

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF

DODGE CITY SALOON, INC.
d/b/a DODGE CITY BAR & GRILL
7201 NE 18TH ST
VANCOUVER, WA 98661

LICENSEE

LICENSE NO. 365465
AVN 1L7363A

OAH No. 2008-LCB-0030
LCB No. 22, 834

FINAL ORDER OF THE BOARD

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

1. The Dodge City Saloon, Inc., and Dodge City Bar & Grill made a timely request for a hearing on the June 26, 2008 Complaint issued by the Liquor Control Board. A formal hearing was held on January 21, 2009 at the Liquor Control Enforcement Office, 12501 NE 99th Street, Suite A-100m Vancouver, Washington.

2. The Complaint alleged that on or about December 29, 2007, the licensee allowed or permitted an apparently intoxicated person to possess alcohol on the premises, in violation of WAC 314-16-150(2). The Complaint sought the standard penalty of a five day suspension of the license, or a monetary penalty of \$500.00 in lieu of suspension.

3. At the hearing the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg and the Licensee was represented by its attorney, Ben Shafton.

4. On October 20, 2009, Administrative Law Judge Janet L. Schneider (ALJ) entered Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint, and the proposed penalty.

5. The Licensee filed a petition for review signed by the Licensee's attorney on October 30, 2009, but it was not received by the Board until November 5, 2009. The Licensee asserts that: (a) the evidence presented by the Liquor Enforcement Officers must be suppressed because they did not obtain a search warrant before entering the premises; (b) that the ALJ erred in applying the "preponderance of the evidence" standard to the alleged violations; (c) that the ALJ failed to make findings of fact detailing Mr. Thrasher's medical history; (d) that the evidence did not show Mr. Thrasher was "apparently under the influence of liquor", and the findings of fact are not supported by substantial evidence; (e) that there is insufficient evidence of possession of alcohol; (f) that Mr. Thrasher's successful challenge of the citation against him for violating RCW 66.24.200(2)(a) collaterally estops the Board from proving the licensee violated WAC 314-16-150(2); and (g) a catchall argument that justice requires a dismissal of the charges.

6. The Education and Enforcement Division of the Board responded to the Petition for Review, but the response was not received by the Board in a timely manner. WAC 314-42-095(2)(b) provides a period of 10 days after service of a petition for review for a response from the other party, but the Board did not receive the Education and Enforcement Division's response until November 17, 2009. However, the points raised in Licensee's Petition for Review were all previously briefed by the parties, and the Board relies on the briefing submitted prior to the entry of the Initial Order, in rejecting the Licensee's Petition for Review.

7. The Licensee's employee, Ms. Parenteau, admitted in her testimony that she believed Mr. Thrasher should not be served, as he appeared to be intoxicated. The Licensee summarizes this testimony in its Petition for Review. It is not the responsibility of the Board's enforcement staff to insure that the licensee does not allow persons who appear to be intoxicated to be served alcohol. While Ms. Parenteau apparently communicated to one other employee that Mr.

Thrasher should not be served, she did not communicate her determination to other employees, and another employee failed to adequately observe Mr. Thrasher's appearance prior to selling him a beer. Mr. Thrasher admitted that he purchased a beer on the day in question.

8. No warrant is required for a law enforcement officer to enter a premises that is open to the public and to observe conduct that any member of the public could observe. RCW 66.28.090 specifically allows inspections of premises licensed to serve liquor at any time, and has not been found to be unconstitutional by any court. The Board lacks authority to declare the statutes governing its actions to be unconstitutional, however, if such power was provided to the Board, we would not be inclined to do so in this case.

9. The Board affirms and adopts the ALJ's Initial Order, including the rulings on Prehearing Motions, Statement of the Case, and Findings of Fact Nos. 1 through 20, and the Conclusions of Law.

10. 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 and Fact and Conclusions of Law and Initial Order, are hereby AFFIRMED AND ADOPTED as the final decision of the Board, and that the liquor license privileges granted to Dodge City Saloon, Inc. d/b/a Dodge City Bar & Grill located at 7201 NE 18th Street, Vancouver, WA 98661, License Number 365465 are hereby suspended for a term of five (5) days to take place from 10:00 AM on Thursday February 11, 2010 until 10:00 AM on Tuesday February 16, 2010, PROVIDED, HOWEVER, that said suspension shall be vacated upon payment of a monetary penalty in the amount of five hundred dollars (\$500), due on or before Feb. 8, 2010 in lieu of suspension. Failure to comply with the terms of this order will result in further disciplinary action.

Payment should be labeled in reference to this matter and sent to:

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

DATED at Olympia, Washington this 29 day of December, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD





Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. 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, Sr. Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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

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



Washington State
Liquor Control Board

January 8, 2010

Ben Shafon, Attorney for Licensee
900 Washington Street, Ste 1000
Vancouver, WA 98660-3455

Dodge City Saloon, Inc
d/b/a Dodge City Bar & Grill
7201 NE 18th Street
Vancouver, WA 98661-7325

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. 1L7363A
LICENSEE: Dodge City Saloon, Inc
TRADE NAME: Dodge City Bar & Grill
LOCATION: 4250 E Fourth Plain Blvd, Vancouver, WA 98661-5650 (formerly located
at 7201 NE 18th Street, Vancouver, WA 98661)
LICENSE NO. 403213 (formerly 365465)
LCB HEARING NO. 22,834
OAH NO. 2008-LCB-0030**

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 February 8, 2010 or suspension will take place from 10:00 am on February 11, 2010 until 10:00 am on February 16, 2010.

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,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
PO Box 43076, 3000 Pacific Ave. SE, Olympia WA 98504-3076, (360) 664-1602
www.liq.wa.gov

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

LCB NO. 22,834
OAH NO. 2008-LCB-0030

DODGE CITY SALOON, INC
d/b/a DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661-7325

DECLARATION OF SERVICE BY
MAIL

LICENSEE

LICENSE NO. 403213 (formerly
365465)

I declare under penalty of perjury under the laws of the state of Washington that on January 8, 2010, I served a true and correct copy of the FINAL ORDER OF THE BOARD in the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage prepaid, to all parties or their counsel of record.

DATED this 8th day of January, 2010, at Olympia, Washington.


Kevin McCarroll, Adjudicative Proceedings Coordinator

BEN SHAFTON, ATTORNEY FOR
LICENSEE
900 WASHINGTON STREET, STE 1000
VANCOUVER, WA 98660-3455

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

DODGE CITY SALOON, INC
d/b/a DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661-7325

DODGE CITY SALOON, INC
d/b/a DODGE CITY BAR & GRILL
4250 E FOURTH PLAIN BLVD
VANCOUVER, WA 98661-5650

DECLARATION OF SERVICE BY
MAIL

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

MAILED
OCT 20 2009
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of:

DODGE CITY SALOON, INC.
DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661

LICENSEE

LICENSE NO. 365465

Docket No. 2008-LCB-0030
LCB No. 22,834

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND INITIAL ORDER

RECEIVED

OCT 22 2009

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

STATEMENT OF THE CASE

On January 12, 2008, the Washington State Liquor Control Board (hereinafter Board) issued an Administrative Violation Process for Violations - Standard Penalty to Dodge City Saloon Incorporated doing business as Dodge City Bar & Grill 7201 NE 18th Street, Vancouver, Washington. In its Notice, the Board alleged that on December 29, 2007, the Licensee, or an employee thereof, allowed a person apparently under the influence of liquor to physically possess liquor on the licensed premise contrary to WAC 314-16-150(2). In its Notice, the Board proposed that the license of the Licensee be suspended for a period of five days, or that the Licensee pay a civil monetary penalty in the amount of five hundred dollars (\$500.00) in lieu of the suspension.

The Licensee made a timely request for hearing

Pursuant to notice duly given, an administrative hearing was held before Janet L. Schneider, Administrative Law Judge, in the Liquor Control Board Enforcement Office, 12501 NE 99th Street, Suite A-100, Vancouver, Washington on the 21st day of January 2009. The Washington State Liquor Control Board was represented by Gordon Karg, Assistant Attorney General, with witnesses Almir Karic and Paul Magerl, Liquor Control Board Enforcement Officers. Ben Shafton, Attorney at Law,

appeared to represent the Licensee. Dan Thrasher, customer; Donna Paranteau, employee; Raveena Battan, employee; and Arthur Anthony (Tony) Kutch, manager/owner appeared as witnesses for the proceeding. Ray Kutch, primary shareholder of Dodge City, observed the proceedings.

