

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 1J9128A

LCB NO. 23,653
OAH NO. 2010-LCB-0047

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 May 8-9, 2009, the above named Licensee, or employee(s) thereof, gave, sold and/or supplied liquor to Shastina Lapping, a person apparently under the influence of liquor, and/or allowed Shastina Lapping, a person apparently under the influence of liquor, to possess and/or consume liquor on the licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150 and/or that on or about May 8-9, 2009, the above named Licensee, or employee(s) thereof, gave, sold and/or supplied liquor to Emily Buck, a person apparently under the influence of liquor, and/or allowed Emily Buck, a person apparently under the influence of liquor, to possess and/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 1 and 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 10, 2011, Administrative Law Judge Thomas P. Rack entered his Order Denying Motion to Dismiss Charge and Initial Order dismissing both counts of the complaint.

6. The Enforcement and Education Division filed a Motion to Extend the Time for Filing a Petition for Review and a requested a copy of the audio record of the hearing on March 15, 2011. The Board granted the request on March 15, 2011. The Enforcement and Education Division filed a Petition for Review on April 18, 2011. The Licensee requested a copy of the audio record of the hearing and an extension to the filing period to submit a Reply to Enforcement's Petition on April 25, 2011. The Board subsequently granted the request. The Licensee's Reply to Enforcement Division's Petition for Review was received timely on May 6, 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 23,653 is adopted.

IT IS HEREBY FURTHER ORDERED that the charges in the Complaint filed in case 23,653 are DISMISSED.

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

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).

FINAL ORDER OF THE BOARD
LCB NO. 23,653
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: 1J9128A
LCB HEARING NO. 23,653
OAH DOCKET NO. 2010-LCB-0047
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.

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

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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. 1J9128A

OAH DOCKET NO. 2010-LCB-0047
LCB NO. 23,653

DECLARATION OF SERVICE BY
MAIL

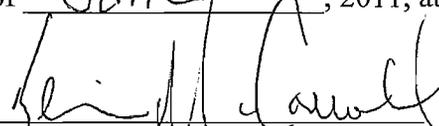
12 I certify that I caused a copy of the *FINAL ORDER OF THE BOARD* in the above-
13 referenced matter to be served on all parties or their counsel of record by US Mail Postage
14 Prepaid via Consolidated Mail Service for Licensees; by Campus Mail for the Office of
15 Attorney General, on the date below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

RECEIVED

MAR 29 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. 36586
AVN No. 1J9128A

Docket No. 2010-LCB-0047
Agency No. 23,653

ORDER DENYING MOTION TO DISMISS
CHARGE and INITIAL ORDER

Administrative Law Judge, Thomas P. Rack, heard oral argument from R.S. Prairie, Inc., dba Prairie Bar and Grill (the "Licensee"), and the Liquor Control Board (the "Board") on January 26, 2011 regarding Licensee's Motion to Dismiss Charge. Licensee was represented by Earl W. Jackson, Esq. and the Board appeared through Assistant Attorney General, Brian Considine.

A hearing on the merits of the case in chief was held before Administrative Law Judge, Thomas P. Rack, on February 1 and 2, 2011, with Earl Jackson, Esq. appearing for the Licensee and Assistant Attorney General Brian Considine representing 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:

ISSUES

Motion to Dismiss Charge

1. Whether the Administrative Violation Notice listing a violation of WAC 314-16-150 or the Liquor Control Board's Complaint No. 23,653, containing two counts of alleged violations of RCW 66.44.200 and/or WAC 314-16-150, controls?
2. Whether the second count of the Board's Complaint No. 23,653 should be dismissed?

Case in Chief

3. Whether on or about May 8-9, 2009, the Licensee, or employees thereof, gave, sold, and/or supplied liquor to Shastina Lapping, a person apparently under the influence of liquor, and/or allowed Shastina Lapping, 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?

4. Whether on or about May 8-9, 2009, the Licensee, or employees thereof, gave, sold, and/or supplied liquor to Emily Buck, a person apparently under the influence of liquor, and/or allowed Emily Buck, 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

Motion to Dismiss Charge

1. Pursuant to WAC 314-42-051, after a request for an administrative hearing by a licensee or permit holder, the assistant attorney general drafts an administrative complaint and serves it upon the licensee or permit holder and the Office of Administrative Hearings. WAC 314-42-051(3). Therefore, the administrative complaint and not the administrative violation notice controls.

2. Because the administrative complaint and not the administrative violation notice controls in administrative hearings, Licensee's Motion to Dismiss Charge is denied.

Case in Chief

3. Based upon the evidence presented, the Licensee did not violate RCW 66.44.200 and/or WAC 314-16-150 by giving, selling or supplying liquor to Shastina Lapping, and/or allowing Shastina Lapping to possess or consume liquor on the licensed premises.

4. Based upon the evidence presented, the Licensee did not violate RCW 66.44.200 and/or WAC 314-16-150 by giving, selling or supplying liquor to Emily Buck, and/or allowing Emily Buck to possess or consume liquor on the licensed premises.

Motion to Dismiss Charge

FINDINGS OF FACT

1. After an investigation by a Liquor Enforcement Officer (the "Officer"), the Officer issued the Licensee an Administrative Violation Notice on February 22, 2010, alleging the Licensee violated WAC 314-16-150 on May 8-9, 2009 by selling or serving liquor to an apparently intoxicated person. (Exhibit A attached to Licensee's Motion to Dismiss Charge).

2. On February 22, 2010, the Licensee requested an informal settlement conference while preserving its right to request an administrative hearing (Page 2 of Exhibit A attached to Licensee's Motion to Dismiss Charge).
3. By Complaint dated July 22, 2010, the Board charged the Licensee with Count One of giving, selling, and/or supplying liquor to Shastina Lapping, a person apparently under the influence of liquor, and/or allowing Shastina Lapping, a person apparently under the influence of liquor, to possess and/or consume liquor on the licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150 (Exhibit B attached to Licensee's Motion to Dismiss Charge).
4. By Complaint dated July 22, 2010, the Board charged the Licensee with Count Two of giving, selling, and/or supplying liquor to Emily Buck, a person apparently under the influence of liquor, and/or allowing Emily Buck, a person apparently under the influence of liquor, to possess and/or consume liquor on the licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150 (Exhibit B attached to Licensee's Motion to Dismiss Charge).
5. The Board stated that it considered the two counts of the alleged violations by the Licensee of RCW 66.44.200 and/or WAC 314-16-150 collectively as a first offence, for penalty purposes, if the Licensee were to be found culpable.

CONCLUSIONS OF LAW

1. WAC 314-29-005 provides that when a liquor enforcement officer believes a licensee or permit holder has committed a violation, the officer may prepare and serve an administrative violation notice on the licensee, licensee's agent or permit holder.
2. The administrative violation notice must include a brief narrative of the alleged violation; the date(s) of the alleged violation; a copy of the law(s) or regulation(s) allegedly violated; an outline of the licensee's or permit holder's options; and the recommended penalty. WAC 314-29-005(2).
3. If the licensee or permit holder and the Board's hearing examiner or captain cannot reach an agreement on a settlement proposal, the licensee or permit holder can accept the original recommended penalty or the hearing examiner or captain can forward a request for an administrative hearing. WAC 314-29-010(3)(d).
4. When an administrative hearing has been requested, the assistant attorney general drafts an administrative complaint if the hearing concerns an administrative violation notice. The administrative complaint is served on the licensee or permit holder. WAC 314-42-051(3).

5. Pursuant to RCW 66.44.040, the description of offenses in complaints, informations, or other proceedings under Title 66, need only contain basic and general information. The amount of liquor, the names of to whom it was sold or given need not be set forth in these charging documents.
6. The Administrative Violation Notice issued to the Licensee on February 22, 2010 satisfied the requirements of RCW 66.44.040 even though it did not contain the names of two persons whom the Board alleged were over-served liquor by the Licensee or two separate alleged violations.
7. The Licensee and its attorneys were aware of the two alleged counts specified in the Board's Complaint for nearly six months before the administrative hearing.
8. Based upon the foregoing Findings and Conclusions, the Licensee was aware of the specific charges and had considerable time to investigate, prepare and defend against the two counts contained in the Complaint.
9. For the foregoing reasons, the dismissal of Licensee's Motion to Dismiss Charge was proper.

