

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

THE ROYAL INN, INC.  
d/b/a THE ROYAL INN  
208 HOLLY ST E  
BELLINGHAM, WA 98225-5024

LICENSEE

LICENSE NO. 353649-3B  
AVN: 3B9157B

LCB NO. 23,570

OAH NO. 2009-LCB-0050

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated November 17, 2009, alleging that on June 6, 2009 the above-named Licensee, or employee(s) thereof, allowed an apparently intoxicated person to possess and/or consume liquor on the license premises, contrary to RCW 66.44.200 and/or WAC 314-16-150.

2. An administrative hearing was held on March 29, 2010, before Christy Gerhart Cufley, Administrative Law Judge. ALJ Cufley entered an order dated and mailed on June 8, 2010, setting aside the complaint.

3. The Education and Enforcement Division of the Board filed a Motion to Extend Time to file a Petition for Review, which was granted by the Board. The Education and Enforcement Division, through its attorney Assistant Attorney General Brian Considine, filed a Petition for Review on July 14, 2010.

4. The Licensee, through its attorney Joel D. Matteson of Tario & Associates, P.S., filed a Response to Enforcement's Petition for Review on July 29, 2010.

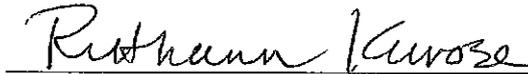
5. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE; IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Initial Order issued by the Administrative Law Judge is adopted, with the exception of Conclusions of Law Nos. 14 and 15, and footnote 9, which are not adopted.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,570 is DISMISSED.

DATED at Olympia, Washington this 10 day of August, 2010.

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, 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).



**Washington State  
Liquor Control Board**

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August 10, 2010

Michael J. Tario, Attorney for Licensee  
119 N Commercial St  
Bellingham, WA 98225-4452

The Royal Inn, Inc., Licensee  
d/b/a The Royal Inn  
208 Holly St E  
Bellingham, WA 98225-4721

Brian Considine, 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. 3B9157B  
LICENSEE: The Royal Inn, Inc.  
TRADE NAME: The Royal Inn  
LOCATION: 208 Holly St E, Bellingham, WA 98225  
LICENSE NO. 353649  
LCB HEARING NO. 23,570  
OAH No. 2009-LCB-0050  
UBI: 601 802 668 001 0001**

Dear Parties:

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

If you have any questions, please contact me at (360) 664-1602.

Sincerely,

  
Kevin McCarroll  
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Bellingham Enforcement and Education Division, WSLCB  
Amber Harris, WSLCB

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2  
3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 THE ROYAL INN, INC.  
6 d/b/a THE ROYAL INN  
7 208 E HOLLY ST  
8 BELLINGHAM WA, 98225

LCB NO. 23,570  
OAH NO. 2009-LCB-0050

DECLARATION OF SERVICE BY  
MAIL

9 LICENSEE

10 LICENSE NO. 353649-3B  
AVN: 3B9157B

11 I declare under penalty of perjury under the laws of the state of Washington  
12 that on August 10, 2010, I served a true and correct copy of the FINAL ORDER OF THE BOARD  
13 in the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage  
14 prepaid, to all parties or their counsel of record.

15 DATED this 10<sup>th</sup> day of August, 2010, at Olympia, Washington.

16  
17   
18 Kevin McCarroll, Adjudicative Proceedings Coordinator

19 MICHAEL J. TARIO, ATTORNEY FOR  
20 LICENSEE  
21 119 N COMMERCIAL ST STE 1000  
22 BELLINGHAM, WA 98225-4452

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

23 THE ROYAL INN, INC., LICENSEE  
24 d/b/a THE ROYAL INN  
25 208 HOLLY ST E  
26 BELLINGHAM, WA 98225-4721

DECLARATION OF SERVICE BY  
MAIL

1

Washington State Liquor Control Board  
3000 Pacific Avenue SE  
PO Box 43076  
Olympia, WA 98504-3076  
(360) 664-1602

MAILED

JUN 08 2010

SEATTLE - OAH

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

IN THE MATTER OF :

The Royal Inn  
208 Holly Street E  
Bellingham, WA 98225

Licensee.

License No. 353649  
AVN No. 3B9157B

OAH No. 2009-LCB-0050  
Agency No. 23,570

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

STATEMENT OF THE CASE

On June 11, 2009 the Washington State Liquor Control Board, Education and Enforcement Division (Board hereafter) issued an Administrative Violation Notice (AVN) to the licensee, Brian Tines, dba The Royal Inn, located at 208 Holly Street E, 98225, Bellingham, in Whatcom County, Washington, for allegedly "allowing an apparently intoxicated patron to possess/consume liquor" on the licensed premises on June 6, 2009 in violation of WAC 314-16-150, and assessing as the 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.

On November 17, 2009, the Board issued a formal written complaint alleging that "on or about June 6, 2009, the above-named Licensee, or an employee(s) thereof, allowed an apparently intoxicated person to possess and/or consume liquor on the licensed premises contrary to RCW 66.44.200 and/or WAC 314-16-150." <sup>1</sup>

The licensee filed a timely request for an administrative hearing on June 17, 2009.<sup>2</sup>

The matter came on for hearing pursuant to due and proper notice at Bellingham, Washington, on March 29, 2010 before Christy Gerhart Cufley, Administrative Law Judge, Office of Administrative Hearings.

The licensee, Brian Tines, Owner of The Royal Inn, Inc., dba The Royal Inn, appeared and was represented by Michael J. Tario, Attorney. The Education and

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<sup>1</sup>Exhibit 1A.

<sup>2</sup>Exhibit 1, p.2.

Enforcement Division of the Washington State Liquor Control Board appeared and was represented by Brian Considine, Assistant Attorney General. Liquor Enforcement Officers (Sgt.) Rafael Lucatero,<sup>3</sup> Kevin Russom, Ian Lawson, and Emma Davis appeared and presented testimony on behalf of the Board.

In addition to the licensee, Brian Tines, Owner of The Royal Inn, three employees appeared and presented testimony on behalf of the licensee: Ty Ericson (Bartender), Shawn Reilly (Doorman), and Trevor Parrick (Doorman and occasional Bartender).

The record remained open for the submission of stipulated findings, and was closed effective April 12, 2010.

Based upon the evidence presented, the undersigned administrative law judge makes the following findings as stipulated to by the parties:

### FINDINGS OF FACT

#### STIPULATED FINDINGS

1. The Washington State Liquor Control Board regulates the conduct of licensees to ensure compliance with applicable laws related to the serving of alcohol in the State of Washington.
2. The Royal Inn, Inc., is the licensee and owner of The Royal Inn, the licenses premises at issue in this matter, located at 208 E. Holly Street, Bellingham, 98225, in Whatcom County, Washington. The licensee has been licensed to sell liquor at the licensed premises since April 1998.
3. The licensee holds a spirits/beer/wine restaurant and lounge liquor license issued by the Washington State Liquor Control Board.
4. On June 6, 2009, Sergeant Rafael Lucatero, Officer Kevin Russom, Officer Ian Lawson, and Officer Emma Davis conducted an undercover premises check at the licensee's premises.
5. Sergeant Rafael Lucatero, Officer Kevin Russom, Officer Ian Lawson, and Officer Emma Davis are liquor enforcement officers with the Washington State Liquor Control Board Enforcement and Education Division.

