant Ryan Navrat, Officer Matt Murphy and Officer Rebecca Burnham entered the Licensee's premises in plain clothes without alerting the Licensee of their status as LEOs and acted as patrons of the establishment. Navrat, Murphy and Burnham were "inside officers," assigned to observe the interior and the patrons of the licensed premises for potential violations of liquor related rules and laws.
2. Three other LEOs, Lieutenant Kent Williams, Officer Gabriel Ramos and Officer Dan Rehfield were assigned as "outside officers" and remained in a car across the street awaiting a call for assistance from any of the three "inside" LEOs. If alerted to a potential violation by inside officers outside officers enter the premises and carry out the actual enforcement duties necessary to address the violation.
3. Over a ten minute period Officer Burnham observed a male patron standing near a pull tab machine in the front main portion of the premises. Officer's Burnham believed the patron displayed signs of intoxication as he was standing with his head down and was

swaying back and forth. Officer Burnham pointed out the patron to Sergeant Navrat and Officer Murphy.

4. Officer Burnham spoke with the patron, asking him what he was drinking as they were both standing at the bar. The patron replied it was some kind of whiskey and Officer Burnham observed him holding a glass with ice and brownish liquid in it. After conversing with the patron Officer Burnham was convinced the symptoms she observed in the patron were attributable to intoxication, and not to a disability or other condition.
5. Officer Matt Murphy confirmed the patron Officer Burnham identified was leaning against the wall, was isolated from and not interacting with other patrons, had glassy eyes and showed possible signs of intoxication.
6. Officer Navrat observed the patron swaying as he walked, which prompted the officers to investigate further for other signs of intoxication.
7. Officer Murphy engaged the patron in further conversation, near the bar and asked what he was drinking. The patron's response was initially unintelligible and the patron then leaned forward toward Officer Murphy, nearly fell forward and the patron then told Officer Murphy that he, the patron, was "pretty fucked up." During the entirety of the conversation the patron had a drink in his hand. Officer Murphy described the patron's speech as slurred and added the patron spoke very slowly.
8. Officer Murphy stepped outside and contacted the outside officers by cell phone and then returned to the same area where he had the conversation with the patron.
9. Sergeant Navrat observed and heard conversation between Officer Murphy and the patron and noted the patron's speech was slurred and also observed the patron lost his balance.

Sergeant Navrat observed the patron to be holding a drink glass with a yellowish whiskey

type of drink. Sergeant Navrat also observed the patron sway while walking and noticed the patron's eyes to be watery and glassy and observed the patron's thought process overall appeared slow in light of the manner in which he conversed with Officer Murphy.

10. All three of the three outside officers, Williams, Ramos and Rehfield, came inside the premises and observed the patron that Officer Murphy had described during his telephone conversation with outside officer Rehfield.
11. Officer Rehfield testified the outside officers spoke with security personnel at the door when they entered the premises, explained they were responding to a potential over service violation and the officers pointed toward the apparently intoxicated patron. Officer Rehfield recalled speaking with a security staff person named "Ben."
12. Officer Ramos observed the patron who was the subject of the investigation by the inside officers as having bloodshot watery eyes. Officer Ramos heard the patron's speech was slurred.
13. Officer Rehfield also observed the patron and saw his eyes as blood shot and watery, saw him swaying and heard the patron's slurred speech and smelled the odor of intoxicants associated with the patron.
14. Officer Williams approached the patron and introduced himself to the patron by name, and showed his badge and asked to "borrow" the patron's drink. The patron provided the drink and Officer Williams passed the drink to Officer Ramos.
15. The three outside officers identify themselves to the patron as LEOs, ascertained the patron's name was "Keith" and asked "Keith" to accompany them outside of the premises.

16. Officer Ramos took a sample of the drink by placing a small amount of the liquid into a lidded container which he then placed in his pocket, and soon thereafter labeled as to date, time and place of sampling. Officer Ramos sent the sample to the state toxicology lab. The toxicology lab report confirmed the sample was alcohol.
17. Outside of the premises the officers informed "Keith" they believed him to be intoxicated and that he was cut off. Keith's appearance and demeanor during that time was flushed face, red and glassy eyes, slow, slurred speech and swaying back and forth. Officer Williams confirmed with Keith he had no disability that would explain the apparent signs of intoxication and that Keith added he was "just drunk."
18. Officer Williams testified Jack-son's security was called over and the officers explained the situation to Ben Alexander. Officer Williams told Ben Alexander the patron "Keith" was showing signs of intoxication, that he was cut off and was refusing to show identification or give his last name and that the LEOs were no longer going to hold the patron.
19. Officer Ramos talked to Ben Zeigler, a manager at Jack-son's, in order to advise of what appeared to be an overservice situation.
20. Officer Ramos also talked to Ben Alexander whom he knew to be a member of Jack-son's security staff and also alerted him to the apparent over service issue.
21. Officer Ramos testified he pointed out "Keith" to both Ben Ziegler and Ben Alexander.
22. It is within an LEO's discretion to require identification from an apparently intoxicated patron. Officer Williams testified the circumstances in this situation were such that the officers determined to let Keith go rather than take the next step and utilize Yakima police resources to cite Keith for failure to produce identification.