Case in Chief

FINDINGS OF FACT

6. On the evening of Friday, May 8, 2009, Sara Fuson ("Fuson"), Emily Buck ("Buck"), Rachel Gette ("Gette") and Michelle Richards ("Richards") were at Richards' home for a Bar-B-Que.
7. While at the Richards' home, Buck received a telephone call from Shastina Lapping ("Lapping"). Lapping asked Buck if she would meet Lapping at the Licensee's establishment, Prairie Bar and Grill (the "Prairie"), to have drinks to celebrate Buck's birthday.
8. Lapping was waiting outside of the Prairie when Buck, Gette, Fuson and Richards arrived in Richards' vehicle sometime between 9:30 and 10:00 PM.
9. After paying the cover charge, Lapping, Richards, Gette, Fuson and Buck entered the Prairie.
10. Upon entering the Prairie, Fuson, Buck, Richards, Gette and Lapping (collectively, the "girls") proceeded to the bar to get alcoholic drinks. There were two to three bartenders behind the bar and two cocktail servers on the floor. Because the Prairie was very crowded that night and there were three to four people deep in front of

the bar, the girls had to wait ten to fifteen minutes before they could get to a bartender and order drinks.

11. Because Gette was the designated driver for the evening, she ordered and consumed only one alcoholic beverage, a Mike's Hard Lemonade. Richards, Fuson, Lapping and Buck each ordered a "cherry bomb"¹ and a beer.

12. After receiving their drinks, the girls found a table and sat down to socialize and consume their drinks.

13. Approximately one-half hour later, the girls, except Gette, ordered another round of cherry bombs from a cocktail server. The cocktail server brought the drinks to the table.

14. At various times throughout the night, Lapping and Buck left the remaining girls at the table to mingle with friends and acquaintances in the Prairie.

15. At approximately 11:30 PM, Lapping and Buck returned to the table with drinks in their hands. The evidence did not establish where or how Lapping and Buck obtained these drinks.

16. Shortly thereafter, Fuson, Buck and Lapping went to the bar and each ordered a cherry bomb. The bartender placed each drink on the bar in front of each of the three girls.

17. On the evening of May 8, 2009 to the early morning of May 9, 2009, a band had been playing live music for the patrons of the Prairie. Lapping and Buck were observed dancing at various times to the music.

18. Shortly before midnight, Lapping approached one of the band members and asked if the band could sing "Happy Birthday" to Buck.

19. At or around midnight, one of the band members attempted to call Buck to the stage. The band member used a microphone to summon Buck. When Buck arrived on stage, Lapping had another cherry bomb and sat down. Lapping placed the drink between her legs and then Buck knelt down to recovery the drink ("birthday shot") from between Lapping's legs. Lapping brought the birthday shot from a bartender.

20. Before and after consuming the birthday shot on stage, Buck danced provocatively and then continued to dance on the dance floor.

21. At least three to four times that night, Lapping, Fuson and Buck went outside of the Prairie to smoke cigarettes.

¹ A "cherry bomb" consists of a shot of cherry flavored vodka mixed with an energy drink, such as Red Bull or a similar product.

22. At around 12:30 AM on May 9, 2009, Gette, Fuson and Richards wanted to leave the Prairie and return to Richards' residence. Lapping and Buck wanted to return to the bar and have one more cherry bomb before leaving. While Fuson, Gette and Richards remained in the Prairie's parking lot, Lapping and Buck went back into the Prairie.

23. When Lapping and Buck did not exit the Prairie after a reasonable amount of time, Fuson, who had been holding Buck's purse, returned to the Prairie to search for Lapping and Buck. Fuson found Lapping and Buck at the bar watching the closed circuit surveillance video because Buck thought someone had stolen her purse.

24. When Lapping and Buck finally left the Prairie, they left in Lapping's vehicle. Approximately five minutes after leaving the Prairie, Lapping's vehicle was involved in a one vehicle accident which ultimately resulted in Buck's death.

25. Fuson had previously observed Buck when Buck was intoxicated. Based on these prior observations, Fuson believed Buck was intoxicated on May 8-9, 2009 because she had observed Buck dancing in a provocative manner, giggling, speaking louder than usual and Buck had glossy eyes. Based upon prior experience seeing Buck intoxicated, Fuson believed that Buck did not dance except when under the influence of alcohol. Fuson also believed Buck was being more social than when Buck was sober. Fuson also believed Buck was intoxicated because Buck did not remember giving her purse to Fuson and thought someone had stolen her purse.

26. Fuson also testified that Buck did not have slurred speech and did not stumble while at the Prairie. Fuson also testified that Buck had been going to tanning salons and had a red face.

27. Fuson had previously observed Lapping when Lapping was intoxicated. Fuson believed Lapping was intoxicated on May 8-9, 2009 because Lapping had glossy eyes, was giggly and smiling and less shy than when Lapping was sober.

28. Lapping believed Buck was intoxicated because she observed Buck to be louder, smiley, red faced and red eyed and dancing in a provocative manner ("dirty dancing"). Lapping also observed Buck to be hugging people and being more affectionate than normal when Buck was sober.

29. Lapping testified that Buck was not stumbling nor falling down.

30. Gette had previously observed Buck when Buck was intoxicated. Gette believed Buck was intoxicated because Buck had a red face; was dirty dancing, laughing, exhibited large arm movements, and only liked to dance after drinking. Gette also believed Buck was intoxicated because a few minutes before midnight, Buck jumped up and kissed Gette on the lips.

31. Gette had previously observed Lapping when Lapping was intoxicated. Gette believed Lapping was intoxicated because Lapping was more outgoing than usual and had glazed eyes.

32. Richards believed Buck was intoxicated because while Buck and Richards were in the restroom she observed Buck hug an acquaintance Buck had not seen for several years. She then observed Buck take out her camera, but was unable to turn it on. There were no Prairie employees in the restroom at the time.

33. Richards further believed Buck was intoxicated because while dancing on the dance floor, Buck rubbed her buttocks and chest on Richards. Richards also had to support Buck's weight while dancing.

34. Richards believed Buck was intoxicated because she had a red face, was sweaty, and had glossy eyes.

35. Richards believed Lapping was intoxicated because Lapping and Buck had their arms locked with each other and were leaning into each other and Richards believed they were supporting each other.

36. Clark County Deputy Sherriff Ryan Taylor was the principal investigator of the Lapping motor vehicle accident which occurred in the early morning of May 9, 2009.

37. In the course of his investigation, Deputy Taylor learned that Lapping's blood alcohol concentration was 0.164% one hour after the motor vehicle accident and 0.13% one and one-half hours after the accident.

38. Deputy Taylor testified the customary physical signs of intoxication are red, blood shot and watery eyes; poor coordination; slurred speech; and stumbling or unsteadiness on one's feet.

39. Liquor Control Enforcement Officer, Kendra Treco, testified the physical signs of apparent intoxication are slurred speech; a red face; red, glossy eyes; exaggerated movements; and swaying in place.

40. There was no evidence that the Prairie's bartenders, cocktail servers or other employees knew Buck and Lapping or had observed them in an intoxicated state prior to May 8, 2009.

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CONCLUSIONS OF LAW

10. RCW 66.44.200(1) states: "No person shall sell any liquor to any person apparently under the influence of liquor."
11. 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.
12. 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.
13. 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.
14. In this case, the testimony clearly established that Fuson, Gette, and Richards believed that Buck and Lapping were intoxicated based upon their prior observations of Buck and Lapping when these individuals were under the influence of alcohol.
15. The evidence established that the Prairie's bartenders, cocktail servers or other employees did not personally know Lapping and Buck nor had observed Buck and/or Lapping in an intoxicated state before May 8, 2009. Therefore, these employees had no knowledge that Buck's dancing, dirty or otherwise on May 8-9, 2009, was an indication that Buck was apparently intoxicated. Likewise, that Lapping's lack of shyness was an indication that she was apparently intoxicated. Nor that any of the other signs, such as giggling, smiling, hugging, kissing Gette, and the like, which Fuson, Gette and Richards observed about Buck and Lapping were out of the ordinary for these individuals and therefore an indication they were intoxicated.

16. While the evidence established that Buck's face was red, this condition could also be explained by Buck's visit to tanning salons. In addition, the testimony also established Buck was red and sweaty from dancing.

17. The testimony also established that Lapping's and Buck's eyes were glossy or glazed. This condition might be explained by the several cigarette breaks they took during the course of the evening. In addition, allergies, perfume, lighting or other irritants could account for the red and glossy eyes.

18. The evidence further established that neither Buck nor Lapping were stumbling or unsteady on their feet. To the contrary, both individuals were observed dancing at various times throughout the night. The only testimony to the contrary was Richards' belief that Lapping and Buck were arm in arm and supporting each other. However, Fuson and Lapping observed no stumbling or unsteadiness.

19. The testimony also established that neither Buck nor Lapping exhibited slurred speech on the evening of May 8th and the early morning of May 9, 2009.