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<sup>3</sup>Sgt Lucatero provided testimony via telephone with no objections noted by any party.

6. Upon entering The Royal Inn, Officer Lawson and Officer Davis noticed a man with a plaid baseball hat, later identified as Ian Alexander Hart, displaying signs of apparent intoxication. Officer Lawson and Officer Davis observed Mr. Hart for approximately twenty (20) minutes inside the bar.
7. Officer Lawson observed Mr. Hart at the downstairs bar and also speaking with Ty Ericson, a bartender. Mr. Hart received a cup of water from Mr. Ericson.
8. Mr. Ericson, a bartender at The Royal Inn, refused to serve alcohol to Mr. Hart because Mr. Hart appeared intoxicated. Instead, Mr. Ericson served Mr. Hart a cup of water.
9. After the lights were turned on, Officer Davis and Officer Lawson observed Mr. Hart possessing and drinking from a glass containing a dark-colored liquid.
10. At approximately 1:40 a.m. on Saturday, June 6, 2009, Sergeant Lucatero and Officer Russom contacted Mr. Hart inside the Licensee's premises. Mr. Hart had a dark-colored drink in his hand and was displaying signs of intoxication when the Enforcement Officers contacted him.
11. The drink in Mr. Hart's possession contained alcohol and is considered liquor pursuant to RCW 66.04.010(24)
12. Mr. Hart was apparently intoxicated the entire time he was inside The Royal Inn.
13. Mr. Hart was not served liquor by any employee of The Royal Inn.

### **ADDITIONAL FINDINGS**

The following are additional findings of fact entered by the undersigned administrative law judge to which the parties did not specifically stipulate:

14. The owner and licensee, Brian Tines, has been involved in the restaurant industry for approximately 26 years. He owns and operates three other establishments in the surrounding area: Big Fat Fish company (in Bellingham), Main Street Bar & Grill (in Ferndale), and the Fairhaven Pub & Martini Bar (in Fairhaven).

15. Officers Davis and Lawson entered the establishment at approximately 1:15 a.m.<sup>4</sup> or 1:20 a.m.<sup>5</sup> They recognized Mr. Hart from having observed him earlier in the evening at another establishment. They subsequently contacted the two outside officers at approximately 1:35 a.m., and Officer Russom and Sgt. Lucatero who entered the establishment within several minutes thereafter and observed Mr. Hart possess and consume liquor.

16. Upon entering the premises, the "lights were up," and the staff was actively engaged in "closing time" activities (closing out tabs, pulling drinks from the floor, cleaning, and clearing the patrons from the establishment by directing them to exit through the front door).

17. At the time Mr. Hart entered the premises (within only a few minutes prior to Officers Davis and Lawson), the door staff did not require him to pay a cover charge because it was so late in the evening. He advised the door staff that he was only there to meet his friends for a ride home, and he was advised by the door staff to "get some water."

18. No AVNs were issued to the individual employees (i.e., any of the other bartenders, doormen, or staff) involved.<sup>6</sup> There was no violation issued for allowing an apparently intoxicated person to enter the premises.

19. On June 11, 2009 Sgt. Lucatero served the AVN at issue herein on the licensee at the subject premises, and explained the various options.

20. The Board has issued a prior AVN to the licensee within the preceding two years for the sale or service of alcohol to an apparently intoxicated person.<sup>7</sup> The licensee elected to pay the monetary civil penalty assessed in that matter of five hundred dollars (\$500) in lieu of a license suspension.<sup>8</sup>

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<sup>4</sup>Officer Davis Narrative Report. Exhibit 5.

<sup>5</sup>Officer Lawson Narrative Report. Exhibit 4.

<sup>6</sup>It is not uncommon for the Board to issue AVNs to both the individual employee and the licensee based on the same incident.

<sup>7</sup>AVN No. 3C9038A. Exhibit 6.

<sup>8</sup>The Board has also issued one subsequent AVN to the licensee alleging an employee engaged in conduct presenting a threat to public safety (alleged violation date of October 10, 2009). Such was not considered by the Board because it involved a violation of a different type than the one charged herein.

21. 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, The Royal Inn, Inc., dba The Royal Inn, 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.

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.

Emphasis supplied.

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.

Emphasis supplied.

7. 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.<sup>9</sup>

8. The actions of a licensee's employees are attributed to the licensee, and the licensee will be held responsible for the actions of its employees if the Board establishes by a preponderance of credible evidence that the alleged violation (i.e., in this case allowing an apparently intoxicated person to possess and/or consume liquor on the licensed premises) occurred.

9. The parties have stipulated that on June 6, 2009 at the licensed premises an apparently intoxicated male patron (Mr. Hart) was in possession of and consuming liquor. The question for ultimate resolution is whether or not the licensee (or an employee of the licensee) allowed or permitted such action to occur in violation of WAC 314-16-150(2).

10. The definition of the word "permit" is crucial to the resolution of this matter. The Board argues that the term has been previously and clearly defined and submits as authority for its proposition a Final Order of the Board dated January 26, 2009 (LCB No. 22,838--Family Legacy Restaurants dba Pete's Bar and Grill) ) which held (at page 3) as follows:

The appropriate legal test for whether a Licensee has permitted an apparently intoxicated person to possess alcohol in violation of WAC 314-16-

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<sup>9</sup>Operation 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.

150 is contained in the case law of *Reeb Inc. v. Washington State Liquor Control Board*, 24, Wn. App. 349 (1979) and *Oscar's Inc. v. Washington State Liquor Control Board*, 100 WN. App. 498 (2000). That test is whether the facts establish that a Licensee had at least constructive knowledge of circumstances that would foreseeably lead to the prohibited activity (possession and/or consumption of liquor by an intoxicated person) and acquiesced to or failed to prevent from occurring either the prohibited activity of the circumstances which could reasonably lead to the prohibited activity.<sup>10</sup>

11. In *Reeb v. Liquor Control Board*, 24 Wn. App, 349, 600 P.2d 578 (1979) the court held that a licensee is deemed to have "permitted" the prohibited conduct when he takes no action in spite of any actual or constructive knowledge of circumstances which would foreseeably lead to the prohibited conduct, and, further, that the licensee need not have actually sanctioned the conduct. The court noted that the licensee in that case was aware of the propensity of its dancers to engage in questionable conduct but chose nevertheless to maintain topless dancing on its premises; the court also noted that both the bartender and a "floor girl" had unobstructed views of a fellow employee ("Annie Fannie"), and had but to look to observe the same conduct as that observed by the liquor control board enforcement officer witnessing the violation.