23. No one from Jack-son's pursued Keith or asked the LEOs any questions or for more information or details about Keith.
24. Officer Williams wrote a report of the incident two or three days after the incident. The report dated June 18, 2008, was entered into evidence as Exhibit No. 4. In the report Officer Williams confirms he observed the patron "Keith" showing signs of intoxication, that he escorted "Keith" outside and that he alerted Jack-son's security personnel Ben Alexander to the over service incident involving Keith, and specifically that Officer Williams informed Ben Alexander that Keith was cut off for showing signs of intoxication and that Keith refused to provide identification.
25. An Administrative Violation Notice (AVN) was drafted by Officer Ramos and issued to the licensee. A copy is entered into evidence as Exhibit 1. The AVN cited Jack-son's for violation of WAC 314-16-150, allowing an apparently intoxicated person to possess or consume alcohol on the premises on June 16, 2007 and assessed the standard penalty, a \$2,500 fine or a five day suspension of liquor license privileges, for the violation, which was calculated in light of the licensee's history of a past violation of the same type. A copy of the standard penalty notice is in evidence as Exhibit 2.
26. The AVN stated Officer Williams informed security personnel Ben Alexander of Keith's apparent intoxication and informed Ben Alexander that the patron "Keith" was cut off from alcohol service.
27. Ben Zeigler is the manager of Jack-son's and was working in that position on June 16, 2007. Mr. Zeigler initially testified that the extent of his interaction with the LEOs was limited to a conversation with Officer Ramos about an incident earlier in the evening, and he did not have any discussion about the incident involving "Keith."

28. Mr. Zeigler later testified he had two conversations with Officer Ramos. In one of the conversations Officer Ramos informed Mr. Ziegler the drink had been taken away from a patron. Mr. Zeigler also testified that Officer Ramos showed or gave him the drink that had been confiscated from Keith. Mr. Zeigler did not ask Officer Ramos to identify the patron. Mr. Zeigler did not discuss the matter of a patron's apparent intoxication and possession of alcohol with any of his staff.
29. Mr. Zeigler acknowledged that the information he had about the circumstances with Keith were such to create notice that a citation could be forthcoming, although no LEO specifically informed Mr. Zeigler on June 16, 2007 that Jack-son's would be receiving a citation arising out of the incident with "Keith."
30. Ben Alexander is employed as a bouncer for Jack-son's and was working the door checking identifications on June 16, 2007. Mr. Alexander observed the LEOs outside but testified he was not aware they were dealing with an intoxicated patron. Mr. Alexander said he was told later that night by a fellow employee when they were doing paperwork related to closing that the LEOs had been talking to an older gentleman who had been over served.
31. Jack-son's has an extensive video security system with 26 cameras, inside and outside of the premises. Unless overridden manually the cameras are programmed to automatically save footage for 5-7 days and then record over it. The cameras could be programmed to retain tape for longer, as much as two weeks, before being overridden.
32. Mr. Ziegler or any other employee of Jack-son's did not take any steps to ensure the tape of June 16, 2007 was saved. Jack-son's owner Steve Swanson was out of town on June 16, 2007 and did not return until June 20, 2007 the date the AVN was served.

33. The Administrative Law Judge applied a now repealed provision of the Washington Administrative Code, WAC 314-42-070 (6), entitled "Presumptions" which states in relevant part:

Upon proof of the predicate facts specified in the following six subdivisions hereof without substantial dispute and by direct, clear and convincing evidence, the board, with or without prior request and with adequate notice to all parties, may make the following presumptions, where consistent with all surrounding facts and circumstances and consistent with the following subsections: . . .

(6) Interference with a remedy. That evidence with respect to a material fact which in bad faith is destroyed, removed, suppressed or withheld by a party in control thereof, would if produced, corroborate the evidence of the adversary party with respect to such fact,

to conclude the LEO's determination to let "Keith" leave the premises without obtaining his true identity and without explicitly informing the licensee that a citation was going to be issued met the criteria for application of the above rule.

III. CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter and is not bound by the findings of fact or conclusions of law entered by the Administrative Law Judge. RCW 34.05.464 (4).
2. The ALJ did not make findings of fact stemming from the ALJ's observation of the witnesses and the Board is not obligated to give deference to the ALJ's opportunity to observe the witnesses in this matter.
3. WAC 314-16-150 does not require proof that the licensee or an employee of the licensee knowingly sold or provided the liquor to an intoxicated person, only that the person was intoxicated and permitted to be in possession of liquor on the licensed premises.
4. The consistent and combined testimony of the six LEOs present at Jack-son's in the early morning hours of June 16, 2007, as well as the confirming documentary evidence in

Exhibits 1 and 4, establishes by a preponderance of evidence that a person, apparently named “Keith”, was intoxicated and was also permitted to possess and/or consume liquor on the licensed premises on June 16, 2007 in violation of WAC 314-16-150.

5. A preponderance of evidence establishes that Jack-son’s staff had sufficient awareness of a situation concerning an apparently intoxicated person on the premises as to at least be on notice during the time period between June 16, 2007 and June 20, 2007 of the possibility that a citation might be forthcoming. Jack-son’s staff had opportunity to locate, pursue or preserve whatever evidence it might find necessary to address the possibility of defending against a citation, including preserving the footage from the security cameras.
6. The LEOs have no legal obligation to hold or otherwise detain an apparently intoxicated person, nor is there legal obligation to serve a licensee with a formal notice of violation at the time the violation is observed by the LEOs.
7. No evidence establishes the LEOs acted improperly or in bad faith when they made the discretionary decision they would not detain “Keith” or that they would not tax Yakima police resources by requesting the police come to the premises to determine whether to issue “Keith” an infraction for failing to produce his identification.
8. In order to apply the presumptions described in WAC 314-42-070, including the presumption contained in subsection (6), the ALJ must first determine there is no substantial dispute as to the predicate facts underlying the presumption. Specifically, in the case of subsection (6), the ALJ must determine it is undisputed that evidence of a material fact was in bad faith destroyed, removed, suppressed or withheld by the party in

control of the evidence and that if produced, the evidence would corroborate the evidence of the other party with respect to the material fact at issue.

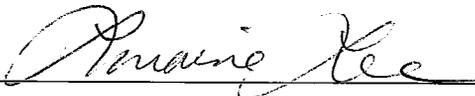
9. None of the predicate facts underlying WAC 314-42-070 are present. There is no evidence the LEOs acted in bad faith; that "Keith's" presence or identity was under the control of the LEOs and, most fundamentally, Keith's true identity or his whereabouts is not a material fact that could be used to disprove the violation that occurred when the licensee permitted an apparently intoxicated person, whomever he may have been, to possess or consume alcohol on the licensed premises.
10. The ALJ erred as a matter of law in applying WAC 314-42-070 to conclude the licensee did not violate WAC 314-16-150.

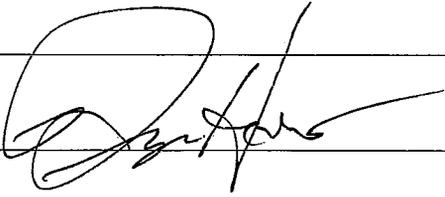
IV. FINAL ORDER

The October 9, 2008 Initial Order is REVERSED and the Board's January 23, 2008 Complaint alleging the licensee or employee(s) thereof, allowed an apparently intoxicated person to possess and/or consume liquor on the licensed premises in violation of WAC 314-16-150 is SUSTAINED. This matter is REMANDED to the ALJ with instructions to enter an order sustaining the complaint and to determine whether the requested standard penalty of a 5 day suspension with the option to a \$2,500 monetary penalty as dictated by WAC 314-29-020 is appropriate, or whether the record of this matter establishes mitigating or aggravating circumstances to support a non-standard penalty.

DATED at Olympia, Washington this 23rd day of January, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD





Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. 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 Martha P. Lantz, 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).

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OCT 17 2008

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

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

In the Matter of:

**STEVE SWANSON, JACK-SONS, INC.
d/b/a JACKSON'S SPORTS BAR**

Licensee

License No. 074679

**OAH Docket No. 2008-LCB-0012
LCB Case No. 22,768 and 4F7166A**

INITIAL ORDER

On June 20, 2007, the Washington State Liquor Control Board (the LCB) served an Administrative Violation Notice (AVN) on Ben Ziegler, the Licensee's Manager. In its Notice, the Board alleges that on or about June 16, 2007, the Licensee supplied to or allowed an intoxicated person to possess or consume liquor on the licensed premises in violation of WAC 314-11-035. LCB Case number 4F7166A was assigned to this matter. On June 22, 2007, the Licensee filed the hearing request.

