BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF Eric Gamache dba HOOPS SPORTS BAR AND GRILL 2103 W LINCOLN AVE YAKIMA, WA 98902 LICENSEE License No. 356926	LCB NO. 22,826 OAH NO. 2008-LCB-0041 FINAL ORDER OF THE BOARD

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

I. FINDINGS OF FACT

1. A formal hearing was held on December 2, 2008 at Licensee Hoops Sports Bar's timely request for a hearing on the September 3, 2008 Complaint issued by the Liquor Control Board.

2. The Complaint alleged that on or about February 8, 2008 the Licensee and/or an employee thereof, allowed a person under twenty-one (21) years of age to frequent a restricted premises contrary to RCW 66.44.310 and WAC 314-11-020 (2).

3. At the hearing the Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine and the Licensee was represented by owner Eric Gamache.

4. At the hearing the Education and Enforcement Division argued for penalty beyond the standard penalty of a five day license suspension or a $500 monetary penalty in lieu of

suspension; specifically, Education and Enforcement argued for a five day suspension with no option for monetary penalty in lieu of the suspension.

5. On January February 5, 2009 Administrative Law Judge Randolph Bolong (ALJ) entered Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint, but imposed a penalty different from either the standard penalty of a five day license suspension or a $500 monetary penalty in lieu of suspension or the penalty of a five day suspension without monetary option as sought by Enforcement and Education, and, instead ordered a three day license suspension or a $300 monetary penalty in lieu of suspension.

6. The Enforcement and Education Division timely filed a Petition for Review of the Initial Order, requesting again a penalty of five day suspension with no option for monetary penalty in lieu of suspension.

7. The Board affirms and adopts the ALJ's Findings of Fact 1- 8, which establish that on February 9, 2008, the Licensee or an employee of the Licensee allowed Chelsey Smith, who was under the age of twenty-one, to frequent a restricted premises contrary to RCW 66.44.310 and WAC 314-11-020 (2).

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

II. CONCLUSIONS OF LAW

1. A preponderance of evidence establishes that on February 9, 2008, the Licensee or an employee of the Licensee allowed Chelsey Smith, who was under the age of twenty-one, to frequent a restricted premises contrary to RCW 66.44.310 and WAC 314-11-020 (2).

2. The standard penalty for a violation of RCW 66.44.310 and WAC 314-11-020 (2) of a five day license suspension or a $500 monetary penalty in lieu of suspension.

3. Ms. Smith's entry into the restricted premises by fraudulent use of her similar looking older sister's identification combined with the Licensee's stated desire to follow the laws and Board rules governing licensees do not constitute mitigating circumstances under WAC 314-29-015 such that downward deviation from the standard penalty is appropriate.

4. The Licensee's failure to prevent Ms. Smith's fraudulent use of her older sister's identification in this instance is not an aggravating circumstance under WAC 314-29-015 such that upward deviation from the standard penalty is appropriate.

5. The standard penalty of a five day license suspension or a $500 monetary penalty in lieu of suspension is appropriate in this instance for the established violation of RCW 66.44.310 and WAC 314-11-020 (2).

NOW THEREFORE; IT IS HEREBY ORDERED that the Board's Complaint is SUSTAINED and the standard penalty of a five day license suspension **or** a $500 monetary penalty in lieu of suspension is imposed.

Payment in reference to this order should be sent to:

Washington State Liquor Control Board

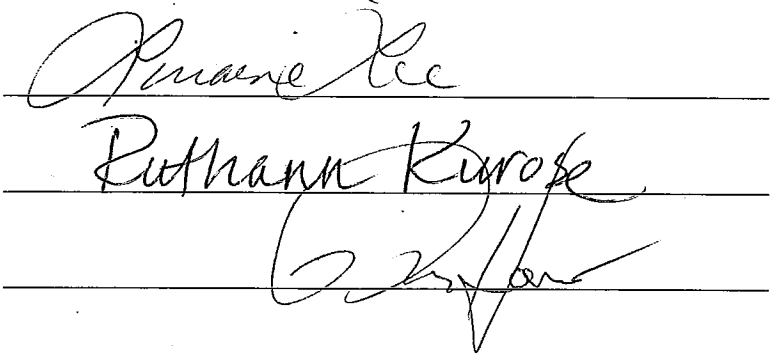
Enforcement and Education Division

P.O. Box 43094

Olympia, WA 98504-3094

DATED at Olympia, Washington this 8th day of April, 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).