20. The uncontroverted testimony established the Prairie was very crowded when Fuson, Buck, Gette, Richards, and Lapping first entered the establishment and that condition did not change throughout the night. There were two to three bartenders on duty and patrons three to four deep in front of the bar. Being that busy, the reasonable inference is the bartenders and cocktail servers had little time to observe Lapping and Buck, unlike the amount of time Fuson, Gette, and Richards had in observing Buck and Lapping.

21. While the tragedy which occurred after Lapping and Buck left the Prairie during the early morning of May 9, 2009 was most unfortunate and ill-fated, the evidence does not support a finding and conclusion that the Licensee and its employees knew or should have known that Lapping and Buck were intoxicated or appeared intoxicated at the times of service.

ORDER

IT IS HEREBY ORDERED:

1. Licensee's Motion to Dismiss Charge is **DENIED**.

2. The Board has failed to establish, by a preponderance of the evidence, that on or about May 8-9, 2009, the Licensee, or employees thereof, gave, sold, and/or supplied liquor to Shastina Lapping, a person apparently under the influence of liquor, and/or allowed Shastina Lapping, 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, Count One of Complaint No. 23,653 is **DISMISSED**.

2. The Board has failed to establish, by a preponderance of the evidence, that on or about May 8-9, 2009, the Licensee, or employees thereof, gave, sold, and/or supplied liquor to Emily Buck, a person apparently under the influence of liquor, and/or allowed Emily Buck, 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, Count Two of Complaint No. 23,653 is **DISMISSED**.

SIGNED and ISSUED this 10th 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 day 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 File 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

APR 18 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-0047
LCB NO. 23,653

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) Thomas Rack, on March 10, 2011, in the above-captioned case.

I. PROCEDURAL BACKGROUND

On July 20, 2010, the Board issued a Complaint to the Licensee, R.S. Prairie, Inc. d/b/a Prairie Bar and Grill (Licensee), alleging:

(1) That on or about May 8-9, 2009, the above named Licensee, or employee(s) thereof, gave, sold and/or supplied liquor to Shastina Lapping, a person apparently under the influence of liquor, and/or allowed Shastina Lapping, a person apparently under the influence of liquor, to possess and/or consume liquor on the licensed premises, contrary to RCW 66.44.200 and/or WAC 314-16-150.

1 (2) That on or about May 8-9, 2009, the above named Licensee, or employee(s)
2 thereof, gave, sold and/or supplied liquor to Emily Buck, a person apparently under
3 the influence of liquor, and/or allowed Emily Buck, a person apparently under the
4 influence of liquor, to possess and/or consume liquor on the licensed premises,
5 contrary to RCW 66.44.200 and/or WAC 314-16-150.

6 *See* Complaint.

7 The case was heard and considered by ALJ Rack in Vancouver, Washington, on February
8 1-2, 2011. After a full evidentiary hearing, the ALJ entered Findings of Fact, Conclusions of
9 Law, and Initial Order on March 10, 2011. The ALJ set aside both alleged violations set forth in
10 the Board's complaint. Enforcement respectfully takes exception to the Findings of Fact,
11 Conclusions of Law, and Initial Order of the ALJ.¹

12 II. DISCUSSION

13 Pursuant to WAC 314-42-095(2)(a), any party, upon receipt of a proposed order, may file
14 exceptions within twenty (20) days of service of the order. Due to a delay in attaining the record
15 from the ALJ, the Board granted Enforcement's request to extend the time for it to file its
16 petition for review. Enforcement must file its petition for review with the Board by April 18,
17 2011. The reviewing officer (including the agency head reviewing an initial order) "shall
18 exercise all the decision-making power that the reviewing officer would have had to decide and
19 enter the final order had the reviewing officer presided over the hearing[.]" RCW 34.05.464(4).
20 Therefore, the Washington State Liquor Control Board is not bound by the ALJ's Findings of
21 Facts or Conclusions of Law in the Initial Order.

22 In order to assist the Board when it reviews the record, Enforcement presented six
23 witnesses: Sara Fuson, 00:14:15-1:28:27; Shastina Lapping, 1:28:28-2:06:16; Rachel Gette,
24 2:06:30-3:23:59, Michelle Richards, 3:24:00-4:35:30; Deputy Ryan Taylor, 4:35:48-4:53:04; and
25 Officer Kendra Treco, 6:18:32-6:57:00. *See* Audio Recording from February 1-2, 2011, Prairie
26 Bar and Grill, No. 23,653, Administrative Hearing (Audio Record). The Licensee presented four

¹ ALJ Rack also issued an order denying the Licensee's Motion to Dismiss. Enforcement is not challenging this decision, and is only challenging the ALJ's determination that neither alleged violation occurred.

1 witnesses: Mary Theonnes, 4:53:20-5:13:18; Derrek Wright, 5:13:21-5:27:50; Troy Steigman,
2 5:28:00-6:04:07; and Ron Steigman, 6:06:00-6:18:30. *See* Audio Recording.

3 **A. Exceptions to Findings of Fact—Case in Chief²**

4 **1. Exception to Finding of Fact Number 14.**

5 Finding of Fact Number 14 omits that Ms. Lapping and Ms. Buck were served, and
6 consumed, the majority of their shots together at the bar. Audio Recording, 1:33:55-1:1:34:39.
7 Additionally, Ms. Buck consumed “many shots or drinks” that were brought to her while they
8 were socializing in and around the bar. *Id.*

9 **2. Exception to Finding of Fact Number 19.**

10 Finding of Fact Number 17 omits reference to Exhibit 7, pages 5, 6, 7, 8, 9, 10, and 11,
11 which depict images of Ms. Buck and Ms. Lapping while they were on stage for Ms. Buck’s
12 “birthday shot.” *See* Exhibit 7; Audio Recording, 00:48:35-00:50:28; 4:09:30-4:11:08.
13 Additionally, Finding of Fact Number 17 omits that Ms. Buck had consumed at least five (5)
14 drinks before going on stage for her “birthday shot.” Audio Recording, 1:40:52-1:41:30

15 **3. Exception to Finding of Fact Number 20.**

16 Finding of Fact Number 20 omits reference to Exhibit 7, pages 11 and 12, which depict
17 images of Ms. Buck and Ms. Lapping while they were headed off the stage and dancing right
18 after Ms. Buck took the “birthday shot.” *See* Exhibit 7, Audio Recording, 4:10:28-4:11:00.
19 Additionally, this finding omits that Ms. Buck and Ms. Lapping danced with Ms. Fuson, Ms.
20 Gette, and Ms. Richards on the dance floor right after Ms. Buck and Ms. Lapping exited the
21 stage. *See* Audio Recording 3:37:43-3:40:30; 4:11:00-4:11:30; Exhibit 4, page 4; Exhibit 6,
22 page 4.

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² There is a scrivener’s error in the Findings of Fact. The findings start at number 6 instead of number 1.

1 **4. Exception to Finding of Fact Number 22.**

2 Finding of Fact Number 22 omits that Ms. Lapping testified that she and Ms. Buck went
3 directly to the bar when they re-entered the Prairie Bar and Grill. Audio Recording, 1:46:55-
4 1:47:30. Once they were able to order, they ordered two (2) “cherry bomb” shots and consumed
5 the shots at the bar. Audio Recording, 1:47:30-1:48:00.

6 **5. Exception to Finding of Fact Number 25.**

7 Finding of Fact Number 25 omits that Ms. Fuson identified Exhibit 7, pages 1 and 13 as
8 examples of when Ms. Buck appeared intoxicated due to her “glossy eyes” and exaggerated
9 smile. 1:04:10-1:06:13. Ms. Fuson also stated that Ms. Buck and Ms. Lapping started to show
10 signs of intoxication after they consumed a third shot at the bar served to them by “Brian.”
11 00:40:00-00:41:00. This third shot occurred before Ms. Buck and Ms. Lapping went on stage for
12 Ms. Buck’s “birthday shot.” *Id.*

13 **6. Exception to Finding of Fact Number 26.**

14 Finding of Fact Number 26 mischaracterizes Ms. Fuson’s testimony. Ms. Fuson testified
15 that Ms. Buck, her sister, did not slur her speech or stumble but she was very hyper and very
16 loud. Audio Recording, 1:02:30-1:03:20. Additionally, Ms. Fuson testified that Ms. Buck’s skin
17 color was due to her going to tanning salons, but her face was redder in some photos and her red
18 face could have been an indication of intoxication. 1:16:48-1:17:20.