The LCB amended the AVN on January 23, 2008 citing to the same facts but amending the charge. In the amended AVN, the LCB alleges that on or about June 16, 2007, the Licensee allowed an apparently intoxicated person to possess or consume liquor on the licensed premises in violation of WAC 314-16-150. The LCB assigned number 22,768 to this complaint.

On January 23, 2008, the Board issued a formal Complaint in which it alleged that on or about June 16, 2007, the Licensee or employees thereof, allowed an apparently intoxicated person to possess and/or consume liquor on the licensed premises in violation of WAC 314-16-150.

On April 14, 2008, the complaint and amended AVN were sent to this tribunal to

commence an adjudicative proceeding. Upon completion of a pre-hearing conference on June 13, 2008, the hearing was scheduled with due and proper notice given to the parties.

This matter came on for hearing before Washington State Office of Administrative Hearings, Administrative Law Judge, Chris Blas, in Yakima, Washington, on August 12, 2008. At hearing, the Education and Enforcement Division (the Division) of the Board was represented by Assistant Attorney General, Jennifer Elias. The Licensee Steve Swanson appeared and was represented by attorney Lou Delorie. Appearing as witnesses for the Division were former Officer Rebecca Burnham, Officer Matthew Murphy, Sergeant Ryan Navrat, Lieutenant Kent Williams, Officer Dan Rehfield and Officer Gabriel Ramos. Appearing as witnesses for the Licensee were manager Ben Ziegler, security worker Ryan Gasseling, and security manager Ben Alexander.

FINDINGS OF FACT

1. Steve Swanson and his wife Dana have owned and operated Jack-Son's Sports Bar at 432 South 48th Avenue in Yakima Washington for 16 years. The LCB has authorized and assigned liquor license 074679 to this establishment.

2. Jack-Son's Sports Bar (Jack Son's) is next door to McGuire's Pub, another drinking establishment holding a liquor license issued by the LCB. Directly inside Jack-Son's, through its main double-door entrance, is the main area with tables, chairs, a serving bar, pool tables, video games, televisions, pull tab machines, and sports memorabilia. Passing through and to the right of the main area is another part of the building which houses the lounge room which provides scheduled entertainment such as comedy, karaoke, and music to patrons for a cover charge Tuesday through Sunday. Jack-Son's is open to all members of the public until

9 p.m. each day. At 9 p.m., Jack-Son's then closes its doors to anyone under the age of 21 years of age.

3. Steve Swanson invested and installed a video surveillance system with approximately 20 cameras throughout the establishment for the purposes of recording significant events. The system records the events for each day in a cycle to a reusable disc. After each cycle, the recorder starts to record over the previous recordings in the cycle. In June 2007, the cycle was less than four days. The recordings may be saved and the disc removed for a permanent record when needed. In June 2007, only Mr. Swanson knew how to save the recordings. The manager, Ben Ziegler, was not aware how these recordings could be saved.

4. For almost two years, Mr. Swanson and Mrs. Swanson have employed Ben Ziegler as the manager of Jack-Son's Sports Bar. Mr. Ziegler had only been the manager for a few months in June 2007 when the events here are alleged to have occurred.

5. Mr. Ziegler schedules staff to meet the needs of the customers. Staff include bartenders, cocktail servers and eight or more security personnel. All employees perform at least hourly intensive checks of customers to determine if anyone is intoxicated or shows signs of intoxication. Additionally, at least two security members are assigned to the front entrance to prohibit those showing signs of intoxication entry into the establishment. Some security personnel are assigned to the lounge area and the remaining to the main area of the bar. Mr. Ziegler performs periodic patrols of the bar himself.

6. Upon finding a person apparently under the influence of alcohol, Jack-Son's personnel remove any drink from the customer's possession and place a wristband on the customer to identify the person as being under the influence. Bar staff have been instructed

not to serve drinks to customers wearing wristbands. Security staff also ensure that those who are under the influence of alcohol and are about to leave the premises do so safely, either by calling a cab for the person or ensuring that the person is accompanied by an unencumbered person.

7. Sometime prior to June 2007, the Education and Enforcement Division received anonymous complaints concerning three of its licensees in the Yakima area. One of the licensees being Jack-Son's Sports Bar. The Liquor Control (LC) officers in this area, with the intent of ensuring public safety, focused their attention on Jack-Son's by organizing an undercover operation to look for violations of the liquor control laws including whether there were any apparently intoxicated customers in possession of or being served alcohol at Jack-Son's.