The hearing record was held open in order for the Appellant to receive a video/audio copy (CD) of Mr. Thrasher's hearing in Superior Court. On February 4, 2009, the Board's Motion in Limine objecting to the admission of the CD and/or transcript was received. The Appellant's response to the Board's Motion was received February 10, 2009. The Appellant's response included a written transcript of the Superior Court proceeding. The Board was given until February 23, 2009 to respond. The response was received. On March 9, 2009 during a post hearing conference, the admission of the CD and transcript from Mr. Thrasher's Superior Court proceeding was denied. The record was held open for closing briefs. The closing briefs were received and the hearing record closed April 6, 2009.

MOTIONS

Prior to the closure of the record several motions were addressed:

1. The Licensee's Motion to have the CD and/or transcript from a Superior Court proceeding entered as an exhibit was DENIED.
2. The Licensee's Motion to Suppress is DENIED.
3. The Licensee's Motion to Dismiss the Board's case based upon the Doctrine of Collateral Estoppel is DENIED.

The administrative law judge, having considered the entire record in this proceeding, including the arguments of the respective representatives, now enters the following Findings of Facts:

FINDINGS OF FACT

1. Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill is the holder of license number 365465. The establishment is located at 7201 NE 18th Street, Vancouver, Washington. The license was issued by the Washington State Liquor Control Board under the provisions of Revised Code of Washington (RCW) 66.24.
2. On the night of December 28, 2007, early morning of December 29, 2007, Liquor Control Board Enforcement Officers Almir Karic and Paul Magerl made a premise check at Dodge City Bar & Grill.
3. As Officers Karic and Magerl entered the facility they noted a patron leaning against the counter/front desk where patrons paid their cover charge to enter the premises.
4. Officer Karic noted that the patron near the entrance had glassy eyes, dilated pupils, droopy eyelids, his head was bobbing and he appeared sleepy. The patron was later identified as Dan Thrasher, DOB 03-08-1956.
5. Officer Karic recognized Mr. Thrasher from a previous contact and proceeded to talk to him. During that conversation, Officer Karic noted that Mr. Thrasher's speech was slurred and that Mr. Thrasher swayed when he attempted to stand up straight. Mr. Thrasher advised Officer Karic that he was doing well and that he was not driving. Mr. Thrasher explained that he was with his nephew and his nephew was driving. Officer Karic advised Mr. Thrasher not to drink anymore.
6. Donna Paranteau, Dodge City Bar & Grill employee who was taking cover charges at the front entrance, advised Officers Karic and Magerl that Mr. Thrasher was not drinking at Dodge City Bar & Grill and that he had just walked through the front door.
7. At hearing Ms. Paranteau asserted that she had observed Mr. Thrasher exhibit signs such as staggering or wobbling, when Mr. Thrasher entered the facility which indicated to her that Mr.

Thrasher should not be served alcohol. She asserted that she was waiting for a security person to come to her station so that the security person could mark the back of Mr. Thrasher's hands with an "X". An "X" on the back of an individual's hand is an indication to all employees at Dodge City Bar & Grill that the individual is "cut off" and not to be served alcohol.

8. After Officer Karic spoke to Mr. Thrasher, Officer Karic and Officer Magerl proceeded into the facility to continue with their premises inspection. While walking around the facility they noted that the facility was busy with approximately 130 patrons, that there were eight to ten employees working and that the facility was adequately lit. They stopped to talk with the manager on duty, Tony Kutch, and followed up on a patron complaint that a customer was selling ecstasy in the men's bathroom. The Officers found no evidence of anybody selling drugs in the men's bathroom and returned to talk to Mr. Kutch.

9. Mr. Thrasher left the front entry area. Mr. Thrasher headed toward the beer well a few feet away and Ms. Paranteau gave Ms. Raveena Battan, the employee working the beer well, a signal not to serve Mr. Thrasher.

10. Mr. Thrasher passed the beer well and headed to the bar. Neither Ms. Paranteau nor Ms. Battan made an effort to stop Mr. Thrasher from going to the bar or to notify the bartenders that Mr. Thrasher should not be served alcohol.

11. While talking to Mr. Kutch, Officer Magerl observed Mr. Thrasher approach the bar, talk to one of the bartenders and hand the bartender some cash. He pointed out the activity to Officer Karic. Both Officers observed the bartender return to where Mr. Thrasher was standing, talk to Mr. Thrasher and hand him a bottle of beer with some change.

12. As Mr. Thrasher left the bar, the Officers headed toward him. Before the Officers could reach Mr. Thrasher, Dodge City Bar & Grill employee, Raveena Battan, intercepted Mr. Thrasher, took his

beer and dumped it into the garbage can at the beer well where she was working. Ms. Battan asserted at hearing that she was instructed by Ms. Paranteau to get Mr. Thrasher's beer.

13. Mr. Thrasher did not object to Ms. Battan taking his beer.

14. After the beer had been taken from Mr. Thrasher, Officer Magerl walked up to Mr. Thrasher and asked for his identification. Officer Karic then asked Mr. Thrasher to step outside of the facility to talk because it was loud inside the facility and he could not hear. Officer Karic issued a ticket to Mr. Thrasher for violation of RCW 66.44.200(2)(a) purchase/possession by apparently intoxicated person inside a licensed establishment.

15. As Officer Karic and Mr. Thrasher were getting ready to leave, Mr. Kutch offered the use of the facilities' portable Breathalyzer to determine whether or not Mr. Thrasher had been drinking. The use of the portable Breathalyzer was declined.

16. Officer Karic and Magerl were in the Dodge City Bar & Grill for approximately ten minutes prior to Mr. Thrasher purchasing a beer and taking the beer with him as he headed toward the dance floor.

17. At hearing, Mr. Thrasher asserted that he had not been drinking on the night in question. He asserted that he was under the influence of a heavy dose of Trazadone which he had taken shortly before his nephew and a friend of his nephew arrived at his home. Mr. Thrasher admitted that he purchased a beer while at Dodge City Bar & Grill but claims that he did not purchase the beer for himself. Mr. Thrasher asserted that as he usually does when out with friends and/or family, he purchased a "round" for his nephew and friend.

18. Mr. Thrasher was unable to explain why he had only one beer when he asserts he purchased a "round" for his nephew and his friend.

19. The side effects of Trazadone are the same or very similar to the indicators of intoxication identified by Officers Karic and Magerl, i.e., glassy eyes, dilated pupils, droopy eyelids, bobbing head and sleepy appearance. Mr. Thrasher asserted that the staggering and swaying observed by the Officers and Ms. Paranteau were not staggering but a limp he has from previous injuries.

20. On January 12, 2008, Officer Karic returned to the premises and served the Administrative Violation Notice on Tony Kutch, owner.

From the foregoing Findings of Fact, the administrative law judge now enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Washington State Liquor Control board has jurisdiction over the licensee, Dodge City Saloon, Inc., who is the holder of a liquor license issued pursuant to chapter 66.24 RCW and is subject to the provisions of RCW 66.24.010.
2. The licensee of a liquor licensed premises is responsible for operation of the licensed premises in compliance with the liquor laws and rules of the Board. If the licensee chooses to employ others in the operation of the business, any violations committed, or permitted, by those employees shall be treated by the Board as violations committed, or permitted, by the licensee. WAC 314-11-015(1)(a). It is the duty and responsibility of the licensee to control the conduct of employees at all times. WAC 314-11-015(2).
3. WAC 314-16-150 provides in relevant part:

(2) No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.
4. Beer is liquor. RCW 66.04.010(3) and (25).

5. The standard of proof in an administrative proceeding is preponderance of the evidence except in cases involving professional licenses or where the statute specifically mandates a different standard. In this case the statute does not address the standard of proof nor is there a professional license involved. Therefore, the appropriate standard of proof in this matter is the preponderance of the evidence standard of proof.

6. Based on the preponderance of the evidence presented, Mr. Thrasher appeared to be under the influence of liquor. There is no provision in the statute that requires the Board to prove that Mr. Thrasher was actually under the influence of liquor only that he appeared to be under the influence of liquor or intoxicated to those around him. In this case, employees of Dodge City Bar & Grill and Officers Karic and Magerl credibly testified that Mr. Thrasher showed clear enough signs of intoxication that an employee was attempting to get a security guard to her work station to mark his hands with an "X" the cut off sign to alert other employees not to serve him and that Officer Karic checked on Mr. Thrasher's well being, made sure he was not driving and advised Mr. Thrasher not to drink anymore. Even Mr. Thrasher, who denies drinking at all on the night in question, asserted that the heavy dose of his medication would make him appear glassy eyed, drowsy, and suffering from motor-function impairment, all signs of being under the influence. Because Mr. Thrasher appeared to be intoxicated at the time in question that provision of the WAC 324-16-150(2) has been met.