19 **7. Exception to Finding of Fact Number 27.**

20 Finding of Fact Number 27 omits that Ms. Fuson identified Exhibit 7, pages 1 and 13, as
21 examples of when Ms. Lapping appeared intoxicated due to her “glossy eyes.” (1:04:10-
22 1:06:13)

23 **8. Exception to Finding of Fact Number 28.**

24 Finding of Fact Number 28 omits that Ms. Lapping testified that she believed Ms. Buck
25 was intoxicated before she consumed their last shot around 1:00a.m. Audio Recording, 1:48:00-
26 1:48:18. Ms. Lapping believed that Ms. Buck appeared intoxicated before they took their last

1 shot because she observed that Ms. Buck was loud, laughing, giggling, hugging people, very
2 smiley, red faced, and had glossy eyes. Audio Recording, 1:48:18-1:49:40. Ms. Lapping
3 observed these signs prior to stating that Ms. Buck was not stumbling or falling down. *Id.*

4 **9. Exception to Finding of Fact Number 29.**

5 Finding of Fact Number 29 omits that Ms. Lapping observed signs of apparent
6 intoxication both before and after Ms. Buck consumed her “birthday shot” on stage. Audio
7 Recording 1:39:25-1:41:00. Additionally, Ms. Lapping admitted to consuming at least three (3)
8 drinks with Ms. Buck, and believed that she observed Ms. Buck consume at least seven (7) shots.
9 Audio Recording 1:35:00-1:35:37.

10 **10. Exception to Finding of Fact Number 30.**

11 Finding of Fact Number 30 omits that Ms. Gette testified that both Ms. Buck and
12 Ms. Lapping appear intoxicated in Exhibit 7, page 1 and 21, and the picture was taken shortly
13 after Ms. Buck consumed her shot on stage and about an hour before Ms. Buck and Ms. Lapping
14 consumed their last shot shortly before 1 a.m. Audio Recording, 2:55:00-2:59:38. Ms. Gette
15 believed they appeared intoxicated in Exhibit 7, page 21, because of their “redish” eyes and
16 Ms. Buck’s red face. 2:57:30-2:59:38. Ms. Gette also testified that Ms. Buck’s breath smelled
17 like alcohol before the “birthday shot” and after she consumed her last shot. 3:13:00-3:14:15.

18 **11. Exception to Finding of Fact Number 32.**

19 Finding of Fact Number 32 omits that Ms. Richards testified that Ms. Buck gave a huge
20 unsolicited hug to the unknown woman and that she was “fumbling” with her camera while they
21 were in the bathroom. Audio Recording, 3:34:00-3:35:23.

22 **12. Exception to Finding of Fact Number 33.**

23 Finding of Fact Number 33 omits that Ms. Richards testified that Ms. Buck was “out-of-
24 control” while dancing with her on the dance floor. Audio Recording, 3:38:16-3:38:47. She also
25 testified that Ms. Buck was “overly close and tight” to Ms. Richards while Ms. Buck was
26 dancing with Ms. Richards. Audio Recording, 3:38:50-3:39:30. Additionally, Ms. Richards

1 believed that Ms. Buck would have ‘fallen over’ if she did not hold Ms. Buck up while they
2 were dancing. Audio Recording, 3:58:00-3:58:21.

3 **13. Exception to Finding of Fact Number 34.**

4 Finding of Fact Number 34 omits Ms. Richards’ testimony that she believed Ms. Buck
5 was intoxicated when Ms. Buck walked off the stage after she consumed her “birthday shot.”
6 Audio Recording, 3:40:10-3:40:41. Ms. Richards believed Ms. Buck appeared intoxicated
7 because she observed that Ms. Buck’s face was red, she had red and glossy eyes and was sweaty.
8 Audio Recording, 3:40:00-3:40:55; 3:57:45. She also testified that Ms. Lapping and Ms. Buck
9 had their arms locked when coming off stage and were using each other to support their weight.
10 Audio Recording, 3:40:55-3:41:05.

11 Ms. Richards also testified that Ms. Buck was very “loud,” “aggressive,” and “overly
12 excited.” See Audio Recoding, 3:41:05-3:41:30. Ms. Richards also testified that Ms. Buck was
13 “loud” because her voice was loud, and she had exaggerated body movements both before,
14 during, and after Ms. Buck consumed her “birthday shot.” Audio Recording, 3:52:00-3:53:34.
15 She also believed that Ms. Buck and Ms. Lapping were unsteady on their feet because they were
16 walking arm-in-arm using each other for balance. Audio Recording, 3:57:45-3:58:45.

17 **14. Exception to Finding of Fact Number 35.**

18 Finding of Fact Number 35 omits Ms. Richards’ testimony that she believed Ms. Lapping
19 appeared intoxicated because Ms. Lapping and Ms. Buck were loud, laughing, giggling, and
20 hugging more than normal. Audio Recording, 3:50:45-3:52:00. She also believed that Ms. Buck
21 and Ms. Lapping were unsteady on their feet because they were walking arm-in-arm using each
22 other for balance. Audio Recording, 3:57:45-3:58:45. Ms. Richards also testified that the photo
23 of the girls in Exhibit 7, page 13 was taken after Ms. Buck consumed her “birthday shot” on
24 stage. Audio Recording 4:11:30-4:11:50. Ms. Richards stated that Ms. Lapping appeared
25 intoxicated when the photo was taken because her eyes are “unfocused.” *Id.*

1 **15. Exception to Finding of Fact Number 38.**

2 Finding of Fact Number 38 omits that Deputy Taylor testified that an “odor of
3 intoxicants” is a sign of apparent intoxication and that signs of intoxication become fairly
4 obvious once a person is above a .08% blood alcohol concentration. Audio Recording, 4:39:38-
5 4:40:40. Additionally, Deputy Taylor testified that Ms. Lapping likely exhibited several signs of
6 intoxication prior to the crash, including, red, watery eyes, slurred speech, and her dexterity,
7 balance, and motor skills would now be affected. Audio Recording, 4:47:45-4:49:10.

8 **16. Exception to Finding of Fact Number 39.**

9 Finding of Fact Number 39 omits that Officer Treco learned that Ms. Buck’s blood
10 alcohol concentration was 0.18% at the time of the accident. *See Exhibit 2, page 2.* Officer
11 Treco also attained written statements from Ms. Fuson, Ms. Richards, and Ms. Gette during her
12 investigation in August 2009. *See Exhibits 4, 5, and 6.*

13 **17. Exception to Finding of Fact Number 40.**

14 Finding of Fact Number 40 omits that Ms. Buck and Ms. Lapping ordered and consumed
15 the majority of their drinks at or around the bar. Audio Recording, 1:35:00-1:35:37.
16 Ms. Lapping recalled there being two or three bartenders who served them their drinks at the bar
17 that night. Audio Recording, 1:38:25-1:40:00. Ms. Buck and Ms. Lapping were at the
18 Licensee’s business for approximately two and half or three hours. *See Finding of Fact No. 8*
19 *and No. 22.*

20 Finding of Fact Number 40 incorrectly states that no bartenders knew Ms. Buck or
21 Ms. Lapping. Ms. Fuson testified that “Brian” was a bartender at the Prairie Bar and Grill on
22 May 8, 2009, and she knew him because they had been previously introduced to each other by
23 Ms. Buck. Audio Recording, 1:18:50-1:21:00; *See also* 00:26:35-00:27:00. “Brian” served the
24 women two rounds of drinks at the bar. 1:20:10-1:20:50; 1:21:50-1:22:19. Additionally,
25 Ms. Buck knew the doorman taking the money on May 8, 2009, and “Chris” who is friends with
26 Ms. Buck’s husband but was not working on May 8, 2009. 1:22:50-1:23:38. Ms. Fuson also

1 testified that she and Ms. Buck had been to the Prairie Bar and Grill two or three times prior to
2 May 8, 2009, and each time they were at the bar Ms. Buck appeared intoxicated because “she
3 drank a lot,” would appear very “hyper,” “loud,” and “obnoxious,” and her eyes would appear
4 “red” and “glossy.” 1:23:38-1:27:10. Ms. Buck also was very animated in her interactions with
5 Ms. Fuson and other patrons in the bar. *Id.*

6 **18. Exception to Omissions in the Findings of Fact.**

7 The Findings of Fact omit that Mr. Troy Steigman, a manager at the Licensee’s business,
8 remembered Ms. Fuson, Ms. Gette, Ms. Richards, Ms. Lapping, and Ms. Buck entering the bar
9 on May 8, 2009. 5:44:55-5:45:45. Mr. Steigman testified that he remembered Ms. Lapping
10 because she was a “pretty good looking girl” and draws a little bit of “attention.” *Id.* Although
11 Mr. Steigman does not remember the group of women after they purchased their first drink, he
12 did admit that they would want to watch women like Ms. Lapping and Ms. Buck because they
13 were celebrating a birthday and were more likely to become intoxicated at the bar than older
14 patrons. Audio Recording, 5:52:50-5:52:55. Mr. Steigman also admitted that he knew they
15 were there to celebrate a birthday, and a lot of people around him seemed to know Ms. Buck and
16 Ms. Lapping. Audio Recording, 5:53:18-5:53:55. Moreover, he admitted that someone
17 displaying signs of apparent intoxication, including slurred speech, unsteady motions, and being
18 loud, would cause him to have a conversation with the person to determine if they were
19 intoxicated. Audio Recording, 5:50:00-5:51:28. Mr. Steigman also testified that they “always
20 take notice of the birthday people” Audio Recording, 5:52:05-5:52:24.