8. On June 16, 2007 between 12:30 a.m. and 1:30 a.m., three LC Officers (Sergeant Ryan Navrat, Officer Matt Murphy and Officer Rebecca Burnham) entered Jack-Son's in plain clothes so as not to make their "official" presence known to anyone at the establishment. Three other LC Officers (Lieutenant Kent Williams, Officer Gabriel Ramos, and Officer Dan Rehfield) waited in a vehicle across the street from Jack-Son's. They waited for a call for assistance from any one of the three Officers inside Jack-Son's.

9. The three Officers who were stationed inside allege they found a person near a pool table leaning against a post or wall who exhibited signs of being under the influence of alcohol. They also allege they saw a drink in his hand. After, the three officers spoke to this person individually, they obtained only his first name, "Keith". Officer Murphy called the Officers in the car via cell phone and summoned them inside to take action. The three outside Officers

entered Jack-Son's and approached "Keith". The three inside Officers inside did not disclose their official capacity to anyone at the establishment and avoided the other Officers while "Keith" was confronted.

10. The evidence from the Education and Enforcement Division consists of the testimony of the six LC Officers claiming to have seen a person at Jack-Son's named "Keith" who they alleged exhibited the signs of being under the influence of alcohol and a toxicology report concerning the drink they claimed was in "Keith's" possession. Jack-Son's claims a violation of due process has occurred here. It claims that its ability to defend itself in this proceeding was adversely affected when the LC Officers released "Keith" in bad faith from their custody without warning Jack-Son's staff. It also claims that the LC Officers failed to obtain "Keith's" identification resulting in a loss of vital evidence which was essential to proving its case.

11. The two managers and a security worker, who the Officers claim they notified of the violation, deny seeing "Keith" or being shown "Keith" by the Officers. The managers and security worker claim that they performed their searches that day for any person under the influence and did not find the person who the Officers claim to have seen. The Education and Enforcement Division presents no independent verification of its Officers' claims such as another patron, video tape or an employee of the bar.

12. The credible evidence shows the LC Officers released "Keith" without delivering control of "Keith" to Jack-Son's management or security staff or directing them to "Keith" to protect him and the public from his allegedly intoxicated condition.

13. Jack-Son's was not served with the Administrative Violation Notice (AVN)

immediately upon the Officers concluding that "Keith" was under the influence of alcohol. This delayed any effort by Jack-Son's to begin gathering evidence to defend against the notice as it was unaware of the intentions of the Education and Enforcement Division. The LC Officers knew that Jack-Son's used a video surveillance system in its establishment as such system had been used by Jack-Son's to defend against a prior allegation by the Education and Enforcement Division.

14. Jack-Son's claims that having "Keith" turned over to their control would have allowed it to gather probative and potentially dispositive evidence about "Keith".

CONCLUSIONS OF LAW

1. There is jurisdiction to hear and decide this matter pursuant to RCW 66.24.010 and WAC 314-29-010.

2. WAC 314-16-150(2) states:

(2) No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.

3. Material evidence which is in bad faith withheld by a party in control thereof is presumed to be favorable to the adverse party. WAC 314-42-070. Keith's demeanor, physical health, and appearance and abilities were material to Jack-Son's defense. Release of "Keith" by the LC Officers without notice to Jack-Son's was in bad faith. Consequently, this evidence is presumed to be favorable to Jack-Son's. The LC Officers knew such evidence was material and critical to Jack-Son's defense. They also knew that Jack-Son's had video recordings and sufficient staff to immediately observe "Keith" if they had appropriately and immediately warned Jack-Son's of its intentions. The LC Officers knew or should have known that if "Keith" were

released, Jack-Son's would not be able to interview him or obtain evidence to rebut the LC Officers' allegations.

4. Jack-Son's has established a defense to the alleged violation of WAC 314-16-150(2). It must be concluded that a violation of such regulation has not been committed.

INITIAL ORDER

The licensee Jack-Son's Sports Bar, owners Steve and Dana Swanson, did not violate WAC 314-16-150 on June 16, 2007. The licensee is not subject to suspension of its license for this alleged violation.

Dated and Mailed this 9th day of October, 2008 at Yakima, Washington.



