

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

R.S. PRAIRIE, INC.
d/b/a PRAIRIE BAR & GRILL
14925 NE CAPLES RD
BRUSH PRAIRIE, WA 98606

LICENSEE

LICENSE NO. 365686
AVN 1J0036A

LCB NO. 23,652
OAH NO. 2010-LCB-0046

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated July 20, 2010, alleging that on or about February 5, 2010, the above named Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to an apparently intoxicated person, and/or permitted and intoxicated person to possess or consume liquor on the licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150.
2. The Licensee made a timely request for a hearing.
3. A hearing took place on February 2, 2011 before an administrative law judge with the Office of Administrative Hearings.
4. Attorney Earl Jackson appeared for the Licensee and Assistant Attorney General Brian Considine represented the Enforcement and Education Division of the Board.
5. On March 28, 2011, Administrative Law Judge Thomas P. Rack entered his Initial Order affirming the complaint.
6. On April 8, 2011, the Licensee's attorney requested a copy of the hearing audio record and an extension to file a Petition for Review, which the Board granted on April 12, 2011. Due to a technical

FINAL ORDER OF THE BOARD
LCB NO. 23,652
PRAIRIE BAR & GRILL
LICENSE 365686

problem with the audio disc, the Board issued a second order on April 26, 2011, granting another extension. The Licensee's timely Petition for Review was received on May 17, 2011. Enforcement's Reply to Licensee's Petition for review was received timely on May 26, 2011.

7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE; IT IS HEREBY ORDERED that the Initial Order for case 23,652 is adopted.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,652 is sustained and that the liquor license privileges granted to R.S. Prairie, Inc. d/b/a Prairie Bar & Grill at 14925 NE Caples Rd in Brush Prairie, Washington, License 365686, are hereby suspended for a term of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of five hundred dollars (\$500.00) due within 30 days of this order. If timely payment is not received, then suspension will take place from 11:00 a.m. on August 4, 2011 until 11:00 a.m. on August 9, 2011. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

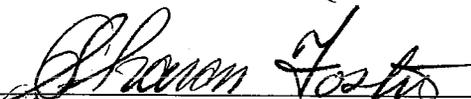
Washington State Liquor Control Board

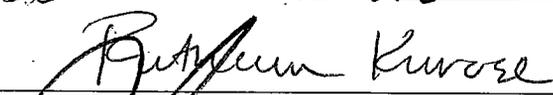
PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 14 day of June, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD







FINAL ORDER OF THE BOARD
LCB NO. 23,652
PRAIRIE BAR & GRILL
LICENSE 365686

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).

**FINAL ORDER OF THE BOARD
LCB NO. 23,652
PRAIRIE BAR & GRILL
LICENSE 365686**

4

Washington State Liquor Control Board
3000 Pacific Ave, S.E.
P.O. Box 43076
Olympia, WA 98504-3076
Phone: 360-664-1602



Washington State
Liquor Control Board

June 15, 2011

Earl W. Jackson, Attorney for Licensee
PO Box 340
Battleground, WA 98604-0340

R.S. Prairie, Inc.
d/b/a Prairie Bar & Grill
PO Box 176
Brush Prairie, WA 98606-0176

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
LICENSEE: R.S. Prairie, Inc.
TRADE NAME: Prairie Bar & Grill
LOCATION: 14925 NE Caples Rd, Brush Prairie, WA 98606
LICENSE NO. 365686-1J
ADMINISTRATIVE VIOLATION NOTICE NO: 1J0036A
LCB HEARING NO. 23,652
OAH DOCKET NO. 2010-LCB-0046
UBI: 600 603 408 001 0001

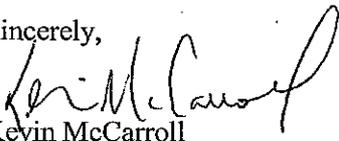
Dear Parties:

Please find the enclosed Declaration of Service by Mail and a copy of the Final Order of the Board in the above-referenced matter.

The applicable monetary penalty is due by July 15, 2011. If payment is not received timely, then suspension will take place during the dates listed in the order.

The address for payments is WSLCB, P.O. Box 43085, Olympia, WA 98504-3085. Please label the check with your License Number and Administrative Violation Notice Number 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
Amber Harris, WSLCB

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

1
2
3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 R.S. PRAIRIE, INC.
6 d/b/a PRAIRIE BAR & GRILL
7 14925 NE CAPLES RD
8 BRUSH PRAIRIE, WA 98606

9 LICENSEE

10 LICENSE 365686-1J
11 AVN NO. 1J0036A

OAH DOCKET NO. 2010-LCB-0046
LCB NO. 23,652

DECLARATION OF SERVICE BY
MAIL

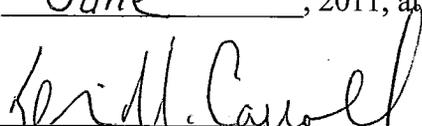
12 I certify that I caused a copy of the *FINAL ORDER OF THE BOARD* in the above-
13 referenced matter to be served on all parties or their counsel of record by US Mail Postage
14 Prepaid via Consolidated Mail Service for Licensees; by Campus Mail for the Office of
15 Attorney General, on the date below to:

17 EARL W. JACKSON, ATTORNEY FOR
18 LICENSEE
19 PO BOX 340
20 BATTLE GROUND, WA 98604-0340

BRIAN CONSIDINE, ASSISTANT ATTORNEY
GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
MAIL STOP 40100

21 R.S. PRAIRIE, INC.
22 d/b/a PRAIRIE BAR & GRILL
23 PO BOX 176
24 BRUSH PRAIRIE, WA 98606-0176

25 DATED this 15th day of June, 2011, at Olympia, Washington.

26 
Kevin McCarroll, Adjudicative Proceedings Coordinator

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

RECEIVED

MAR 31 2011

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

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

IN THE MATTER OF:

**R.S. Prairie, Inc.
d/b/a Prairie Bar & Grill,**

Respondent.

**License No. 36586⁶ (365686)
AVN No. 1J0036A**

**Docket No. 2010-LCB-0046
Agency No. 23,652**

INITIAL ORDER

INITIAL ORDER

A hearing on the merits of the case was held before Administrative Law Judge, Thomas P. Rack, on February 2, 2011, with Earl Jackson, Esq. appearing for R.S. Prairie, Inc., dba Prairie Bar & Grill (the "Licensee") and Assistant Attorney General Brian Considine representing the Liquor Control Board (the "Board").