12. Yet, contrary to reaffirming the blanket analysis of foreseeability, the court held in *Oscar's Inc. v. Washington State Liquor Control Board*, 100 Wn. App. 498 (2000) that the licensee "had not knowingly allowed illegal drug activity on the licensed premises." The court went on to hold:

We do not think the application of the *Reeb* standard is appropriate in the present context. In this case, "knowingly permit" requires more than awareness of circumstances which could foreseeably lead to the prohibited drug transactions. We hold that "knowingly permit" in WAC 314-16-120(4)

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<sup>10</sup>The Board reversed the Proposed Order in that matter which had initially found that the licensee did not permit an apparently intoxicated patron to consume liquor given the number of patrons present, the short time period involved, the larger than normal number of staff present, and the fact that the patron was not served alcohol by an employee but rather procured the alcohol from another patron. The ALJ in that case concluded, "(T)he mere possibility that a patron may attempt to circumvent the law and consume alcoholic beverages while in an apparently intoxicated state does not, in the mind of the undersigned, equal actual or constructive knowledge of the prohibited conduct." (at page 10).

requires a showing analogous to the criminal definition of "knowledge" or "knowingly..." pursuant to the provisions of RCW 9A.08.101(1)(b).<sup>11</sup>

13. The court ultimately concluded in *Oscar's* that the Board incorrectly based its conclusion on the bare fact that undercover buys took place and inferring that the licensee thus had constructive knowledge of illegal drug activity. Finally, the court noted that it did not agree with the Board's interpretation of "permit" to mean mere acquiescence to or failure to prevent not only prohibited activity but also circumstances of which the licensee has at least constructive knowledge that would foreseeably lead to the prohibited activity.

14. Thus, after reviewing the cited cases, and considering the totality of the circumstances presented in the factual case at issue herein, the undersigned must respectfully disagree with what is essentially a strict liability construction promulgated by the Board which takes into consideration no mitigating circumstances, does not recognize or distinguish the particular facts of this case from other cases, and incorrectly applies the legal analysis regarding foreseeability.

15. While it is tempting to view the facts of this case with the benefit of hindsight (which, of course, is always 20-20), the undersigned concludes the analysis must be made *prior* to taking into account whether or not a violation subsequently occurred.

16. In utilizing this approach, the question must be asked whether or not the licensee had at least constructive notice of circumstances that would foreseeably lead to an intoxicated person having the ability to possess or consume alcohol on the licensed premises and did the licensee acquiesce to or fail to prevent those circumstances from occurring. In other words, is the mere fact that Mr. Hart was allowed to enter the premises sufficient to hold the licensee to a strict foreseeability standard? Would such reasoning be the same if, in fact, the patron had not obtained or consumed any other alcohol but, instead, simply drank the glass of water provided to him by the bartender? It is respectfully suggested that there are other significant mitigating circumstances present (the licensee served the patron a glass of water not alcohol, and the incident occurred immediately prior to closing with the employees actively involved in clearing all patrons from the establishment for the evening) that preclude an adverse finding against the licensee.<sup>12</sup>

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<sup>11</sup>RCW 9A.08.101(1)(b) defines the term knowledge as: A person knows or acts knowingly or with knowledge when: (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

<sup>12</sup>In reaching this conclusion, the undersigned is cognizant that the initial decision made by licensee staff at the door in allowing Mr. Hart to even enter the premises could arguably constitute circumstances whereby a reasonable person could foresee that such intoxicated patron could have

17. 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 not established by a preponderance of credible evidence that the licensee, or an employee of the licensee, permitted an apparently intoxicated person to possess and/or consume alcohol at the licensed premises on June 6, 2009.

18. 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 November 17, 2009 alleging that on June 6, 2009 the licensee, The Royal Inn, Inc., dba The Royal Inn, located at 208 Holly Street E, 98225, Bellingham, in Whatcom County, Washington allowed an apparently intoxicated person to possess and/or consume liquor in violation of WAC 314-16-150 is **SET ASIDE**. The licensee is not subject to the civil penalties set forth in the Board's Complaint.

**Dated** at Seattle, Washington this 8<sup>th</sup> day of June, 2010.

By   
Christy Gerhart Cufley  
Administrative Law Judge  
Office of Administrative Hearings

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access to and the ability to possess additional liquor, even if the licensee did not sell to or serve the intoxicated patron. Still, for the reasons set forth herein, the undersigned concludes the Board has not met the burden of proof require to sustain the AVN.

A copy of the Proposed Findings of Fact, Conclusions of Law, and Initial Order was mailed on June 8, 2010 to the following parties and representatives:

Brian Tines  
The Royal Inn  
208 Holly Street E  
Bellingham, WA 98226

Michael J. Tario  
Tario & Associates, P.S.  
119 N. Commercial Street  
Bellingham, WA 98225

Brian Considine  
Assistant Attorney General  
Office of the Attorney General  
PO Box 40100  
Olympia, WA 98504-0100

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

Kevin McCarroll  
Adjudicative Proceedings Coordinator  
Liquor Control Board  
3000 Pacific Avenue  
PO Box--(Mail Stop) 43076  
Olympia, WA 98504-3076

**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.

Office of Administrative Hearings  
600 University St., Suite 1500  
Seattle, WA 98101-2376  
(206) 389-3400 1-800-845-8830  
FAX (206) 587-5135

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).

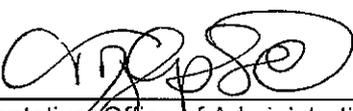
Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten (10) days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

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).

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 8<sup>th</sup> day of June, 2010.

  
\_\_\_\_\_  
Representative, Office of Administrative Hearings

**RECEIVED**

JUL 15 2010

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

THE ROYAL INN, INC. d/b/a  
THE ROYAL INN

208 HOLLY ST. E.  
BELLINGHAM, WA 98225

LICENSEE.

LICENSE NO. 353649  
AVN NO. 3B9157B

OAH NO. 2009-LCB-0050  
LCB NO. 23,570

ENFORCEMENT DIVISION'S  
PETITION FOR REVIEW OF THE  
INITIAL ORDER

The Washington State Liquor Control Board's (Board) Education & Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, and pursuant to RCW 34.05.464 and WAC 314-42-095(2), submits the following exceptions to the Initial Order issued by Administrative Law Judge (ALJ) Christy Gerhart Cufley, on June 8, 2010, in the above-captioned case.

**I. PROCEDURAL BACKGROUND**

On November 17, 2009, the Board issued a Complaint to the Licensee, The Royal Inn, Inc. d/b/a The Royal Inn (Licensee), alleging that on or about June 6, 2009, the Licensee and/or an employee thereof, allowed an apparently intoxicated person to possess and/or consume liquor on the licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150.

1 This case was heard and considered by the ALJ in Bellingham, Washington, on March  
2 29, 2010. After a full evidentiary hearing, the ALJ entered Findings of Fact, Conclusions of  
3 Law, and Initial Order on June 8, 2010. The ALJ set aside the Board's complaint in this case.  
4 The Enforcement respectfully takes exception to the Findings of Fact, Conclusions of Law, and  
5 Initial Order of the ALJ.