Chris Blas
Administrative Law Judge
Office of Administrative Hearings
32 North Third Street, Ste 320
Yakima, WA 98901
(509) 575-2147, or 1-800-843-3491
FAX: (509) 454-7281

Copies mailed to:

Steve Swanson, Licensee
Lou Delorie, Attorney for Licensee
Jennifer Elias, AAG

NOTICE TO PARTIES

Either the licensee or the Assistant Attorney General representing the Education and Enforcement Division may file a petition for review of this initial order. The petition for review must be filed with the liquor control board within twenty (20) days of the date of service of the initial order. The petition for review must specify the portions of the initial order to which exception is taken and refer to the evidence of the record which is relied upon to support the petition. Copies of the petition and any replies must be mailed to all

other parties or their representatives at the time the petition or replies are filed. WAC 314-29-010(4).

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LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

STEVE SWANSON
JACK-SON'S, INC.
d/b/a JACKSON'S SPORTS BAR
432 SOUTH 48TH AVENUE
YAKIMA, WA 98902

OAH NO. 2008-LCB-0012
LCB CASE NO. 22,786

ENFORCEMENT DIVISION'S
PETITION FOR REVIEW OF THE
INITIAL ORDER

LICENSE NO. 074679

The Washington State Liquor Control Board's Education & Enforcement Division ("Enforcement"), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and JENNIFER ELIAS, 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 Chris Blas, on October 9, 2008, in the above-captioned case.

I. PROCEDURAL BACKGROUND

On January 23, 2008, the Board issued a Complaint to the Licensee, Steve Swanson, Jack-son's Inc., d/b/a Jackson's Sports Bar, alleging that on or about June 16, 2007, the Licensee and/or an employee thereof, sold and/or allowed an apparently intoxicated person to possess or and/or consume liquor on the licensed premises in violation of 314-16-150.

This case was heard and considered by the Administrative Law Judge ("ALJ") in Yakima, Washington on August 12, 2008. After a full evidentiary hearing, the ALJ entered Findings of Fact, Conclusions of Law, and Initial Order on October 9, 2008. In the Initial Order,

1 the ALJ dismisses the Board's Complaint. Enforcement respectfully takes exception to the
2 Initial Order of the ALJ.

3 II. DISCUSSION

4 **THE LICENSEE IS NOT ENTITLED TO A PRESUMPTION THAT THERE WAS NO** 5 **APPARENTLY INTOXICATED PERSON ON THE PREMISES ON JUNE 16, 2007.**

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

12 **A. There is no direct, clear, and convincing evidence that establishes that Enforcement** 13 **interfered with the Licensee's ability to defend itself against allegations.**

14 The ALJ erred in applying the presumption of interference with a remedy in the present
15 case by finding that the license established a defense to the violation. Pursuant to WAC 314-42-
16 070, certain presumptions are available provided that the predicate facts for such presumptions
17 are not in substantial dispute and that such facts have been established by direct, clear, and
18 convincing evidence. Presumptions may be made with or without prior request but with
19 adequate notice to the parties. WAC 314-42-070(1). The presumption of interference of remedy
20 under WAC 314-42-070(6)¹ presumes that where evidence with respect to a material fact is bad
21 faith destroyed, removed, suppressed, or withheld by a party in control of that evidence, such
22 evidence would if it had been produced corroborate the defense of the adversarial party with
23 respect to that fact.

24 In the present case, the Licensee is not entitled to the presumption of interference with a
25 remedy, because the facts regarding the interference are substantially in dispute and were not

26 ¹ Changes to chapter 314-42 of the WAC became effective September 15, 2008. As the violation is dated
June 16, 2007 and the hearing occurred on August 12, 2008, all references are to former WAC 314-42.

1 established by direct, clear, and convincing evidence as required by WAC 314-42-070(1).
2 Moreover, the record does not establish that Enforcement acted in bad faith, as found by the
3 ALJ.

4 The evidence presented at hearing establishes a substantial dispute as to whether the
5 Licensee's staff was notified on the night of the violation that Enforcement had identified an
6 individual who was apparently intoxicated. Lieutenant Williams testified that he informed staff
7 member Ben Alexander that Keith, the person who enforcement identified as being apparently
8 intoxicated and should be cut off. The ALJ did not make an adverse credibility finding relating
9 to Lieutenant Williams, or any of the other five officers who testified at hearing. Although the
10 ALJ found that Enforcement presented "no independent verification of its Officers claims such
11 as another patron, video tape, or an employee of the bar" (Finding of Fact 11), the testimony of
12 the officers' regarding the actions that they took that night was competent, direct evidence of the
13 events in question and required no corroboration. Although Ben Alexander denied being notified
14 of the presence of an apparently intoxicated person ("AIP"), the record is similarly devoid of any
15 "independent verification" to corroborate Mr. Alexander's claims that he was not informed about
16 the AIP. A substantial dispute exists as to Enforcement's alleged failure to notify Licensee's
17 staff of the AIP, and the alleged failure was not established by direct, clear, and convincing
18 evidence; therefore, the presumption cannot be applied.

