



Washington State
Liquor Control Board

October 8, 2009

David Osgood, Attorney for Licensee
1411 4th Avenue, Ste 1506
Seattle, WA 98101-2247

Cincocon, LLC, Licensee
d/b/a Tia Lou's
2218 First Avenue
Seattle, WA 98121-1615

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

**RE: FINAL ORDER OF THE BOARD
ADMINISTRATIVE VIOLATION NOTICE NO. 2C8029A
LICENSEE: Cincocon, LLC
TRADENAME: Tia Lou's
LOCATION: 2218 1st Avenue, Seattle, WA 98121
LICENSE NO. 075199
LCB HEARING NO. 22,832
OAH DOCKET NO. 2008-LCB-0028**

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Final Order in the above referenced matter.

The applicable monetary penalty option is due by 5:00 pm on November 9th, 2009 or suspension will take place as stated in the final order.

If you are sending in payment, please send it to the mailing address in the final order and label the check with your License and Administrative Violation Notice numbers listed above. If you have any questions, please contact me at (360) 664-1602.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin McCarroll".

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tukwila and Seattle Enforcement and Education Divisions, WSLCB

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

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CINCOCON LLC
d/b/a TIA LOU'S
2218 FIRST AVENUE
SEATTLE, WA 98121

LICENSEE

LICENSE NO. 075199

LCB NO. 22,832

OAH NO. 2008-LCB-0028

FINAL ORDER OF THE BOARD

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

1. An administrative hearing was held at the licensee's timely request.
2. The Liquor Control Board's Complaint dated June 12, 2008, alleged that on or about December 14, 2007 the licensee or an employee(s) of the licensee thereof, supplied liquor to a person apparently under the influence of liquor on the licensed premises in violation of WAC 314-16-150(2).
3. The Complaint further alleged that on or about December 15, 2007, the licensee or an employee(s) thereof, permitted a person to perform an act of touching, caressing , or fondling of the genitals of another person in violation of WAC 314-11-050(2).
4. A hearing was held on December 1, 2008, and reconvened for additional testimony on April 15, 2009. At the hearings, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg and the Licensee was represented by David Osgood, Attorney at Law.

5. On July 23, 2009 Administrative Law Judge Christy Gerhart Cufley entered her Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint.

6. A petition for review was timely filed by the licensee.

7. A reply to the petition was filed by the Enforcement Division.

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; NOW THEREFORE; IT IS HEREBY ORDERED that that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order heretofore made and entered in this matter be, and the same hereby are, AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board, except for the following changes:

a. In the first paragraph on page 1 of the Initial Order, the description of the penalty assessed in the AVN for permitting an act of lewd conduct is modified to reflect that the penalty was a five (5) day license suspension or a civil monetary penalty in the amount of two hundred and fifty dollars (\$250) in lieu of suspension.

b. Conclusion of law 26, on page 16 of the Initial Order is modified to reflect that the penalty set forth in WAC 314-29-020 for the second Group 1 violation within a two-year period for service of alcohol to an apparently intoxicated person is a five (5) day license suspension or a monetary penalty of \$2,500 in lieu of suspension, not a seven day suspension as stated in this paragraph.

IT IS HEREBY ORDERED that the liquor license privileges granted to Cincocon, LLC d/b/a Tia Lou's, 2218 1st Avenue, Seattle, WA 98121, License Number 075199, are hereby suspended for a term of ten (10) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in

the amount of two-thousand seven-hundred and fifty dollars (\$2,750) due within 30 days of this order. If timely payment is not received, suspension will take place from 10:00 a.m. on November 13, 2009 until 10:00 a.m. on November 23, 2009. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

**Washington State Liquor Control Board
Enforcement and Education Division
PO Box 43085
Olympia, WA 98504-3085**

DATED at Olympia, Washington this 8th day of October, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Fato
Putnam Kuose

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty

(20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Stay of Effectiveness. The filing of a petition for reconsideration does not stay the effectiveness of this Order. The Board has determined not to consider a petition to stay the effectiveness of this Order. Any such request should be made in connection with a petition for judicial review under chapter 34.05 RCW and RCW 34.05.550.

Judicial Review. Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

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

RECEIVED

JUL 24 2008

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

IN THE MATTER OF :

CINCOCON LLC
dba TIA LOU'S
2218 First Avenue
Seattle, WA 98121

Licensee.

License No. 075199

OAH No. 2008-LCB-0028
Agency No. 22,832

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

STATEMENT OF THE CASE

On February 20, 2008 the Washington State Liquor Control Board, Education and Enforcement Division (Board hereafter) issued an Administrative Violation Notice (AVN) to the Licensee, Cincocon LLC, dba Tia Lou's, 2218 First Avenue, Seattle, in King County, Washington, alleging that on December 14, 2007 the licensee allowed or permitted an apparently intoxicated person to consume and/or possess alcohol on the licensed premises in violation of WAC 314-16-150, and assessing as the civil penalty a five (5) day license suspension or a civil monetary penalty in the amount of two thousand five hundred dollars (\$2,500) in lieu of suspension. The AVN further alleged that on or about December 15, 2007 the licensee permitted an act of lewd conduct on the licensed premises by allowing or permitting a person to perform an act of touching, caressing, or fondling of the genitals of another person in violation of WAC 314-11-050(2), and assessing as the civil penalty a five (5) day license suspension or a civil monetary penalty in the amount of five hundred dollars (\$500) in lieu of suspension.¹

On June 12, 2008, the Board issued a formal written complaint alleging that "on or about December 14, 2007, the above-named Licensee, or an employee(s) thereof, supplied liquor to a person apparently under the influence of liquor on the licensed premise in violation of WAC 314-16-150 (2)." The complaint further alleged that "on or about December 15, 2007, the above-named Licensee, or an employee(s) thereof, allowed or permitted a person to

¹The total proposed sanction is a ten (10) day license suspension or a civil monetary penalty in the amount of two thousand seven hundred fifty dollars (\$2,750) in lieu of suspension.

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

Office of Administrative Hearings
600 University St, Ste 1500
Seattle, WA 98101-1129
Tel: (206) 464-7095
Fax: (206) 587-5135

perform an act of touching, caressing, or fondling of the genitals of another person in violation of WAC 314-11-050(2).”²

The licensee filed a timely request for an administrative hearing.³

The matter came on for hearing pursuant to due and proper notice at Seattle, Washington, on December 1, 2008 and on April 15, 2009 before Christy Gerhart Cufley, Administrative Law Judge, Office of Administrative Hearings.

The licensee, Cincocon LLC, dba Tia Lou’s, appeared and was represented by David Osgood, Attorney at Law. The Education and Enforcement Division of the Washington State Liquor Control Board appeared and was represented by Gordon Karg, Assistant Attorney General. Liquor Enforcement Officers Steven Grassfield, and Seattle Police Department (SPD) Officers Amy Branham and Donald Jones appeared and presented testimony on behalf of the Board.⁴

Based upon the evidence presented, the undersigned administrative law judge makes the following:

FINDINGS OF FACT

1. Eric Contreras is the licensee and owner of Cincocon LLC dba Tia Lou’s, located at 2218 First Avenue, Seattle, in King County, Washington. Such establishment is the subject premises in this matter, and is licensed to sell beer, wine, and spirits for on premises consumption.
2. Amy Branham has been employed by the Seattle Police Department (SPD) for approximately nine years, and has had prior training in narcotics recognition and attended undercover school. She has prior experience and training in undercover operations and crime scene investigations.

²Exhibit 16.

³The licensee filed an initial request on February 25, 2008; an amended request was filed on August 14, 2008. (Exhibit 5). The Board raised no objection to jurisdiction based on timeliness issues, and any such objection is deemed waived.

⁴The licensee, Eric Contreras, and Officer Branham did not personally appear at the reconvened hearing on April 15, 2009.

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

Office of Administrative Hearings
600 University St, Ste 1500
Seattle, WA 98101-1129
Tel: (206) 464-7095
Fax: (206) 587-5135

3. Donald Jones has been employed by the Seattle Police Department (SPD) for approximately seven (7) years; he has prior experience and training in undercover activities.

4. On December 14, 2007 SPD Officers Branham and Jones participated in an undercover operation at Tia Lou's, the licensed premises in this matter. The investigation was initiated by the Seattle Police Department based on complaints that had been received. The undercover operation was commenced and conducted without the prior knowledge of the Board. This was the first liquor premises check in which Officer Jones had participated.

5. Prior to commencement of the undercover premises check at the licensed premises, Officers Branham and Jones attended an initial precinct briefing from approximately 7:00 pm until 8:00 p.m. on December 14, 2007. In addition to Officers Branham and Jones, SPD Sgts. Long and Kelly were also present at the briefing. The officers were shown a photo of a bartender (Mr. Penalver-Gruber), but were not asked to specifically target any individuals during their observations. They were informed only that there had been complaints received, and they were instructed to visit the licensed premises (and several other premises) that evening to observe and note any liquor violations. The officers originally planned to visit other premises; they were unable to do so because of the events that transpired at the licensed premises.

6. The two officers initially entered the subject premises between approximately 8:00 p.m. and 9:00 p.m. on December 14, 2007.⁵ They were attired in casual civilian clothing with no indicators as to their status as law enforcement officers. Their sole intent was to observe the premises for any potential liquor law violations. They were not instructed how long to remain at the subject premises, nor were they instructed to remain until they observed liquor law violations. Upon entering the premises, the officers noted there were very few patrons present; they exited with the intent of returning later.

7. At approximately 10:15 p.m. (2215) Officers Branham and Jones returned to the subject premises, a two-story building with a lounge located downstairs connected by a stairwell to an upstairs bar area. At that time, there were approximately 150 to 175 patrons present in the downstairs portion of the establishment. Officer Branham describes the lighting as "between bright and dim" but sufficient to read a menu unassisted. A disc jockey (DJ) was present loudly playing music.

⁵Officer Branham estimates their initial arrival time at 8:00 p.m. while Officer Jones estimates their arrival time to be 9:00 p.m.