21 Additionally, Ms. Fuson, Ms. Gette, Ms. Richards, and Ms. Lapping all testified that
22 Ms. Buck and Ms. Lapping were on stage for a “birthday shot.” All four women testified as to
23 the signs of apparent intoxication they observed before, during, and after Ms. Buck consumed
24 her “birthday shot.” A band was on stage during the time Ms. Buck consumed her “birthday
25 shot” and were also singing “happy birthday” during this time. The band members are
26 “employees” under WAC 314-01-005(3), and they had to have observed Ms. Buck and

1 Ms. Lapping during Ms. Buck’s “birthday shot” and the dancing that occurred afterwards. *See*
2 Exhibit 7, pages 5-11.

3 The Findings of Fact also omit any reference to Exhibit 7, pages 1-22. Exhibit 7 contains
4 twenty-two (22) pictures taken at the Prairie Bar and Grill on May 8, 2009. Audio Recording,
5 00:47:00-00:52:00; 2:38:36-3:03:37; 4:06:58-4:07:10. Ms. Fuson, Ms. Lapping, Ms. Gette, and
6 Ms. Richards all testified that the photos were true and accurate photos taken during the time
7 they were at the Prairie Bar and Grill on May 8, 2009. *Id.*

8 **B. Exceptions to Conclusions of Law—Case in Chief**

9 **1. Exception to Conclusion of Law Number 14.**

10 Conclusion of Law Number 14 is not supported by the record. The ALJ overlooks the
11 fact that Ms. Fuson, Ms. Lapping, Ms. Gette, and Ms. Richards all testified to common signs of
12 intoxication. Specifically, they testified that Ms. Buck and Ms. Lapping had red, “glossy” eyes,
13 were loud and had exaggerated movements when interacting with each other or the other women
14 in the group. Furthermore, the witnesses testified that Ms. Buck had a red face, was overly
15 exited and animated in her interactions with the other women in the group, especially when she
16 was dancing. Though the women’s previous experiences with Ms. Buck and Ms. Lapping
17 informed them that Ms. Buck and Ms. Lapping were intoxicated, they all testified to outward
18 signs of intoxication that any person could observe.

19 **2. Exception to Conclusion of Law Number 15.**

20 Conclusion of Law Number 15 is not supported by the record. The ALJ incorrectly
21 asserts that none of the bartenders, servers, or other employees knew Ms. Buck or Ms. Lapping.
22 Ms. Fuson and Mr. Troy Steigman both testified that a bartender named “Brian” and other
23 employees knew Ms. Buck and Ms. Lapping from previous times the two women had been
24 patrons at the Prairie Bar and Grill. Additionally, the ALJ overlooks Mr. Troy Steigman’s
25 testimony that any younger patron who was celebrating a birthday at his bar would be a person
26 his staff would keep an eye on because that person was more likely to become intoxicated while

1 at the bar. Additionally, he agreed that a person who consumed a “birthday shot” on stage, and
2 engaged in “dirty dancing,” might be showing signs of intoxication. Additionally, the ALJ
3 incorrectly asserts that none of the actions of Ms. Buck and Ms. Lapping, as described by
4 Ms. Fuson, Ms. Lapping, Ms. Gette, and Ms. Richards were “out of the ordinary.” However,
5 Ms. Fuson, Ms. Gette, and Ms. Richards all testified that Ms. Buck and Ms. Lapping’s actions
6 were atypical and Mr. Troy Steigman admitted actions similar to those described by Ms. Fuson,
7 Ms. Lapping, Ms. Gette, and Ms. Richards may cause him to question them to determine if they
8 were intoxicated.

9 **3. Exception to Conclusion of Law Number 16.**

10 Conclusion of Law Number 16 is speculative and contrary to law. The ALJ’s speculation
11 that Ms. Buck’s face was red because she went to tanning salons and was dancing is pure
12 speculation and not a basis in determining if Ms. Buck displayed signs of intoxication.
13 Ms. Fuson testified that Ms. Buck’s face was redder than normal and Ms. Gette and Ms.
14 Richards both testified that her red face was a sign that she was intoxicated. Furthermore, the
15 photos in Exhibit 7 clearly indicate the redness of Ms. Buck’s face throughout the night, and the
16 color of her face is one sign that she appeared intoxicated.

17 Additionally, the reason for a condition is immaterial to whether or not a person appears
18 intoxicated. The Supreme Court in *Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009),
19 held that the apparently intoxicated standard “revolves around appearance” and even evidence of
20 actual blood alcohol content is insufficient to establish whether a person “appeared drunk”.
21 *Faust*, 167 Wn.2d at 541. An appearance can be “contrary to reality or truth” and therefore a
22 person can appear to be intoxicated by liquor, and satisfy this element of WAC 314-16-015(2)
23 even if that appearance is actually caused by some other agent. *See Barrett v. Lucky Seven*
24 *Saloon*, 152 Wn.2d 259, 268, 96 P.3d 386 (2004). Therefore, the reason for an appearance is
25 immaterial, and the only question is whether or not someone’s appearance would indicate that
26 they are apparently intoxicated.

1 **4. Exception to Conclusion of Law Number 17.**

2 Conclusion of Law Number 17 is speculative, not supported by the record, and contrary
3 to law. The ALJ’s speculation that Ms. Buck and Ms. Lapping’s eyes were red, glossy, and/or
4 glazed because of their cigarette breaks, allergies, perfume, lighting, or other irritants is pure
5 speculation and not found in the record. There is no evidence that Ms. Buck or Ms. Lapping’s
6 eyes were red, glossy, or glazed because of cigarette smoke and there is also no evidence in the
7 record of any other possible “irritant” as described by the ALJ.

8 Additionally, as previously stated, the reason for someone’s appearance is immaterial to
9 whether or not a person appears intoxicated. The Supreme Court in *Faust v. Albertson*, 167
10 Wn.2d 531, 222 P.3d 1208 (2009), held that the apparently intoxicated standard “revolves
11 around appearance” and even evidence of actual blood alcohol content is insufficient to establish
12 whether a person “appeared drunk”. *Faust*, 167 Wn.2d at 541. An appearance can be “contrary
13 to reality or truth” and therefore a person can appear to be intoxicated by liquor, and satisfy this
14 element of WAC 314-16-015(2) even if that appearance is actually caused by some other agent.
15 *See Barrett v. Lucky Seven Saloon*, 152 Wn.2d 259, 268, 96 P.3d 386 (2004). Therefore, the
16 reason for an appearance is immaterial, and the only question is whether or not someone’s
17 appearance would indicate that they are apparently intoxicated.

18 **5. Exception to Conclusion of Law Number 18.**

19 Conclusion of Law Number 18 misstates the facts in the record. Ms. Richards testified
20 that she had to hold Ms. Buck up while they were dancing together. Additionally, the witnesses
21 agreed that neither Ms. Buck nor Ms. Lapping were stumbling or falling down, but they all
22 testified that Ms. Buck’s movements were exaggerated and “loud.” Moreover, the witnesses’
23 testimonies are consistent that Ms. Buck and Ms. Lapping’s movements were exaggerated when
24 they were interacting with each other and they were more affectionate with every person they
25 interacted with.
26

1 **6. Exception to Conclusion of Law Number 20.**

2 Conclusion of Law Number 18 ignores the law and its conclusion is not found in the
3 record. RCW 66.44.200 states that “no person shall sell any liquor to any person apparently
4 under the influence of liquor.” Additionally, WAC 314-16-150 states:

5 (1) *No retail licensee shall give or otherwise supply liquor* to any person under the
6 age of twenty-one years, either for his/her own use or for the use of his/her parent or
7 of any other person; or *to any person apparently under the influence of liquor; nor*
8 *shall any licensee or employee thereof permit any person* under the said age or *in*
9 *said condition to consume liquor on his/her premises, or on any premises*
10 *adjacent thereto and under his/her control.*

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

13 See Attachment 1, WAC 314-16-150 (emphasis added). Therefore, neither licensees, nor their
14 employees, may sell liquor to an apparently intoxicated person or allow a person apparently
15 under the influence of liquor to possess and/or consume liquor on the licensed premises. In the
16 context of the rule, the courts and the Board have defined the term “permit” as “the licensee’s
17 actual or constructive knowledge of the circumstances which would foreseeably lead to the
18 prohibited activity.” See *Reeb v. Liquor Control Board*, 24 Wn. App. 349, 353, 600 P.2d 578
19 (1979); *Oscar’s, Inc. v. Liquor Control Board*, 101 Wn. App. 498, 506-07, 3 P.3d 813 (2000).