7. The Licensee had a duty to prevent an individual who appeared to be under the influence of liquor from possessing alcohol on the licensed premises. In this case the Licensee failed. Ms. Paranteau, who observed that Mr. Thrasher was showing signs of intoxication when he entered the establishment, failed to ensure that Mr. Thrasher's hand was marked by a black "X" to indicate he was to be "cut off" before he left the entry or to make any other effort to notify other employees Mr.

Thrasher should not be served liquor. Although Ms. Paranteau did alert one other employee that Mr. Thrasher was "cut off", this information went no further and did not prevent Mr. Thrasher from walking up to the bar, purchasing a beer and taking that beer into his possession. It was not until after Mr. Thrasher left the bar with the beer in his possession and headed toward the dance area, that an employee took the beer away and had his hand marked to alert other employees he was not to be served alcohol. While It is commendable that the employees moved quickly to remove the beer from Mr. Thrasher's possession after he was served, it was their duty and responsibility to be sure that Mr. Thrasher never had alcohol in his possession inside the licensed premises.

8. The Licensee was prohibited from permitting any person apparently under the influence of liquor to physically possess liquor on the license premises. The Licensee was aware of this prohibition. The Licensee violated the provisions of WAC 314-16-150(2).

9. The remaining issue in this proceeding is the appropriate penalty for the violation of the above cited law. The Board has the authority to establish an appropriate penalty as a matter of discretion. Under WAC 314-29-020, sales or service to an apparently intoxicated person has a standard 5-day suspension or \$500 monetary option for the first violation.

10. After careful review of this case, the undersigned finds that the licensee committed this violation. The licensee was aware of the restriction against allowing an intoxicated person to have possession of liquor on the licensed premises. The statutory penalty is appropriate.

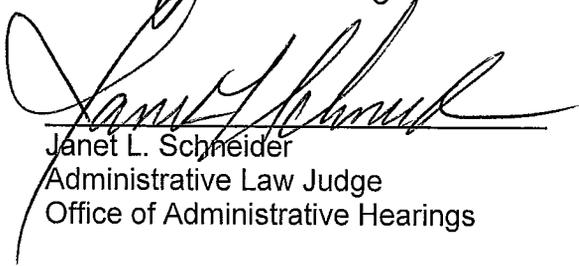
From the foregoing Conclusions of Law, NOW THEREFORE

INITIAL ORDER

IT IS HEREBY ORDERED That the Board's Complaint be sustained and that the liquor license privileges granted to Dodge City Saloon Inc., doing business as Dodge City Bar & Grill,

License Number 365465, shall, on a date to be set by the Board in its final order, be suspended for five days or the licensee may make a payment of a monetary civil penalty in the amount of five hundred dollars (\$500.00) in lieu of suspension.

DATED and mailed at Vancouver, Washington, this 20th day of October, 2009.


Janet L. Schneider
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO THE 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 and WAC 10-08-211, 314-29-010(1)(c) and 314-42-095(2)(a).

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)(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, and any exceptions 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 which is appealable under the provisions of RCW 34.05.510 through 34.05.598. WAC 314-42-095 (4). The board may issue a final order that differs from the initial order even though no party has filed a petition for review or reply. WAC 314-42-095(4).

A copy was mailed to:

Dodge City Saloon, Inc.
Dodge City Bar & Grill
7201 NE 18th Street
Vancouver, WA 98661

Ben Shafton
Attorney at Law
900 Washington Street, Suite 1000
Vancouver, WA 98660-3455

Gordon Karg
Office of the Attorney General
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

Barbara Cleveland, OAH
Mail Stop: 42488

RECEIVED

NOV 05 2009

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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

In the Matter of:

DODGE CITY BAR & GRILL,

Licensee

License No.: 365465

OAH No. 2008-LCB-0030

LCB No. 22,834

PETITION FOR REVIEW

COMES NOW Dodge City Bar & Grill (Dodge City) and petitions for review of the Findings of Fact and Conclusions of Law and Initial Order dated October 20, 2009. This Petition is made pursuant to WAC 314-42-095, WAC 10-08-211, and RCW 34.05.464. The following points are made in connection with the Petition for Review.

I. The Evidence Must Be Suppressed.

a. Facts.

There can be no dispute concerning the facts that give rise to the Motion to Suppress. Those facts are set out in Findings of Fact 2, 3, 4, 5, 8, and 11.

To summarize briefly, Liquor Control Board (the Board) officers Karic and Magerl made a premise check at the Dodge City's premises. While they were there, they made observations of the patron at issue in this case, Dan Thrasher. They observed how he behaved at

1 that time. They observed him with a bottle of beer in his hands. Had the officers not been on the
2 premises, they obviously would not have made the observations.

3 There is no evidence that the Board obtained a warrant for entering Dodge City's
4 premises on December 29, 2007.

5
6 b. Argument.

7 i. Admissibility Standard.

8 Washington's Administrative Procedure Act allows the admission of
9 evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
10 However, evidence excludable on constitutional or statutory grounds cannot be admitted in
11 administrative proceedings. As the relevant statute states:
12

13 The presiding officer shall exclude evidence that is excludable on
14 constitutional or statutory grounds or on the basis of evidentiary
privilege recognized in the courts of this state.

15 RCW 34.05.452(1). All of the Board's evidence was obtained in violation of the Fourth
16 Amendment to the United States Constitution and of Article 1, Section 7 of the Washington State
17 Constitution. The evidence should therefore have been excluded.

18
19 ii. The Test for Validity of the Search.

20 The Fourth Amendment to the United States Constitution prohibits
21 unreasonable searches and seizures. Article 1, Section of the Washington State Constitution
22 precludes governmental interference in a person's private affairs. These two provisions apply co-
23 extensively to administrative searches. *Centimark Corp v. Department of Labor & Industries*, 129
24 Wn.App. 368, 375 (2005). They apply when the government forced to enter upon private property
25

1 to ascertain whether there is compliance with governmental regulations. *City of Seattle v.*
2 *McCready*, 123 Wn.2d 260 (1994).

3 Intrusion onto private property to conduct an administrative inspection can
4 be sanctioned by a properly issued warrant supported by probable cause. *Camara v. Municipal*
5 *Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *City of Seattle v. McCready*,
6 *supra*, 123 Wn.2d at 273. The Board did not obtain a warrant authorizing the action that it took on
7 May 16, 2008.

8
9 Nonetheless, the Board can justify its actions if they fall within one of the
10 jealously guarded exceptions to the warrant requirement. The Board bears the burden of proof that
11 its conduct falls into one of those exceptions. *State v. Manthe*, 102 Wn.2d 537 (1984).

12
13 Searches of regulated industries can be conducted without a warrant if three
14 (3) requirements are met:

- 15 1. A substantial governmental interest that informs a regulatory
16 scheme pursuant to which the inspection is made;
- 17 2. The warrantless inspection must be necessary to further the
18 regulatory scheme; and
- 19 3. The inspection program in terms of the certainty and
20 regularity of its application must provide constitutionally
21 adequate substitutes for a warrant. Examples of such
22 substitutes are prior warning to the persons to be searched;
limitations on the scope of the search; and clear restraints on
the discretion of the investigating officers.

23 *New York v. Burger*, 482 U.S. 691, 699-700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Alberado v.*
24 *Washington Public Power System*, 111 Wn.2d 424, 439 (1988).

1 business and/or any premises where a banquet permit has been
2 granted, shall at all times be open to inspection by any liquor
3 enforcement officer, inspector, or peace officer.

4 The Supreme Court of Washington held a similarly worded statute to be unconstitutional in
5 *Washington Massage Foundation v. Nelson*, 87 Wn.2d 948 (1976). In that case, the Court was
6 required to the constitutionality of former RCW 18.108.180 and RCW 18.108.190. The former
7 statute provided as follows:

8 The director or any of his authorized representatives may at any
9 time visit and inspect the premises of each massage business
10 establishment in order to ascertain whether it is conducted in
11 compliance with the law, including the provisions of this
12 chapter, and the rules and regulations of the director. The
operator of such massage business shall furnish such reports
and information as may be required.