## 6 II. DISCUSSION

7 Pursuant to WAC314-42-095(2)(a), any party, upon receipt of a proposed order, may file  
8 exceptions within twenty (20) days of service of the order. The reviewing officer (including the  
9 agency head reviewing an initial order) "shall exercise all the decision-making power that the  
10 reviewing officer would have had to decide and enter the final order had the reviewing officer  
11 presided over the hearing[.]" RCW 34.05.464(4). Therefore, the Washington State Liquor  
12 Control Board is not bound by the ALJ's Findings of Facts or Conclusions of Law in the Initial  
13 Order.

### 14 A. Exceptions to Findings of Fact

#### 15 1. Clarification and Exception to Finding of Fact Number 16

16 As clarification, Finding of Fact Number 16 refers to when Sergeant Lucatero and Officer  
17 Russom entered the premises. See Exhibit 2; Exhibit 3; Administrative Hearing Audio  
18 Recording (Audio Recording), 1:08:00-1:11:00. Additionally, the ALJ omits the fact that  
19 Sergeant Lucatero testified that there were not many people inside the premises when Sergeant  
20 Lucatero approached Mr. Hart.

#### 21 2. Exceptions to Finding of Fact Number 17.

22 Finding of Fact Number 17 omits testimony that the bartender, Ty Ericson, informed the  
23 other bartenders behind the bar that Mr. Hart was intoxicated and to not serve him, but he did not  
24 inform security. See Audio Recording, 3:27:05-3:27:32. Additionally, Mr. Ericson testified that  
25 Mr. Hart's intoxication was obvious and he could tell that Mr. Hart was intoxicated "right away."  
26 See Audio Recording, 3:33:00-3:33:44.

1 **B. Exceptions To Conclusions Of Law**

2 **1. Exceptions to Conclusion of Law Number 11.**

3 The ALJ misstates the ruling in *Reeb v. Liquor Control Board*, 24 Wn. App. 349, 600  
4 P.2d 578 (1979) to some extent. In *Reeb* the licensee employed erotic dancers to operate inside  
5 the establishment. *Reeb*, 24 Wn. App. at 350. The dancers were prohibited, by Board  
6 regulation, from engaging in intimate physical contact with patrons. *Id.* A liquor control officer  
7 had entered the establishment and observed one of the dancers engaging in the prohibited  
8 intimate contact with a customer. *Id.* The dancer denied it took place. *Id.* It was established  
9 that the licensee had not sanctioned the prohibited activity, had in the past terminated employees  
10 for engaging in questionable conduct, and had explicitly informed dancers of what types of  
11 conduct were prohibited. *Id.* at 351.

12 On review, Division One of the Court of Appeals held that the word “permit”, as used in  
13 the regulation, did not require that the “licensee must have permanently sanctioned the prohibited  
14 act”. Instead, the term “refers to the licensee’s actual or constructive knowledge of the  
15 circumstances which would foreseeably lead to the prohibited activity.” *Reeb*, 24 Wn. App. at  
16 353. The Court went on to conclude that the licensee was aware of the existence of a potential  
17 problem with its dancers engaging in questionable conduct and yet it continued to have such  
18 dancers in the establishment. *Id.* The Court held that under these circumstances, the licensee  
19 had “permitted” the prohibited conduct. *Id.*

20 **2. Exceptions to Conclusion of Law Numbers 12 and 13.**

21 The ALJ appears to conclude that the standard in this matter is “knowingly permit.” The  
22 ALJ is incorrect, and she misstates the ruling in *Oscar’s, Inc. v. Liquor Control Board*, 101 Wn.  
23 App 498, 3 P.3d 813 (2000). In *Oscar’s*, the court did not contradict the ruling in *Reeb*. See  
24 *Oscar’s*, 101 Wn. App at 506-07. Division One of the Court of Appeals reaffirmed the holding  
25 in *Reeb* that the term “permit,” as used within the Board rules, does not mean a licensee  
26 encouraged or sanctioned prohibited behavior, but “permit” means: “acquiescence of or failure to

1 prevent not only prohibited activity but also circumstances of which the licensee has at least  
2 constructive knowledge that would foreseeably lead to prohibited activity.” *Oscar’s*, 101 Wn.  
3 App. at 506.

4 The portion of the *Oscar’s* decision cited to by the ALJ discussed the term “permit,” as  
5 defined in *Reeb*, versus “knowingly permit.” *See Oscars*, 101 Wn. App. at 506-508. In *Oscar’s*,  
6 the court determined that “knowingly permit” applied because the rule at issue, WAC 314-16-  
7 120(4)<sup>1</sup>, inserted the word “knowingly<sup>2</sup>” before “permit” creating a different standard than the  
8 “permit” standard in *Reeb*. *See Oscar’s*, at 506-07. Therefore, *Oscar’s* was clear that “permit”  
9 means: “acquiescence of or failure to prevent not only prohibited activity but also circumstances  
10 of which the licensee has at least constructive knowledge that would foreseeably lead to  
11 prohibited activity” unless the Board creates a higher standard by using the word “knowingly.”  
12 *See Id.* Here, WAC 314-16-150 only uses the word “permit.” Consequently, the “permit”  
13 standard articulated in *Reeb* applies and the Licensee permitted an apparently intoxicated person  
14 to consume and/or possess liquor on the licensed premises if it acquiesced or failed to prevent a  
15 violation of WAC 314-16-150 or circumstances that the Licensee had knowledge or constructive  
16 knowledge that would foreseeably lead to a violation of WAC 314-16-150.

### 17 3. Exceptions to Conclusion of Law Numbers 14, 15, and 16.

18 The ALJ erroneously misreads and disregards case law and the Board, and ignores Title  
19 314 WAC. The ALJ asserts that the Board conducts a “strict construction” analysis without  
20 taking into consideration mitigating circumstances and it has incorrectly applied the legal  
21 analysis regarding foreseeability. *See Conclusion of Law 14*. Then, after reciting the legal  
22 standard that appears to be the standard articulated in *Reeb*<sup>3</sup>, the ALJ asks: “is the mere fact that

23 <sup>1</sup> WAC 314-16-120 was repealed by the Board in 2001. *See* WAC 314-16-120, Dispositions

24 <sup>2</sup> The ALJ refers to the court’s citation of the criminal standard “knowingly” that states: the licensee or  
25 employee hav[ing] the required knowledge of a violation when: (i) he is aware of a fact, facts, or circumstances or  
26 result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in  
the same situation to believe that facts exist which facts are described by a statute defining an offense. *See Oscar’s*, 101 Wn. App at 507.

<sup>3</sup> *See Reeb*, 24 Wn. App. at 353.