Based upon the arguments, the pleadings and files, and the evidence in this matter, the Administrative Law Judge makes the following Findings of Fact, Conclusions of Law and Initial Order:

ISSUE

1. Whether on or about February 5, 2010, the Licensee, or employees thereof, gave, sold, and/or supplied liquor to Joseph Holbrook, a person apparently under the influence of liquor, and/or allowed Joseph Holbrook, a person apparently under the influence of liquor, to possess and/or consume liquor on the licensed premises, in violation of RCW 66.44.200 and/or WAC 314-16-150?

RESULT

1. Based upon the evidence presented, the Licensee did violate RCW 66.44.200 and/or WAC 314-16-150 by giving, selling or supplying liquor to Joseph Holbrook, and/or allowing Joseph Holbrook to possess or consume liquor on the licensed premises.

FINDINGS OF FACT

1. The testimony of the parties conflicted on material points. The undersigned, having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in responses), party motivations, the reasonableness and consistency of testimony throughout the hearing and the totality of the circumstances presented, resolves conflicting testimony in favor of the Board. In making these findings, the Administrative Law Judge need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the persuasive evidence be clear, cogent and convincing. The Administrative Law Judge need only determine what most likely happened.
2. During the evening of February 5, 2010, Liquor Enforcement Officer, Kendra Treco ("Treco"), was in the Licensee's establishment (the "Premises") taking photographs in connection with another investigation.
3. After taking the photographs, Treco noticed a male customer, later identified as Joseph Holbrook ("Holbrook"), sitting at the bar. Based upon her training and experience, Treco observed Holbrook and believed he was or appeared to be intoxicated.
4. Holbrook was seated at the bar near the bar break area, the place where cocktail servers place and pick up their drink orders. The bartenders also engaged Holbrook in conversation that evening as Holbrook was a regular patron of the Licensee.
5. Treco took a position approximately fifteen feet from Holbrook and continued to observe him. Treco observed that Holbrook had been drinking from a bottle of Bud Light. Treco observed that Holbrook had red, glassy and droopy eyes and moved very slowly.
6. After observing Holbrook from her vantage point for approximately ten minutes, Treco watched as Holbrook stood up and proceeded to the restroom. Treco observed Holbrook walking slowly and deliberately and it appeared as though Holbrook was unbalanced on his feet.
7. Treco observed Holbrook return from the restroom and retake his seat at the bar. Treco observed a bartender give another bottle of beer to Holbrook. At that time, Treco called the Sheriff's Office for back-up before questioning Holbrook.
8. Shortly after a Deputy Sheriff arrived to cover Treco, Treco identified herself to Holbrook and asked him to step outside. Treco and the Deputy Sheriff escorted Holbrook outside of the Premises for questioning.

9. After Treco identified herself as a Liquor Enforcement Officer and the Deputy Sheriff identified himself, Holbrook asked what law firm they worked for. Holbrook was in the process of divorcing his wife and believed Treco and the Deputy Sheriff were trying to obtain evidence to be used against him in the divorce proceedings. Treco observed that Holbrook was very unsteady on his feet while they were questioning him. Treco also noted that Holbrook's speech was slurred.
10. Holbrook admitted he consumed three beers before ordering a fourth, when he was approached by Treco and the Deputy Sheriff and asked to step outside.
11. Licensee's bartender, Christina Peterson ("Peterson"), served Holbrook a fourth beer. Peterson noted that Holbrook had ordered three beers before she served him the fourth, based upon Holbrook's tab which was started earlier that night.
12. After speaking with Holbrook outside, Treco issued him a citation for violating RCW 66.44.200(2)(a), for purchasing or consuming liquor while apparently under the influence of liquor.
13. As he was being released, Holbrook told Treco he had a ride home because he did not wish to be arrested for driving under the influence. Holbrook then re-entered the Premises.
14. Treco returned to the Premises and issued a citation to the bartender, Peterson, for a violation of RCW 66.44.200(1), selling liquor to a person apparently under the influence of liquor.
15. The Clark County Prosecutor declined to prosecute Peterson because there was no blood alcohol concentration evidence. Peterson's case was dismissed without prejudice.
16. The case against Holbrook was dismissed as there was no prosecutor present and no trial occurred.

CONCLUSIONS OF LAW

1. RCW 66.44.200(1) states: "No person shall sell any liquor to any person apparently under the influence of liquor."
2. WAC 314-16-150 states:
 - (1) No retail licensee shall give or otherwise supply liquor to any person under the age of twenty-one years, either for his/her own use or for the use of his/her parent or of any other person; or to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person under the said age or in said condition to consume liquor on his/her licensed 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.

3. In *Ensley v. Mollman*, 155 Wn.App. 744, 756, 230 P.3d 599, 605-606 (Wash.App. 2010), the Court of Appeals, citing, *Faust v. Albertson*, 167 Wn.2d 531, 539, 222 P.3d 1208, 1216-17 (2009 Wash.) held that apparently under the influence meant readily perceptible to the senses and capable of being readily perceived by the sensibilities or understanding as certainly existent or present. The Court also noted that apparently under the influence must be demonstrated by direct, observational evidence at the time of the alleged over-service or by reasonable inference deduced from observation shortly after the over-service.

4. In *Faust v. Albertson*, 167 Wn.2d 531, 548, 222 P.3d 1208, 1225 (2009 Wash.), the Washington Supreme Court held that over-service may be demonstrated by direct or circumstantial evidence and blood alcohol concentration reports can corroborate evidence of post-service appearance and support an inference that the person appeared to be under the influence of alcohol at the time of service.

Standard of Proof

5. Licensee asserted the standard of proof in liquor license enforcement cases is by the clear, cogent and convincing evidence standard. In support thereof, Licensee cited to *Nguyen v. Department of Health, Medical Quality Assurance Commission*, 144 Wn.App. 516, 29 P.3d. 689 (2001), cert. denied 535 U.S. 904 (2002) and *Ongom v. Department of Health, Office of Professional Standards*, 159 Wn2d 132, 148 P.3d 1029 (2006), cert. denied 550 U.S. 905 (2007). *Nguyen* concerned the suspension/revocation of a medical doctor's license and *Ongom* dealt with a nursing certificate. These were professional licenses and a higher standard of proof was required. A professional license is defined as ". . . an individual, nontransferable authorization to carry on an activity based upon qualifications which include: (a) graduation from an accredited or approved program, and (b) acceptable performance on a qualifying examination or series of examinations." RCW 18.118.020(8). Licensee's reliance on these cases is misplaced. There is no graduation from an accredited or approved program and qualification examination as a prerequisite to obtaining a retail liquor license.