19 Moreover, Enforcement did not act in bad faith by failing to "deliver" Keith to staff at
20 Jackson's. Lieutenant Williams testified that Enforcement officers removed Keith's drink inside
21 the bar in full view of the front bar. He further testified that he attempted to obtain identification
22 from Keith but that Keith refused to produce identification and left the premises. Enforcement
23 did not have Keith under custodial arrest and could not lawfully prevent his departure from the
24 premises. In fact, in the absence of a legal basis for custodial arrest, any action to physically
25 prevent Keith's departure could result in a violation of Keith's constitutional rights. Although
26 the ALJ concludes in Conclusion of Law 3 that Enforcement's "release" of Keith deprived the

1 Licensee of information material to Jackson's defense, such as Keith's demeanor, physical
2 health, appearance, and abilities, the ALJ mistakenly concludes that Enforcement had a legal
3 basis to detain Keith and that Keith's departure had to be authorized or otherwise sanctioned by
4 Enforcement. Furthermore, the testimony of the inside officers establishes that prior to
5 Lieutenant Williams' contact with Keith, Keith was physically present in the bar for at least an
6 hour. During this period, the Licensee, who is legally responsible for what occurs in the licensed
7 premises, had ample time to observe Keith's physical condition and demeanor. Therefore,
8 Keith's departure from the premises and refusal to provide identification does not constitute bad
9 faith on the part of Enforcement. Furthermore, Enforcement is not required to and does not as a
10 matter of practice "deliver" apparently intoxicated persons to licensees.

11 **B. The ALJ incorrectly concludes that Enforcement failed to timely and appropriately
12 notify the Licensee of the violation in Conclusion of Law 13.**

13 If a Liquor Enforcement officer believes that a licensee has violated a Board statute or
14 rule, the officer is required to prepare an Administrative Violation Notice ("AVN") and mail or
15 deliver the notice to the licensee. WAC 314-29-005(1). The AVN should include a brief
16 narrative description of the violation charged, the date of the alleged violation, a copy of the
17 applicable laws, an outline of the licensee's options going forward, and finally the penalty being
18 sought for the charge. WAC 314-29-005(2). The rule does not impose a requirement that an
19 officer who observes a violation must immediately issue the violation on site. In fact, such a
20 requirement would prevent Enforcement officers from conducting often necessary follow-up
21 investigation before concluding whether a sufficient quantum of evidence exists to pursue
22 administrative action.

23 The Licensee was provided with the AVN in this case on June 20, 2007, three and half
24 days after the officers witnessed what they believed was a violation. The ALJ finds in
25 Conclusion of Law number 13, that Enforcement's failure to "appropriately and immediately
26 warn Jack-Son's of its intentions" deprived the Licensee of the ability of using video surveillance
footage to defend itself and the ability to assess Keith's condition. CL 13. However, the record

1 shows that Jackson's staff was aware that Enforcement officers were present on June 16, 2007,
2 and it could have chosen to preserve the footage as a precaution, but did not. As stated above,
3 Lt. Williams testified that he verbally notified Ben Alexander on the night in question that an
4 individual was showing signs of apparent intoxication and should be cut off. As the ALJ notes in
5 Finding of Fact Number 13, the license had previously used video surveillance footage to defend
6 against a prior violation and here the Licensee could have chosen to preserve footage from
7 June 16, 2007.²

8 III. CONCLUSION

9 At hearing, Enforcement demonstrated by a preponderance of the evidence, through the
10 sworn testimony of six trained liquor enforcement officers that an AIP was allowed to possess
11 and consume alcohol on the licensed premises on June 16, 2007. Therefore, the Enforcement
12 Division respectfully requests that the Initial Order not be adopted in this matter, that the
13 complaint be sustained, and the penalty be imposed.

14 DATED this 29th day of October, 2008.

15 ROBERT M. MCKENNA
16 Attorney General

17
18 *for* *Ruth Emmert #20879*
19 JENNIFER ELIAS, WSBA #36334
20 Assistant Attorney General
21 Attorneys for the Washington State Liquor
22 Control Board Enforcement Division

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² The Licensee Steve Swanson testified that surveillance footage recycles every 5-7 days and indicated that the recycle day during this week was probably Wednesday June 20, 2007, the same day the AVN was served.