8. At approximately 11:15 p.m. Officer Branham was approached in the downstairs bar area by a white male patron identifying himself as "Greg." During their initial conversation, the patron spoke with slurred words, alternately leaned on the officer and the bar for balance, his eyes appeared glazed and watery, and he was slow to react. The patron ordered two drinks from the bartender-- a "Crown Royal and 7-Up" for himself and a "Vodka Cranberry" for Officer Branham; while ordering the patron spoke with the bartender for less than one minute. After several more minutes of conversation with Officer Branham, the patron advised her that he had been at "his boss's house" prior to arriving at Tia Lou's and he then ordered them both another drink (at that time, Officer Branham still had most of her drink remaining and present in front of her on the bar). As the bartender poured the second round of drinks, the patron commented to Officer Branham, "I'm f--ked up. If they're gonna serve me, who cares." After several more minutes, the patron walked away, and no further conversation occurred.⁶

9. Officer Branham did not identify the patron, did not issue any criminal citations to him, and did not question him as to whether he wore contacts, suffered from allergies, or had any other medical conditions (e.g., a stroke) which might otherwise account for the conditions she observed. Based on her observations, training, and experience, Officer Branham concluded the patron "Greg" was apparently intoxicated.

10. Officer Jones was in another part of the premises during the majority of the subject conversation, and did not closely observe the entire interaction between "Greg" and Officer Branham. However, he was near enough at one point to overhear the slurred speech exhibited by the patron and concurs the patron appeared to be apparently intoxicated.

11. The two officers continued their observation of patrons in the establishment. At approximately midnight they went upstairs to the bar located on the upper level. Officer Jones and Officer Branham were both standing next to each other by a railing approximately 10 feet across from the upstairs bar (which is itself approximately 42 inches high). Within approximately five minutes, Officer Jones noticed a female patron "staggering" up the stairs. She passed by him, approached the bar, ordered and was served a drink by the bartender (later identified as Luis R. Penalver-Gruber).⁷ The female patron then walked around to an open side of the bar at the end of the bar and began kissing and hugging the bartender for several minutes. As Officer Jones watched, the female patron then placed her right hand in

⁶It is unclear whether or not music was playing at the time this conversation occurred or at the time the patron ordered drinks from the bartender; it is unclear whether or not the bartender would have been able to hear the conversation between Officer Branham and the patron.

⁷Officer Jones assumed the drink was an alcoholic beverage, but did not verify such nor is such included in his written report of the incident.

the crotch area of the bartender and began rubbing and fondling him in the genital area "between his legs...where his penis is"⁸ for approximately one minute in full view of approximately 20 patrons present in the upstairs bar area. Both parties remained fully clothed; the woman's hands remained on the outside of the bartender's trousers, and no direct touching of the bartender's genitals otherwise occurred.

12. Officer Jones' attention was particularly drawn to this incident because the female patron was wearing a teal dress, was "very pretty," and "it's not that common to see somebody grab somebody in the crotch area and fondle them in public."⁹

13. The lighting upstairs was brighter than the dimmer lighting downstairs, and Officer Jones had a clear and unobstructed view of this incident. He initially described the parties in his written report as being "behind" the bar.¹⁰ He subsequently clarified that such meant the parties were at the edge and to the side of the open-ended upstairs bar, not directly behind it, and that nothing impeded his view.¹¹ The parties were embracing at an angle, and the woman's hands were visible the entire time.

14. Officer Branham did not observe the incident as described by Officer Jones. Although she was standing next to Officer Jones at the railing, she was turned away and looking over the railing in the opposite direction over the railing into the downstairs dance area below.

15. Officer Jones was customarily scheduled to work from 7:00 a.m. until 4:00 p.m., Monday through Friday. He is not entirely certain, but believes on Friday, December 14, 2007 he reported for work at 11:00 a.m. and worked until approximately 3:00 a.m. on December 15, 2007 (which included completing his written report of the evening's observations). Officer Jones is accustomed to working long hours, and has done so on prior occasions. He was not overly fatigued during the relevant time period herein.

16. Officer Branham acknowledges herself consuming alcohol during the course of the evening. She believes she consumed more than "one or two" drinks containing cranberry juice and vodka during the course of the evening, but is uncertain as to the exact amount; she does not recall how many drinks she consumed prior to contact with "Greg." She does not

⁸December 1, 2008 digital recording, at 2:18:07 and 2:18:28.

⁹December 1, 2008 digital recording, at 2:02:40.

¹⁰Exhibit 2.

¹¹Via sworn rebuttal testimony presented on April 15, 2009.

believe she was intoxicated or impaired in any way, and does not believe her ability to accurately observe and recall her observations was detrimentally impacted. Officer Jones acknowledges ordering and holding, but not consuming, a beer during the course of the evening. He did not observe Officer Branham exhibit any signs of intoxication.

17. Neither of the officers issued any criminal citations, nor did they directly discuss their observations with each other during the course of the evening while at the subject premises; to do so could have jeopardized their anonymous cover, and such may have also distracted them from making other observations to detect other possible violations as instructed.

18. The two officers exited the premises at approximately 12:30 a.m. on December 15, 2007 without making any arrests, without ascertaining the identity of the various parties involved in their observations, without issuing any criminal citations, and without advising the licensee at that time that alleged violations had been observed.

19. The two SPD officers returned to the precinct office at approximately 1:00 a.m. on December 15, 2007 and . . . Following completion of their observations, the two SPD officers returned to the precinct and prepared individual written statements summarizing their recollection of the evening's events.¹² Neither Officer Branham or Jones kept contemporaneous notes of their respective observations on December 14-15, 2007. Prior to reducing their recollections of their observations to written form, they did briefly discuss the events of the evening. Neither officer assisted in the preparation of the other officer's written statement.

20. The written reports were then forwarded to the Seattle Liquor Enforcement Office on or about December 15, 2007. The statements describe in detail three specific observations made by Officers Branham and Jones.¹³

21. Liquor Enforcement Officer Steve Grassfield has been employed by the Board for approximately 18 months. He formerly served in the US Marine Corps for twenty years. As part of his current and regular duties, he reviews information provided to the Board by local law enforcement authorities regarding alleged violations of liquor control laws to determine if issuance of an Administrative Violation Notice (AVN) is warranted.

¹²Exhibits 1 and 2.

¹³SPD Report Nos. 2007-501427, 501428, and 501429. Exhibit 4. The third incident is addressed in paragraph 25 below.

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

22. When Officer Grassfield received the SPD complaints referenced herein, he reviewed their contents.¹⁴ He subsequently contacted and briefly interviewed the two bartenders employed by the licensee (Jose Quintero (on January 30, 2008) and Luis R. Penalver-Gruber (on January 31, 2008). Mr. Quintero "did not remember any specifics about that night" and the bartender named in the lewd conduct allegation (Mr. Penalver-Gruber) denied the contact with the customer."¹⁵

23. On February 7, 2008 Officer Grassfield sent to SPD Sgt. Peth an email requesting clarification as to one of the assertions raised in the officers' statements; he received no reply to his inquiry. Officer Grassfield did not discuss the allegations contained in the officers' reports with Sgt. Long. Officer Grassfield did not interview or have any contact with either Officer Branham or Officer Jones regarding this matter. He is unaware of the basis or motivation for the initiation of the undercover operation by the SPD, and was not present at the licensed premises on December 14-15, 2007.

24. Based on his review of the written information provided by the two SPD officers, the brief interviews he conducted with the two bartenders (the employees of the licensee), and a review of the licensee's prior AVN history, Officer Grassfield concluded it was appropriate to issue an Administrative Violation Notice (AVN) to the licensee for one count of over service (allegedly occurring on December 14, 2007) and one count of lewd conduct (allegedly occurring on December 15, 2007).

25. Officer Grassfield also reviewed the additional allegation by Officer Branham that she had observed two customers at the lower bar at approximately 11:45 p.m. (2345) on December 14, 2007 leaning on each other and staggering after having been served an "unsubstantiated alcoholic beverage."¹⁶ He concluded there was insufficient evidence to issue to the licensee an Administrative Violation Notice (AVN) based on that incident, and

¹⁴ Officer Grassfield is uncertain as to the exact date the Board received these complaints, and attempts to ascertain the exact date were unsuccessful. The date of December 15, 2007 is referred to in the AVN, and in the absence of any other clarifying information, such is deemed the approximate date of receipt by the Board.

¹⁵ Exhibit 3, page 2.

¹⁶ Exhibit 4.

declined to do so. No AVNs were issued to the individual employees (i.e., the two bartenders) involved.¹⁷

26. On February 20, 2008 Officer Grassfield served the AVN at issue herein on the licensee at the subject premises, and explained the various options. Mr. Contreras did not recall any specifics of the events occurring during the evening of December 14-15, 2007.

27. On February 25, 2008 the licensee advised the Board of his request for a formal administrative hearing; such was subsequently amended on August 14, 2008 and resubmitted to the Board.¹⁸

28. Following receipt of the request for hearing by the licensee, Officer Grassfield prepared a written Case Report dated March 21, 2008. Such reports are customarily prepared following receipt of a licensee's request for an administrative hearing.¹⁹

29. Mr. Contreras has been the owner of the subject establishment (described as a Mexican restaurant and nightclub) since approximately May, 2000. The maximum occupancy for the establishment is 735, and he employs approximately 20 individuals (including wait staff, kitchen employees, bartenders, security, etc.).

30. During the relevant time frame herein (i.e., the very late evening hours of December 14, 2007 and the very early morning hours of December 15, 2007), Mr. Contreras believes he was present in the establishment, but was unaware of the events described as allegedly occurring during that evening. He did not observe the officers nor did he witness any of the alleged violations.

31. The duties of the "downstairs" bartenders were typically performed by Carlos Alvarado and Jose Quintero Langarica ("Pepe"), while the "upstairs" bartender duties were typically performed by Luis Chavez and Luis Penalver-Gruber. Mr. Penalver-Gruber last worked for the licensee in March 2008, and is no longer employed by the licensee.²⁰

¹⁷It is not uncommon for the Board to issue AVNs to both the individual employee and the licensee based on the same incident.

¹⁸Exhibit 5.

¹⁹Prior to issuance of the report, Officer Grassfield submitted his proposed draft for review to his supervisor, Frank Gallegos; no significant or substantive changes were made. Exhibit 3.