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

In the Matter of: **ERIC GAMACHE** **d/b/a HOOPS SPORTS BAR AND GRILLE, LLC,** **Licensee** **License No. 356926**	**OAH No. 2008-LCB-0041** **LCB No. 22,826** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND INITIAL ORDER**

STATEMENT OF THE CASE

The hearing was held before Randolph F. Bolong, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on December 2, 2008, in Yakima, Washington. The Washington State Liquor Control Board (Board) Education and Enforcement Division (Enforcement) was represented by Brian J. Considine, Assistant Attorney General. Gabriel Ramos, Liquor Enforcement Officer, and Sergeant (Sgt.) Paul Eric Hildebrand, Yakima Police Department, appeared as witnesses for the Board. The Licensee, Hoops Sports Bar and Grille, L.L.C., d/b/a Hoops Sports Bar and Grille, was represented by the owner, Eric Gamache.

Based on the record presented, the ALJ makes the following Findings of Fact:

FINDINGS OF FACT

1. The Licensees, Hoops Sports Bar and Grille, L.L.C., d/b/a Hoops Sports Bar and Grille (Hoops Bar), is a restaurant and lounge located at 2103 W. Lincoln Avenue in Yakima, Washington. The premises have been licensed by the Board for the sale of spirits, beer and

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wine pursuant to License Number 356926. The liquor license granted to Hoops Bar limits minors being on the premises at any time.

2. Until the events of February 9, 2008, the Licensees had not received any citation for violation of the statutes or rules of the Board.

3. On the evening of February 9, 2008 at approximately 12:50 a.m., Sgt. Hildebrand of the Yakima Police Department was present inside the Licensee's premises conducting a "bar check". Sgt. Hildebrand observed a young woman who appeared to be underaged on the premises. Sgt. Hildebrand contacted the woman and was able to confirm that she was 21 years old. However, when he asked her if she had any sisters, she indicated that she had a 19 year old sister inside the premises. After approximately fifteen minutes, the sister, Chelsey Smith, was located. She was placed under arrest and the officer noted a strong odor of intoxicants on her breath. Her eyes were watery and bloodshot. A preliminary breath test (PBT) confirmed her intoxication. During her detention, she stated that she was 19 years old. Sgt. Hildebrand questioned her on the trip to the police department, and she disclosed her entry to Hoops as follows:

> ...I asked Chelsey about how she got into the bar. She said that she used her sister's ID to get in. She said that they arrived just a short time before we got there and she sent a friend in to get her sister's ID. She then used the ID to get in. I asked her if she had ever been to Hoops before and she said that she had been there one other time with her sister.

Chelsey Smith was cited for unlawful possession/consumption of liquor by person under 21, person under 21 misrepresenting age to purchase liquor/enter off limits area, and minor frequenting tavern-person under 21 in off limits area.

4. At approximately 12:50 a.m., of February 9, 2008, Officer Gabriel Ramos of Enforcement was working with various safety enforcement officers from the Yakima Police

Department and City Fire Department conducting routine premises checks. While conducting a check of the Licensee's premises, he learned that Sgt. Hildebrand had discovered an underaged person on the premises and the circumstances of her entry. He was informed that Ms. Smith had admitted to "having six straight shots while in the premises." He filled out his report based upon Sgt. Hildebrand's report.