6. In non professional license enforcement cases, the standard of proof is the same as in a civil case, namely, by a preponderance of the evidence. *Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (Wash. App 2008); *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (Wash. App. 2009). The preponderance of evidence standard applies in administrative hearings unless mandated by statute or due process. *Thompson v. The Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601, 609 (1999). Therefore, the standard of proof in this matter is by a preponderance of the evidence.

7. By his own admission, Holbrook had consumed three beers while on the Premises and had ordered a fourth before being questioned by Liquor Enforcement Officer Treco.
8. Treco observed that Holbrook had red, glassy, droopy eyes and moved very slowly and deliberately. Treco also noticed that Holbrook was unsteady on his feet. After Treco and the Deputy Sheriff identified themselves, Holbrook kept insisting they were working for his wife's divorce attorney and were trying to get him in trouble.
9. Because Holbrook was seated near the bar break area, Licensee's bartenders and cocktail servers were in a position to observe Holbrook over a period of time.
10. Based upon Holbrook's physical manifestations, including red, glassy and drooping eyes, unsteadiness on his feet, slurred speech, slow and deliberate movements and the number of beers he consumed before ordering a fourth, Licensee's employees knew or should have known that Holbrook appeared to be under the influence of liquor.
11. Licensee, through its employees, violated RCW 66.44.200 and/or WAC 314-16-150 by giving, selling or supplying liquor to Joseph Holbrook, and/or allowing Joseph Holbrook to possess or consume liquor on the licensed premises.

Collateral Estoppel

12. Licensee argued that the doctrine of collateral estoppel precluded the Board from taking action because the criminal case against Peterson was dismissed without prejudice and the prosecution against Holbrook was also dismissed.
13. Collateral Estoppel requires the party asserting the doctrine to establish: (1) the issue decided in the prior adjudication is identical to the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party in the prior adjudication; and (4) the application of the doctrine does not work an injustice. *Thompson v. Department of Licensing*, 138 Wn.2d 783, 790, 982 P.2d 601, 605 (1999), citing *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998).
14. In this case, there was no final judgment on the merits in the Peterson case as the prosecutor chose not to prosecute because of the lack of blood alcohol concentration evidence. Blood alcohol concentration evidence is not required to establish a violation of RCW 66.44.200 and/or WAC 314-16-150. Having the charge dismissed without prejudice, before trial, is not an adjudication on the merits.
15. Likewise, the prosecution in the Holbrook case was dismissed since no prosecutor nor witnesses appeared and no trial was held. Because no trial occurred, there was no adjudication on the merits.

16. Notwithstanding the lack of adjudication on the merits in the Peterson and Holbrook citations, an adjudication in a criminal case does not preclude administrative agency enforcement action under the same facts and circumstances. *Jow Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 382 418 P.2d 424, 430 (1966); see also, *Thompson v. Department of Licensing*, 138 Wn.2d 783, 796 982 P.2d 601, 608 (1999).

17. The Board was not estopped to bring an administrative enforcement action against the Licensee in this case.

ORDER

IT IS HEREBY ORDERED:

1. The Board has established, by a preponderance of the evidence, that on or about February 5, 2010, the Licensee, or employees thereof, gave, sold, and/or supplied liquor to Joseph Holbrook, a person apparently under the influence of liquor, and/or allowed Joseph Holbrook, a person apparently under the influence of liquor, to possess and/or consume liquor on the licensed premises, in violation of RCW 66.44.200 and/or WAC 314-16-150. Therefore, the charge in Complaint No. 23,652 is **AFFIRMED**.

2. The Board is not estopped from pursuing an administrative enforcement action against the Licensee, because the doctrine of collateral estoppel does not apply to this case.

SIGNED and ISSUED this 28th day of March, 2011 at Tacoma, Washington.



Thomas P. Rack
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO PARTIES OF FURTHER APPEAL RIGHTS

Either the applicant, 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. Documents are deemed filed with the Board upon actual receipt by the Board, during office hours, at the Board's headquarters office in Olympia, Washington (P.O. Box 43075, 3000 Pacific Avenue, S.E., Olympia, WA 98504-3075). If the Board does not receive a petition for review within twenty (20) days, the Board will review and make this order its final order.

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 relied upon to support the petition; and,
- (iii) Be filed with the Liquor Control Board and 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 parties and their representatives at the time the petition is filed. Within (10) ten days after service of the Petition for Review, any of the other parties may file a Reply 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 days of the service of a Final Order, any party may file a Petition for Reconsideration, stating the specific ground 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 34.05.058 (Washington Administrative Procedure Act).

RECEIVED

MAY 17 2011

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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

R.S. PRAIRIE, INC. d/b/a PRAIRIE
BAR AND GRILL

OAH NO. 2010-LCB-0046
LCB NO. 23,652

14925 NW CAPLES RD
BRUSH PRAIRIE, WA 98606,

LICENSEE'S PETITION FOR
REVIEW

LICENSEE.

LICENSE NO. 365686
AVN NO. 1J9128A

Licensee named above, by its attorney, Earl W. Jackson, Petitions the Washington Liquor Control Board under the authority of RCW 34.05.464 and WAC 314-42-095 to review of the Initial Order of Judge Thomas P. Rack entered March 28, 2011 in this cause based on a hearing on Licensee's initial appeal of an Administrative Violation Order issued to Licensee under RCW 66.44.200 and WAC 314-16-150 alleging that Licensee sold liquor to an apparently intoxicated person (Joseph Holbrook) on February 5, 2010.

1. Witnesses Testifying

For Enforcement

Kendra Treco Audio Record: 8:20-34:34 and Rebuttal: 3:16:18-3:18:40

For Licensee:

Audio Record

Christina Peterson – Bartender

1:04:16-1:38:41

George Lonnee – Doorman

1:38:06-1:48:36

Ronnee Steigman – Licensee Principal

Bar Video Played

1:48:52-2:29:36

1 Tai Mansigh – Bartender 2:29:42-2:57:00
2 Joseph Holbrook – Served Patron 2:47:05-3:18:40

3 **2. General Exceptions**

4 Pursuant to WAC 314-42-095(2) Licensee specifies the portions of the Order to which
5 exception is generally taken:

6
7 2.1 Disregard of preponderance of witness testimony. Licensee disputes the Result of
8 Judge Rack that Licensee did violate RCW 66.44.200 and/or WAC 314-16-150 by selling
9 liquor to Joseph Holbrook, Conclusion of Law 11 and the Order Number 1 of Judge Rack to
10 the same effect. All of Licensee's witnesses testified that Mr. Holbrook exhibited no signs of
11 apparent intoxication at the time of his service by Licensee, and all of their testimony was
12 disregarded by Judge Rack.