²⁰Exhibit 19.

32. On or about January 18, 2008 Mr. Contreras was advised by another Board officer (Dee Johnson) that there had been a "sting" conducted at the licensed premises on December 14, 2007. A meeting was scheduled to take place on January 22, 2008 to discuss the matter further. When the licensee inquired at a subsequent staff meeting whether any of the bartenders remembered the alleged incidents of December 14-15, 2007, they indicated they had no specific recollection about the alleged incidents, that they were opposed to over serving patrons, and that they would never do so intentionally.

33. The licensee has promulgated written policies to "promote public safety by maintaining a safe atmosphere in and around our club."²¹ The licensee, along with four of his employees, successfully completed an eight-hour Seattle Police Department's In-house Security Training on June 22, 2008.²²

34. The Board has issued one prior AVN to the licensee within the preceding two years for service to an apparently intoxicated person (violation date of August 18, 2007).²³ The licensee elected to pay the monetary civil penalty assessed in that matter of five hundred dollars (\$500) in lieu of a license suspension.²⁴

35. The Board has promulgated various policies over the years regarding inspection techniques, essential elements for Board agents to determine signs of apparent intoxication, procedures for issuance of warnings, and procedures for conducting undercover operations.²⁵

36. The Board policy for undercover investigations dated August 9, 1999 states in relevant part as follows: If a violation is observed, the lead agent or designee, will normally notify the

²¹Exhibit 18.

²²Exhibit 17.

²³Exhibit 6.

²⁴The Board has also issued one prior AVN to the licensee within the preceding two years for furnishing liquor to minors/allowing minors to frequent premises (violation date of August 25, 2007). The licensee elected to pay the monetary civil penalty assessed in that matter of five hundred dollars (\$500) in lieu of a license suspension. (Exhibit 6). Such was not considered by the Board because it involved a violation of a different type than the one(s) charged herein.

²⁵Copies of these various policies are dated October 2, 1998 (Exhibit 9), November 6, 1996 (Exhibit (A)), September 24, 1999 (Exhibit 10), April 7, 1995 (Exhibit 11), and August 9, 1999 (Exhibit 12). It is unknown whether or not these policies are still in effect or whether they have been subsequently updated or otherwise modified.

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

Office of Administrative Hearings
600 University St, Ste 1500
Seattle, WA 98101-1129
Tel: (206) 464-7095
Fax: (206) 587-5135

licensee of the violation the following working day. Any corrective action taken will normally be taken within three (3) working days following the violation.”²⁶

37. Policies promulgated by the Board are not applicable to matters referred to the Board by law enforcement agencies. Neither Office Branham or Officer Jones were aware of or familiar with any such Board policies. Officer Grassfield concluded that the investigation performed by SPD officers on December 14-15, 2007 complied with Board standards and generally conformed to Board policies and practices.

38. The Washington State Liquor Control Board seeks to prevent the misuse of alcohol and tobacco and promote public safety through controlled retail and wholesale distribution, licensing, regulation, enforcement, and education.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to chapters 66.44, 34.12, and 34.05 RCW, and chapters 10-08, 314-11, 314-16, and 314-29 WAC.

2. As the holder of a liquor license, the licensee, Mr. Contreras, Cincocon, LLC, dba Tia Lou's, is subject to the jurisdiction of the Washington State Liquor Control Board. The license is subject to the conditions and restrictions imposed by Title 66 RCW, and chapters 314-11, 314-16, and 314-29 WAC. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an administrative law judge pursuant to chapter 34.12 RCW. A proper hearing was provided in this case.

3. RCW 66.44.200(1) prohibits the sale of liquor to any person apparently under the influence of liquor. The definition of liquor includes spirits. RCW 66.04.010(23). RCW 66.44.200 further provides in relevant part as follows:

(2)(a) No person who is apparently under the influence of liquor may purchase or consume liquor on any premises licensed by the board.

(b) A violation of this subsection is an infraction punishable by a fine of not more than five hundred dollars.

²⁶Exhibit 12, page 2.

4. Chapter 314-11 WAC sets forth general requirements for liquor licenses (WAC 314-11-005) and outlines the responsibilities of a liquor licensee and employees of a liquor licensee (WAC 314-11-015). Further, WAC 314-11-005(2) specifically references restrictions against alcohol service to apparently intoxicated persons.

5. WAC 314-11-035 further provides as follows:

Per RCW 66.44.200, licensees or employees may not supply liquor to any person apparently under the influence of liquor, or allow an apparently intoxicated person to possess or consume liquor on the licensed premises.

6. The provisions of WAC 314-16-150 provide in relevant part as follows:

(1) No retail licensee shall give or otherwise supply liquor ... to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person ... in said condition to consume liquor on his/her premises, or on any premises adjacent thereto and under his/her control.

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

7. The provisions of WAC 314-11-050(2) outline conduct prohibited on a licensed premises, and provide in relevant part as follows:

(2) Licensees may not allow, permit, or encourage any person (including him or herself) on the licensed premises to:

(a) perform acts of or acts which simulate, or use artificial devices or inanimate objects which depict:

–Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law;

–The touching, caressing, or fondling of the breast, buttocks, anus or genitals; or

– The displaying of the pubic hair, anus, vulva, or genitals.

8. The occurrence of any of the above acts or conduct, whether permitted by a licensee, employee, or any other person under the control or direction of the licensee or an employee, constitutes good and sufficient cause for cancellation of license privileges. WAC 314-11-050(5).

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

9. As the holder of a liquor license and a seller of alcohol, the licensee is charged with the responsibility to control the licensed premises at all times, and to ensure full compliance with all properly promulgated laws regarding the sale and service of liquor including the prevention of over service of alcohol to patrons. The licensee is further charged with the responsibility for ensuring the actions of its employees comply with all applicable liquor laws.²⁷

10. The first question for resolution by the undersigned is whether or not an employee of the licensee supplied liquor to an apparently intoxicated person and/or allowed an apparently intoxicated person to possess and/or consume liquor at the licensed premises on or about December 14, 2007 in violation of WAC 314-16-150(2).

11. Officer Branham presented sworn testimony regarding her personal, direct, first-hand observations during an approximately 15-minute interval of time with a male patron ("Greg") at the licensed premises on December 14, 2007. Those observations of the patron's demeanor included a demonstrated lack of coordination, lack of balance, watery and glazed eyes, and slurred speech. In addition, during their conversation, the patron commented to Officer Branham that he was "f-ked up." The patron was in possession of and consuming alcohol during their interaction.

12. The licensee argues that Officer Branham was herself consuming alcohol and implies that her ability to accurately observe and record her observations was detrimentally impacted. While it is problematic that Officer Branham does not recall how much alcohol she consumed that evening, there is no evidence that she was impaired. Officer Jones did not witness any impaired behavior, and Officer Branham's conclusion that the patron was apparently intoxicated is corroborated by Officer Jones' brief observance of the patron's slurred speech.

13. The testimony presented by Officer Branham, an experienced SPD officer, is deemed credible. To find otherwise would require a conclusion that the officer's testimony is not credible, and there is no basis in this record for doing so.²⁸

²⁷Operation of any premise licensed to sell alcohol admittedly presents inherent and ongoing challenges for achieving a balance between providing sufficient liquor to create satisfied customers while still obeying all relevant liquor laws prohibiting over service and unlawful conduct.

²⁸The undersigned is mindful that the initial AVN was issued by the Board not based on observations of trained Board agents familiar with the Board's policies but instead issued based on a second-hand review by the Board of SPD allegations. However, any challenge to the sufficiency of that evidence is deemed cured at hearing following the presentation of sworn, personal, first-hand testimony subject to full cross examination (and further supplemented by the presentation of rebuttal testimony).

14. The licensee argues that the failure to identify the patron denied to the licensee a meaningful opportunity to potentially rebut the officer's testimony with possible evidence of a medical condition to explain the patron's demeanor (e.g., allergies, wearing contacts, speech impediment/balance issues due to a stroke, etc). The undersigned must respectfully disagree. Officer Branham has prior training and experience in recognizing the symptoms of an apparently intoxicated person. Had she described only one or two indications of apparent intoxication, such might raise reasonable questions as to whether another valid explanation existed for the patron's behavior and demeanor, and the decision herein might otherwise be different. However, Officer Branham observed a variety of mannerisms and behavior that, particularly when viewed collectively, are indicia of an apparently intoxicated individual.

15. Given the plethora of credible observations described by Officer Branham, the undersigned concludes that any reasonable person, let alone a trained police officer, would logically conclude that the male patron "Greg" was apparently intoxicated.²⁹ Her direct observation regarding his consumption and/or possession of alcohol is sufficient to satisfy the necessary elements of proof.

16. Based upon careful consideration of the evidence, including the demeanor and motivation of the parties, the reasonableness of the testimony, and the totality of the circumstances presented, the undersigned concludes the Board has established by a preponderance of credible evidence that an employee of the licensee allowed an apparently intoxicated person to possess and/or consume alcohol on the licensed premises on or about December 14, 2007. Accordingly, the first count in the Complaint issued by the Board on June 12, 2008 that the above-named Licensee, or an employee(s) thereof, supplied liquor to a person apparently under the influence of liquor on the licensed premise in violation of WAC 314-16-150(2) is affirmed.

17. The second question for resolution by the undersigned is whether or not the licensee violated the regulatory provisions prohibiting lewd conduct set forth at WAC 314-11-050(2).

18. The licensee disputes the testimony presented by Officer Jones that an individual standing approximately 10 feet across from the upstairs bar would be able to observe activities occurring below the 42-inch height of that bar, and a great deal of testimony was presented addressing this issue. After considering in its entirety the testimony presented by both parties, the undersigned is satisfied that the reference contained in the written statement

²⁹Even if the bartender preparing and serving alcoholic beverages to the male patron had a much briefer opportunity than did Officer Branham to interact with the patron, the bartender is still charged with the responsibility of ascertaining and being aware of each patron's condition, and refraining from serving alcohol to any person who is apparently intoxicated.

prepared by Officer Jones documenting his observations of behavior which occurred "behind" the upstairs bar in actuality describes individuals standing at the side of and next to the open end of the bar. In addition, the evidence is persuasive that Officer Jones had an unimpeded, unobstructed view and clearly observed a female patron approach the upstairs bartender, order and be served a drink, walk to the side of the open bar where she then began kissing and hugging the bartender for one or two minutes, then place her right hand in the bartender's "crotch area" and fondle and rub his penis in view of other patrons as the two continued hugging and kissing.