CERTIFICATE OF TRANSMITTAL

On this day, the undersigned sent to the attorneys of record for plaintiff(s) (defendant(s)) a copy of this document by U.S. Mail postage prepaid, or by Attorneys Messenger Service. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

11/7/08 Yakima
Date Place
William L. Bunn
Signed

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

STEVE SWANSON
JACK-SON'S, INC.
d/b/a JACK-SON'S SPORTS BAR
432 SOUTH 48TH AVENUE
YAKIMA WA 98902

)
)
) OAH NO.:
) LCB CASE NO. 22,786
)
) LICENSEE'S MEMORANDUM IN
) OPPOSITION TO PETITION FOR
) REVIEW
)
)
)

LICENSE NO. 074679

The licensee, by and through counsel Lou V. Delorie, of Delorie – Johnson PLLC submits the following memorandum in opposition to Washington State Liquor Control Board's Education and Enforcement Division's (Enforcement) Petition for Review of the initial Order issued by Administrative Law Judge, Chris Blass, on October 9, 2008.

For purposes of this review, the licensee adopts the procedural background set forth in Enforcement's Petition dated October 29, 2008. The violation arises out of an allegation by Enforcement that Jack-Son's allowed an individual, by the name of Keith, to possess or consume alcohol while in an intoxicated state. It is undisputed that Enforcement did not detain Keith; did not secure his last name, telephone number or address and did not allow Jack-Son's employees the opportunity to confront Keith.

1 alcoholic beverage and advise the patron that he will not be allowed to consume any more
2 alcohol. It is their practice to place a wrist band on the patron so other employees will know that
3 the patron has been cut off from alcohol service. They encourage the patron to consume non-
4 alcoholic beverages and to eat something in an attempt to sober them up. If the patron wishes to
5 leave, employees will make sure that a safe mode of transportation is provided via Taxi or by a
6 friend of the intoxicated patron. All of the aforementioned testimony was undisputed and
7 clearly, cogently and convincingly supports all Findings of Fact entered by Administrative Law
8 Judge, Chris Blass, in his order of October 9, 2008.

9
10 The Administrative Law Judge was in the best position to judge the credibility of all
11 witnesses who testified at the hearing and obviously found the Jack-Son's employees believable.
12 Enforcement argues that they had no legal basis to detain Keith. The evidence demonstrates the
13 contrary as if indeed Keith was obviously intoxicated as alleged, he would have been in violation
14 of Washington statutes and Liquor Control Board regulations. Regardless of whether
15 Enforcement had authority to detain Keith, surely Jack-Son's had the authority if indeed he was
16 obviously intoxicated as alleged. Jack-Son's has the obligation to protect its patrons from injury
17 and the employees testified as to the reasonable steps taken by Jack-Son's if they encounter an
18 obviously intoxicated individual. If Jack-Son's had been allowed to confront Keith, it could
19 have been determined how long he had been at the establishment and whether or not he had
20 come from some other establishment, such as McGuire's, prior to entering Jack-Son's.
21 Enforcement was obviously aware that by allowing Keith to leave, without being identified, that
22 Jack-Son's ability to defend the violation was severely compromised.

23
24 Enforcement takes the position that they were not required to immediately warn Jack-
25 Son's of their intention to issue a violation. Enforcement argues in many instances follow up

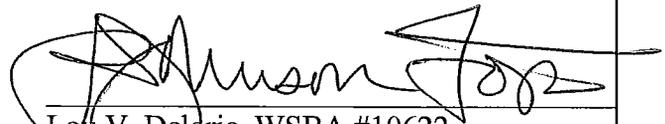
1 investigation is required before issuing a notice of violation. In this case it is undisputed that
2 Enforcement did absolutely no further investigation after allowing Keith to leave Jack-Son's.
3 Enforcement knew, at the time, that they were going to issue a notice of violation, but they said
4 nothing to warn the Jack-Son's employees. Accordingly, Jack-Son's employees did not take
5 steps to preserve evidence of video surveillance, nor did they take immediate steps to attempt to
6 locate Keith. One can think of few instances in which prejudice to the accused licensee has
7 been proven by more clear, cogent and convincing evidence than presented herein.
8

9 CONCLUSION:

10 The licensee respectfully requests that the initial Order entered by Administrative Law
11 Judge, Chris Blass, on October 9, 2008, be adopted, becoming the final Order.

12 RESPECTFULLY SUBMITTED this 7th day of November, 2008.

13 DELORIE – JOHNSON PLLC

14 

15
16 Lou V. Delorie, WSBA #10622
17 Lawyer for Licensee