5. Enforcement did not conduct further investigation of the incident.

6. On the morning of February 9, 2008, a doorperson was to check all those entering the premises to verify that each entrant had proper identification and was twenty-one (21) years of age or older. Sgt. Hildebrand testified that identification was checked at the door every night he has been at the premises and opined that the sisters were similar-looking. Officer Ramos has attended educational compliance meetings for the Licensee to explain the guidelines for the employees approximately three to four times a year.

7. On February 9, 2008, the bartender checked identification and age of any customers that he questioned as not being twenty-one (21) years of age or older. Cocktail waitpersons also are required to request identification at the time of order.

8. On February 13, 2008, the Washington State Liquor Control Board (Board) served an Administrative Violation Notice to Samantha Townsend, the bartender at Hoops Bar. In its notice, the Board alleged that on February 8, 2008, the Licensee had violated the provisions of Revised Code of Washington (RCW) 66.44.310(1) by allowing a minor to frequent a restricted area. person under the age of twenty-one (21) years to remain in an area classified as off-limits to any person under the age of twenty-one (21) years.

9. The penalties for the statutory violations sought by the Board against the Licensees is a five (5) day suspension or fine of five hundred dollars ($500.00) in lieu of suspension.

10. The Licensees made a timely request for an informal settlement conference to discuss resolution on February 29, 2008.

11. The informal settlement conference did not resolve the matter and this case was set for a formal administrative hearing.

12. At hearing, Enforcement argues that a harsher penalty will ensure that the acts of passing identification back and forth will not happen in the future. He argues that the a five day suspension is appropriate and that the fine amount is inadequate for the violation. However, the Board admits there was no aggravating circumstance in this case.

13. The Licensee argues that they did not knowingly allow the minor on the premises. Mr. Gamache testified that he has a good relationship with Enforcement and has at all times attempted to follow the Board's rules. He has experienced people at the door checking identification and additional people inside to check identification. The Licensee has taken steps to prevent the passing of identification. Though he was not present on the night in question, Mr. Gamache testified that the underaged person was not on the premises very long and that the waitperson had not had an opportunity to serve Ms. Smith before she was contacted by Sgt. Hildebrand.

CONCLUSIONS OF LAW

1. As the holders of a retail liquor license, Eric Gamache, the owner of Hoops Bar, is subject to the jurisdiction of the Washington State Liquor Control Board. The Board has the authority pursuant to RCW 66.24.010 to suspend or cancel a license so long as the Licensee is afforded an opportunity for a hearing. RCW 66.08.150, WAC 314-29-010. A proper hearing was provided in this case.

2. The provisions of RCW 66.44.310 are applicable and provide as follows:

(1) Except as otherwise provided by RCW 66.44.316, 66.44.350, and 66.24.590, it shall be a misdemeanor:

(a) To serve or allow to remain in any area classified by the board as off-limits to any person under the age of twenty-one years;

(b) For any person under the age of twenty-one years to enter or remain in any area classified as off-limits to such a person, but persons under twenty-one years of age may pass through a restricted area in a facility holding a spirits, beer, and wine private club license;

(c) For any person under the age of twenty-one years to represent his or her age as being twenty-one or more years for the purpose of purchasing liquor or securing admission to, or remaining in any area classified by the board as off-limits to such a person.

(2) The Washington state liquor control board shall have the power and it shall be its duty to classify licensed premises or portions of licensed premises as off-limits to persons under the age of twenty-one years of age.

3. The provisions of Washington Administrative Code (WAC) 314-11-020(2) are applicable and provide in relevant part as follows:

(1) Per RCW 66.44.270, licensees or employees may not supply liquor to any person under twenty-one years of age, either for his/her own use or for the use of any other person.

(2) Per RCW 66.44.310, licensees or employees may not allow persons under twenty-one years of age to remain in any premises or area of a premises classified as off-limits to persons under twenty-one.