19. The licensee further disputes that the activity observed constitutes lewd conduct (generally defined as conduct that is suggestive of or tending to moral looseness or given to or exhibiting lustful desires).

20. The overall impression gleaned from reviewing the regulations in their entirety is that they clearly seek to prohibit sexual activity of a more blatant nature (e.g., lack of clothing, performance of explicit sexual acts, exposure of certain body parts, pornography, etc.). Nevertheless, the incident observed by Officer Jones was significant enough to draw and retain his attention and technically falls within the purview of WAC 314-11-050(2) because an employee of the licensee allowed a person to perform acts which simulate the touching, caressing, or fondling of the genitals.³⁰

21. Finally, the licensee argues that the delay between the alleged incidents and notice to the licensee not only denied the licensee due process, but also deprived the licensee of the opportunity to obtain potentially exculpatory evidence. Due process requires notice and a meaningful opportunity to be heard and to respond to the allegations. Unquestionably, memories can fade with the passage of time. However, the licensee was on notice by mid-January 2008 (within approximately 30 days of the incidents) from Ms. Johnson that alleged violations had been observed. Although the licensee's frustration is understandable, the licensee has nevertheless had a full opportunity to present evidence and question witnesses. Thus, there has been no denial of due process.

22. Although the licensee asserts Board policies must be applied to the case at hand, law enforcement agencies are not required to follow Board policies; and failure to do so does not

³⁰The undersigned is mindful that the lewd conduct charge is based on the reported observation of one SPD officer. While it is admittedly puzzling that Officer Branham, standing next to Officer Jones, would not have also observed the conduct, such is not impossible given the stated explanation that her gaze was directed in the opposite direction and down toward a crowded dance floor.

negate the validity of the observations made. Even the Board policies (which may or may not be current as submitted) utilize the word "normally" thus affording some discretion to the Board. Moreover, Officer Grassfield is satisfied that the SPD investigation complied with appropriate Board standards prior to his issuing the AVN. In addition, the evidentiary standard utilized here is the preponderance of the evidence standard. Neither of the two other evidentiary standards (beyond a reasonable doubt or clear, cogent, and convincing) are applicable. The preponderance of credible evidence establishes that an employee of the licensee allowed lewd conduct on the licensed premises on or about December 15, 2007 in violation of WAC 314-11-050(2).

23. The actions of a licensee's employees are attributed to the licensee, and the licensee is held responsible for the actions of its employees. In this case, the licensee is liable for the two alleged violations at issue herein: supplying liquor to an apparently intoxicated person and allowing lewd conduct to occur on the licensed premises.

24. The provisions of WAC 314-29-015 outline the penalties if a licensee or employee violates liquor laws or rules, and delineate penalties for violations into the following four categories:

- (a) Group One – Public safety violations, WAC 314-29-020.
- (b) Group Two – Conduct violations, WAC 314-29-025.
- (c) Group Three – Regulatory violations, WAC 314-29-030.
- (d) Group Four – Violations involving the manufacture, supply, and/or distribution of liquor by nonretail licensees and prohibited practices between nonretail licensees and retail licensees, WAC 314-29-035.

24. WAC 314-29-015 also specifies that for the purposes of chapter 314.29 WAC, a two-year window for violations is measured from the date one violation occurred to the date a subsequent violation occurred. WAC 314-29-015(3). Based on mitigating or aggravating circumstances, the Board may impose a different penalty than the standards specified in the schedules.

25. The sale or service of alcohol to, or permitting consumption or possession by, an apparently intoxicated person is classified as a Group 1 violation which provides for a five (5)-day license suspension or a \$500 monetary option in lieu of license suspension for the first offense within a two-year window, a five (5) day suspension or \$2,500 monetary option fine in lieu of license suspension for a second violation within a two-year window, a ten (10) day license suspension or a \$5,000 monetary option in lieu of license suspension for a third violation within a two-year window, and cancellation of the license for a fourth violation within a two-year window. WAC 314-29-020.

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

26. Based on the above findings and conclusions, the preponderance of credible evidence establishes the service of alcohol to an apparently intoxicated person on December 14, 2007 is the second violation incurred by the licensee within a two-year period. Therefore, the appropriate penalty is a seven (7) day license suspension or a civil monetary penalty in the amount of two thousand five hundred dollars (\$2,500) in lieu of suspension.

27. Engaging in or permitting conduct in violation of WAC 314-11-050 (lewd conduct) is classified as a Group 2 violation which provides for a five- day suspension or \$250 monetary option in lieu of license suspension for the first offense, a five-day suspension or \$1,500 monetary option in lieu of license suspension or a second violation within a two-year window, a 10-day license suspension or a \$3,000 monetary option in lieu of license suspension for a third violation with a two-year window, and cancellation of the license for a fourth violation within a two-year window. WAC 314-29-025.

28. Based on the above findings and conclusions, the preponderance of credible evidence establishes that the licensee (or an employee thereof) violated the provisions of WAC 314-11-050. There are no prior similar violations. Accordingly, the appropriate sanction is a five (5) day license suspension or payment of a civil monetary penalty of two-hundred fifty dollars (\$250) in lieu of license suspension.

29. The undersigned has considered all arguments made by the parties. Arguments that are not specifically addressed herein have been duly considered but are found to have no merit or to not substantially affect a party's rights.

From the foregoing conclusions of law, NOW THEREFORE,

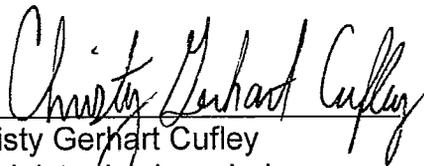
INITIAL ORDER

IT IS HEREBY ORDERED, that the Board's Complaint dated June 12, 2008 alleging that on December 14, 2007 the licensee, Cincocon LLC, dba Tia Lou's in King County, Washington, allowed an apparently intoxicated person to possess and/or consume liquor in violation of WAC 314-16-150 and RCW 66.44.200 and that on December 15, 2007 the licensee allowed or permitted a person to perform an act of touching, caressing, or fondling of the genitals of another person in violation of WAC 314-111-050(2) is AFFIRMED.

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

The Board's proposed penalties are within the Board's authority under RCW 66.44.010 and reflect the standard penalties generally prescribed by chapter 314-29 WAC. The licensee, Cincocon LLC, dba Tia Lou's, License No. 075199, is subject to imposition of a total sanction of a ten (10) day license suspension to commence on a date to be set by the Board in its final order OR the licensee may pay a civil monetary penalty in the total amount of two thousand seven hundred fifty dollars (\$2,750) in lieu of suspension on a date to be determined by the Board in its final order.

Dated at Seattle, Washington this 23rd day of July, 2009.

By 
Christy Gerhart Cufley
Administrative Law Judge
Office of Administrative Hearings

A copy of the Proposed Findings of Fact, Conclusions of Law, and Initial Order was mailed on July 23, 2009 to the following parties and representatives:

David Osgood
Law Office of David Osgood, PS
1411 4th Avenue, Suite 1506
Seattle, WA 98101-2247

Gordon Karg
Assistant Attorney General
Washington Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98501-0100

Cincocon LLC
dba Tia Lou's
2218 1st Avenue
Seattle, WA 98121

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

✓ Frances Munez Carter
Washington State Liquor Control Board
PO Box 43076
Olympia WA 98504-3076

Barbara Cleveland,
Executive Assistant
Office of Administrative Hearings
PO Box 42488
Olympia WA 98504-2488

NOTICE TO PARTIES

Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the liquor control board within twenty (20) days of the date of service of the initial order. RCW 34.05.464, WAC 10-08-211 and WAC 314-42-095.

The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and
- (iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within ten (10) days after service of the petition for review, any of the other parties may file a response to that petition with the liquor control board. WAC 314-42-095(2)(a) and (b). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten (10) days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

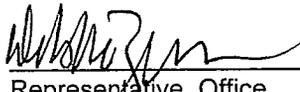
PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND INITIAL ORDER

Office of Administrative Hearings
600 University St, Ste 1500
Seattle, WA 98101-1129
Tel: (206) 464-7095
Fax: (206) 587-5135

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I hereby certify that I have this day served a copy of this document upon all parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, to each party to the proceeding or his or her attorney or authorized agent.

DATED at Seattle, Washington, this 23RD day of July, 2009.



Representative, Office
of Administrative Hearings

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

Office of Administrative Hearings
600 University St, Ste 1500
Seattle, WA 98101-1129
Tel: (206) 464-7095
Fax: (206) 587-5135

RECEIVED

AUG 12 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

IN THE MATTER OF THE HEARING OF

CINCON, LLC
D/B/A TIA LOU'S
2218 1ST AVENUE
SEATTLE WA 98121

LICENSEE

LICENSE NO. 075199

OAH NO.: 2008-LCB-0028
LCB NO.: 22,832

LICENSEE'S EXCEPTIONS TO
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
INITIAL ORDER

COMES NOW the licensee, by and through the undersigned counsel of record, and pursuant to the provisions of RCW 34.05.464 and WAC 314-08-410(7), takes exception to Administrative Law Judge (ALJ) Christine Gerhart Cufley's Findings of Fact, Conclusions of Law and Initial Order dated July 23, 2009.