20 Here, the ALJ incorrectly focuses on the Licensee’s actual knowledge of intoxication
21 instead of actual or constructive knowledge of the circumstances which would foreseeably lead
22 to Ms. Buck and Ms. Lapping being apparently intoxicated on the licensed premises. The
23 evidence shows that Ms. Buck and Ms. Lapping entered the Licensee’s establishment between
24 9:30 p.m. and 10:00 p.m, on May 8, 2009, and they consumed their last drinks between
25 12:30 a.m. and 12:45 a.m. on May 9, 2009. The testimonies of Ms. Fuson, Ms. Lapping, Ms.
26 Gette, and Ms. Richards all indicate that Ms. Buck and/or Ms. Lapping started displaying signs
of apparent intoxication around 11:30 p.m., which was shortly before Ms. Buck and Ms. Lapping
went on stage for Ms. Buck’s “birthday shot.” Consequently, Ms. Buck and Ms. Lapping were
displaying signs of apparent intoxication for around one hour prior to consuming their last shot.

1 During this hour, Ms. Buck and Ms. Lapping were on stage, dancing in front of the stage, and
2 socializing around the physical bar where drinks are served.

3 Additionally, the ALJ overlooks the fact that the band members are employees of the
4 Licensee because they were performing services on the licensed premises of the benefit of the
5 licensee. *See* WAC 314-01-005(3). Furthermore, the bartenders and servers should have been
6 watching Ms. Buck and Ms. Lapping because they knew the two women were celebrating
7 Ms. Buck's birthday and were more likely to become intoxicated on the premises. *See* Audio
8 Recording, 5:52:05-5:52:55.

9 The evidence is clear that there were band members on stage both during and after
10 Ms. Buck consumed her "birthday shot." Additionally, Ms. Lapping and Ms. Fuson both
11 testified that they ordered several of their drinks from a bartender named "Brian" and that the
12 majority of drinks consumed by Ms. Buck and Ms. Lapping were served to them by an employee
13 of the Licensee. The ALJ also implies that Ms. Fuson, Ms. Gette, and Ms. Richards had a lot
14 more time to observe Ms. Lapping and Ms. Buck than Licensee's employees. However,
15 Ms. Fuson, Ms. Gette, Ms. Richards, and Ms. Lapping all testified that Ms. Lapping and
16 Ms. Buck spent time around the physical bar area socializing and Ms. Lapping testified to
17 several signs of intoxication Ms. Buck displayed while they were around the bar socializing.
18 Additionally, the Licensee's bartenders and servers were solely responsible for watching for
19 signs of apparent intoxication. *See* Audio Recording, 5:21:15-5:22:00.

20 Therefore, Ms. Buck and Ms. Lapping displayed several outward signs of apparent
21 intoxication while they were inside the Prairie Bar and Grill on May 8-9, 2009, and the Licensee
22 had both active and constructive knowledge of Ms. Buck and Ms. Lapping's condition because it
23 knew the women were celebrating Ms. Buck's birthday and Ms. Buck and Ms. Lapping
24 displayed signs of intoxication for at least one hour while they were consuming liquor inside the
25 Licensee's establishment. Additionally, the ALJ provides no authority and no evidence that the
26

1 Licensee and its employees have an excuse for overlooking Ms. Lapping and Ms. Buck's apparent
2 intoxication because they were too busy, and this reasoning should be expressly overturned.

3 **7. Exception to Conclusion of Law Number 21.**

4 In Conclusion of Law Number 21, the ALJ incorrectly concludes that Enforcement did
5 not establish by a preponderance of the evidence that the Licensee or an employee thereof,
6 served liquor to an apparently intoxicated person or permitted an apparently intoxicated person
7 to consume and/or possess liquor on the licensed premises. Ms. Fuson, Ms. Lapping, Ms. Gette,
8 and Ms. Richards uncontroverted testimonies clearly establish that Ms. Buck and Ms. Lapping
9 appeared "seemingly drunk" while they were inside the Licensee's establishment on May 8-9,
10 2009. *See Faust v. Albertson*, 143 Wn. App. 272, 280, 178 P.3d 358 (2008) *overturned on other*
11 *grounds by Faust v. Albertson*, 167 Wn.2d 531, 222 P.3d 1208 (2009). Furthermore, the photos
12 in Exhibit 7, clearly show that Ms. Buck and Ms. Lapping were displaying signs of apparent
13 intoxication while they were inside the Licensee's premises. Moreover, the blood alcohol
14 concentration results from both Ms. Lapping and Ms. Buck's blood taken shortly after they left
15 the Licensee's establishment corroborates and supports the credibility of Ms. Fuson,
16 Ms. Lapping, Ms. Richards, and Ms. Gette's observations. *See Faust v. Albertson*, 166 Wn.2d
17 653, 662, 211 P.3d 400 (2009). Therefore, Enforcement did establish that the Licensee or an
18 employee thereof served both Ms. Buck and Ms. Lapping while they were apparently intoxicated
19 or allowed Ms. Buck and Ms. Lapping to consume and/or possess liquor while they were
20 apparently intoxicated.

21 **III. CONCLUSION**

22 Enforcement has demonstrated by a preponderance of the evidence, through the sworn
23 testimony of Ms. Fuson, Ms. Lapping, Ms. Gette, Ms. Richards, Deputy Taylor, and Officer
24 Treco that Ms. Emily Buck and Ms. Shastina Lapping were apparently intoxicated inside the
25 Licensee's premises on May 8-9, 2009, and they were served liquor and/or permitted to consume
26 and/or possess liquor in violation of RCW 66.44.200 and/or WAC 314-16-150. Therefore, the

1 Enforcement Division respectfully requests that the Initial Order not be adopted in this matter,
2 the complaint be sustained, and the standard penalty be imposed.³

3 DATED this 18th day of April, 2011.

4 ROBERT M. MCKENNA
5 Attorney General

6 
7 BRIAN J. CONSIDINE, WSBA #39517
8 Assistant Attorney General
9 Attorneys for the Washington State Liquor
10 Control Board Enforcement Division
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24 ³ If the Board sustains its Complaint, this would be two first-time violations in a two-year period, which
25 carries with it a standard five (5) day suspension or a five hundred dollar (\$500) monetary penalty. Additionally,
26 these first time violations would change the penalty in LCB No. 23,652 from a five (5) day suspension or a five
hundred dollar (\$500) monetary penalty to a thirty (30) day suspension because the violation would be the
Licensee's third since it occurred within two-years from the violation in this matter.

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. 365686-1J

LCB NO. 23,653
OAH NO. 2010-LCB-0047

ORDER GRANTING LICENSEE'S
MOTION TO EXTEND THE
FILING TIME FOR A REPLY TO
PETITION FOR REVIEW

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

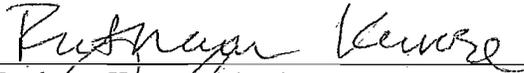
1. On March 10, 2011, Administrative Law Judge Thomas P. Rack issued an Initial Order in this matter, and;
2. On March 18, 2011, the Enforcement Division of the Board, through Assistant Attorney General Brian J. Considine, filed a Petition for Review, and;
3. On April 25, 2011 the Licensee, through attorney Earl W. Jackson, filed a motion to extend the filing time for a reply to Enforcement's petition to begin April 27, 2011 and requested a copy of the audio record from the hearing, and;
4. On April 25, 2011, the Board's Adjudicative Proceedings Coordinator placed a CD copy of the audio record in the mail to the Licensee's attorney, and;
5. The Board finds that the Licensee has made a clear and convincing showing of good cause to extend the date for filing a Reply to a Petition for Review, due to exigent circumstances, and;

The Board hereby ORDERS that the Licensee's Motion is granted. The Licensee may file a Reply to Petition for Review within ten (10) days from April 27, 2011. Since the tenth day will fall on a weekend, the petition must be received by May 9, 2011.

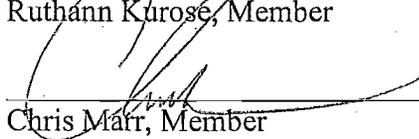
DATED at Olympia, this 26 day of April, 2011.