13
14 2.2 Disregard of Video Evidence. Licensee presented video evidence which was
15 admitted by Judge Rack as an exhibit, and is contained on a flash drive submitted to Judge
16 Rack. The video evidence, which was taken from the multiple cameras at the Prairie Tavern,
17 shows that Mr. Holbrook exhibited no unstable walking, boisterousness, unsteadiness, or any
18 other signs of apparent intoxication during the period that he was alleged to be intoxicated by
19 Officer Treco. Judge Rack's decision fails to demonstrate that he even considered the video
20 evidence which he admitted as evidence. (2:29:25-2:29:36)

21
22 2.3. Failure to Consider Undisputed Evidence of Low Alcohol Consumption. The
23 video evidence shows that Mr. Holbrook is a large man, probably in the range of 220 pounds.
24 The undisputed testimony of licensee's witnesses was that Holbrook was drinking Bud Light
25 beer (2:53:50-2:53:59 and Kendra Treco Report Enforcement Exhibit 2 – Page 2). As found
26 by Judge Rack, (Findings 10 and 11) Mr. Holbrook only consumed three Bud Light beers.

1 Judge Rack omitted to find that Mr. Holbrook had been on the premises for nearly 3.5
2 hours while he consumed those light beers (3:00:27-3:01:08 and 2:43:43-2:44:04) and Video
3 Evidence (taped times). This would substantiate that the testimony of Licensee's witnesses that
4 Mr. Holbrook exhibited no signs of intoxication as he was obviously able to assimilate the
5 alcohol amount consumed over those three and one-half hours and was not in fact intoxicated.
6

7 **2.4. Failure to Consider Lack of Blood Alcohol Evidence and Dismissals.**

8 There was no evidence of Mr. Holbrook's' blood alcohol level, or any evidence of field
9 sobriety checks, even though Officer Treco testified that she was accompanied by a Sheriff's
10 Deputy when she interviewed Mr. Holbrook, and that Sheriff's Deputies do administer blood
11 alcohol tests during premises checks such as she was conducting. (0:34:34-0:37:25). Further
12 Officer Treco took no photographs of Mr. Holbrook even though she had her camera and spent
13 several minutes in the bar taking photographs in relation to another case she was attempting to
14 pursue. (0:40:12-0:42:56).
15

16 The lack of any evidence except the oral testimony of Officer Treco led to both the
17 dismissal of the citations issued by Officer Treco against Licensee's bartender, Christina
18 Peterson, who served the last confiscated Bud Light beer to Mr. Holbrook, and Mr. Holbrook
19 himself. (1:14:48-1:15:25 and 3:13:20-3:13:55).
20

21 This lack of evidence also tends to substantiate the evidence of Licensee's witnesses
22 that Mr. Holbrook showed no signs of intoxication.

23 **3. Specific Objections**

24 Pursuant to WAC 314-42-095(2) licensee specifies the portions of the Order to which
25 exception is specifically taken:
26

1 3.1 Finding of Fact No. 1. (Underlined portions):

2 1. The testimony of the parties conflicted on material points. The undersigned, having
3 carefully considered and weighed all of the evidence, including witness demeanor (as
4 determined by voice, attitude, straightforwardness, unreasonable hesitancy in
5 responses), party motivations, the reasonableness and consistency of testimony
6 throughout the hearing and the totality of the circumstances presented, resolves
7 conflicting testimony in favor of the Board. In making these findings, the
8 Administrative Law Judge need not be persuaded beyond a reasonable doubt as to the
9 true state of affairs, nor must the persuasive evidence be clear, cogent and convincing.
10 The Administrative Law Judge need only determine what most likely happened.

11 Listening to the audio record demonstrates that there were no attributes of “voice,
12 attitude, straightforwardness, unreasonable hesitancy in responses” that would give rise to
13 doubt about the truthfulness of Licensee's witnesses.

14 The testimony of Licensee's witnesses was consistent and reasonable under the totality
15 of the circumstances. Officer Treco testified that it would be proper for Licensee's employees
16 to investigate if they had any suspicion of intoxication on the part of a patron. (0:58:54-
17 1:03:17)

18 Bartender Peterson testified that she spoke to Mr. Holbrook and determined that his behavior
19 did not indicate intoxication as it was no different than his prior behavior when in the bar
20 (1:11:29-1:11:45), any walk problems on his part were consistent with his back surgery
21 (1:11:45-1:12:19), she knew he was tired from work based on her conversations with him
22 (1:14:06-1:14:13). Mr. Lonnee testified that Mr. Holbrook was sober as a judge (1:43:36-
23 1:43:42) when Mr. Holbrook was escorted out and in by Officer Treco. Bartender Mansigh
24 testified that based on her nine years of experience as a bartender and her mast training, and
25 her observations of Mr. Holbrook at the bar during the evening, and the fact she examined and
26 talked to Mr. Holbrook after he came back in from being interrogated by Officer Treco, when
Mr. Holbrook stated he had driven truck since 3:00 AM and was thus tired, none of the

1 bartenders observed any evidence of intoxication (2:42:02-2:43:40). Mr. Holbrook also
2 testified he had nothing to drink before he arrived at the bar, (3:00:27-3:00:35), had two rods
3 and four pins in his back which can impede walking and had been up since 2:30 AM (3:02:45-
4 3:03:22) and thus was tired. He explained Officer Trace's concern about red eyes as he was
5 tire (3:03:22-3:04:02.) He stated he thought it was a joke when he was removed from the bar
6 as he had done nothing wrong, and asked Officer Treco if his wife had put her up to it, as he
7 had just just separated. (3:06:10-3:07:20). This was consistent with Officer Treco's testimony
8 about confusion on Mr. Holbrook's part. ((0:20:30-:21:35).

10 There was no evidence of Licensee's witnesses being biased due to some sort of
11 personal interest, because Christina Peterson was no longer working for Licensee (1:04:16-
12 1:06:00), Tai Mansigh was no longer working full time for Licensee and was working full time
13 for another establishment in Woodland, Washington (2:29:42-2:31:15), and Mr. Holbrook had
14 already been found not guilty by a Judge in Clark County (3:11:45-3:13:20).

16 The totality of the testimony along with the video tape evidence established that there
17 was no overserving on the part of the Licensee's employee Christina Peterson.

19 3.2. Finding of Fact No. 5.:

20 5. Treco took a position approximately fifteen feet from Holbrook and continued to
21 observe him. Treco observed that Holbrook had been drinking from a bottle of Bud
22 Light. Treco observed that Holbrook had red, glassy and droopy eyes and moved very
23 slowly.