I. INTRODUCTION

Between December 14, 2007 and December 15, 2007, Tia Lou's was visited by two undercover officers of the Seattle Police Department, who were charged by their superiors with finding liquor violations on Tia Lou's premises. One of the two officers, Officer Branham, was drinking alcoholic beverages on premises, and could not recall the amount she had consumed; the

**LICENSEE'S EXCEPTIONS TO FF&CL
AND INITIAL ORDER - 1**

DAVID R. OSGOOD
LAW OFFICES OF DAVID OSGOOD, P.S.
1411 FOURTH AVENUE, SUITE 1506
SEATTLE, WASHINGTON 98101
TEL: (206) 838-8777
FAX: (206) 838-8778

1
2 other, Officer Jones, was several hours of overtime on top of a full day of work. They were
3 unaccompanied by any other officers, or WSLCB agents. During the course of their evening at Tia
4 Lou's, Officer Branham took notice of an allegedly apparently intoxicated patron—"Greg"; Officer
5 Jones noticed an unidentified woman in a teal party dress allegedly fondling a bartender from behind
6 the bar. They made no attempts to obtain the identification of "Greg" or the woman in the teal dress,
7 instead leaving the premises and recording their observations some hours later.
8

9
10 Licensee and its employees were notified of the undercover "sting" operation approximately
11 one month after it occurred, and after the bartenders and staff had forgotten any details of the
12 evening in question. On June 12, 2008, the Board issued a formal written complaint for violations of
13 WAC 314-16-150(2) and WAC 314-110-050(2). Licensee timely appealed and a hearing was held
14 on December 1, 2009 and April 15, 2009 in front of ALJ Christine Gerhart Cufley; her Findings of
15 Fact Conclusions of Law and Initial Order were signed on July 23, 2009, finding that the violations
16 did in fact occur, and imposing a ten day license suspension, or, in the alternative, a monetary
17 penalty of two thousand seven hundred fifty (\$2,750) dollars. The Licensee respectfully presents its
18 exceptions therefrom.
19

20 **II. STANDARD OF REVIEW**

21 Review of an Administrative Law Judge's Initial Order is governed by RCW 34.05.474.
22

23 **III. EXCEPTIONS**

24
25 The following exceptions will address the paragraphs in ALJ Cufley's Initial Order to which the
26 Licensee takes exception.

27 **A. Findings of Fact.**

1
2 2. Findings 2 & 3 are generally accurate, but neglect to include the fact that neither Officer Branham
3 nor Officer Jones' undercover experience and training involved liquor enforcement.
4

5 3. See above.

6 5. Licensee excepts to Finding No. 5, insofar as no evidence was presented that Officers Branham
7 and Jones visited any other licensed premise that evening to observe liquor violations.

8 8. Licensee excepts to Finding No. 8, insofar as Officer Branham provided no evidence of how the
9 patron identified as "Greg" presented himself to the bartender. A patron's self-assessment of his or
10 hers intoxication level is immaterial to their appearance to the bartender at the time of service.
11

12 11. Licensee strenuously excepts to Finding No. 11. Officer Jones initially placed the female patron
13 behind the bar with the bartender, and testified that her back was towards him. When asked how he
14 could see her hands with her back to him, he recanted his earlier testimony, and stated that they were
15 "angled towards him" in profile, behind the bar. When the Licensee provided testimony and
16 photographic evidence that proved it impossible to observe anyone behind the bar engaged in the
17 activity Officer Jones described, Officer Jones was recalled to the stand, and again changed his
18 testimony to place them some distance *away* from the bar, not *behind* it as he'd earlier testified.
19 Officer Jones is not credible on this issue.
20

21 21. Finding of Fact No. 21 is generally accurate, however, Licensee would like to add that as an
22 Enforcement Agent of the WSLCB, Officer Grassfield is subject to WSLCB policies and procedures
23 laid out in its Enforcement Manual.
24

25 24. Licensee Excepts to Finding of Fact No. 24 insofar as Agent Grassfield issued an AVN for
26 overservice and an AVN for lewd conduct based on reports that adhered to none of the policies and
27 procedures promulgated by the WSLCB for proper conduct of undercover investigations.
28

29 25. Licensee Excepts to Finding No. 25 as immaterial to the matter at hand.

1
2 37. Licensee strongly excepts to Finding of Fact No. 37. Policies promulgated by the Board govern
3 the actions of WSLCB employees, whether they are conducting undercover investigations
4 themselves, or making charging decisions based on input from outside agencies. The investigation
5 performed by SPD officers on December 14-15, 2007 manifestly did not meet WSLCB standards,
6 policies or practices. SPD did not identify the patrons allegedly involved; SPD did not notify the
7 Licensee of the investigation in a timely manner, SPD did not perform even rudimentary checks to
8 ensure that signs of intoxication were not caused by other factors, SPD did not log the amount of
9 alcoholic beverages its undercover agents consumed, SPD did not take samples of alcohol to prove
10 that the patrons were actually served alcoholic beverages. Although the SPD may choose not to
11 comply with what the WSLCB Education and Enforcement Division has determined to be the
12 minimum procedural safeguards and requisites to establish a case for an administrative violation,
13 Agent Grassfield is bound by Board policies and procedures, and must bear them in mind when
14 determining whether or not an AVN is appropriate.
15
16
17

18 **B. Conclusions of Law.**

19 2. Licensee excepts to Conclusion No. 2, insofar as it seeks to challenge the legitimacy of WAC
20 314-11-050 (lewd conduct). An administrative agency created by statute has only those powers
21 expressly granted or necessarily implied by that statute. Properties Four, Inc. v. State, 125 Wn.App.
22 108, 105 P.3d 416 (2005), Barendregt v. Walla Walla School Dist. No. 140, 26 Wn.App. 246, 249,
23 611 P.2d 1385 (1980). The Legislature has never expressly granted the WSLCB the authority to
24 enforce its own version of community standards throughout the state—WAC 314-11-050’s statutory
25 authority is silent on any issue of non-alcohol-related “prohibited conduct.”
26

27 7. Licensee excepts to Conclusion of Law No. 7, for the reasons stated previously in Exception No.
28

29 2.

1
2 11. Licensee excepts to Conclusion of Law No. 11: Officer Branham's investigation did not comply
3 with WSLCB Enforcement policies, practices and procedures, she did not identify the patron, she did
4 not take steps to identify possible non-alcohol related causes for the patron's symptoms, she did not
5 witness the bartender serving the patron, and thus did not see how the patron presented himself to the
6 bartender.
7

8 12. Licensee excepts to Conclusion No. 12. Not only did Officer Branham not recall how much
9 alcohol she consumed, she also admitted that she'd consumed it on a nearly empty stomach. Insofar
10 as alcohol affected her memory on that issue, it is reasonable to conclude that it had affected her
11 other observations and the quality of her investigation as well. Again, failure to monitor an
12 undercover agent's alcohol intake is a violation of WSLCB policies and procedures.
13

14 13. Licensee excepts to Conclusion No. 13, insofar as Officer Branham's observations on December
15 14-15 were likely clouded by her alcohol intake.
16

17 18. Licensee objects to Conclusion No. 18. Officer Jones recanted his testimony several times
18 through the course of questioning. Initially both parties were behind the bar, with the female's back
19 to him. When asked how he could view her hands, he changed his testimony. Then they were
20 "angled" towards him. When it was shown that he could not have seen what he described from his
21 vantage point, he stated that they were not "behind" the bar as he'd previously testified and wrote in
22 his report, they were in an *entirely different location*. Officer Jones' testimony cannot be found to be
23 credible on this subject.
24

25 19-20. Again, Licensee excepts insofar as it avers that WAC 314-11-050(2) is in excess of the
26 WSLCB's express or implied statutory authority under the Revised Code of Washington. Licensee
27 reserves the right to challenge WAC 314-11-050 on review of this matter.
28
29

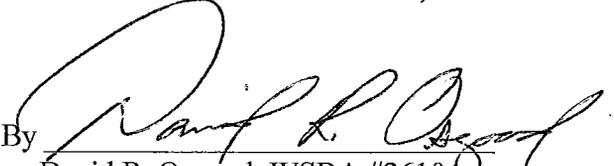
1
2 21. Licensee objects to Conclusion No. 21: failure to identify witnesses and provide timely notice
3 of an alleged incident of violation not only violates WSLCB policies and procedures, it denies the
4 Licensee that ability to confront witnesses, discover potential exculpatory information, and be heard
5 in a *meaningful* manner. Although the licensee had the opportunity to question select witnesses, it
6 was deprived the opportunity to question the key witnesses, “Greg” and the “woman in the teal party
7 dress.”
8

9
10 22. Licensee objects to Conclusion No. 22: failure to subject Officer Grassfield’s charging decision
11 to the Board’s own policies and procedures violates the standards the Board has set for its agents and
12 employees. Local law enforcement may, in fact, be free to follow whatever standards it wants, or
13 none at all—ultimately, Officer Grassfield was charged with evaluating the evidence, and none of it
14 met the Board’s minimum standards.

15
16 26 – 28. Licensee excepts to Conclusions No. 26-28 insofar as the ALJ has not taken into account
17 mitigating circumstances. The record shows that the Licensee subsequently put its employees
18 through additional training, adopted written policies and procedures, let Mr. Penalver-Gruber go, and
19 has been cooperative with both agents of the WSLCB and Seattle Police. Further, the ALJ barred
20 Licensee from presenting the testimony of Officer Camilio Pena, testimony which would have shown
21 additional mitigating factors under WAC 314-29-015(4)(a).
22

23
24 DATED this 12th day of August, 2009.

25
26 **LAW OFFICE OF DAVID OSGOOD, P.S.**

27
28 By 
David R. Osgood, WSBA #26104
Attorney for Licensee

29
**LICENSEE’S EXCEPTIONS TO FF&CL
AND INITIAL ORDER - 6**

DAVID R. OSGOOD
LAW OFFICES OF DAVID OSGOOD, P.S.
1411 FOURTH AVENUE, SUITE 1506
SEATTLE, WASHINGTON 98101
TEL: (206) 838-8777
FAX: (206) 838-8778

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

IN THE MATTER OF:

CINCOCON LLC
TIA LOU'S
2218 1st Avenue
SEATTLE, WA 98121

LICENSEE

LICENSE NO. 075199

OAH No. 2008-LCB-0028
LCB No. 22,832

ENFORCEMENT DIVISION'S
REPLY TO LICENSEE'S
EXCEPTIONS TO INITIAL
ORDER

The Enforcement and Education Division (Enforcement) of the Washington State Liquor Control Board (Board), by and through its attorneys, ROBERT M. MCKENNA, Attorney General and GORDON KARG, Assistant Attorney General, hereby responds to Cincocon, LLC. d/b/a Tia Lou's (Licensee) Exceptions to Findings of Fact and Conclusions of Law and Initial Order (Initial Order).