4. The preponderance of evidence in the hearing record establishes that on February 9, 2008, Chelsey Smith, a patron age nineteen (19) years, was present at the off-limits premises of Hoops Bar. Though there is an issue of whether the patron was *allowed* to remain on the premises by the licensee, her admission that she was served while on the premises establishes violation of the statute at issue. Ms. Smith admitted her violation of criminal law

in separate and consistent admissions to Sgt. Hildebrand on February 9, 2008. In making such admission, Chelsey Smith raised her likelihood of possible prosecution for her illegal purchase of alcohol. RCW 66.44.150. Such violation, if proven, is a misdemeanor and punishable by imprisonment in the county jail for a maximum term not to exceed ninety (90) days, or a fine in an amount fixed by the court but not more than one thousand dollars ($1,000.00), or both fine and imprisonment. RCW 9A.20.021. Her admissions were statements against her interest and are therefore deemed credible and reliable by the undersigned. Therefore, the undersigned concludes that Chelsey Smith was served in an area classified by the Board as off-limits to underaged individuals, in violation of RCW 66.44.310.

5. With the established violation of RCW 66.44.310, the Board's Complaint is affirmed

6. The Board has the authority to establish an appropriate penalty as a matter of its discretion. RCW 66.24.010. The board in suspending any license may further provide in the order of suspension that such suspension shall be vacated upon payment to the board by the licensee of a monetary penalty in an amount then fixed by the board. RCW 66.24.120. Pursuant to RCWs 66.24.010 and 66.240.120, the Board adopted as rules a set of "standard penalties" which may apply to certain offenses. WAC 314-29-015.

7. The standard penalty for a first violation of RCW 66.44.310 is a five (5) day license suspension or five hundred dollars ($500.00) fine in lieu of suspension. WAC 314-29-020.

8. In the matter of penalties, WAC 314-29-015(4) sets forth certain examples of mitigating or aggravating circumstances which the Board may wish to consider; however, it does not appear that these examples are exclusive. An example of mitigating circumstances is "[s]howing cooperation with local law enforcement". WAC 314-29-015(4)(a). One example of an aggravating circumstance is "committing the violation willfully." WAC 314-29-015(4)(b).

Mitigation or aggravation of the standard suspension period or fine in lieu of suspension may be granted at the discretion of the Board.

6. In this case, the underaged patron secured entry and service by misrepresenting her age to the Licensee. Though Enforcement argues a deterrence rationale for imposing a five-day suspension on the Licensee instead of the monetary fine, it is difficult to see how imposing such an onerous penalty on the Licensee will deter underage individuals from attempting to gain entry to restricted premises for the purpose of experiencing social and sensory stimulation for themselves. Moreover, one of the statutes upon which the penalty regulation was authorized explicitly allows for the payment of a monetary option in lieu of suspension. Rather, the evidence demonstrates a desire and intent of the Licensee to comply with the applicable laws and rules of the Board and with law enforcement. This constitutes a mitigating factor which should be considered by the Board. Accordingly, this tribunal concludes that it is appropriate to recommend a mitigated penalty to the Board consisting of a three-day suspension of the Licensee's liquor license or, in lieu thereof, a civil monetary penalty option in the amount of $300.00.

ORDER

IT IS HEREBY ORDERED, that the Board's Complaint in this matter is SUSTAINED. On a date to be established in the Board's Final Order, the license privileges of Eric Gamache, the owner of Hoops Sports Bar and Grille, L.L.C., d/b/a Hoops Sports Bar and Grille, under License Number 084806, shall be suspended for a period of three (3) days. In lieu of such suspension, the Licensees may pay a civil monetary fine of three hundred dollars ($300.00).

Dated and Mailed this 5th day of February, 2009, at Yakima, Washington.

Randolph Bolong
Administrative Law Judge
Office of Administrative Hearings
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Yakima, WA 98901
(509) 575-2147, or 1-800-843-3491
FAX: (509) 454-7281

Copies mailed to:

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Ruth Ammons, AAG (360) 586-3264