13 The second reads as follows:

14 State and local law enforcement personnel shall have the
15 authority to inspect the premises at any time including business
16 hours.

17 The Court ruled that these two statutes did not sufficiently delineate the purpose, scope, time, and
18 place of inspection and were therefore unconstitutional.

19 There is no greater specificity in RCW 66.28.090(1) than in former RCW
20 18.108.180 and RCW 18.108.190. In fact, there is less. The language of former RCW 18.108.180
21 allowed inspections to determine whether the business was being conducted in compliance with the
22 law. There is no such limitation in RCW 66.28.090(1). It allows Board officers to come onto
23 licensed premises for any reason or for no reason at all. It is therefore infirm.
24
25

1 to identify the three factors that must determine the burden of proof required. These are the
2 following:

- 3 1. The nature of the property interest;
- 4 2. The risk of an erroneous deprivation of that interest through the procedures
5 used; and
- 6 3. The government's interest in the added fiscal and administrative burden that
7 the additional burden of proof might cause.

8 144 Wn.2d at 526-27. After analyzing those factors, the Court held that the burden of proof would
9 be clear and convincing evidence.

10 Various agencies reacted to the decision in *Nguyen v. Department of Health, supra*, by
11 attempting to limit the holding of that case to proceedings involving medical doctors. Division One
12 of the Court of Appeals ruled that the holding of *Nguyen v. Department of Health, supra*, would be
13 applied on a profession-by-profession basis. In *Eidson v. Department of Licensing*, 108 Wn.App.
14 712 (2001), it held that the preponderance of evidence standard would apply to disciplinary
15 proceedings brought against a real estate appraiser. By contrast, Division Two of the Court of
16 Appeals saw no distinction between a medical doctor and any other profession. It ruled that the
17 clear and convincing evidence standard applied in an action to revoke an engineering registration in
18 *Nims v. Board of Registration*, 113 Wash.App. 499 (2002).

19
20
21 The Supreme Court resolved this controversy in *Ongom v. Department of Health*, 159
22 Wn.2d 132 (2006). It held that the Department of Health was required to produce clear and
23 convincing evidence to suspend the license of a nursing assistant for alleged abuse of a patient. It
24 found no discernable difference between the due process rights of a medical doctor and a nursing
25

1 assistant based upon the factors identified in *Mathews v. Eldridge, supra*. The Court of Appeals
2 has now acknowledged that the clear and convincing evidence standard applies to all proceedings
3 involving suspension or revocation of a professional license. In *Chandler v. Office of Insurance*
4 *Commissioner*, 141 Wn.App. 639, 644 (2007), it so held in a case involving the license of an
5 insurance agent.
6

7 Just as state agencies attempted to distinguish between the due process rights of a medical
8 doctor and a nursing assistant or other profession, the Board is attempting to distinguish between a
9 “professional license” and a “business license.” The analysis set out in *Mathews v. Eldridge, supra*,
10 shows there is no distinction to be made. The first factor is the nature of the interest in question.
11 Just as the ability of a professional to practice his or her occupation is valuable, Dodge City’s retail
12 liquor license is also valuable. The license allows Dodge City to pursue its chosen business. The
13 Supreme Court has clearly stated that it will tolerate no distinction on the type of the license. As it
14 stated in *Ongom v. Department of Health, supra*:
15

16 We cannot say that Ms. Ongom’s interest in earning a living is any less
17 valuable to her than Dr. Nguyen’s interest in pursuing a career as a medical
18 doctor.

19 159 Wn.2d at 138. Furthermore, Dodge City has expended consider effort and capital in its
20 business. It has employees that depend upon it for their livelihood. If anything, Dodge City’s
21 license may be more valuable than a professional license. Dodge City also has an interest in the
22 preservation of its good name and standing much as did Dr. Nguyen and Ms. Ongom.
23

24 The Board has hinted that Dodge City has no due process rights that it is bound to
25 recognize. However, the legislature has expressed a contrary belief. It has clearly stated that any

1 licensee faced with license suspension is entitled to a hearing before the suspension can be
2 effective. RCW 66.08.150.

3 The Board may also suggest that Dodge City's interest is somehow less valid because it is a
4 corporation and not an individual. This argument ignores the Board's own regulation. When
5 Dodge City obtained its license, all of its shareholders owning more than ten percent (10%) of its
6 stock and all of its officers had to qualify for a license also. WAC 314-07-035.

7 The second factor—risk of erroneous deprivation of rights—also presents no distinction. In
8 *Ongom v. Department of Health, supra*, the Court stated that the risk was no different based upon
9 the profession at issue. 159 Wn.2d at 140.

10 The final factor is the fiscal burden on the governmental agency. In both *Nguyen v.*
11 *Department of Health, supra*, and *Ongom v. Department of Health, supra*, the Court found that the
12 absence of any additional fiscal burden from requiring proof by clear and convincing evidence. As
13 it noted, a change in the burden of proof does not change the cost for the hearing in any way. 159
14 Wn.2d at 141. Furthermore, the Supreme Court has questioned whether seeking a lower burden of
15 proof is in the public interest. As it noted, the overriding public interest lies in obtaining an
16 accurate result. The requirement that any finding be supported by clear and convincing evidence
17 advances that goal.

18 The State of Florida has dealt with the precise question presented here. First, its Supreme
19 Court held that the clear and convincing standard applied in proceedings to revoke a professional
20 license. *Ferris v. Turlington*, 510 S.2d 292 (Fla. 1987). Based on this holding, the Court of
21 Appeals ruled that the clear and convincing standard applied in a proceeding to suspend a store's
22
23
24
25

1 liquor license. *Pic N' Save Central Florida, Inc. v. Department of Business Regulation*, 601 S.2d
2 245 (Fla.App. 1992). There is no reason for Washington to reach any other conclusion.

3 The Board may contend that the clear and convincing evidence standard may not apply
4 because the penalty can be a monetary penalty. That argument lacks merit for a number of reasons.
5 First of all, the Supreme Court has indicated that the precise outcome of the proceeding doesn't
6 matter. The key is whether suspension can occur. *Ongom v. Department of Health, supra*, 159
7 Wn.2d at 140. In this case, the Board has promulgated a penalty regulation that would authorize a
8 five-day suspension or a \$500.00 monetary fine. Furthermore, the Administrative Law Judge only
9 imposed the fine. However, suspension was possible. That means that the clear and convincing
10 evidence standard must apply.
11

12 Furthermore, the regulation also provides for cancellation of the license on the fourth
13 violation within two years. Therefore, each individual violation can amount to a "nail in the coffin"
14 for the ultimate cancellation of a liquor license. It makes no sense only to require clear and
15 convincing evidence for the subsequent violation that would lead to ultimate license cancellation.
16 Since each violation could lead to cancellation, clear and convincing evidence must be required for
17 all violations.
18

19 Finally, and as will be discussed below, the clear and convincing standard may well make a
20 difference in the resolution of this case. Use of the clear and convincing standard would require a
21 determination that there had been no violation.
22

23 ///
24
25

1 III. Failure to Make Findings of Fact.

2 Dan Thrasher gave undisputed evidence concerning his physical problems. These consisted
3 of injuries while in the armed forces; injuries sustained in a car accident; and an injury he received
4 while working in law enforcement. He received a disability retirement. There is no doubt that his
5 gait — one of the observations made on the night in question — is the result of these injuries.
6

7 There was no contrary evidence produced. The Administrative Law Judge should have made
8 findings concerning Mr. Thrasher's undisputed medical history and its effects on him.

9 The Administrative Law Judge also made no finding concerning the length of Mr.
10 Thrasher's interaction with Dodge City personnel. The Board Officers testified that Mr. Thrasher's
11 interaction with the employee who provided him with alcoholic beverage was less than one minute.
12

13 The evidence was also undisputed that Mr. Thrasher had physical possession of a bottle of beer for
14 less than one minute before another employee took the beer from him.

15 Finally, it is undisputed that Mr. Thrasher consumed no alcoholic beverage on Dodge City's
16 premises. The Administrative Law Judge should have made this finding as well.