24 The evidence was that the bar lights were dim, and a position of 15 feet away would not
25 allow viewing red glassy or droopy eyes in such light. None of the three bartenders could see
26 any evidence of intoxication from five feet away across the bar. (2:43:40-2:43:47 and 1:12:19-
1:13:26).

1 3.3 Finding of Fact No. 6.

2 After observing Holbrook from her vantage point for approximately ten minutes, Treco
3 watched as Holbrook stood up and proceeded to the restroom. Treco observed
4 Holbrook walking slowly and deliberately and it appeared as though Holbrook was
 unbalanced on his feet.

5 The video evidence shows that Mr. Holbrook was not walking slowly or deliberately or
6 in an unbalanced manner, and in any even his back injury would explain any slowness or
7 awkwardness in his walk. ((3:02:45-3:03:22).

8 3.4 Finding of Fact No. 9 (Underlined Portion) and Conclusion of Law 10

9 9. After Treco identified herself as a Liquor Enforcement Officer and the Deputy
10 Sheriff identified himself, Holbrook asked what law firm they worked for. Holbrook
11 was in the process of divorcing his wife and believed Treco and the Deputy Sheriff
12 were trying to obtain evidence to be used against him in the divorce proceedings. Treco
13 observed that Holbrook was very unsteady on his feet while they were questioning him.
14 Treco also noted that Holbrook's speech was slurred.

15 Conclusion of Law 10

16 10. Based upon Holbrook's physical manifestations, including red, glassy and drooping
17 eyes, unsteadiness on his feet, slurred speech, slow and deliberate movements and the
18 number of beers he consumed before ordering a fourth, Licensee's employees knew or
19 should have known that Holbrook appeared to be under the influence of liquor.

20 As stated in prior exceptions all of the other witnesses stated, and the video evidence
21 shows, that Mr. Holbrook was not unsteady on his feet going out of the bar with Officer Treco
22 and coming back in, and was not making slow and deliberate movements. The bartenders both
23 stated they conversed with Mr. Holbrook in depth immediately after he was removed from the
24 bar by Officer Treco, and found no evidence of slurring or any other signs of intoxication.

25 (1:14:13-1:14:20, 2:39:05-2:39:25, 2:43:00-2:43:40). Ms. Peterson testified that the Deputy
26 Sheriff with Officer Treco even stated to her while she herself was removed from the bar that

1 he was sorry for the incident. (1:09:19-1:09:32). The number of beers drank by Mr. Holbrook
2 would mitigate against any finding of intoxication as stated above.

3 3.5 Finding of Fact 13.

4 13. As he was being released, Holbrook told Treco he had a ride home because he did
5 not wish to be arrested for driving under the influence. Holbrook then re-entered the
6 Premises.

7 Although Mr. Holbrook did testify that he told Officer Treco that he had a ride home,
8 he did not say that he did it to not be arrested for a DUI. Rather he explained that as he had
9 just got a ticket he did not understand he was just covering his bases to did not want Officer
10 Treco radioing around the corner, presumably to avoid having her false impressions of his
11 being apparently intoxicated being communicated to highway patrolmen. (3:08:57-3:09:25)
12 He also explained that he had in fact arranged for a safe ride if necessary (3:3:13:55-3:14:26).
13

14 3.6. Finding of Fact No. 16 and Conclusion of Law 15.

15 16. The case against Holbrook was dismissed as there was no prosecutor present and
16 no trial occurred.

17 Conclusion of Law 15

18 15 Likewise, the prosecution in the Holbrook case was dismissed since no prosecutor
19 nor witnesses appeared and no trial was held. Because no trial occurred, there was no
20 adjudication on the merits.

21 The only evidence of the trial was the testimony of Mr. Holbrook, and Mr. Holbrook
22 testified that he did have a trial, although the prosecutor was not present. (3:11:45-3:13:55),
23 and that there was a final adjudication of dismissal on the merits of the evidence presented.

24 3.7 Failure To Admit Exhibit 9. Judge Rack improperly refused to admit Licensee's
25 Exhibit 9, which is a print out of the District Court Record of the Holbrook trial. RCW
26 §34.05.452 (1) provides that evidence is admissible if it is the kind of evidence on which

1 reasonably prudent persons are accustomed to rely in the conduct of their affairs. Surely a print
2 out of the Court's hearing is reasonably reliable.

4. Conclusion

3
4
5 As stated by the Court in *Ensley v. Mollmann*, 155 Wn.App. 744, 755, 230 P.3d 599
6 (Wash.App. Div. 1 2010):

7 ¶ 18 RCW 66.44.200(1) prohibits the sale of alcohol to anyone " apparently under the
8 influence of liquor." That language also establishes the standard of civil liability
9 for a commercial host in an over service case. *Barrett v. Lucky Seven Saloon, Inc.*, 152
10 Wash.2d 259, 273-74, 96 P.3d 386 (2004). "**Apparently**" means "**' readily**
11 **perceptible to the senses' and ' capable of being readily perceived by the**
12 **sensibilities or understanding as certainly existent or present.'**" *Barrett*, 152
13 Wash.2d at 268, 96 P.3d 386 (quoting WEBSTER'S THIRD NEW INTERNATIONAL
14 DICTIONARY 103, 1559 (2002)). ,,,

15 There is a more than a preponderance of the evidence in favor of Licensee not having
16 served a person apparently under the influence including:

- 17 i. Licensee's evidence from video surveillance that Mr. Holbrook was not
18 exhibiting any symptoms of being intoxicated,
- 19 ii. Direct observational testimony that Mr. Holbrook was not under the influence
20 of alcohol at that time of service by four witnesses who had no motivation to
21 lie. Christina Peterson and Tai Mansigh had observed Mr. Holbrook over the
22 course of the evening, and conversed with him in depth after he was escorted
23 out of the bar, and Ms. Peterson recognized him as a regular from prior
24 occasions at the Licensee's establishment.
- 25 iii. The fact that Mr. Holbrook had only had 3 light beers over the course of over
26 three hours on the premises,
- iv. The dismissal of both cases against Mr. Holbrook and Server Peterson,

1 v. Mr. Holbrook's plausible explanations for red eyes from working since 2:30
2 AM and slowness from stiffness while walking due to major back surgery

3 All of this evidence is balanced against the sole testimony of Officer Treco, who failed
4 to take photographs when she had and was using a camera on the premises, only saw Mr.
5 Holbrook for a 15 minute period in dim light before calling for back up and escorting him
6 from the bar having made her decision about his condition, and who failed to produce any
7 kind of corroborating proof of blood alcohol or physical tests on Mr. Holbrook. Clearly the
8 preponderance of the evidence was in favor of the Licensee.
9