Sharon Foster, Chair



Ruthann Kurose, Member



Chris Marr, Member

RECEIVED

MAY 06 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

14925 NW CAPLES RD
BRUSH PRAIRIE, WA 98606,

LICENSEE.

LICENSE NO. 365686
AVN NO. 1J9128A

OAH 2010-LCB-0047
LCB NO. 23,653

LICENSEE'S REPLY TO
ENFORCEMENT DIVISION'S
PETITION FOR REVIEW

Licensee named above, by its attorney, Earl W. Jackson, replies to Enforcement Division's Petition For Review of the Initial Order as follows:

1. ENFORCEMENT'S EXCEPTIONS TO FINDINGS OF FACT

Licensee generally disputes Enforcements' objections to the Findings of Fact made by Administrative Law Judge Rack as they cite portions of the audio record that have been contradicted by a other witnesses, or the witness's own subsequent statements on the record.

Judge Rack heard and observed the demeanor of all of the witnesses, and made Findings of Fact based on all of the evidence he head from the witnesses. Pursuant to RCW 34.05.064(4) the Liqour Control Board, as reviewers, "shall give due regard to the presiding officer's opportunity to observe the witnesses."

Judge Rack was concerned about the ability of the friends of Ms. Lapping and Ms. Buck to judge whether or not Ms. Lapping or Ms. Buck were apparently under the influence of

1 liquor, as all of the witnesses except Rachel Gette had themselves been drinking, and many
2 testified on the record that they were "buzzed."

3 A review of the testimony shows that Enforcement's witnesses to apparent intoxication
4 were basing their belief of intoxication on their prior knowledge of the ordinary behavior of
5 Ms. Buck and Ms. Lapping outside of a the Prairie Tavern, which knowledge would not be
6 available to licensee or its employees. Ms. Buck and Ms. Lapping may have been more
7 affectionate and happy than usual, but this behavior could not be judged by licensee's
8 employees, who would have no way of knowing how Ms. Buck or Ms. Lapping acted outside
9 of the Prairie Tavern.

10 Ms. Buck and Ms. Lapping were out of the observation of the remaining women most
11 of the night, because they were mingling with others as per Finding 14. Thus the testimony of
12 the other women, being Ms. Gette, Ms Fusion and Ms. Richards was necessarily limited.
13 There was no direct observational testimony of apparent intoxication at the time any liquor was
14 served by Licensee's employéés.

15 In fact Sara Fusion, sister of Emily Buck, testified and stated in page 6 of
16 Enforcement's Exhibit 5 that at no point were either Ms. Buck or Ms. Lapping slurring their
17 speech or stumbling, but were uncharacteristically happy and talkative. All of the women were
18 smoking and going out for cigarette breaks many times in full view of the licensee's
19 employees, and their glossy eyes was probably attributable to smoker's irritation, and not a
20 sign of apparent intoxication, as noted by Judge Rack in Finding 21.

21 Ms. Lapping stated other patrons were furnishing Ms. Buck alcohol, which of course
22 would not be known to the licensee's servers. (Audio Record 1:51:21-1:51:41). Ms. Buck
23 stated she was not intoxicated prior to taking her last shot at the bar and had spaced her drinks
24 out fairly good. (1:55:01-1:55:21). Ms. Lapping testified that for the most part she and Emily
25 were by themselves and they were not being observed by the other girls with them. (1:55:21-
26 1:55:55). Ms. Lapping told the 911 operator after leaving the bar that she was not drunk.

1 (1:58:30-1:58:55.) Her own blood alcohol expert at trial put her blood alcohol at .09 only.

2 (1:59:35-1:59:47).

3 Mary Theonnes, who was a patron in the Prairie Bar and Grill, testified that although
4 she talked to Sara Fusion, and saw Ms. Lapping and Ms. Buck over a period from
5 approximately 9:00 to 11:30-12:00, dancing, conversing, and walking to the bathroom, she saw
6 no evidence of intoxication. The women looked happy and social, but were not intoxicated.
7 She also saw no excessive drinking. (4:56:50 – 5:00:45). She stated she had seen women
8 “dirty dancing” with other women in every bar she has been in, and she does not consider it
9 evidence of intoxication. (5:00:45-5:01:25). She specifically denied seeing staggering,
10 slurring, or glossy eyes from Ms. Buck or Ms. Lapping. (5:01:25-5:01:46). She confirmed the
11 bar was busy, being 3-4 deep, and everyone was hovering around the bar. Because the bar was
12 so busy people would need to step away after obtaining their drink to allow others to order
13 theirs. (5:01:46-5:02:50). She stated that taking birthday shots in the manner done by Ms.
14 Buck was commonplace at all bars. (5:04:00-5:04:34.)

15 Both of licensee’s employees, Mr. Derek Wright and Mr. Troy Steigman, Licensee’s
16 bar manager for 10 years, who had taught classes in alcohol training as well as having taken
17 multiple classes himself (5:29:00-5:29:30), stated they saw no evidence of intoxication in Ms.
18 Buck or Ms. Lapping. (5:40:15-5:41:37). Mr. Wright testified the group of women were
19 going out many times for cigarette breaks in front of him.

20 2. SPECIFIC OBJECTIONS

21 Comments on selected Licensee’s Exceptions follow:

22 2.1. Exception to Finding of Fact 14 (Service at bar)

23 Finding:

24 14. At various times throughout the night, Lapping and Buck left the remaining girls at
25 the table to mingle with friends and acquaintances in the Prairie.

1 Enforcement' states it should be noted that Ms. Lapping and Ms. Buck were served a
 2 majority of their shots at the bar. However Judge Rack determined this not to be relevant
 3 because of the fact the bar was very busy, and it could not be proven that Licensee employees
 4 at the bar were able to observe evidence of intoxication. In response to Judge Rack's questions
 5 Ms. Lapping stated she and Emily had to wait in line around 10 minutes for their end-of-
 6 evening shot and it was a few minutes more before the drink was made. (2:05:40-2:05:54.)
 7 She also stated the bar was in that crowded condition most of the night. (2:05:54-2:06:07).

8 **2.2. Exception to Finding of Fact 19 (Birthday Shot)**

9 Finding:

10 19. At or around midnight, one of the band members attempted to call Buck to the
 11 stage. The band member used a microphone to summon Buck. When Buck arrived
 12 on stage, Lapping had another cherry bomb and sat down. Lapping placed the drink
 13 between her legs and then Buck knelt down to recovery the drink ("birthday shot")
 14 from between Lapping's legs. Lapping brought the birthday shot from a bartender.

15 Enforcement stated Finding of Fact Number 17 (*sic*) omits reference to the photographs
 16 in Exhibit 7, pages 5, 6, 7, 8, 9, 10, and 11, which depict images of Ms. Buck and Ms. Lapping
 17 while they were on stage for Ms. Buck's "birthday shot." However the photographs show no
 18 more than the women being happy and social, consistent with festive behavior. In fact
 19 photograph 9 of Exhibit 7 shows Ms. Buck executing a complicated dance maneuver when
 20 taking the birthday shot, which would show she is not apparently under the influence of liquor.

21 Further the photographs taken were flash photographs, and were not indicative of the
 22 appearance of the Buck party under the dimmer lights of the tavern. Glossy eyes certainly
 23 could not be observed readily outside of flash camera range.

24 Although Ms. Lapping said that the photographs in Exhibit 7 identified glossy eyes,
 25 photograph 13 identified by her was taken with flash photography and show all of the friends'
 26 eyes to be the same, even Rachel Gettes who Ms. Fusion characterized as sober. (1:05:00-
 1:05:33.)

1 Photograph 19 shows a blue mark on Ms. Buck's face, but Ms. Richards testified that
2 she had changed the picture on her computer which gave rise to the mark, and that she was
3 unable to identify when the picture was taken or even who took it. (4:14:45-4:15:23.)

4 Additionally, Enforcement states Finding of Fact Number 17 (*sic*) omits that Ms. Buck
5 had consumed at least five (5) drinks before going on stage for her "birthday shot." This
6 exception should also be denied as Ms. Lapping testified that she could not say as a "for sure
7 statement" how many drinks Ms. Buck had consumed before she took her birthday shot and
8 five was only her guess. (1:40:52-1:41:30.)

9 Shastina Lapping had consumed three shots and a beer between 9:30-12:45 according
10 to Sara Fuson (1:01:32-1:01:33). Ms. Fusion testified that she judged Ms. Lapping's condition
11 how she, Ms. Fusion, felt, and she was feeling a buzz around 11:30 after three drinks. This is
12 not the proper way to identify another's intoxication. She stated neither Emily nor Shastina
13 were slurring their speech or staggering, and Emily was more outgoing than usual. (1:02:50-
14 1:03:12.)