17 IV. The Findings That Were Made Clearly Show that No Violation Occurred.

18 Dodge City was charged with violation of WAC 314-16-150(2). It provides that "no
19 licensee shall permit any person apparently under the influence of liquor to physically possess
20 liquor on licensed premises." The findings the Administrative Law Judge made clearly
21 demonstrate that Dodge City did not commit this offense.
22

23 In order for a licensee to violate WAC 314-16-150(2), the Board must prove that a person in
24 possession of "liquor" was "apparently under the influence of liquor" at that time. All agency
25

1 regulations are interpreted as if they were statutes. *Children's Hospital v. Department of Health*, 95
2 Wn.App. 858, 864 (1999); *Cobra Roofing Service, Inc. v. Department of Labor & Industries*, 122
3 Wn.App. 402, 409 (2004). The regulation in question can lead to license suspension or a fine. It is
4 therefore considered penal. *State v. Von Thiele*, 47 Wn.App. 558, 562 (1987). All penal statutes
5 are interpreted in accordance with the rule of lenity. That rule requires any ambiguous penal statute
6 to be construed in favor of the person being charged. Its terms must be interpreted to eliminate
7 borderline conduct from the thrust of the enactment. *State v. Roberts*, 117 Wn.2d 576, 585 (1991);
8 *State v. Jacobs*, 154 Wn.2d 596, 601 (2005); *State v. Sullivan*, 28 Wn.App. 29, 31 (1980).

9
10 In this case, it is undisputed that Mr. Thrasher had consumed a prescribed medication —
11 Trazadone — on the night in question. (Finding of Fact No. 17) In Finding of Fact No. 19, the
12 Administrative Law Judge found as follows:
13

14 Side effects of Trazadone are the same or very similar to the indicators of
15 intoxication identified by Officers Kuric and Magerl, i.e. glassy eyes, dilated
16 pupils, droopy eyelids, bobbing head and sleepy appearance. . . .

17 Conversely, the Administrative Law Judge made no finding that Mr. Thrasher was under the
18 influence of any alcoholic beverage. In fact, there is no evidence that he consumed any alcoholic
19 beverage on the evening in question.¹

20 The regulation requires the Board to prove that Mr. Thrasher was “apparently under the
21 influence of liquor.” The regulation is not violated by its terms if, instead, he was under the
22 influence of prescribed medication such as Trazadone. As the Administrative Law Judge found, the
23 symptoms of “Trazadone intoxication” are exactly the same as those of intoxication by liquor. The
24
25

1 import of the Administrative Law Judge's findings is that Mr. Thrasher was under the influence of
2 Trazadone on the night in question. If that was the case, he was most assuredly not "apparently
3 under the influence of liquor." Therefore, the violation was not proven.
4

5 The Administrative Law Judge took the position that the regulation does not require the
6 Board to prove that Mr. Thrasher was actually under the influence of liquor only that he appeared to
7 be under the influence of liquor or intoxicated to those around him. (Conclusion of Law No. 6)
8 That conclusion was erroneous. The regulation requires that the individual in possession of liquor
9 must be "apparently under the influence of liquor." In other words, by its terms, the regulation does
10 indeed require the Board to eliminate all other possible causes of the intoxication in order to
11 prevail. At the very least, the regulation is ambiguous on that point. Therefore, the rule of lenity
12 requires strict construction of the regulation and a necessity of elimination of all other possible
13 causes of intoxication.
14

15 The Board chose the language of regulation in question. It could well have used other
16 language to eliminate this ambiguity. For example, the regulation could provide that "no licensee
17 shall permit any apparently intoxicated person to physically possess liquor on the licensed
18 premises." If that language were used, the cause of the intoxication would not be relevant. Any
19 apparent intoxication would be sufficient. The Board did not choose that language, however. The
20 language of the regulation requires that the intoxication be as the result of liquor.
21

22 The interpretation of the regulation adopted by the Administrative Law Judge is
23 unreasonable because it subjects a licensee to conflicting duties. On the one hand, a licensee cannot
24

25 ¹ Despite the absence of any finding, the evidence is undisputed that Mr. Thrasher did not consume any alcoholic

1 allow a person apparently intoxicated by liquor to physically possess alcoholic beverage. Mr.
2 Thrasher, however, was intoxicated by virtue of consumption of prescribed medication he was
3 taking due to a physical disability. If Dodge City would have denied him service, it would have
4 violated WAC 314-11-070. That regulation requires the premises to be open to the general public.
5 Dodge City would have faced civil liability for discrimination in public accommodations proscribed
6 by RCW 49.60.030(1)(b).
7

8 The regulation also states that the person allowed to possess alcoholic beverage be
9 “apparently under the influence of liquor.” The regulation does not state, however, to whom this
10 intoxication must be apparent or when it must be apparent.
11

12 V. The Findings of Fact are Insufficient to Support the Conclusions of Law Made.

13 a. The Findings Are Insufficient Concerning “Apparent” Intoxication.

14 The regulation requires that the person allowed to possess alcoholic beverage be apparently
15 under the influence of liquor. The regulation does not state, however, to whom this intoxication
16 must be apparent or when it must be apparent. The rule of lenity requires that the “intoxication by
17 liquor” be apparent to the person who has allowed a customer to possess alcoholic beverage. For
18 example, the regulation cannot be reasonably interpreted to allow for the finding of a violation if a
19 licensee allows a person to possess alcoholic beverage when that person was apparently intoxicated
20 at another licensed premises six hours previously.
21

22 There is nothing in the Administrative Law Judge’s findings of fact or in the evidence that
23 any “intoxication” was apparent to the person who sold Mr. Thrasher the beer. The evidence shows
24

25 beverage on Dodge City’s premises.

1 that she interacted with him for less than one minute on a busy Friday night/Saturday morning.
2 There is evidence that Mr. Thrasher walked toward the bar where he made contact with her. There
3 is no evidence, however, as to whether she observed him walking or even had the opportunity to do
4 so given her other duties. There is no evidence that his speech to her was anything other than
5 normal. There is no evidence that he showed any manifestations of any intoxication — from
6 whatever source — during that brief period. Therefore, there is no sufficient evidence that any
7 intoxication was “apparent.”
8

9 b. There is Insufficient Evidence of Possession.

10 According to Board officers, Mr. Thrasher had a bottle of beer in his hand for less than a
11 minute. As soon as Donna Parenteau noted this, she signaled to Raveena Battan to take the bottle
12 away from Mr. Thrasher. She took the beer away from him before the officers could reach him.
13 (Finding of Fact No. 12) These facts do not support the conclusion that Mr. Thrasher was “in
14 possession” of intoxicating liquor.
15

16 Washington courts have addressed the issue of what constitutes “possession” primarily in a
17 context of prosecutions for violation of the Uniform Controlled Substance Act, RCW 69.50. It has
18 long been recognized that person must have actual control, care, and management to possess an
19 item of contraband. Fleeting or momentary control of contraband is not lawful but it is also not
20 sufficient to make out possession. *State v. Callahan*, 77 Wn.2d 27, 29 (1969); *State v. Staley*, 123
21 Wn.2d 800-801 (1994).
22

23 Mr. Thrasher possessed the alcoholic beverage for less than a minute before Ms. Battan
24 took it from him. His possession was of a fleeting nature. Furthermore, if a Dodge City employee
25

1 could deprive him of that beer of no consequence, it cannot be said that he dominion and control
2 over it. It also undisputed that he did not drink any of the beer's contents. Therefore, there can be
3 no conclusion of possession.
4

5 VI. The Board Is Collaterally Estopped from Arguing that a Dodge City Employee "Permitted"

6 Mr. Thrasher to Possess Alcoholic Beverage.

7 a. Facts.

8 Officer Karic testified that he wrote a citation charging Mr. Thrasher with violation
9 of RCW 66.44.200(2)(a). That statute provides as follows:

10 No person who is apparently under the influence of liquor may
11 purchase or consume liquor on any premises licensed by the board.

12 This offense is a civil infraction. Mr. Thrasher requested a hearing as he was allowed to do.
13 RCW 7.80.080. The State had the burden to establish the commission of the infraction by a
14 preponderance of the evidence. RCW 7.80.100(3).
15

16 The Court acquitted Mr. Thrasher because there was no admissible evidence that
17 he had made any such purchase. There was no admissible evidence because the report Officer
18 Karic submitted was not sworn.

19 b. Argument.