10 DATED: May 16, 2011.

11
12 
13 EARL W. JACKSON WSBA No 7238
14 Attorney for Licensee
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATE

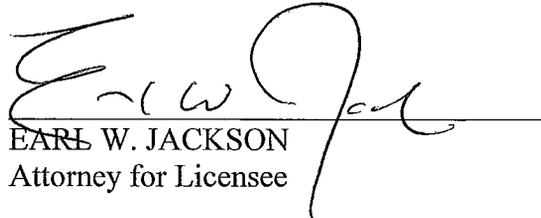
I declare under penalty of perjury under the laws of the state of Washington that I mailed a copy of the foregoing document to the following person at the following address:

Brian Considine Deputy Attorney General
Office of the Attorney General, GCE Division
MS: 40100
Olympia WA 98504-0100

Washington State Liquor Control Board
attn: Kevin McCarroll
3000 Pacific Ave, SE
PO Box 43076
Olympia, WA 98604-3076
(And Via facsimile to 360.586.3190 and VIA FED EX)

postage prepaid, on May 16, 2011.

Dated May 16, 2011, at Battle Ground, Washington.



EARL W. JACKSON
Attorney for Licensee

RECEIVED

MAY 26 2011

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

R.S. PRAIRIE, INC. d/b/a PRAIRIE BAR
AND GRILL

14925 NW CAPLES RD
BRUSH PRAIRIE, WA 98606,

LICENSEE.

LICENSE NO. 365686
AVN NO. 1J9128A

OAH NO. 2010-LCB-0046
LCB NO. 23,652

ENFORCEMENT'S REPLY TO
LICENSEE'S PETITION FOR
REVIEW

The Washington State Liquor Control Board's (Board) Education and Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, hereby responds to Licensee R.S. PRAIRIE, INC. d/b/a PRAIRIE BAR AND GRILL's (Licensee) Petition for Review (Petition).

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

I. STANDARD OF REVIEW

Any party in an administrative action may file a petition for review of the initial order pursuant to RCW 34.05.464 and WAC 314-29-010(4). A party filing a petition for review must specify the portions of the initial order to which exception is taken and refer to evidence

1 in the record on which the party relies to support the petition. WAC 314-29-010(4). In
2 reviewing findings of fact, reviewing officers “shall give due regard to the presiding officer’s
3 opportunity to observe the witnesses.” RCW 34.05.464(4).

4 **II. BACKGROUND**

5 On February 10, 2010, Enforcement served the above-identified Licensee with an
6 Administrative Violation Notice (AVN) alleging that the Licensee committed a violation of
7 WAC 314-16-150. *See* AVN. The AVN reflects a 2-year violation history comprised of no
8 previous violations of WAC 314-16-150, which is reflected in the proposed standard penalty of
9 a 5-day suspension or a \$500 monetary penalty for the current violation.¹ *See* AVN. On July
10 20, 2010, the Liquor Control Board issued an administrative complaint based on the above-
11 referenced AVN. The Complaint charged that “on or about February 5, 2010, the Licensee or
12 an employee thereof, gave, sold and/or supplied liquor to an apparently intoxicated person,
13 and/or permitted an apparently intoxicated person to possess and/or consume liquor on the
14 licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150.” *See* Complaint.

15 The case was heard by ALJ Thomas Rack in Vancouver, Washington, on February 2,
16 2011. After a full hearing on the merits, the ALJ entered his Findings of Fact, Conclusions of
17 Law, and Initial Order on March 28, 2011. The ALJ sustained the Board’s complaint and
18 found that the Licensee gave, sold, and/or supplied liquor to Joseph Holbrook, a person
19 apparently under the influence of liquor, and/or allowed Mr. Holbrook to possess and/or
20 consume liquor while he was apparently intoxicated. The Licensee timely filed exceptions to
21 the ALJ’s Initial Order and Enforcement now responds to its Petition.

22 **III. LICENSEE’S GENERAL EXCEPTIONS**

23 The Licensee’s general exceptions to ALJ Rack’s factual findings should be rejected.
24 The Licensee’s exceptions to the ALJ’s decision are not supported by the evidence or law.

25
26 ¹ However, if the Board determines that the Licensee committed one or both of the violations alleged in
LCB No. 23,653, then this would be the second or third violation for selling to an apparently intoxicated person
and the penalty should be a seven or thirty day suspension with no option of a monetary penalty.

1 “Findings of fact by an administrative agency are subject to the same requirement as are
2 findings of fact drawn by a trial court.” *Weyerhaeuser v. Pierce Licensee*, 124 Wn.2d 26, 35-
3 36, 873 P.2d 498 (1994) (quoting *State ex rel. Bohon v. Department of Pub. Serv.*, 6 Wn.2d
4 676, 694, 108 P.2d 663 (1940); *State ex rel. Duvall v. City Coun.*, 64 Wn.2d 598, 602, 392
5 P.2d 1003 (1964)). Formal findings of fact serve multiple purposes. They inform the parties
6 of those portions of the record on which the trier of fact relied in reaching the decision, and the
7 basis for that decision. *Weyerhaeuser*, 124 Wn.2d at 35-36. Factual findings also help to
8 ensure that the trier of fact fully and properly dealt with all of the issues of the case before
9 rendering a decision. *Id.* Finally, they aid in meaningful judicial review of the decision. *Id.*;
10 *Boeing Company v. Gelman*, 102 Wn. App. 862, 871, 10 P.3d 475 (2000) (citations omitted).

11 Additionally, an administrative law judge is afforded discretion in weighing the
12 evidence. *See Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 605 n.19, 13 P.3d
13 1076 (2000). In weighing the evidence, it is within the province of the administrative law
14 judge to determine issues of witness credibility. *See State v. Carver*, 113 Wn.2d 591, 604, 781
15 P.2d 1308, 789 P.2d 306 (1989); *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*,
16 65 Wn. App. 614, 618, 829 P.2d 217. When reviewing factual findings, the courts generally
17 accept the fact-finder's views regarding the credibility of witnesses and the weight to be given
18 to reasonable but competing inferences. *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn.
19 App. 547, 556, 156 P.3d 232 (2007), *citing Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-
20 72, 859 P.2d 610 (1993); *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-
21 70, 798 P.2d 799 (1990). The purpose of factual findings is not to restate every fact elicited
22 during the hearing – the transcript of proceedings serves that purpose. “Findings must be made
23 on matters ‘which establish the existence or nonexistence of determinative factual matters ...’.”
24 *Weyerhaeuser*, 124 Wn.2d at 35-36. It is the role of the trier of fact, rather than the attorneys,
25 to determine which facts have been established by the evidence. *Hering v. State, Dept. of*
26 *Motor Vehicles*, 13 Wn. App. 190, 192, 534 P.2d 143 (1975).

