

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

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

LICENSEE

LICENSE NO. 403213-1L  
AVN 1L0089A

LCB NO. 23,670  
OAH NO. 2010-LCB-0041

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated June 21, 2010, alleging that on March 30, 2010, the above-named Licensee, or employee(s) thereof, sold, supplied or otherwise provided alcohol to a person under the age of twenty-one in violation of RCW 66.44.270(1).
2. The Licensee made a timely request for a hearing.
3. A hearing took place on January 11, 2011, consisting of oral argument on the Education and Enforcement Division's Motion for Summary Judgment.
4. The Licensee Dodge City Saloon, Inc. and owner Ray Kutch appeared and was represented by Attorney at Law Ben Shafton. The Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg.
5. On February 2, 2011, Administrative Law Judge Gina L. Hale entered her Findings of Fact, Conclusions of Law, and Initial Order sustaining the complaint.
6. The Licensee filed a Petition for Review and Enforcement filed a Reply to Licensee's Petition for Review. The Licensee filed a Rejoinder on Petition for Review and Enforcement filed a Motion to Strike Licensee's Rejoinder.

FINAL ORDER OF THE BOARD  
LCB NO. 23,670  
DODGE CITY BAR & GRILL  
LICENSE 403213

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 23,670 is adopted. IT IS FURTHER ORDERED that the Rejoinder filed by the Licensee is stricken from the record. In the Rejoinder, the Licensee first notes that it "sees no reason to make any further response" to the arguments of the Enforcement Division in its Response to the Licensee's Petition for Review. However, the Rejoinder then raises new issues. A Rejoinder is not allowed or provided for in the Board's rules, and it is inappropriate to attempt to raise new issues in the Rejoinder (or in a Petition for Review) that were not raised before the Administrative Law Judge. We find that the Administrative Law Judge properly ruled on the Motion to Suppress Evidence, the denial of the Licensee's Motion to Dismiss, and the Granting of Enforcement's Motion for Summary Judgment.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,670 is sustained and that the liquor license privileges granted to Dodge City Saloon, Inc d/b/a Dodge City Bar & Grill located at 4250 E. Fourth Plain Boulevard in Vancouver, Washington, License 403213, are hereby suspended for a term of seven (7) days. The suspension will be served from 2:00 p.m. on May 13, 2011 until 2:00 p.m. on May 20, 2011.

DATED at Olympia, Washington this 29<sup>th</sup> day of MARCH, 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. 23,670  
DODGE CITY BAR & GRILL  
LICENSE 403213

4

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



**Washington State  
Liquor Control Board**

---

March 30, 2011

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

Dodge City Saloon, Inc  
d/b/a Dodge City Bar & Grill  
4250 E Fourth Plain Blvd  
Vancouver, WA 98661-5650

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

**RE: FINAL ORDER OF THE BOARD**  
**LICENSEE: Dodge City Saloon, Inc**  
**TRADE NAME: Dodge City Bar & Grill**  
**LOCATION: 4250 E Fourth Plain Blvd, Vancouver, WA 98661-5650**  
**LICENSE NO. 403213-1L**  
**ADMINISTRATIVE VIOLATION NOTICE NO: 1L0089A**  
**LCB HEARING NO. 23,670**  
**OAH DOCKET NO. 2010-LCB-0041**  
**UBI: 601 396 219 001 0003**

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Final Order for the above captioned 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

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

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

4 IN THE MATTER OF:

5 DODGE CITY SALOON, INC  
6 d/b/a DODGE CITY BAR & GRILL  
7 4250 E FOURTH PLAIN BLVD  
8 VANCOUVER, WA 98661-5650

LCB NO. 23,670  
OAH NO. 2010-LCB-0041

DECLARATION OF SERVICE BY  
MAIL

9 LICENSEE

10 LICENSE 403213-1L  
11 AVN NO. 1L0089A

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:

16  
17 BEN SHAFTON, ATTORNEY FOR LICENSEE  
18 900 WASHINGTON STREET, STE 1000  
VANCOUVER, WA 98660-3455

GORDON KARG, ASSISTANT ATTORNEY  
GENERAL, GCE DIVISION  
OFFICE OF THE ATTORNEY GENERAL  
MAIL STOP 40100

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

22 DATED this 30<sup>th</sup> day of March, 2011, at Olympia, Washington.

23  
24   
25 Kevin McCarroll, Adjudicative Proceedings Coordinator  
26

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

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE Liquor Control Board

MAILED  
FEB 02 2011  
VANCOUVER OFFICE OF  
ADMINISTRATIVE HEARINGS  
**RECEIVED**  
FEB 07 2011

In the Matter of:

Dodge City Saloon, Inc.  
d.b.a. Dodge City Bar & Grill,

Licensee

License No. 403213

OAH No. 2010-LCB-0041  
LCB No. 23,670

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND INITIAL ORDER

Gina L. Hale, Assistant Deputy Chief - Administrative Law Judge (ALJ), conducted a hearing on January 11, 2011. Oral arguments were heard on the Liquor Control Board's Motion for Summary Judgment. **The Licensee**, Dodge City Saloon, Inc and owner Ray Kutch, appeared and were represented by Ben Shafton, Attorney at Law. Gordon Karg, Assistant Attorney General, appeared and represented **The Liquor Control Board - Enforcement Division (The Board)**.

**PREHEARING MOTIONS**

**I. Licensee's Motion to Suppress and Motion to Dismiss**

Prior to the hearing, the Licensee submitted a Motion to Suppress the Board's evidence and a Motion to Dismiss the Board's case. The Licensee argued that the Board's evidence violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution.

**DISCUSSION**

As an Administrative Law Judge, the undersigned has no authority to rule a statute or regulation unconstitutional. The undersigned is unable to give the Licensee the relief they seek. The Licensee may have valid constitutional arguments. However, this is not the forum within which they can be addressed. Under the provisions of Article IV, Section 6 of the Washington State Constitution, only superior courts have jurisdiction to address constitutional issues.

**DECISION SUMMARY**

**Licensee's Motion to Suppress And Motion to Dismiss**

1. The Licensee's Motion to Suppress is **Denied**.
2. The Licensee's Motion to Dismiss is **Denied**.

## II. Board's Motion for Summary Judgment

Prior to the hearing and in response to the Licensee's motions, the Board submitted a Motion for Summary Judgment and provided Stipulated Findings of Fact.

This decision is based on the written submissions, attached Exhibits, witness testimony, and oral arguments of the parties.

### DECISION SUMMARY Board's Motion for Summary Judgment

1. The Board's Motion for Summary Judgment is **Granted**.
2. The Licensee shall be assessed the penalty of suspension for seven (7) days based on this as the second violation in a rolling two-year period.

The parties have stipulated to the following Findings of Fact:

### FINDINGS OF FACT

#### I. Stipulated Findings of Fact

1. The Washington State Liquor Control Board regulates the conduct of licensees and their patrons to ensure compliance with applicable laws and administrative rules.
2. Dodge City Saloon, Inc. is the Licensee and owner of Dodge City Bar & Grill, the licensed premises at issue in this matter, located at 4250 E. Fourth Plain Blvd., Vancouver, Washington 98661.
3. The Licensee holds a spirits / beer / wine restaurant license issued by the Washington State Liquor Control Board, license No. 403213.
4. The Licensee was open to the public and conducting business in its current location as of September 10, 2009.
5. On March 30, 2010, Lieutenant Marc Edmonds, Officer Almir Karic, and Investigative Aide Christopher Rowell conducted a compliance check at the Licensee's premises.
6. On March 30, 2010, the Licensee was aware that Enforcement had previously sent in minor Investigative Aides to engage in "compliance checks" and understood on March 30, 2010, that Enforcement might attempt to conduct a "compliance check" at any time.
7. Lieutenant Marc Edmonds and Officer Almir Karic are liquor enforcement officers with the Washington State Liquor Control Board Enforcement and Education Division.

8. On March 30, 2010, Christopher Rowell was employed by the State of Washington, and specifically by the Washington State Liquor Control Board Enforcement and Education Division, as a minor Investigative Aide.

9. On March 30, 2010, prior to the compliance check conducted at the Licensee's premises, enforcement officers photographed Rowell and ensured Rowell only had in his possession his own Washington State intermediate driver's license, his cell phone, and money provided to him by Officer Karic for the compliance check.

10. The compliance check at the Licensee's premises was one of several conducted by the Board officers and Mr. Rowell on March 30, 2010. The compliance check was conducted on the Licensee's premises due to its general proximity to where other licensed premises compliance checks were being conducted. It was not a predetermined destination prior to leaving the Liquor Control Board offices in Vancouver.