20 Collateral estoppel precludes the litigation of an issue that was decided in
21 previous litigation. The purpose of the doctrine is to promote the policy of any disputes,
22 promoting judicial economy, and preventing harassment of an inconvenience to litigants. It is
23 applicable when the issue decided in the prior adjudication is identical with the one presented in
24
25

1 the second matter; the prior adjudication ended in a final judgment on the merits; the party
2 against whom collateral estoppel is asserted was a party or in privity with the party to the prior
3 adjudication; and the application of the doctrine would not work an injustice. *Hanson v. City of*
4 *Snohomish*, 121 Wn.2d 552, 562 (1993); *Pederson v. Potter*, 103 Wn.App. 62, 69 (2000).

6 Dodge City is charged in this matter with violation of WAC 314-16-150(2). As
7 indicated above, it provides that “no retail licensee shall permit any person apparently under the
8 influence of liquor to physically possess liquor on the licensed premises.” The doctrine of
9 collateral estoppel precludes the Board from demonstrating that Dodge City “permitted” Mr.
10 Thrasher to possess alcoholic beverage.

12 In our case, the Board seeks to satisfy the element of “permitting” by claiming that
13 a Dodge City employee sold Mr. Thrasher a bottle of beer. The Board charged Mr. Thrasher with
14 the civil infraction while he was apparently under the influence of liquor. The District Court
15 found that the infraction had not been committed because the Board failed provide admissible
16 evidence that Mr. Thrasher had in fact purchased a beer. This finding means that the Board
17 cannot rely on any alleged purchase of a beer to support its case because the District Court ruled
18 on the merits that there was no purchase.

20 Our case is governed by *Lucas v. Velikanje*, 2 Wn.App. 888 (1970). In that case,
21 the plaintiff’s husband created an irrevocable trust that was unfavorable to her. She sued her
22 husband’s son claiming that the trust was invalid due to duress, undue influence, and
23 misrepresentation practiced by that son on her husband. She also sued Mr. Velikanje — her
24 attorney — for failing to discover evidence of that duress, undue influence, and fraud. Her claim
25

1 against her stepson was tried first. The jury found that there was no fraud, undue influence, or
2 misrepresentation in connection with the execution of the trust. Based on that finding, the trial
3 court ruled that Mr. Valikanje could not be guilty of malpractice for failing to discover bad acts
4 that the jury determined had not occurred. The trial court affirmed.
5

6 In the same way, the Board seeks to support the element of "permitting
7 possession" by evidence to the effect that Mr. Thrasher purchased a bottle of beer from a Dodge
8 City employee. The District Court concluded, however, that Mr. Thrasher did not purchase a
9 bottle of beer from any Dodge City employee. Therefore, there can be no finding that Dodge
10 City "permitted" Mr. Thrasher to possess alcoholic beverage.
11

12 VII. Justice Requires Dismissal of These Charges.

13 Mr. Thrasher was first greeted by Donna Parenteau at the front door of the premises. Ms.
14 Parenteau believed that Mr. Thrasher should not be served. It was her desire to get the attention
15 of Dodge City personnel who would write an "x" on the back of Mr. Thrasher's hand. All agree
16 that Dodge City personnel will not serve anyone with such a marking. Ms. Parenteau could not
17 leave her station, however, because she would necessarily abandon the till for the cover charge
18 that she was taking.
19

20 Officer Karic understood that Ms. Parenteau was attempting to flag down a security
21 person to place the "x" on the back of Mr. Thrasher's hand. He could have watched her till and
22 asked Mr. Thrasher to remain until security personnel came to put the "x" on the back of Mr.
23 Thrasher's hand. He could have gone to get a security person and directed him to go to the front
24 door where Ms. Parenteau and Mr. Thrasher were interacting. He could have asked Mr. Thrasher
25

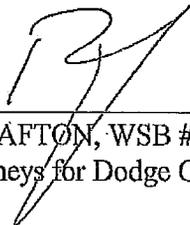
1 to accompany him while the two went to get a security person who would then put the "x" on Mr.
2 Thrasher's hand. Had he taken any of those three steps, the violation the Board now wishes to
3 prosecute would never had occurred.
4

5 When a Board Officer could and should have taken action to prevent a violation, the
6 Board should not be allowed to prosecute that violation. Its doing so demonstrates to licensees
7 that the Board was not interested in taking constructive action. Rather, it shows that the Board
8 will go to any length to prosecute any violation regardless of the licensee's good faith or attempts
9 to comply with the regulations the Board has enacted. On that basis alone, all charges against
10 Dodge City should be dismissed.
11

12 VIII. Conclusion.

13 For the reasons indicated above, all charges against Dodge City should be dismissed.

14 RESPECTFULLY SUBMITTED this 30 day of Oct, 200

15
16
17 
18 _____
19 BEN SHAFTON, WSB #6280
20 Of Attorneys for Dodge City
21
22
23
24
25

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NOV 05 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

October 30, 2009

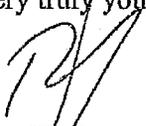
Washington State Liquor Control Board
Vancouver Enforcement and Education Division
12501 NE 99th Street, Suite A-100
Vancouver, WA 98682

RE: Dodge City Saloon, Inc.,
License/Permit No.: 365465

To Whom It May Concern:

Enclosed is our Petition for Review. Thank you for your attention to this matter.

Very truly yours,


Ben Shafton

Enclosure
BCS:lv

cc: Ray Kutch – Dodge City Saloon, Inc.
Gordon Karg

RECEIVED

NOV 17 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

IN THE MATTER OF:

DODGE CITY SALOON, INC.
DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661

LICENSEE

LICENSE NO. 365465

OAH No. 2008-LCB-0030
LCB No. 22,834

RESPONSE TO LICENSEE'S
PETITION FOR REVIEW

The Washington State Liquor Control Board, Enforcement and Education Division (Enforcement) by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GORDON KARG, Assistant Attorney General, now responds to the Petition for Review filed by Dodge City Saloon, Inc. d/b/a Dodge City Bar and Grill (Licensee) in the above-captioned matter.

I. INTRODUCTION

On June 16, 2008 the Washington State Liquor Control Board issued a Complaint charging the Licensee with a violation of WAC 314-16-150(2) which prohibit a Licensee, or an employee thereof, from permitting a person apparently under the influence of liquor to possess liquor on the licensed premise. Namely, that Enforcement Officers observed Mr. Dan Thrasher apparently under the influence of liquor while in possession of alcohol on the licensed premise.

1 See Exhibit (Ex.) 1; Ex. 4. A formal administrative hearing was set for this matter to be held
2 on December 8, 2008. The hearing was continued *sua sponte* to be held on January 21, 2009.
3 On the day of hearing, Licensee's counsel engaged in surprise when it raised substantive issues
4 of collateral estoppel and the appropriate burden of proof at the beginning of the hearing
5 without any prior warning or briefing to the Administrative Law Judge (ALJ) or Enforcement's
6 counsel.

7 Prior to the adjournment of that hearing, counsel for both Enforcement and the
8 Licensee provided brief oral closing arguments. The record was held open at that time to
9 address issues of the admission of additional evidence and further closing argument. At the
10 order of the ALJ a telephonic conference was held on March 9, 2009, regarding scheduling
11 briefing for the remaining matters. At the March 9, 2009 conference, the Tribunal gave leave
12 to engage in limited final briefing and argument. Subsequently, Enforcement filed and served
13 its concluding argument in this matter on March 19, 2009. The Licensee filed and served its
14 response, in the form of a "Hearing Memorandum" on March 30, 2009. Enforcement then
15 filed its reply to the Licensee's hearing memorandum on April 6, 2009.

16 On March 9, 2009, the day of the conference, the Licensee filed a motion to suppress.
17 The ALJ denied the motion, essentially, on the grounds that leave had only been given to brief
18 already specified issues and the ALJ would consider only those issues. Based on this,
19 Enforcement never responded to the motion to suppress.

20 After all briefing was filed the record was closed on April 6, 2009. The ALJ issued an
21 Initial Order with finding of facts (FOF) and a conclusion of law (COL) on October 10, 2009.
22 The Licensee filed a timely petition for review and Enforcement now responds.

23 II. ARGUMENT

24 A. Licensee's Petition Only Reiterates Previous Argument

25 The Licensee's Petition appears to simply regurgitate, for the most part, the exact same
26 language and arguments presented to the ALJ. These arguments and motions, and their

1 responses will be before the Board when it makes its determination as to whether the Initial
2 Order should be sustained. Therefore, Licensee's petition really posits no new argument or
3 fresh assertions. As a result, Enforcement will rely primarily on its previous briefings in
4 response to the Licensee's multitude of motions, both timely and untimely. However,
5 Enforcement will now make additional responses as it deems necessary.