1 Here, the Licensee argues that the ALJ's failure to accept its witnesses' testimony
2 and/or its video evidence was in error. Petition at 2, ¶2.1-2.2. However, the Board should
3 disregard this argument because the Licensee does not provide a legal or factual basis for its
4 argument and it is meritless. ALJ Rack had the opportunity to observe each of the Licensee's
5 witnesses and its video evidence. See LCB No. 23,653 Administrative Hearing Audio Record
6 (Audio Record), 1:04:16-3:18:40; 1:51:11-2:29:36. In his role as the trier of fact, ALJ Rack is
7 allowed to weigh the evidence by determining the credibility of the evidence and witnesses
8 presented and he is not required to restate every fact elicited during the hearing. See
9 *Weyerhaeuser*, 124 Wn.2d at 35-36.

10 The record is clear that ALJ Rack heard the testimonies of the Licensee's witnesses and
11 viewed the video tape submitted by the Licensee. See Audio Record, 1:04:16-3:18:40;
12 1:51:11-2:29:36. ALJ Rack also heard Officer Treco's testimony concerning the alleged
13 violation. See Audio Record, 00:08:10-1:04:10. As stated in Finding of Fact Number 1, ALJ
14 Rack recognized that the "testimony of the parties conflicted on material points." ALJ Rack
15 then stated he "carefully considered and weighted all of the evidence, including witness
16 demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in
17 responses), party motivations, the reasonable and consistency of testimony and totality of the
18 circumstances." See Order at 2. These statements clearly indicate that ALJ Rack considered
19 all the evidence and found Enforcement's evidence outweighed the Licensee's by a
20 preponderance of the evidence.

21 Additionally, the Licensee asserts that Mr. Holbrook could not have appeared
22 intoxicated because he could "assimilate" all the alcohol he consumed on the day of the
23 violation because he was 220 pounds and drinking light beer. Petition at 2-3, ¶2.3. The
24 Licensee also asserts that the lack of a blood alcohol test and/or photographs is evidence that
25 Mr. Holbrook was no apparently intoxicated. Petition at 3, ¶2.4. Both arguments are
26 speculative and unsupported by the record.

1 As stated in the ALJ's Conclusions of Law, a person is apparently under the influence
2 if he or she displays signs that are readily perceptible to the senses. Conclusion of Law 3.
3 Additionally, the courts have found that "apparently under the influence of liquor" means that
4 a person is "seemingly drunk" whether or not they are actually at some particular blood alcohol
5 level. *Faust v. Albertson*, 143 Wn. App. 272, 280, 178 P.3d 358 (2008) *overturned on other*
6 *grounds by Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009). Moreover, an
7 appearance can be "contrary to reality or truth" and therefore a person can appear to be
8 intoxicated by liquor, and satisfy this element of WAC 314-16-015(2) even if that appearance
9 is actually caused by some other agent. *See Barrett v. Lucky Seven Saloon*, 152 Wn.2d 259,
10 268, 96 P.3d 386 (2004). Therefore, a violation of RCW 66.44.200 and/or WAC 314-16-150
11 when a person is "seemingly drunk."

12 The Licensee's contention that Mr. Holbrook was not intoxicated because
13 Mr. Holbrook and Ms. Peterson, the bartender who served Mr. Holbrook, testified that
14 Mr. Holbrook was not apparently intoxicated is unpersuasive and insufficient to overturn
15 ALJ Rack's Findings of Fact. Additionally, Officer Treco's testimony clearly showed that
16 Mr. Holbrook displayed common signs of apparent intoxication over a sufficient period of time
17 for the ALJ to find that a violation occurred. *See Audio Record*, 00:16:00-00:20:05.
18 Moreover, a person's blood alcohol content can not show if a person appears intoxicated; it can
19 only corroborate direct evidence of a person appearing intoxicated. *Faust v. Albertson*, 166
20 Wn.2d 653, 662, 211 P.3d 400 (2009). Therefore, the ALJ's Findings are fully supported by
21 the record and should be adopted by the Board.

22
23 ///

24
25 ///

1 **IV. LICENSEE'S EXCEPTIONS TO THE ALJ'S FINDINGS OF FACT²**

2 **A. Exception to Finding of Fact No. 1.**

3 The Licensee objects to Finding of Fact Number 1 by arguing that the audio recording
4 does not support the ALJ's Finding. Petition at 4, ¶3.1. As previously stated, the ALJ, rather
5 than the attorneys, is afforded discretion in weighing the evidence and witness credibility. *See*
6 *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 605 n.19, 13 P.3d 1076 (2000).
7 All of the Licensee's witnesses had a potential bias towards the Licensee, and the Licensee's
8 excuses for Mr. Holbrook's apparent intoxication are not a legally justifiable defense. *See*
9 *Barrett*, 152 Wn.2d at 268. Furthermore, the Licensee's doorman, Mr. Lonnee, testified that
10 he had received no training on signs of intoxication. Audio Record, 1:43:47-1:44:05. He also
11 testified that he does not look for signs of intoxication when he observes patrons at the bar and
12 he only noticed Mr. Holbrook when Officer Treco and the Sherriff's deputy contacted
13 Mr. Holbrook inside the bar. Audio Record, 1:44:05-1:46:23. The Licensee's bartenders,
14 Ms. Peterson and Ms. Mansigh, both testified that they did not observe Mr. Holbrook for much
15 of the night and neither of them knew how many drinks Mr. Holbrook consumed before
16 Officer Treco contacted Mr. Holbrook inside the bar. Audio Record, 1:18:38-1:38:44;
17 2:43:44-2:51:00. Ms. Peterson and Ms. Mansigh also testified that the signs identified in
18 Findings of Fact Numbers 5 and 6 were signs of apparent intoxication. *Id.* Therefore, the
19 ALJ's Finding of Fact Number 1 is fully supported by the record and should be adopted by the
20 Board.

21 **B. Exception to Finding of Fact No. 5.**

22 The Licensee objects to Finding of Fact Number 5 by arguing that the record does not
23 support the ALJ's Finding. Petition at 4, ¶3.2. The Licensee does not cite to any place in the
24 record that indicates the lighting was insufficient to observe a patron's eyes. *Id.* Additionally,
25 Officer Treco's testimony indicates that she was able to easily observe Mr. Holbrook while he

26 ² Exceptions were only filed for some of the ALJ's Findings of Fact. Therefore, the Findings not being challenged by the Licensee will not generally be addressed any further and should be adopted by the Board.