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. STANDARD OF REVIEW

Any party in an administrative action may file a petition for review of the initial order pursuant to RCW 34.05.464¹ and WAC 314-29-010(4). A party filing a petition for review must specify the portions of the initial order to which exception is taken and refer to evidence in the record on which the party relies to support the petition. WAC 314-29-010(4). In reviewing findings of fact, reviewing officers "shall give due regard to the presiding officer's opportunity to observe the witnesses." RCW 34.05.464(4).

II. ALJ'S FINDINGS OF FACT

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

The purpose of factual findings is not to restate every fact elicited during the hearing – the transcript of proceedings serves that purpose. "Findings must be made on matters 'which establish the existence or nonexistence of determinative factual matters ...'." *Weyerhaeuser*, 124 Wn. 2d at 35-36. The trier of fact is not required to enter negative findings or to find that a certain fact has not been established. *Scott R. Sonners*,

¹ The Licensee's briefing in this matter fails to accurately set forth the applicable standard of review. The Licensee cites RCW 34.05.474. Such a law does not exist. RCW 34.05.464 and specifically WAC 314-29-010(4) establishes the standard of review.

1 *Inc. v. Dep't of Labor & Indus.*, 101 Wn. App. 350, 356, 3 P.3d 756 (2000); *See Hering*
2 *v. Dep't of Motor Vehicles*, 13 Wn. App. 190, 192, 534 P.2d 143 (1975). It is the role of
3 the trier of fact, rather than the attorneys, to determine which facts have been established
4 by the evidence. *Hering*, 13 Wn. App. at 192.

5 The Licensee's exceptions to Administrative Law Judge Christine Gerhart-
6 Cuffley's factual findings, including wholly new findings which the Licensee improperly
7 attempts to inject into the record, should be rejected. The Licensee's exceptions and
8 proposed additions either mischaracterize the evidence adduced during the hearing, or are
9 misleading or irrelevant to the ALJ's decision. In comparison, the ALJ's factual findings
10 identify the salient facts that were established during the hearing and formed the basis of
11 her decision, and they are supported by substantial evidence in the record.

12 **A. Individual Responses to Licensee's Exceptions To Findings Of Fact**

13 **1. Finding of Fact No. 2&3²**

14 The Licensee argues the ALJ "neglected" to note that the Seattle Police
15 Department (SPD) officers involved in this matter had not been trained in liquor
16 enforcement. The ALJ here is not required to enter negative findings or to find that a
17 certain fact has not been established. *Scott R. Sonners, Inc.*, 101 Wn. App. 350, 356.
18 Moreover, whether the officer's had such training is irrelevant to whether the actions
19 observed by the officer's in the Licensee's premise rose to the level of a violation of
20 liquor law or rule.

21 **2. Finding of Fact No. 5**

22 Licensee takes exception to this finding of fact by arguing that no evidence was
23 presented that the SPD officers who testified in this matter visited any other licensed

24 _____
25 ² This Reply will address each exception individually, utilizing the same paragraph numbers in the
26 Initial Order that are referenced by the Licensee. It is also noted that no exceptions were filed to many of
the ALJ's Findings. Those Findings, then, remain unchallenged by the Licensee and will not generally be
addressed any further.

1 establishment. Finding of fact No. 5 states: "the officers originally planned to visit other
2 premises; they were unable to do so because of the events that transpired at the
3 [Licensee's] licensed premise." The finding clearly establishes the officers never went to
4 another premises that night. Nor was that ever a fact in controversy, or relevant to what
5 the officers observed in the Licensee's establishment on the night in question. The
6 Licensee's exception is unnecessarily argumentative.

7 **3. Finding of Fact No. 8.**

8 **a. The License is attempting to make a new, unsupported, factual**
9 **argument and does not actually object to the finding as set**
10 **forth by the ALJ.**

11 The Licensee initially argues that the testifying officer "provided no evidence of
12 how the patron identified as "Greg" presented himself to the bartender." This is not a
13 proper exception as the Licensee fails to challenge or dispute the facts as found based on
14 the record. Rather than positing an actual deficiency in the finding of fact, and having the
15 Board review it as such, the Licensee is attempting to re-try this issue with a new factual
16 argument unsupported by any evidence in the record. *See* WAC 314-29-010(4).

17 Officer Branham's testimony related the patron's behavior as she observed it.
18 The Officer testified that the patron in question interacted with the bartender, an
19 employee of the Licensee, not once but twice during her contact with him. Initial Order
20 Finding of Fact No. 5. Additionally, the record establishes that during her contact with
21 the patron, neither Officer Branham nor the patron appeared to move away from the bar
22 area or out of the bartender's general area of observation. *Id.* The ALJ's Finding of Fact
23 No. 8 accurately reflects the record and should be adopted by the Board.

24 **b. The Licensee's second assertion is a conclusion of law that is**
25 **unsupported by authority.**

26 The Licensee also argues that "a patron's self assessment of his or hers [sic]
intoxication level is immaterial to their appearance to the bartender at the time of

1 service.” This is not an “exception” to a finding of fact as it does not challenge the ALJ’s
2 finding based upon the evidence in the record. Instead, the Licensee’s assertion is a legal
3 argument. Furthermore, the assertion lacks any citation to authority, or evidence in the
4 record, to support it as a legal or a factual conclusion.

5 The term “apparently under the influence of alcohol” is defined as the individual
6 being “seemingly drunk” such that the individual appears intoxicated to those around
7 him. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 264, 96 P.3d 386 (2004);
8 *Faust v. Albertson*, 143 Wn. App. 272, 280, 178 P.3d 358 (2008). Based on this legal
9 authority, a colorful, obscenity laden, vocal self-assessment of intoxication would
10 reasonably be a factor to take into consideration in determining if the speaker was
11 “seemingly drunk”. See Finding of Fact No. 8.

12 4. Finding of Fact No. 11

13 The Licensee argues that Officer Jones’s testimony, specifically in regards to the
14 prohibited conduct he observed the Licensee’s employee engaging in, is not credible. It
15 is the role of the trier of fact, rather than the attorneys, to determine which facts have
16 been established by the evidence. See *Hering*, 13 Wn. App. at 192. It is the role of the
17 ALJ to make determinations of credibility when engaged in the fact finding process in an
18 administrative hearing. See RCW 34.05.461(3), (4). Any review of an ALJ’s findings of
19 fact shall “give due regard to the presiding officer’s opportunity to observe the
20 witnesses”. RCW 34.05.464(4).

21 The Licensee fails to provide any citation to the record to prove its version of
22 Officer Jones’s testimony at hearing. The Licensee accuses Officer Jones of recanting
23 several statements made during his testimony. To “recant” testimony is to fully withdraw
24 or disavow the factual truth of a statement or statements made previously under oath. See
25 e.g. *State v. Landon*, 69 Wn. App. 83, 87, 848 P.2d 724 (1993) (where a witness recanted
26

1 testimony by completely disavowing and withdrawing his previous testimony identifying
2 the defendant as the man who pointed a firearm at him in a sworn statement).

3 The record will reveal to the Board that Officer Jones did not fully withdraw or
4 disavow any of his testimony. The record reflects that Officer Jones testified to what he
5 observed and that testimony was elaborated on during the normal hearing process of
6 direct-examination, cross-examination, redirect-examination and rebuttal testimony³.
7 The ALJ found Officer Jones credible and the Licensee cannot presume to usurp the
8 ALJ's authority to do so. The Licensee's exception either mischaracterizes the record or
9 simply relates testimony already considered by the ALJ. The Licensee fails to establish
10 any lack of credibility on the part of Officer Jones. The ALJ's Finding of Fact No.11
11 accurately reflects the record and should be adopted by the Board.

12 **5. Finding of Fact No. 21 and 24**

13 **a. Enforcement's internal policies are neither law nor rule that**
14 **controls this adjudication.**

15 The Licensee seeks to include a finding that "Officer Grassfield [an Enforcement
16 officer] is subject to WSLCB policies and procedures laid out in its Enforcement
17 Manual." The Licensee does not dispute the ALJ's finding that Officer Grassfield is a
18 Liquor Enforcement Officer. Finding of Fact No. 21. Enforcement does not dispute that
19 Officer Grassfield is bound by the statutes enacted by the legislature and the portions of
20 the Washington Administrative Code promulgated by the Board applicable to one
21 holding his authority and position. However, the Licensee never defines what it means
22 by insisting that Officer Grassfield is "subject to" internal agency policies.

23
24 ³ Enforcement recalled Officer Jones for rebuttal testimony after the Licensee introduced evidence
25 in the middle of the hearing that had not previously been disclosed and after failing to disclose significant
26 inaccuracies in a hand-drawn map of the premises that Licensee's Counsel had previously requested both
Officer Jones and the ALJ to rely on during the course of cross examining the officer. See Enforcement's
Motion to Reconvene and Strike Evidence.

1 The Licensee, again, appears to be positing a legal conclusion when excepting to
2 a finding of fact. To that extent, internal agency policies are not law nor do they have the
3 authority of law and neither Officer Grassfield, nor the Licensee, is “subject” to them in
4 an adjudicative sense. *See Mills v. Western Washington University*, 150 Wn. App. 260,
5 276-77, 208 P.3d 13 (2009) (Where an internal policy was not a “rule” as that term is
6 used in the Administrative Procedures Act and could not be relied upon as authority by
7 an adjudicative body).

8 **b. Licensee’s proposed finding lacks any support in the record
9 and is irrelevant.**

10 Similarly, the Licensee does not take exception to Finding of Fact No. 24, but
11 rather seeks to add to the finding. The Licensee asserts that the finding should include
12 that Officer Grassfield issued an AVN to the Licensee based upon “reports that adhered
13 to none of the policies and procedures promulgated by the WSLCB for the proper
14 conduct of undercover investigations.” This suggested finding is both inaccurate and
15 immaterial.