6 **B. Challenge To The ALJ's Ruling To Dismiss Licensee's Motion To Suppress**

7 The Licensee argues the ALJ was erred in dismissing its motions to suppress evidence,
8 arguing that the evidence presented by Enforcement was obtained in violation of the Forth
9 Amendment to the United States Constitution and Article 1, Section 7 of the Washington State
10 Constitution. Petition at 2-3. This argument is based on the assumption that the evidence
11 sought to be suppressed¹ was obtained through a warrantless search and the statute which
12 allows Enforcement officers to enter and inspect a licensed premise is facially unconstitutional.
13 *Id.* at 3-6.

14 **1. Licensee's motion was untimely.**

15 The Licensee failed to raise this issue in a timely manner and it was dismissed on those
16 grounds by the ALJ. The substance of the Licensee's motion was never considered by the ALJ
17 nor was Enforcement given an opportunity to respond. Given that the issue was never
18 substantively decided by the ALJ, there is no proper argument or determination in the record
19 the Board or a reviewing court to consider. Licensee may not raise this argument for the first
20 time in its petition for review and its argument on this issue should be ignored by the Board.

21 **2. Warrantless searches and statutory authority to inspect.**

22 Even if this matter was to be considered by the Board for the first time, the Licensee's
23 argument still fails to establish that an unconstitutional search took place. Warrantless
24 inspections of liquor licensed premises are authorized by statute. RCW 66.28.090.² Because

25 ¹ The Licensee's motion had sought to broadly suppress the testimony of "Mr. Mangan's testimony and the
26 testimony of any other Board officer or police officer that observed him." Licensee's Motion to Suppress at 13.

² RCW 66.28.090 Provides that: "(1) All licensed premises used in the manufacture, storage, or sale of liquor, or
any premises or parts of premises used or in any way connected, physically or otherwise, with the licensed

1 no warrant was sought or acquired in this matter, the Licensee’s argument for suppression rests
2 largely on its assertion that RCW 66.28.090 is constitutionally inadequate to authorize a
3 warrantless search of its premise. Petition at 3-6.

4 However, before the Licensee can reach the issue of whether RCW 66.28.090 meets
5 constitutional “muster” they must first establish, as a factual matter, that the conduct engaged
6 in by Enforcement was not subject to one of the valid warrantless-search exceptions
7 established by case law.

8 “[A] search occurs under the Fourth Amendment if the government intrudes upon a
9 reasonable expectation of privacy.” *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000);
10 *State v. Lakotiy*, 151 Wn. App. 699, 711, 214 P.3d 181 (2009). While the Licensee also
11 invokes Article 1, Section 7 of the Washington State Constitution as well, federal analysis
12 frequently guides Washington courts because both court systems recognize “similar
13 constitutional principles.” *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007)³.

14 One traditional exception to the warrant requirement is valid consent. *State v.*
15 *Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). In criminal cases, the State has the
16 burden of proving that the defendant voluntarily consented, that the defendant had the authority
17 to consent, and that the search did not exceed the scope of the consent. *Bonneville v. Pierce*
18 *County*, 148 Wn. App. 500, 511, 202 P.3d 309 (2009). “Significantly, consent requirements
19 are less stringent for an administrative inspection.” *Cranwell v. Mesec*, 77 Wn. App. 90, 102,
20 890 P.2d 491 (1995); *Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (2009).
21 “The court will consider various factors to determine whether consent was properly given,
22

23 business, and/or any premises where a banquet permit has been granted, shall at all times be open to inspection by
24 any liquor enforcement officer, inspector or peace officer. (2) Every person, being on any such premises and
25 having charge thereof, who refuses or fails to admit a liquor enforcement officer, inspector or peace officer
26 demanding to enter therein in pursuance of this section in the execution of his/her duty, or who obstructs or
attempts to obstruct the entry of such liquor enforcement officer, inspector or officer of the peace, or who refuses
to allow a liquor enforcement officer, and/or an inspector to examine the books of the licensee, or who refuses or
neglects to make any return required by this title or the regulations, shall be guilty of a violation of this title.”

1 including whether there is evidence of intimidation, coercion or misrepresentation.”
2 *Bonneville*, 148 Wn. App. at 511. Furthermore, in an administrative inspection, state agents
3 are not required to inform a license or permit holder of their right to refuse consent so long as
4 the purpose of the inspection is to determine if the licensee or permit holder is complying with
5 all applicable regulatory conditions. *Id.* at 512.

6 Here the record indicates that the liquor agents entered the Licensee’s premises and
7 identified themselves to an employee, shortly thereafter. Initial Order FOF ¶3-6. The Liquor
8 agents also spoke with the manager on duty, Mr. Tony Kutch. *Id.* at ¶8. Nothing in the record
9 indicates the Liquor Enforcement Officers had any purpose other than to ensure the Licensee
10 was complying with all applicable regulatory laws and rules. *See* Initial Order FOF ¶2; Ex. 1;
11 Ex. 4. Nothing in the record indicates the Officers were asked to leave by any employee.
12 Initial Order FOF ¶6, ¶8, ¶11, ¶16. Nothing in the record indicates the Officers entered any
13 portion of the premise not regularly held open to the public by the Licensee. *Id.* at ¶8.
14 Nothing in the record indicates the Officers intimidated or coerced anyone to allow them to
15 inspect the premise. *Id.* Nor is there any evidence that they misrepresented either themselves
16 or their purpose in order to gain access to the Licensee’s premise. *Id.*

17 Even setting aside the issue of the constitutionality of RCW 66.28.090, the inspection at
18 issue here was one voluntarily consented too by the Licensee’s employees, including the
19 manager on duty. The inspection by the Officers was lawful.

20 **3. The Board lacks jurisdiction to review the constitutionality of RCW**
21 **66.28.090.**

22 The Licensee’s original motion to suppress and its petition for review now before the
23 Board, also posits a facial constitutional challenge to RCW 66.28.090. Petition at 5-6.
24 Administrative tribunals are a creature of statute and lack the authority to resolve the type of
25 constitutional challenge at issue here. *See* Washington State Constitution Art. IV, § 6 (granting
26 superior courts original jurisdiction to hear constitutional issues); RCW 34.05.570(3)(a)

1 (determination by a superior court that an agency order based on a statute or rule which is
2 unconstitutional on its face or as applied is a basis to overturn agency order on judicial review);
3 *Standing v. Dept. of Labor and Industries*, 92 Wn.2d 463, 466-467, 598 P.2d 725 (1979)
4 (because an administrative agency declined to rule on the constitutionality of a statute, due to
5 lack of jurisdiction, it became the sole issue before the Court on appeal). The Board lacks
6 jurisdiction to resolve constitutional arguments, it should decline consideration of Licensee's
7 facial challenge to the constitutionality of RCW 66.28.090.

8 **C. The Preponderance Of The Evidence Standard Is Appropriate In Liquor
9 Enforcement Proceedings**

10 The Licensee argues, as is did in its "Hearing Memorandum" filed, after the hearing, on
11 March 30, 2009, that the ALJ should have applied the "clear and convincing evidence"
12 standard in this matter based on the *Ongom* and *Nugyen* decisions. Petition at 6-10.

13 The Licensee's argument in its Petition is almost word-for-word exactly the same
14 argument it posited in its briefing. *Compare* Hearing Memorandum at 4-8 *and* Petition 6-10.
15 Enforcement has fully responded the Licensee's arguments on this issue in its Concluding
16 Argument and its Reply to Licensee's Hearing Memorandum respectively and incorporates
17 those arguments herein by reference. For the ease of the Board, the Licensee also provides the
18 following additional argument.⁴

19 The Licensee ignores the basic legal tenant that the preponderance standard used in
20 civil proceedings is applied in administrative hearings in Washington unless otherwise
21 mandated by statute or due process principles. *Thompson v. Department of Licensing*, 138
22 Wn.2d 783, 797, 982 P.2d 601 (1999); *see also Steadman v. Securities & Exchange Comm'n.*,
23 450 U.S. 91, 103-04, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981); *Ingram v. Dept. of Licensing*, 162
24 Wn.2d 514, 518, 173 P.3d 259 (2007) (noting that civil driver's license suspension proceedings
25 have a lower burden of proof then the parallel criminal proceeding.)

26 ⁴ Enforcement's argument in this reply is essentially the same as that set out in its response to the same issue raised in the Licensee's petition for review in LCB Case No. 22, 849.