1 Mr. Hart was allowed to enter the premises sufficient to hold the licensee to a strict foreseeability  
2 standard, and would such reasoning be the same if, in fact, the patron had not obtained or  
3 consumed any other alcohol but, instead, simply drank the glass of water provided to him by the  
4 bartender?" See Conclusion of Law 16. However, the ALJ never answers these questions.  
5 Instead, the ALJ appears to roughly explain that Enforcement did not meet its burden because of  
6 "mitigating circumstances," which are outlined in a parenthetical, and determines, in a footnote,  
7 that the ALJ is cognizant that the decision by the Licensee's staff to allow Mr. Hart entrance into  
8 the licensee's premises could arguably constitute circumstances whereby a reasonable person  
9 could foresee that Mr. Hart could have access to, and the ability to possess liquor. See  
10 Conclusion of Law 16.

11 Nevertheless, ALJ's assertion of a "strict foreseeability standard" is incorrect and the  
12 parties would not have litigated this matter if Mr. Hart had only possessed a glass of water on  
13 June 6, 2009. The ALJ's assertion of "strict foreseeability" is unsupported by the record,  
14 contrary to case law, and should be disregarded by the Board. As previously discussed, the  
15 meaning of "permit" in *Reeb* applies in this matter, and a violation occurred in this matter if the  
16 Licensee acquiesced or failed to prevent a violation of WAC 314-16-150, or that the  
17 circumstances are such that the licensee has at least constructive knowledge that the  
18 circumstances would foreseeably lead to a violation of WAC 314-16-150. See *Oscar's*, 101 Wn.  
19 App. at 506; *Reeb*, 24 Wn. App. at 353.

20 The question that was before the ALJ, and now the Board, is if the record is sufficient to  
21 show, by a preponderance of the evidence, that the Licensee, through the actions of its staff,  
22 permitted Mr. Hart, who was apparently intoxicated, to consume and/or possess liquor on June 6,  
23 2009. The parties agree that Mr. Hart appeared intoxicated, and possessed and consumed  
24 alcohol while on the licensed premises. The only point of contention in this matter is whether or  
25 not the circumstances were such that the Licensee should have prevented Mr. Hart from  
26 possessing and consuming liquor when the Licensee's staff knew he was apparently intoxicated.

1           Additionally, the ALJ's brief discussion of mitigating circumstances is unsupported by  
2 the record, was not argued by the Licensee, and is contrary to rule. WAC 314-29-015 sets forth  
3 mitigating and aggravating circumstances that the Board would consider. The rule clearly states  
4 that the relief for a mitigating circumstance is a lower penalty and is not grounds for dismissal of  
5 a violation. *See* WAC 314-29-015(a). Additionally, the ALJ's mitigating circumstances are not  
6 found in WAC 314-29-015(a)<sup>4</sup>, and do not warrant mitigation of the Licensee's penalty if a  
7 violation is found to have occurred.

8           **3.       Exceptions to Conclusion of Law Number 17**

9           The ALJ incorrectly concludes that Enforcement did not establish by a preponderance of  
10 the evidence that the Licensee, or an employee thereof, permitted an apparently intoxicated  
11 person to consume and/or possess liquor on the licensed premises. The record is clear that Mr.  
12 Hart had to pass by one or two of the Licensee's staff working the entrance to the premises while  
13 he displayed signs of intoxication. It is undisputed that Mr. Hart was apparently intoxicated the  
14 entire time he was on the Licensee's premises and that Officer Lawson and Officer Davis  
15 observed Mr. Hart for approximately twenty (20) minutes while he was apparently intoxicated on  
16 the licensed premises. It is also undisputed that the Licensee's staff did not serve Mr. Hart when  
17 he asked for a drink because the Licensee's bartender, Ty Ericson, determined that Mr. Hart was  
18 clearly intoxicated and should only have water to drink. Afterwards, Mr. Hart remained on the  
19 Licensee's premises and eventually came to possess and consume liquor.

20           Here, the element of "permit," as defined in *Reeb*, only requires knowledge of  
21 circumstances that could foreseeably lead to prohibited activity. *See Reeb*, 24 Wn. App. at 353;  
22 *Oscar's*, 101 Wn. App. at 506. Upon Mr. Hart entering the premises, the Licensee's staff should  
23 have been aware of his apparent intoxication. Even if he managed to enter the premises without  
24 the Licensee's staff knowing of his apparent intoxication, the bartender, Mr. Ericson, was acutely

25           <sup>4</sup> Mitigating circumstances should be analyzed under WAC 314-29-015(a) before this rule was amended by  
26 a November 2009 rule change. However, if the Board were to apply the current reading of WAC 314-29-015(a),  
the record would be insufficient to support mitigation of the penalty in this matter.

1 aware of Mr. Hart's apparent signs of intoxication as he approached the bar, and Mr. Ericson  
2 refused to serve Mr. Hart alcohol and served him water instead. Next, Mr. Hart walked away  
3 from the bar with a glass of water and a few minutes later Officer Davis observed Mr. Hart  
4 possessing a different glass that likely contained liquor. Upon this observation, the undercover  
5 liquor officers informed Sergeant Lucatero about the possible violation. Approximately five  
6 minutes later, Officer Lucatero and Officer Russom entered the premises and approached Mr.  
7 Hart while Mr. Hart was holding a glass containing a tan colored liquid. Upon contacting Mr.  
8 Hart, Sergeant Lucatero observed visible signs of intoxication by Mr. Hart, confiscated the drink  
9 that was in Mr. Hart's possession, and determined, and later confirmed, that Mr. Hart's drink  
10 contained liquor.

11 Therefore, the facts adduced at hearing, as set forth in the record, demonstrate that Mr.  
12 Hart clearly displayed signs of apparent intoxication over a twenty (20) minute period on June 6,  
13 2009. The Licensee's staff was aware that Mr. Hart appeared intoxicated, and still permitted him  
14 to remain on the premises with the ability to access liquor. The Licensee's employees had the  
15 opportunity to prevent Mr. Hart's possession and consumption of liquor that was observed by  
16 Officer Davis, Officer Lawson, and Sergeant Lucatero, but the Licensee and its employees failed  
17 to do so.

18 Enforcement anticipates that the Licensee will argue that it is not a crime or an  
19 administrative violation for an apparently intoxicated person to be on the Licensee's premises  
20 and that it should not be held liable for its decision to allow an apparently intoxicated person to  
21 be on its premises. While it is not a violation to knowingly allow Mr. Hart to be on the licensed  
22 premises, the Licensee's staff had knowledge that Mr. Hart was apparently intoxicated and had  
23 the burden to ensure that Mr. Hart did not possess and/or consume liquor while he was allowed  
24 to remain on the licensed premises. It is reasonably foreseeable that Mr. Hart would have the  
25 opportunity and desire to consume and/or possess liquor even if the Licensee and/or its  
26 employees do not directly serve him liquor. The Licensee created the risk when it allowed Mr.

1 Hart to remain on its premises, and it is responsible for ensuring he does not possess or consume  
2 liquor even if it does not serve him.