15 2.3 Exception to Finding of Fact 40.

16 Finding:

17 40. There was no evidence that the Prairie's bartenders, cocktail servers or other
18 employees knew Buck and Lapping or had observed them in an intoxicated state
19 prior to May 8, 2009.

20 This exception should be denied because Ms. Lapping testified that she had seen Ms.
21 Buck at the Prairie Tavern a few times before, but had only observed Ms. Buck intoxicated one
22 time before, at a bachelorette party in Portland. Further Ms. Lapping stated that only old
23 acquaintances and people Ms. Buck had known would see her as intoxicated, as she was louder
24 than usual, and unusually affectionate (1:51:10-1:51:21).

25 Mr. Troy Steigman, bar manager, stated that he had never seen Ms. Lapping or Ms.
26 Buck in the bar before the night of the incident. (5:53:25-5:55:34)

2.4 Exception to Omissions in Findings of Fact.

Enforcement focuses on the testimony of Mr. Troy Steigman, Licensee's manager on duty until 9:30PM and present at a table 20 feet away from the Lapping-Buck party until 1:00 PM (5:30:38-5:30:48; 5:40:15-5:40:40). Mr. Steigman stated he observed the Lapping-Buck party over the course of the evening and saw no signs of intoxication. (5:44:50-5:46:19) He further stated that it was quite common in all bars for girls to dance with other girls, and even make physical contact, and to take birthday shots at midnight while bending over another person, and did not lead to belief a person was intoxicated if it was done. (5:47:05-5:48:09).

Mr. Steigman agreed with Deputy AG Considine that more than one sign of possible intoxication was needed before a person was talked to and assessed for intoxication. (5:50:55-5:51:25). He also said that drink consumption on birthday's depends on the person, and men were much more likely than women to become intoxicated upon birthday occasions (5:52:07-5:42:42).

He also stated it was way too busy in the bar to watch any particular person unless they stood out by exhibiting signs of intoxication (5:54:55-5:55:11). If bar patrons were exhibiting signs of intoxication the servers would talk to them to assess their condition and take appropriate steps from slowing them down, serving food or cutting them off. Nothing happened on May 8th - 9th to show anyone was intoxicated. (5:59:10-6:00:27).

Nothing in Mr. Steigman's testimony established that the servers had a duty to keep anyone under observation unless they were exhibiting signs of intoxication, and he stated no one was. There is no testimony showing that any employee of the licensee failed to talk to Ms. Lapping or Ms. Buck to allow them to assess their condition, or that any employee served alcohol to them while they were exhibiting apparent signs of intoxication.

3. DIRECT OBSERVATIONAL EVIDENCE REQUIRED

There was no direct observational evidence of anyone being apparently intoxicated at the time of service of alcohol by Licensee's employees. Direct observational evidence is required to establish a violation of RCW 66.44.200(1) under the case law. Without that evidence the Court in *Ensley v. Mollmann*, 155 Wn.App. 744, 230 P.3d 599 (Wash.App. Div. 1 2010) dismissed a claim against the bar on summary judgment, stating at 155 Wn.App pp 755-757:

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

¶ 19 **To survive summary judgment in an overservice case, a plaintiff must demonstrate " that the tortfeasor was 'apparently under the influence' by direct, observational evidence at the time of the alleged overservice or by reasonable inference deduced from observation shortly thereafter."** *Faust*, 166 Wash.2d at 659, 211 P.3d 400 (quoting RCW 66.44.200(1)). **Evidence of the amount of alcohol consumed is insufficient to establish that the person was apparently under the influence at the time of service.** See *Christen v. Lee*, 113 Wash.2d 479, 487, 780 P.2d 1307 (1989) (applying common law obviously intoxicated standard). **Likewise, a person's appearance a substantial time after the service is insufficient evidence of apparent intoxication to defeat summary judgment.** See *Christen*, 113 Wash.2d at 488-89, 780 P.2d 1307. (Bold Emphasis Added)

4. BAC POST ACCIDENT INSUFFICIENT

The court in *Faust v. Albertson*, 166 Wn.2d 653, 211 P.3d 400 (Wash. 2009) stated at 166 Wn.2d 666:

¶ 10 This court has held that a combination of postaccident observational evidence, expert testimony, and BAC were insufficient evidence to survive a summary judgment motion. *Purchase v. Meyer*, 108 Wash.2d 220, 223, 737 P.2d 661 (1987). *Purchase* involved the alleged overservice of a 19-year-old who, some time after leaving a restaurant where she and her friends had been drinking, struck a motorcyclist with her

1 car. Id. at 222, 737 P.2d 661. Meyer's BAC was measured at .13 some three and one-
2 half to four hours after she had left the restaurant. Id. The court held:

3 **Insofar as a cause of action for furnishing intoxicating liquor to an " obviously**
4 **intoxicated" person is concerned, the results of a blood alcohol test ... and an**
5 **expert's opinion based thereon, and the physical appearance of that person at a**
6 **substantial time after the intoxicating liquor was served, are not by themselves**
7 **sufficient to get such a cause of action past a motion for summary judgment.**
8 **Whether a person is " obviously intoxicated" or not is to be judged by that person's**
9 **appearance at the time the intoxicating liquor is furnished to the person. Id. at 223, 737**
10 **P.2d 661. Because a heavy drinker may not appear intoxicated despite a high BAC**
11 **and because alcohol may react on the human body differently because of "**
12 **medically recognized variables," the court restated the rule that sobriety must be**
13 **judged at the time of service. Id. at 225-26, 737 P.2d 661.**
14 (Bold Emphasis Added)

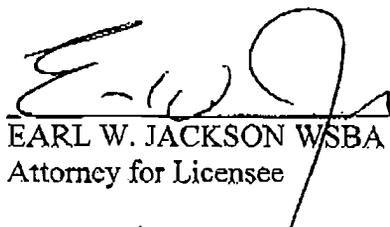
15 5. PROBABILITY OF OVERSERVING

16 Enforcement cites *Reeb, Inc. v. Washington State Liquor Control Bd.*, 24 Wn.App.
17 349, 600 P.2d 578 (Wash.App. Div. 1 1979), as being relevant to the Licensee permitting
18 unlawful overserving prohibited by RCW 66.44.200. However *Reeb* dealt with a licensee
19 employing dancers that licensee knew had engaged in lewd conduct in the past, and the *Reeb*
20 Court held that allowing them to continue to dance when there was lewd conduct in the past
21 was tantamount to permitting that conduct on an ongoing basis, in violation of the law against
22 permitting lewd conduct by employees. There is no evidence in our case that licensee
23 employed bartenders or servers who habitually over-served, and in fact the evidence was that
24 licensee had not had any over-serving charges in over 25 years. (5:31:20-5:31:27) Nor is
25 there any legal standard in Washington to keep persons celebrating birthdays or other special
26 occasions under surveillance for over consuming, as Enforcement implies.

6. CONCLUSION.

Judge Rack's Findings, Conclusions, and Dismissal of the charges against the Licensee were correct given the lack of any direct observational evidence against the Licensee. Licensee's alleged signs of intoxication were either not apparent to third parties that did not know the personalities of Ms. Lapping and Ms. Buck to be less exuberant outside of a bar, or were in fact not signs of intoxication after assessment. Assessment and talking to the women would show redness was a result of artificial tanning as testified by Ms. Fusion, and that glossy eyes could be explained by the amount of smoking they were doing outside the bar. There is absolutely no evidence that such assessments were not done by Licensee's servers.

DATED: May 6, 2011.



EARL W. JACKSON WSBA No 7238
Attorney for Licensee

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CERTIFICATE

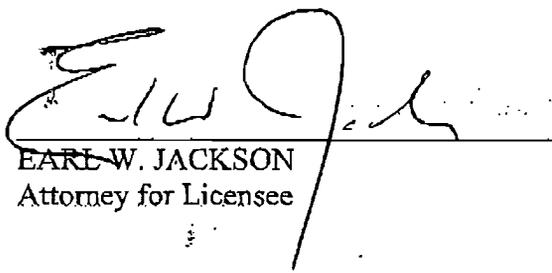
I declare under penalty of perjury under the laws of the state of Washington that I mailed a copy of the foregoing document to the following person at the following address:

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

Office of Administrative Hearings
attn: Presiding ALJ
949 Market St., Suite 500
Tacoma, WA 98402
(also via facsimile)

postage prepaid, on May 6, 2011.

Dated May 6, 2011, at Battle Ground, Washington.


EARL W. JACKSON
Attorney for Licensee

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