1 A specific, non-statutory, exception to the general rule arises in professional license
2 disciplinary proceedings. *Nguyen*, 144 Wn.2d at 524, 29 P.3d 689; *Ongom v. Department of*
3 *Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006). In creating this exception to the general rule,
4 the Washington State Supreme Court held that professional healthcare license revocation
5 proceedings “instigated by the state” involved “a stigma more substantial than mere loss of
6 money”. *Nguyen*, 144 Wn.2d at 529, 29 P.3d 689; *Ongom*, 159 Wn.2d at 139, 148 P.3d 1029.

7 A liquor license is nothing like a professional license. Recently the Washington State
8 Court of Appeals, Division Two, held that erotic dancers were not holders of a professional
9 license and, therefore, the *Ongom* opinion would not apply in an administrative hearing
10 determining whether an erotic dancer permit should be suspended. *Brunson v. Pierce County*,
11 149 Wn. App. 855, 205 P.3d 963 (2009). The Court relied on RCW 18.118.020 to establish
12 what constituted a “professional license” in Washington State:

13 “‘Professional license’ means an individual, nontransferable authorization to
14 carry on an activity based on qualifications which include: (a) Graduation from
15 an accredited or approved program, and (b) acceptable performance on a
16 qualifying examination or series of examinations.”

17 *Brunson*, 149 Wn. App. at 865.

18 A liquor license does not convey a legal right to carry on an activity based upon
19 graduation from an accredited program and a qualifying exam; rather, it conveys only the
20 privilege to sell alcohol out of a licensed business. RCW 66.24.010. Liquor licenses are
21 issued to business entities, not individuals. RCW 66.24.010; WAC 314-07-010(4); WAC 314-
22 07-035. A liquor license is transferrable when ownership of the licensed business entity
23 changes. WAC 314-07-080. In short, a liquor license fails to meet any of the criteria
24 established by the *Brunson* court for what qualifies as a “professional license.” *Brunson*, 149
25 Wn. App. at 865-66. Accordingly, *Ongom* does not apply to the present matter.

26 In comparison, adjudications involving the revocation of a non-professional license or
permit have been found to be subject to the preponderance standard just as in any other civil

1 proceeding. See e.g. *Bonneville*, 148 Wn. App. 500. In *Bonneville* the appellant held a
2 conditional use permit, issued by Pierce County, to conduct a business out of his home. *Id.* at
3 504. County investigators alleged the permit holder violated several use permit conditions. *Id.*
4 at 505-06. After an administrative hearing, the hearing examiner concluded, by a
5 preponderance of the evidence, that the permit holder had violated three conditions of the use
6 permit and subsequently revoked the permit. *Id.* at 506.

7 On appeal, the appellant contended that the County had violated his Due Process rights
8 when the hearing officer failed to apply the clear, cogent and convincing standard of proof. *Id.*
9 at 515. In doing so, the appellant relied, in part on *Nguyen*. *Id.* at 317. Division Two held that
10 the reliance was misplaced as the interest at issue in *Nguyen* was far more significant a
11 property interest, namely, a professional license. *Id.* The Court went on to note that the
12 preponderance standard satisfied due process “when the interest at stake was a 14-day
13 involuntary civil commitment.” *Id.* at 517, citing *In re Det. of LaBelle*, 107 Wn.2d 196, 220-
14 21, 728 P.2d 138 (1986). The Court held that “if the preponderance standard met due process
15 for a 14-day involuntary civil commitment . . . it surely meets due process for revoking a
16 conditional land use permit.” *Id.* The Court concluded by reasserting the general rule: that the
17 preponderance standard generally applies to all civil matters. *Id.*

18 Furthermore, In *Bang Nguyen* the Court specifically notes that Due Process requires
19 clear and convincing standard in civil adjudications only when necessary “to protect particular
20 important individual interests.” *Bang Nguyen*, 144 Wn.2d at 525. The Court went on to note
21 that the standard was only appropriate when “the individual interests at stake are more
22 substantial than mere loss of money.” *Id.* at 527-28.

23 A liquor license cannot be held by an individual and does not represent an individual
24 property interest, but rather a property interest held by an entity and its “true parties in
25 interest”. WAC 314-07-010(4). Clearly, in the license application process individuals who
26 have some potential control over the business operation, the “true parties in interest”, must be

1 vetted for potentially troubling criminal history. WAC 314-07-035, 040. None of these
2 individuals, though, holds a liquor license in their name, nor does such a license convey the
3 right to practice a profession⁵. Moreover, the interest at stake in this matter, and in all liquor
4 license hearings, is always the same - “a mere loss of money”, whether it is in the form of the
5 funds paid for the fine or the loss of revenue associated with a suspension or revocation of the
6 license. *See Bang Nguyen*, 144 Wn.2d at 525-26. The Licensee here does not have an
7 individual interest and the only interest at stake is a “mere loss of money.”

8 The Licensee also suggests that “Dodge City” has an interest avoiding some
9 unspecified injury to its “reputation” equivalent to a professional individual who faces possible
10 discipline for violating the law in the course of their professional duties. Petition at 8. The
11 Licensee has provided no evidence that “Dodge City” has a reputation in the community that
12 would be affected by the outcome of the current matter. More importantly, the Court in
13 *Ongom* noted that both Dr. Nguyen and Ms. Ongom had a liberty interest in their professional
14 reputations and that *professional* discipline was stigmatizing. *Ongom*, 159 Wn.2d at 139. The
15 Licensee provides no authority to support the contention that a corporation, holding a liquor
16 license, is legally considered to have the same liberty interests, or would face the same
17 professional stigma if disciplined, as an individual human holding a professional license.
18 Licensee’s argument defies the law and common sense.

19 Furthermore, the sale of alcohol is a highly regulated industry, not only in Washington
20 State, but throughout the nation. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72,
21 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *see also Jow Sin Quan v. Washington State Liquor*
22 *Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966). A license to engage in the retail sale
23 of liquor does not constitute a vested property right, but rather “a temporary permit, in the
24 nature of a privilege, to engage in a business that would otherwise be unlawful.” *Id*; *see also*

25 _____
26 ⁵ A liquor license may be held by a sole proprietor, but that license is still held by a business entity with a separate
license to conduct business in Washington State and the proprietor is the only true party in interest.

1 *Scottsdale Insurance Co. v. Intl. Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058
2 (2001) (noting that a liquor license is “merely representative of a privilege granted by the
3 state”).

4 Nothing indicates a liquor license is in any way similar to a professional license. The
5 preponderance of the evidence standard is the appropriate burden of proof in this matter, just as
6 in all other administrative hearings absent statute or other legal authority to the contrary.
7 *Thompson*, 138 Wn.2d 783 at 797.

8 **D. Insufficiency Of The Evidence And Collateral Estoppel**

9 The Licensee argues that there was insufficient evidence to demonstrate that Mr.
10 Thrasher, was actually “apparently under the influence of liquor”, or that he was in possession
11 of alcohol. Petition at 11-15. The Licensee also argues that the ALJ should have been
12 collaterally estopped from finding that Mr. Thrasher was “permitted” to possess alcohol by the
13 Licensee’s employees. Petition at 16-18 Again, the Licensee fails to set forth any new
14 argument on any of these issues and, instead, appears to simply rely on the language from
15 previous briefing. As Enforcement has already thoroughly responded to all of these arguments
16 in its Concluding Argument, Reply to Licensee’s Hearing Memorandum and its Rebuttal to
17 Licensee’s Response to Motion in Limine, respectively. Enforcement incorporates all such
18 arguments and briefing herein in way of response to Licensee’s petition.

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III. CONCLUSION

For the foregoing reasons, Enforcement respectfully requests that the Initial Order in this matter be sustained.

DATED this 17 day of November, 2009.

ROBERT M. MCKENNA
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**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

OAH NO. 2008-LCB-0030

DODGE CITY SALOON, INC.
DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661

LCB NO. 22,834

DECLARATION OF SERVICE

LICENSEE

LICENSE NO. 365465

I declare under penalty of perjury under the laws of the state of Washington that on November 17, 2009, I served a true and correct copy of the *Response to Licensee's Petition for Review* by placing same in the U.S. mail with proper postage affixed to:

Ben Shafton
Caron, Colven, Robison & Shafton, P.S.
900 Washington Street. Ste 1000
Vancouver, WA 98661

DATED this 17th day of November, 2009 at Olympia, Washington.



NICOLE TEETER, Legal Assistant