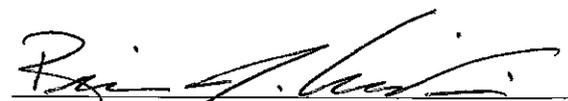
3 Here, the record is clear that the Licensee had knowledge of Mr. Hart's apparent  
4 intoxication and it failed to prevent Mr. Hart from possessing and consuming liquor on the  
5 licensed premises. Consequently, Enforcement respectfully requests that the Board not adopt  
6 Conclusion of Law 17, apply the correct legal standard under *Oscar's* and *Reeb*, and find that the  
7 Licensee permitted Mr. Hart to consume and possess liquor while he appeared intoxicated.

### 8 III. CONCLUSION

9 Enforcement has demonstrated by a preponderance of the evidence, through the sworn  
10 testimony of trained liquor enforcement officers, that Mr. Ian Hart was apparently intoxicated,  
11 and was permitted to consume and/or possess alcohol on the licensed premises on  
12 June 6, 2009. Therefore, the Enforcement Division respectfully requests that the Initial Order  
13 not be adopted in this matter, that the complaint be sustained, and the standard penalty be  
14 imposed.<sup>5</sup>

15 DATED this 14<sup>th</sup> day of July, 2010.

16 ROBERT M. MCKENNA  
17 Attorney General

18  
19   
20 BRIAN J. CONSIDINE, WSBA #39517  
21 Assistant Attorney General  
22 Attorneys for the Washington State Liquor  
23 Control Board Enforcement Division  
24

25 <sup>5</sup> If the Board sustains its Complaint, then this would be a second violation in a two-year period, which,  
26 under the former penalty matrix, carries with it a standard five (5) day suspension or a two thousand, five hundred  
dollar (\$2,500) monetary penalty. See Exhibit 6, Licensing History.

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7 **BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

8 IN THE MATTER OF:

LCB NO. 23,570

9 THE ROYAL INN, INC. d/b/a  
10 THE ROYAL INN

DECLARATION OF SERVICE

11 208 HOLLY ST. E.  
12 BELLINGHAM, WA 98225

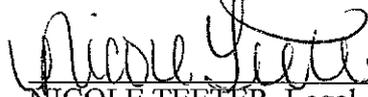
LICENSEE.

13 LICENSE NO. 353649  
14 AVN NO. 3B9157B

15 I declare under penalty of perjury under the laws of the state of Washington that on July  
16 14, 2010, I served a true and correct copy of *Enforcement Division's Petition for Review of the*  
17 *Initial Order* by placing same in the U.S. mail with proper postage affixed to:

18 Michael J. Tario  
19 Tario & Associates PS  
20 119 N Commercial  
21 Bellingham, WA 98225

22 DATED this 14<sup>th</sup> day of July, 2010 at Olympia, Washington.

23   
24 \_\_\_\_\_  
25 NICOLE TEETER, Legal Assistant  
26



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

GCB

1125 WASHINGTON STREET SE  
PO BOX 40100  
OLYMPIA WA 98504-0100

Kevin McClarrill  
DOB: 430710

WSJOB MS: 43075

JUL 14 2010

**RECEIVED**

MAR 20 2010

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

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

<b>In the Matter of:</b>	)	OAH DOCKET NO. 2009-LCB-0050
	)	
THE ROYAL INN, INC.	)	LCB Case No. 23,570
THE ROYAL INN	)	
208 HOLLY STREET EAST	)	
BELLINGHAM, WA 98225	)	
	)	<b>STIPULATION EXTENDING</b>
	)	<b>LICENSEE'S DUE DATE</b>
	)	<b>TO RESPOND TO</b>
LICENSEE	)	<b>ENFORCEMENT DIVISION'S</b>
	)	<b>PETITION FOR REVIEW</b>
LICENSE NO. 353649	)	
AVN NO. 3B9157B	)	

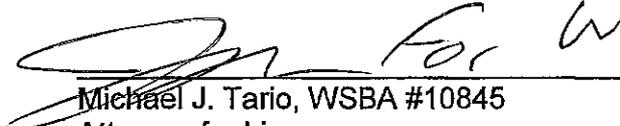
ORIGINAL

The Licensee THE ROYAL INN, INC. d/b/a THE ROYAL INN of Bellingham, Washington, by and through its undersigned attorney, MICHAEL J., TARIO, and pursuant the agreement with the Washington State Liquor Control Board's Education and Enforcement Division's attorney, Brian Considine, Assistant Attorney General, hereby stipulate to a two week extension to allow Licenee, THE ROYAL INN, INC. to file its response to the Washington State Liquor Control Board's Enforcement Division's Petition for Review of the Initial

<p>STIPULATION EXTENDING LICENSEE'S DUE DATE TO RESPOND TO ENFORCEMENT DIVISION'S PETITION FOR REVIEW - 1</p>	<p><b>Tario &amp; Associates, P.S.</b> 119 N. Commercial Street Bellingham, Washington 98225 (360) 671-8500 FAX (360) 733-7092</p>
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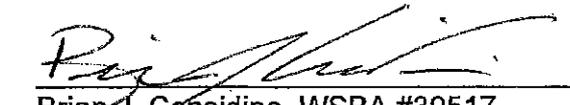
Order pursuant to WAC 314-42-095(2). no later than August 6, 2010.

LICENSEE'S COUNSEL

  
Michael J. Tario, WSBA #10845  
Attorney for Licensee

For WSBA 40523

ROBERT M. MCKENNA  
Attorney General

  
Brian J. Considine, WSBA #39517  
Assistant Attorney General  
Attorneys for LCB Enforcement

STIPULATION EXTENDING LICENSEE'S DUE  
DATE TO RESPOND TO ENFORCEMENT DIVISION'S  
PETITION FOR REVIEW - 2

**Tario & Associates, P.S.**  
119 N. Commercial Street  
Bellingham, Washington 98225  
(360) 671-8500  
FAX (360) 733-7092

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

**In the Matter of:**

THE ROYAL INN, INC.  
THE ROYAL INN  
208 HOLLY STREET EAST  
BELLINGHAM, WA 98225

LICENSEE

LICENSE NO. 353649  
AVN NO. 3B9157B

OAH DOCKET NO. 2009-LCB-0050

LCB Case No. 23,570

**DECLARATION OF SERVICE**

I Lori S. Gillies declare under penalty of perjury under the laws of the State of Washington that on the 26<sup>th</sup> day of July 2010, I caused to be delivered a Stipulation Extending Licensee's Due Date to Respond to Enforcement Division's Petition for Review and Declaration of Service to the Office of Administrative Hearings and to Assistant Attorney General, Brian J. Considine with regard to the above captioned matter upon the parties herein as indicated below:

Assistant Attorney General  
Brian J. Considine  
P.O. Box 40100  
Olympia, WA 98504-0100  
Fax (360) 664-0229

U.S. Mail  
 Hand Deliver  
 Via Facsimile  
 Overnight Express

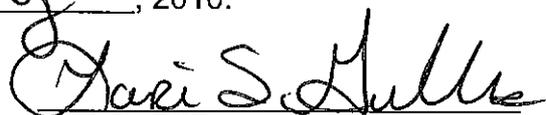
////

1 Kevin McCarroll  
2 Adjudicative Proceedings Coordinator  
3 Washington State Liquor Control Board  
4 3000 Pacific Avenue  
5 P.O. Box 43076  
6 MS 43076  
7 Olympia, WA 98504  
8 Fax: (360) 586-3190

U.S. Mail  
 Hand Deliver  
 Via Facsimile  
 Overnight Express

9 the foregoing being the last known address, via U.S. mail and affixed with proper  
10 postage.