1 was inside the Licensee's establishment. Audio Record, 00:08:20-00:33:45. Therefore, the
2 ALJ's Finding of Fact Number 5 is fully supported by the record and should be adopted by the
3 Board.

4 **C. Exception to Finding of Fact No. 6.**

5 The Licensee objects to Finding of Fact Number 6 by arguing that the video evidence
6 presented by the Licensee does not support the ALJ's Finding. Petition at 5, ¶3.3. Finding of
7 Fact Number 6 summarizes Officer Treco's testimony, and there is nothing in the record that
8 contradicts her observations. See Audio Record, 00:08:20-00:33:45. Additionally, the silent
9 video was edited by the Licensee to show footage it believed would be beneficial to its case,
10 and the ALJ, over Enforcement's objections, admitted the video into evidence and indicated he
11 would give it the proper weight. Audio Record, 1:51:11-2:29:36. Furthermore, Officer Treco
12 testified that the video showed some signs of apparent intoxication. Audio Record, 3:17:00-
13 3:18:40. As previously stated, the Licensee's excuses for Mr. Holbrook's apparent
14 intoxication is not a legally justifiable defense in this matter. See *Barrett*, 152 Wn.2d at 268.
15 Therefore, the ALJ's Finding of Fact Number 6 is fully supported by the record and should be
16 adopted by the Board.

17 **D. Exception to Finding of Fact No. 9.**

18 The Licensee objects to Finding of Fact Number 9 by arguing that the record does not
19 support the ALJ's Finding. Petition at 6, ¶3.4. The Licensee re-asserts that its witnesses
20 contradicted Officer Treco's testimony and the number of drinks allegedly consumed by
21 Mr. Holbrook would "mitigate" against any finding of intoxication. *Id.* Finding of Fact
22 Number 9 summarizes Officer Treco's testimony, and there is nothing in the record that
23 contradicts her observations. See Audio Record, 00:08:20-00:33:45. Additionally, Mr.
24 Holbrook's apparent, not actual, intoxication is at issue in this matter and the record supports
25 the findings that Mr. Holbrook displayed several signs of intoxication. Therefore, the ALJ's
26 Finding of Fact Number 9 is fully supported by the record and should be adopted by the Board.

1 **E. Exception to Finding of Fact No. 13.**

2 The Licensee objects to Finding of Fact Number 13 by arguing that the record does not
3 support the ALJ's Finding. Petition at 7, ¶3.5. The ALJ's Finding is supported by the record
4 and is a summary of Mr. Holbrook's testimony. See Audio Record, 2:47:05-3:16:05.
5 Therefore, the ALJ's Finding of Fact Number 9 is fully supported by the record and should be
6 adopted by the Board.

7 **F. Exception to Finding of Fact No. 16.**

8 The Licensee objects to Finding of Fact Number 16 by arguing that the record does not
9 support the ALJ's Finding. Petition at 7, ¶3.5. However, the ALJ's Finding is supported by
10 the record and is an accurate summary of Mr. Holbrook's testimony. See Audio Record,
11 3:11:55-3:14:05. Additionally, the Licensee is correct that the only evidence of
12 Mr. Holbrook's civil infraction hearing was his testimony. The Licensee did not submit any
13 credible documentation supporting Mr. Holbrook's claim that his infraction was dismissed.
14 Also, contrary to the Licensee's assertion, Mr. Holbrook did testify that he did not go through a
15 whole trial and that he only presented his case without the State's involvement. See Audio
16 Record, 3:11:55-3:14:05. Therefore, the ALJ's Finding of Fact Number 9 is fully supported by
17 the record and should be adopted by the Board.

18 **V. LICENSEE'S EXCEPTIONS TO THE ALJ'S CONCLUSIONS OF LAW³**

19 **A. Exception to Conclusion of Law No. 10.**

20 The Licensee objects to Conclusion of Law Number 10 by arguing that the record does
21 not support the ALJ's Conclusion. Petition at 6, ¶3.4. However, the record fully supports the
22 ALJ's factual findings and the findings indicate that the Licensee or its employees should have
23 known that Mr. Holbrook *appeared* intoxicated. Therefore, the ALJ's Conclusion of Law
24 Number 10 is fully supported by the record and should be adopted by the Board.
25

26 ³ Exceptions were only filed for some of the ALJ's Conclusions of Law. Therefore, the Conclusions not being challenged by the Licensee will not generally be addressed any further and should be adopted by the Board.

1 **B. Exception to Conclusion of Law No. 15.**

2 The Licensee objects to Conclusion of Law Number 15 by arguing that the record does
3 not support the ALJ's Conclusion. Petition at 7, ¶3.6. However, the record fully supports the
4 ALJ's factual findings and the findings indicate that Mr. Holbrook had an infraction hearing,
5 not a full contested trial, and the License presented no admissible documentation indicating
6 what transpired during Mr. Holbrook's hearing. Therefore, the ALJ's Conclusion of Law
7 Number 15 is fully supported by the record and should be adopted by the Board:

8 **C. Exception to Exclusion of Licensee's Exhibit 9.**

9 The Licensee objects to the ALJ's exclusion of its proposed Exhibit Number 9.
10 Petition at 7, ¶3.7. The Licensee argues that proposed Exhibit 9 is admissible under
11 RCW 34.05.452. The ALJ correctly determined that the Exhibit was not admissible because it
12 was not certified nor a complete record from the hearing and no foundation had been given for
13 its admissibility. Audio Record, 00:54:45-00:59:00. Therefore, it is not a document that a
14 reasonable person would rely upon and exclusion of proposed Exhibit 9 is fully supported by
15 the record and should not be admitted by the Board.

16 **VI. CONCLUSION**

17 The ALJ's Findings of Fact and Conclusions of Law are supported by the record and
18 case law. The Licensee's exceptions do not show that the ALJ made an unreasoned decision,
19 and its exceptions do not form grounds for modification of the Initial Order. Accordingly, for
20 the reasons set forth above, Enforcement respectfully requests that the Board adopt and affirm
21 the findings of fact and conclusions of law set forth in the Initial Order of ALJ Rack.

22 DATED this 26th day of May, 2011.

23 ROBERT M. MCKENNA
24 Attorney General

25 
26 BRIAN J. CONSIDINE, WSBA #39517
Assistant Attorney General
Attorneys for Enforcement