16 First, the Licensee fails to point to any evidence in the record demonstrating the
17 reports in question, produced by SPD officers, adhered to “none” of Enforcement’s
18 internal policies. *See Enforcement’s Exhibits 1, 2.* Such a sweeping statement is simply
19 hyperbole. Second, the Licensee fails to cite to anything in the record supporting the
20 assertion that Enforcement’s internal policies are “promulgated by the WSLCB.” Instead
21 the Licensee’s own documentary exhibits setting out certain internal Enforcement
22 policies are signed in approval by the Chief of Enforcement, not the members of the
23 Board. *See Licensee’s Exhibits No. 9-12.*

24 Additionally, “Findings must be made on matters ‘which establish the existence
25 or nonexistence of determinative factual matters ...’” *Weyerhaeuser*, 124 Wn. 2d at 35-
26 36. As noted above, internal policies are not law nor do they have the authority of law.

1 | *See Mills*, 150 Wn. App. at 276-77. Therefore, whether the information gathering
2 | techniques of a third party complied with Enforcement's internal policies would not be
3 | determinative as to the admissibility or relevance of the information gathered. Even if
4 | adherence to such policies had some legal weight, internal Enforcement policies would
5 | not apply to a third party. The License has failed to cite to any legal authority to the
6 | contrary. The ALJ's Finding of Fact No's 21 and 24 accurately reflects the record and
7 | should be adopted by the Board.

8 | **6. Finding of Fact No. 25**

9 | The Licensee takes exception to this finding of fact by arguing it is "immaterial".
10 | This finding only notes that Officer Grassfield declined to charge additional violations
11 | based on the SPD report of Officer Branham. Finding of Facts No 25. It is material to
12 | the extent it explains how Officer Grassfield exercised his discretion in issuing an AVN
13 | based upon the SPD reports and his investigation. *See* Finding of Facts No's. 20-23, 25.
14 | The ALJ's Finding of Fact No. 25 accurately reflects the record and should be adopted by
15 | the Board.

16 | **7. Finding of Fact No. 37**

17 | In its lengthy exception to Finding of Fact No. 37, the Licensee's makes
18 | numerous assertions which are inaccurate, misleading, unsupported by law or the record,
19 | or simply immaterial.

20 | **a. The Licensee's assertions regarding the role of Enforcement's**
21 | **policies are misleading and inaccurate.**

22 | The Licensee begins its exception by again asserting both a factual and a legal
23 | conclusion for which it provides no evidence or authority. The Licensee fails to cite to
24 | anything in the record to support its contention that Enforcement policies' are
25 | "promulgated" by the Board as opposed to internally by the Enforcement division.
26 | Furthermore, as a legal issue, Enforcement's internal policies do not "govern" the action

1 of Enforcement agents as argued by the Licensee as internal policies are not law. *See*
2 *Mills*, 150 Wn. App. at 276-77. Enforcement officers are “governed” solely by the law as
3 set forth in the Revised Code of Washington by the Legislature, and rules promulgated by
4 the Board and codified in the Washington Administrative Code, Title 314. *See e.g.* RCW
5 66.44.010(4); WAC 314-29-005(1).

6 The Licensee also asserts that Enforcement officers generally, and Officer
7 Grassfield specifically, are “governed” by internal policies even if they are making a
8 charging decision based on information supplied by another agency. Again, the Licensee
9 points to no evidence in the record, no law, no rule, no case authority, not even a specific
10 Enforcement policy, to support this contention.

11 **b. The ALJ is not required to find facts which did not occur or**
12 **are irrelevant.**

13 The bulk of the Licensee’s exception to Finding of Fact No. 37 is a laundry list of
14 proposed findings, all of which are actions the Licensee asserts the SPD *did not do*. The
15 ALJ is not required to enter negative findings. *Scott R. Sonners, Inc.*, 101 Wn. App. at
16 356. The ALJ is not obligated to find what the SPD Officers did not do, but rather to
17 make a finding as to what relevant events did occur in the licensed premise, based on the
18 evidence presented. *See id*; *See also Weyerhaeuser*, 124 Wn.2d at 35-36 (findings
19 indicate what portion of the record a finder relied on in reaching its conclusions). Here,
20 the Licensee suggests the ALJ is at fault in its Finding of Fact No. 37 for failing to “find”
21 facts and events that did not occur. Furthermore, the Licensee has failed to set forth any
22 theory or analysis as to how any of its proposed findings are relevant or would affect the
23 outcome of the instant case. The ALJ’s Finding of Fact No. 37 accurately reflects the
24 record and should be adopted by the Board.
25
26

1 | invalidity. *Id.* A rule will be found valid so long as it is “reasonably consistent” with the
2 | statutes it implements. *Id.*

3 | It is correct that in order to be valid, a rule must be promulgated pursuant to
4 | properly delegated authority. *State v. Brown*, 142 Wn.2d 57, 62, 11 P.3d 818 (2000).
5 | However, the Licensee fails to recognize that agency rules may fill gaps in an existing
6 | enabling statute. *Id.*; *see also, Ass’n of Wash. Bus. v. Dep’t of Revenue*, 121 Wn. App.
7 | 766, 772, 90 P.3d 1128 (2004) (agencies have inherent authority to pass interpretive rules
8 | and, therefore, do not need expressly delegated authority for such rules). More
9 | importantly, when determining the scope of an agency’s implied powers, courts will
10 | consider the declaration of purpose contained in a statute. *Armstrong v. State*, 91 Wn.
11 | App. 530, 537, 958 P.2d 1010 (1998).

12 | The powers of the Board in regulating the sale of alcohol and liquor licensees are
13 | very broad. RCW 66.08.050; *Cosro, Inc. v. Washington State Liquor Control Board*, 107
14 | Wn.2d 754, 757, 733 P.2d 539 (1987) (recognizing the Board is charged with
15 | administering the Liquor Act); *Anderson, Leech & Morris, Inc.*, 89 Wn.2d at 694; *Jow*
16 | *Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 379, 418 P.2d 424
17 | (1966) (The Supreme Court recognizes that the Board possesses broad constitutional and
18 | statutory authority to enact rules to protect the “public health, safety and morals.”); *Sukin*
19 | *v. Washington State Liquor Control Board*, 42 Wn. App. 649, 653, 710 P.2d 814 (1985)
20 | (“The dominion of the Board over the regulation, supervision and licensing of liquor is
21 | broad and extensive”); *Corral Inc., v. Washington State Liquor Control Board*, 17 Wn.
22 | App. 753, 760-761, 566 P.2d 214 (1977) (recognizing the broad rule making authority of
23 | the Board given the nature of the attendant danger to the community the sale of alcohol
24 | may pose).

1 RCW 66.08.030 expressly confers rule-making authority upon the Board "(f)or
2 the purpose of carrying into effect the provisions of this title according to their true intent
3 or of supplying any deficiency therein, the board may make such regulations not
4 inconsistent with the spirit of this title as are deemed necessary or advisable." The
5 Liquor Control Act's declaration of purpose, set forth by the Legislature, provides, "(t)his
6 entire title shall be deemed an exercise of the police power of the state, for the protection
7 of the welfare, health, peace, morals, and safety of the people of the state, and all its
8 provisions shall be liberally construed for the accomplishment of that purpose." RCW
9 66.08.010.

10 The Supreme Court has previously upheld the validity of Board rules prohibiting
11 lewd or erotic activity on liquor licensed premises as being within the Boards statutory
12 authority to create rules promoting the public health and welfare. *Anderson, Leech &*
13 *Morris, Inc.*, 89 Wn.2d at 694 (holding Board regulations prohibiting employees or
14 entertainers from being unclothed or exposing the breast, buttock or genitalia are valid);
15 *See also Corral Inc., v. Washington State Liquor Control Board*, 17 Wn. App. 753, 760,
16 566 P.2d 214 (1977) (Holding a Board rule prohibiting "disorderly conduct" was valid in
17 the context of the Board charging a licensee with allowing the "disorderly conduct" of
18 individuals dancing provocatively and "brushing" their breasts against patrons).

19 The Board's broad authority to promulgate rules has already been determined to
20 include the ability to prohibit certain erotic or lewd conduct on licensed premises.
21 *Anderson, Leech & Morris, Inc.*, 89 Wn.2d at 695. WAC 314-11-050's prohibition on
22 allowing persons on the premises, including employees, from engaging in sexual conduct
23 is also valid within the context of this same broad authority. WAC 314-11-050 promotes
24 the general health, safety and welfare of the public by helping prevent the potentially
25
26

1 dangerous or even criminal combination of overt sexual activity and alcohol on licensed
2 premises.

3 **2. Exceptions to Conclusion of Law No. 11**

4 The Licensee, again, complains SPD Officer Branham failed to comply with
5 internal Enforcement policies. That this is wholly irrelevant has already been established
6 by Enforcement's response to Licensee's exceptions to Finding of Fact No's. 21 and 24
7 above. Moreover, the Licensee fails to set forth any theory indicating how an SPD
8 officer's non-adherence to internal Liquor Enforcement policies is relevant to whether the
9 officer's testimony presents facts sufficient to establish a violation of a liquor law or rule.
10 Similarly, the Licensee has failed to set forth any theory or authority that would call for
11 the exclusion or inadmissibility of the officer's testimony. The officer's testimony was
12 deemed admissible and establishes sufficient facts to meet the elements of the relevant
13 liquor violation charged. *See* WAC 314-16-150(2). The Licensee has not set forth any
14 argument to the contrary of this legal conclusion. The ALJ's Conclusion of Law No. 11
15 is an accurate conclusion of law, is fully supported by the record, and should be adopted
16 by the Board.

17 **3. Exceptions to Conclusion of Law No.'s 12 and 13**

18 The Licensee takes exception to the ALJ's conclusion that there was no evidence
19 that Officer Branham was impaired by the alcohol she consumed while in an undercover
20 capacity on the evening in question. Conclusion of Law No. 12. The ALJ's conclusion
21 was based on Officer Branham's own testimony, the testimony of Officer Jones who
22 observed Officer Branham that night, and that there was no other evidence presented
23 indicating she was impaired that evening. Finding of Fact No. 16; Conclusion of Law
24 No. 12. The Licensee argues, in relevant part that: "Insofar as alcohol affected her
25 [Officer Branham's] memory on that issue, it is reasonable to conclude that it affected her
26

1 observations and the quality of her investigation as well” and “Officer Branham’s
2 observations on December 14-15 were likely clouded by her alcohol intake.”