11 DATED this 26 day of July, 2010.

12   
13 **Lori S. Gillies**

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**RECEIVED**

JUL 29 2010

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:  
THE ROYAL INN, INC. d/b/a  
THE ROYAL INN  
208 HOLLY ST. E.  
BELLINGHAM, WA 98225

LICENSEE

LICENSE NO. 353649  
AVN NO. 3B9157B

OAH NO. 2009-LCB-0050  
LCB NO. 23,570

LICENSEE'S RESPONSE TO  
ENFORCEMENT DIVISION'S  
PETITION FOR REVIEW OF THE  
INITIAL ORDER

The licensee, The Royal Inn, Inc., by and through its attorney, Joel D. Matteson, of the law firm Tario & Associates, P.S., and pursuant to RCW 34.05.464 and WAC 314-42-095(2), responds to the Enforcement Division's Petition for Review of Administrative Law Judge (ALJ) Christy Gerhart Cufley's Initial Order, issued on June 8, 2010.

**I. PROCEDURAL BACKGROUND**

The Washington State Liquor Control Board, Education and Enforcement Division (Enforcement) alleges that The Royal Inn, Inc. d/b/a The Royal Inn (Licensee), violated RCW 66.44.200 and/or WAC 314-16-150 by allowing an

LICENSEE'S RESPONSE TO  
ENFORCEMENT DIVISION'S PETITION  
FOR REVIEW OF THE INITIAL ORDER - 1

Tario & Associates, P.S.  
119 N. Commercial Street, Suite 1000  
Bellingham, Washington 98225  
(360) 671-8500  
FAX (360) 733-7092

1 apparently intoxicated person to possess and/or consume liquor on the licensed  
2 premises on or about June 6, 2009.

3  
4 On June 11, 2009 Enforcement issued an Administrative Violation Notice  
5 to the Licensee in connection with this alleged violation. Enforcement issued a  
6 Complaint to the Licensee on November 17, 2009. The Licensee filed a timely  
7 request for an administrative hearing on June 17, 2009. A full evidentiary hearing  
8 on Enforcement's Complaint took place on March 29, 2010 before Administrative  
9 Law Judge (ALJ) Christy Gerhart Cufley. On June 8, 2010, the ALJ entered  
10 Findings of Fact, Conclusions of Law, and Initial Order. In her Initial Order, the  
11 ALJ set aside Enforcement's Complaint and the Enforcement Division filed a  
12 Petition for Review of the Initial Order on July 14, 2010. The Licensee now  
13 respectfully responds to Enforcement Division's Petition for Review of the Initial  
14 Order.  
15  
16  
17

## 18 II. DISCUSSION

19  
20 On July 14, 2010, Enforcement filed their exceptions to the ALJ Findings  
21 of Fact, Conclusions of Law, and Initial Order pursuant to WAC 314-42-095(2)(a).  
22 While it is conceded that, under RCW 34.05.464(4), the reviewing officer  
23 exercises "all the decision-making power that the reviewing officer would have to  
24 decide and enter the final order had the reviewing officer presided over the  
25 hearing," the reviewing officer does not have unbounded discretion. Instead, the  
26 reviewing officer must "give due regard to the presiding officer's opportunity to  
27 observe the witnesses." RCW 34.05.464(4); WAC ADC 388-02-0600(2)(a). Also,  
28  
29

1 when reviewing the decision of the presiding officer, the reviewing officer may not  
2 go outside the record or consider additional evidence other than that cited by the  
3 parties unless otherwise authorized by law. *Towle v. Washington State Dept. of*  
4 *Fish and Wildlife* (1999) 94 Wash.App. 196 at 205, 971 P.2d 591 at 595. Lastly, a  
5 reviewing officer may not arbitrarily and capriciously substitute his or her own  
6 conclusions of law for those of the ALJ (*Id.*)  
7  
8

9 **A. RESPONSE TO ENFORCEMENT'S EXCEPTIONS TO**  
10 **CONCLUSIONS OF LAW**

11 **Conclusion of Law Number 11**

12 In its Exceptions to Conclusion of Law Number 11, Enforcement argues  
13 that the ALJ misstates the Court's ruling in *Reeb v. Liquor Control Board*, 24 Wn.  
14 App. 349, 600 P.2d 578 (1979) "to some extent." (Enforce. Pet. p. 3). In an  
15 attempt to clarify a perceived misunderstanding on the part of the ALJ,  
16 Enforcement points out that the *Reeb* Court interpreted the word "permit" to refer  
17 to "the licensee's actual or constructive knowledge of the circumstances which  
18 would foreseeably lead to the prohibited activity." *Reeb*, 24 Wn. App. 349 at 353.  
19 Enforcement goes on to discuss how the licensee in *Reeb* was deemed to have  
20 "permitted" the prohibited conduct (an employee dancer making physical contact  
21 with a patron) because the "licensee was aware of the existence of a potential  
22 problem with the dancers engaging in questionable conduct and yet it continued  
23 to have such dancers in the establishment." *Id.*  
24  
25  
26  
27

28 Enforcement neglects to mention a key distinguishing fact between the  
29 facts in *Reeb* and those presented here. In *Reeb*, "[n]o evidence was submitted

1 that Reeb's employees tried to stop the [prohibited] conduct of the go-go dancer."  
2 *Id* at 353. (Brackets added). *Reeb* is factually distinguished from our case  
3 because, unlike the licensee in *Reeb* who took no action on the night in question  
4 to prevent the violation, Licensee employees took reasonable steps to prevent a  
5 violation by making it clear to Mr. Hart that he was only being allowed into the  
6 establishment for the limited purpose of obtaining a ride home, by refusing to  
7 serve Mr. Hart with alcohol, and by spreading the word among employees that  
8 Mr. Hart was not to be served any alcohol.

11 **Conclusions of Law Numbers 12 and 13**

13 We agree with Enforcement that, in *Oscar's Inc. v. Washington State*  
14 *Liquor Control Board*, 100 Wn. App. 498, "the court did not contradict the ruling in  
15 *Reeb*." (Enforce. Pet. 3). Instead, the *Oscar* court simply refused to apply the  
16 *Reeb* standard to the facts presented in *Oscar's* because both the facts and the  
17 applicable regulations differed. *Reeb*, 24 Wn. App. At 353. In *Reeb*, the code at  
18 issue, WAC 314-16-125(3) (1979), contained the word "permitted", while in  
19 *Oscar's*, the applicable regulation, WAC 314-16-120(4), adopted the phrase  
20 "knowingly permit." *Id*.

23 While it makes logical sense for the *Oscar* court to adopt the express  
24 language cited in WAC 314-16-120(4), the difference in language is of little  
25 practical significance in our case as, in both cases, a knowledge requirement is  
26 incorporated into the analysis.

27 For instance, even though the word "knowingly" does not immediately  
28  
29

1 precede the word "permit" in WAC 314-16-125(3) (1979). the *Reeb* Court  
2 reasonably interpreted "permission" as encompassing "the licensee's actual or  
3 constructive *knowledge* of the circumstances which would foreseeably lead to the  
4 prohibited activity." *Reeb* at 353. Thus, the *Reeb* court incorporated a knowledge  
5 element into its analysis even though the word "knowledge" was absent from the  
6 applicable code.  
7

8  
9 Similarly, even though the word "knowledge" is absent from the code at  
10 issue in our case (WAC 314-16-15), *Reeb* makes it abundantly clear that this  
11 absence cannot reasonably be interpreted as a deliberate attempt by the  
12 legislature to convert WAC 314-16-150 into a strict liability offense by overlooking  
13 the critical issue of a licensee's knowledge, constructive or otherwise.  
14

15 **Conclusions of Law Numbers 14, 15 and 16**  
16

17 The facts of this case do not support Enforcement's assertions that the  
18 Licensee "permitted" Mr. Hart to possess liquor on the licensed premises. On the  
19 contrary, it is undisputed that Licensee employees refused to serve any alcohol  
20 to Mr. Hart.  
21

22 Contrary to Enforcement's contentions, the ALJ was correct in pointing out  
23 that Enforcement's construction of WAC 314-16-150 approaches strict liability.  
24 Here, an apparently intoxicated individual was allowed into a licensed  
25 establishment for the express purpose of obtaining transportation; this individual  
26 was unequivocally refused alcohol; this individual then surreptitiously acquired  
27 alcohol from a non-employee at precisely the time that the establishment began  
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29

1 to remove the patrons for the night. On these facts, a finding that the Licensee  
2 permitted this individual to possess alcohol would be tantamount to strict liability  
3 if it overlooks the appropriate action taken by the Licensee to prevent Mr. Hart  
4 from possessing alcohol and the Licensee employee's lack of knowledge that Mr.  
5 Hart had in fact possessed alcohol. The fact that an individual manages to obtain  
6 alcohol despite being refused service does not automatically support a  
7 conclusion that the bar "permitted" this unlawful possession or knowingly  
8 acquiesced to the possession, as was the case in *Reeb*.  
9

10  
11 Our case is clearly distinguishable from *Reeb*. There, the violations  
12 conspicuously took place in full view of the employees. Here, in contrast, the  
13 Licensee's failure to pounce on Mr. Hart when he obtained a drink from a non-  
14 employee while the bar was closing falls far short of "acquiescence", willful  
15 blindness, or constructive knowledge that the unlawful possession had already  
16 taken place.  
17

18  
19 The issue in our case is not whether it was foreseeable that a patron could  
20 somehow obtain alcohol on the premises despite being refused service. If that  
21 were the case, possession of liquor by an apparently intoxicated patron would be  
22 a strict liability offense. Instead, the issue is whether the Licensee had sufficient  
23 knowledge or acquiesced in the unlawful possession *after* the patron acquired  
24 the drink. Here, Mr. Hart possessed alcohol for a relatively brief period of time  
25 compared to the total amount of time he spent on the premises, which was  
26 approximately 20 minutes. In light of these relevant facts, Enforcement has failed  
27  
28  
29

1 to carry its burden of demonstrating by a preponderance of the evidence that the  
2 Licensee permitted Mr. Hart's unlawful possession by acquiescing in the  
3 misconduct or by failing to prevent the violation despite having at least  
4 constructive knowledge that Mr. Hart possessed alcohol.  
5

6 Finally, the circumstances cited by the ALJ as "mitigating" are not  
7 "contrary to the rule" as suggested by Enforcement. Instead, these facts are  
8 absolutely essential in determining whether the Licensee "permitted" a person to  
9 possess alcohol in violation of WAC 314-16-150. Otherwise, if the only relevant  
10 facts are whether Mr. Hart possessed alcohol at any time while on the Licensee's  
11 premises, the Board would then be applying a standard functionally  
12 indistinguishable from strict liability.  
13  
14

15 **Conclusions of Law Number 17**  
16

17 Contrary to Enforcement's assertions, Enforcement has not established  
18 "by a preponderance of the evidence that the Licensee, or an employee thereof,  
19 permitted an apparently intoxicated person to consume and/or possess liquor on  
20 the licensed premises" simply because Licensee employees were aware that Mr.  
21 Hart was intoxicated. The ALJ correctly determined that the Licensee employees  
22 did not have sufficient knowledge of Mr. Hart's relatively brief possession of  
23 alcohol while on the premises.  
24  
25

26 As previously discussed, the issue is not simply whether it was  
27 foreseeable that Mr. Hart could obtain alcohol while on the premises; rather, the  
28 issue is whether Licensee employees had sufficient knowledge that Mr. Hart had  
29

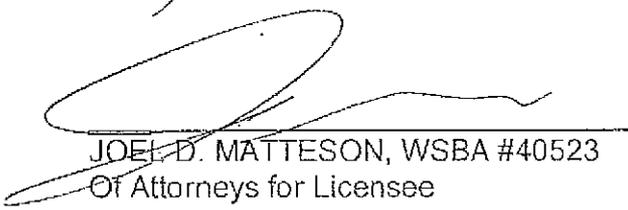
1 in fact possessed alcohol. despite being refused service.

2 Finally, Enforcement misstates the Licensee's burden on the night in  
3 question. The Licensee was not required to ensure that Mr. Hart "does not  
4 posses or consume liquor." Rather, the Licensee was only obligated to take  
5 reasonable action to prevent unlawful possession. Here, Licensee employees  
6 took reasonable action by refusing to serve Mr. Hart any alcohol. Accordingly, the  
7 Licensee respectfully requests that the Board adopt Conclusion of Law 17, and  
8 affirm that the Licensee did not "permit" Mr. Hart to consume and possess liquor  
9 while on the premises.  
10  
11  
12

### 13 III. CONCLUSION

14 As determined by the ALJ, Enforcement has failed to demonstrate by a  
15 preponderance of the evidence that Ian Hart was permitted to consume and/or  
16 possess alcohol while on the licensed premises on June 6, 2009. Therefore, the  
17 Licensee respectfully requests that the Initial Order be adopted in this matter, that  
18 the complaint be dismissed, and that the Licensee not be subjected to the civil  
19 penalties set forth in Enforcement's Complaint.  
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22

23 DATED this 28 day of July, 2010.

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27   
28 JOEL D. MATTESON, WSBA #40523  
29 Of Attorneys for Licensee