3 The Licensee presented no evidence at hearing to establish Officer Branham was
4 impaired. The Licensee never presented any evidence to rebut Officer Branham’s
5 testimony that she was not impaired.⁵ Finding of Fact No. 16. The Licensee never
6 presented any evidence to rebut Officer Jones’s testimony that he never witnessed Officer
7 Branham acting as though she were impaired. Conclusion of Law No. 12. The Licensee
8 never produced expert testimony to establish that it is “reasonable to conclude” or that it
9 was “likely” that a person would be impaired based on the evidence adduced at hearing.
10 All relevant evidence produced at hearing demonstrated that Officer Branham was not
11 impaired, in any way. In short, the Licensee calls into question the veracity and judgment
12 of a sworn peace officer without producing a single piece of evidence to support its
13 contention. The ALJ’s Conclusion of Law No. 12 and 13 are accurate conclusions of
14 law, are fully supported by the record and should be adopted by the Board.

15 **4. Exception to Conclusion of Law No. 18**

16 The Licensee’s exception to this conclusion of law is effectively no different from
17 its exception to Finding of Fact No. 11 which was fully responded to by Enforcement
18 above and is incorporated into this response by reference. The ALJ’s Conclusion of Law
19 No. 18 is an accurate conclusion of law, is fully supported by the record, and should be
20 adopted by the Board.

21
22
23
24
25
26

⁵ The Licensee failed to take exception to the ALJ’s Finding of Fact No. 16 establishing that
Officer Branham testified she was not impaired and therefore must accept that finding of fact.

1 **5. Exception to Conclusions of Law No. 21**

2 **a. Licensee's argument that notice was untimely is unsupported**
3 **by authority or evidence.**

4 The Licensee takes exception to the ALJ's conclusion that the Licensee's
5 notification that possible violations had been observed on the premises was timely and
6 satisfied due process. The Licensee sets forth no legal authority to contest this
7 conclusion of law. The Licensee's entire argument rests on its contention that the notice
8 was not timely per "WSLCB policies and procedures." The Licensee fails to cite to any
9 particular policy or procedure to support this contention. Moreover, internal agency
10 policies are not law nor do they have the authority of law. *Mills*, 150 Wn. App. at 276-77.
11 The Licensee cannot rely on any internal Enforcement policies to establish a legal
12 conclusion as to what is or is not timely notification in this matter. *Id.*

13 A liquor enforcement officer is required to issue an AVN only *after* he or she
14 believes a licensee has violated a Board statute or rule. WAC 314-29-005(1). The state,
15 in a criminal context, meets more stringent due process requirements when it acts in a
16 manner "reasonably calculated" to provide timely notice of pending charges to a
17 defendant so long as it does so with due diligence. *See State v. Vailencour*, 81 Wn. App.
18 372, 377, 914 P.2d 767(1996).

19 The Licensee does not challenge the conclusion that it was given notice of
20 potential pending charges within forty days of the SPD officer's observations on the night
21 and early morning of December 14-15, 2007. Finding of Fact 32; Conclusion of Law No.
22 21. The Licensee does not challenge the finding that Officer Grassfield did not complete
23 his investigation into this matter until sometime in early February of 2007. *See* Finding
24 of Fact No. 23. Nor does the Licensee challenge the finding that that the AVN was
25 formally issued on February 20, 2007 shortly after the investigation was concluded.
26 Findings of Fact No. 26. Enforcement was not obligated to inform the Licensee of the

1 pending charges against the Licensee until it was believed a violation occurred. WAC
2 314-29-005(1). An AVN was issued less than two weeks after Officer Grassfield
3 concluded his investigation and no authority presented demonstrates this issuance was
4 untimely or violated Due Process.

5 **b. Licensee's argument that it did not have a meaningful**
6 **opportunity to question the "key witnesses" is misleading.**

7 The Licensee also argues it was deprived the opportunity to question "the key
8 witnesses", namely, the apparently intoxicated patrons observed by the SPD officers on
9 the night in question. Enforcement notes initially that neither party in this matter had any
10 reasonable opportunity to interview these individuals or subpoena them to testify. The
11 Licensee suffered no prejudice in not having access to information which was also not
12 available to Enforcement.

13 The Licensee does not deny it had knowledge and opportunity to contact the SPD
14 officers. See Enforcement's Witness and Exhibit List. Nothing in the record indicates it
15 took any steps to informally interview either of these witnesses. Nothing in the record
16 indicates the Licensee requested permission from the ALJ to depose these or any other
17 witnesses. See RCW 34.05.446(3). Furthermore, the Licensee was in a far stronger
18 position to interview its own employees. See Findings of Fact No's. 11, 22, 31 and 32. If
19 any witness was "key" to rebutting the observation and testimony of the SPD officers, it
20 would logically be the employees observed violating the law. The burden is on
21 Enforcement to meet the elements of the violations charged. See WAC 314-29-010(3)(f).
22 Enforcement presented evidence to that end at hearing. The Licensee had an opportunity
23 to present the testimony of its own employees to rebut the testimony of the SPD officers
24 at hearing and declined to do so. See Finding of Fact No. 29.⁶ The ALJ's Conclusion of

25 _____
26 ⁶ At hearing the only witness presented by the Licensee was the owner of the establishment, Mr.
Eric Contreras. Findings of Fact No's. 29 and 30.

1 Law No. 21 is an accurate conclusion of law, is fully supported by the record, and should
2 be adopted by the Board.

3 **6. Exception to Conclusion of Law No. 22**

4 While not entirely clear, the Licensee seems to take exception to the ALJ's legal
5 conclusion that the preponderance of credible evidence establishes a violation of
6 WAC 314-11-050(2) occurred. The Licensees primary argument is that Officer
7 Grassfield's charging decision was not subject to the "Board's policies and procedures"
8 and he was "charged with evaluating the evidence, and none of it met the Board's
9 minimum standards." The Licensee fails to provide any citation to the record or authority
10 indicating what "policies and procedures" or "minimum standards" it is referring to. The
11 Licensee fails to provide any analysis as to how Officer Grassfield failed to meet these
12 undefined minimum standards.

13 To the extent the Licensee is referring to internal Enforcement policies, it has
14 already been established that such policies have no force or effect in law.
15 *Mills*, 150 Wn .App. at 276-77. Furthermore, the Licensee has failed to provide any
16 analysis as to how either of the SPD officer's testimonies are invalid or excludable on
17 any theory, including not following policies inapplicable to them.⁷

18 Officer Grassfield, as a Liquor Enforcement Officer, is empowered to enforce all
19 liquor laws and rules. RCW 66.44.010(4). Similarly, Officer Grassfield is charged with
20 issuing an AVN if he believes a licensee has violated a liquor law or rule. WAC 314-29-
21 005(1). His review and investigation of the reports forwarded to him indicated the SPD
22 officer's had observed violations of liquor rules by the Licensee's employees. Finding of
23 Fact No. 24. Accordingly, he issued an AVN. *Id.* Officer Grassfield properly exercised

24 _____
25 ⁷ The Licensee has spent the bulk of these exceptions arguing that internal Enforcement policies
26 were not followed by the SPD officers involved in this matter but never actually articulating how that is
relevant. Inexplicably, in its exception to Conclusion of Law No. 22 the Licensee then reverses itself and
concedes that "Local law enforcement may, in fact, be free to follow whatever standards it wants."

1 his legal authority in this matter, and the Licensee has failed to set out any evidence in the
2 record or legal authority to the contrary. The ALJ's Conclusion of Law No. 22 is an
3 accurate conclusion of law, is fully supported by the record, and should be adopted by the
4 Board.

5 7. **Exception to Conclusion of Law No. 26-28**

6 The Licensee does not actually contest the specific conclusions set out by the ALJ
7 but, instead, simply argues the ALJ "has not taken into account mitigating
8 circumstances." This statement is inaccurate. The Initial Order discussed most of the
9 circumstances which the Licensee now argues are "mitigating." See Findings of Fact
10 No's. 31 and 33. The ALJ also established as a conclusion of law that the Board may
11 consider mitigating circumstances in assessing a penalty. Conclusion of Law No. 24.
12 While no specific mention is made in the Initial Order, given the findings and
13 conclusions that are set out by the Initial Order, it appears the ALJ considered these
14 factors and found them to not be mitigating or otherwise without merit. See Conclusion
15 of Law No. 29⁸. The ALJ's Conclusions of Law No's. 26-28 are accurate conclusions of
16 law, are fully supported by the record, and should be adopted by the Board.

17 Additionally, Enforcement notes that the Licensee has listed in its exception
18 "letting Mr. Penalver-Gruber go"⁹ as one of the mitigating factors to be considered in this
19 matter. The Licensee provides no explanation as to how terminating Mr. Penalver-
20 Gruber is a mitigating factor in light of the Licensee's insistence that the employee
21 misconduct charged in this case either did not occur or has not been established by
22
23

24 ⁸ The ALJ's Conclusion of Law No. 29 specifically holds that "the undersigned has considered *all*
25 *arguments* made by the parties. Arguments that are not specifically addressed herein have been duly
26 considered but are found to have no merit or to not substantially affect a party's rights" (emphasis added).

⁹ Mr. Penalver-Gruber was the Licensee's employee who engaged in prohibited lewd conduct with
a patron. Finding of Fact No. 11.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

credible evidence. Similarly, if Mr. Penalver-Gruber was terminated for some other misconduct, it would have no relevance to the instant matter.

IV. CONCLUSION

The Licensee's exceptions to the finding of facts and conclusions of law are unsupported by the record. The Licensee's exceptions are unsupported by authority and frequently lack substantial analysis or explanation. The Licensee's exceptions do not form grounds for modification of the Initial Order. Accordingly, for the reasons set forth above, Enforcement respectfully requests that the Board adopt and affirm the findings of fact and conclusions of law set forth in the Initial Order of Administrative Law Judge Christine Gerhart-Cuffley.

Respectfully submitted this 24th day of August, 2009.

ROBERT M. MCKENNA
Attorney General



GORDON KARG, WSBA #37178
Assistant Attorneys General
Attorneys for Washington State Liquor
Control Board Licensing and Regulation
Division
(360) 664-0092