11. Christopher Rowell has a birth date of June 11, 1991, and was eighteen (18) years of age on March 30, 2010.

12. On March 30, 2010, Donna Paranteau was an employee of the Licensee working in the licensed premises as a bartender and waitress.

13. There are three separate rooms at Dodge City's premises where patrons can be. These are a restaurant area; a bar or lounge area; and a game room. The lounge or bar and the game room are off limits to persons under the age of twenty-one (21) years. Prior to March 30, 2010, Dodge City had posted signs at or near the entrance to the bar or lounge area and the game room to the effect that these areas are off limits to persons under the age of twenty-one (21) years.

14. Dodge City does a regular lunchtime business that it promotes. Prior to March 30, 2010, it had a special for tacos on Tuesdays.

15. March 30, 2010, was a Tuesday.

16. In May of 2008, Dodge City secured an "I Detect" machine. It reads identification cards that patrons might submit; determines if the cards are valid; and advises if the card shows that a person is over or under twenty-one (21) years.

17. Since its acquisition, Dodge City has used the "I Detect" machine on all Thursday, Friday, and Saturday nights. On those nights, all patrons are required to produce identification which is then submitted to the "I Detect" machine.

18. Dodge City has a policy that prohibits persons under the age of twenty-one (21) years from being on restricted premises or to be served alcoholic beverages. Employees who violate this policy are subject to sanction.

19. At times when the "I Detect" machine is not in use, Dodge City employees are required to obtain identification from any person who appears to be under the age of thirty (30) years before allowing that person on restricted premises or serving that person alcoholic beverages.

20. Prior to March 30, 2010, Dodge City had placed a "We ID" sign on the front door of the establishment.

21. Prior to March 30, 2010, Dodge City had placed a "We ID" device on a wall visible from the entrance. The machine indicates that a person must be born twenty-one years prior to the present date before that person can be served.

22. On March 30, 2010, Donna Paranteau had a MAST permit.

23. Prior to March 30, 2010, Donna Paranteau had never - to her knowledge - served an alcoholic beverage to a person under the age of twenty-one (21) years or allowed such a person to be on restricted premises.

24. Board officers did not obtain a warrant prior to their agent, Mr. Rowell, entering the Licensee's premises on March 30, 2010.

25. Board officer did not secure consent from any Dodge City employee to send Mr. Rowell onto Dodge City's premises and into areas off limits to persons under the age of twenty-one (21) years on Dodge City's premises.

26. Prior to the compliance check conducted at the Licensee's premises, the Board officers parked in a lot near the Licensee's premises. The Investigative Aide, Mr. Rowell, was instructed to enter the Licensee's premises go to the lounge area and attempt to purchase alcohol by requesting a menu and a beer.

27. At approximately 12:50 p.m., on March 30, 2010, Rowell entered the Licensee's premises and at the specific direction of liquor enforcement officers entered the lounge area of the premises and sat down in a booth.

28. Paranteau, who was working as a bartender and waitress for the Licensee at the Licensee's premises on March 30, 2010, approached Rowell. Rowell asked Paranteau for a "Bud-light" beer and a menu.

29. Paranteau asked to see Rowell's identification. Rowell handed to Paranteau his own Washington State intermediate driver's license which clearly sated his date of birth as June 11, 1991, demonstrating that on March 30, 2010, he was eighteen (18) years of age.

30. Paranteau briefly reviewed Rowell's intermediate driver's license and returned it to Rowell.

31. Paranteau left Rowell and after a short time, returned to Rowell and provided him with a "Bud-light" beer and a menu.

32. "Bud-light" beer is an alcoholic beverage.

33. Lieutenant Marc Edmonds entered the Licensee's premises after Rowell. Lt. Edmonds observed Rowell sitting in the lounge area of the Licensee's premises with a "Bud-light" beer in his possession.

34. Rowell approached Lt. Edmonds, who informed him to wait a few minutes and then pay for the "Bud-light" beer. Rowell sat back down, waited approximately three minutes, then went to the register and paid Paranteau \$3.25 for the "Bud-light" beer. Rowell then exited the Licensee's premise.

35. Lt. Edmonds took possession of the "Bud-light" beer served to Rowell, conferred possession to Officer Almir Karic shortly thereafter, who photographed and disposed of the alcohol.

36. Paranteau observed Officer Karic after Rowell left and upon recognizing Officer Karic, suspected Rowell was working with Enforcement and was under the age of twenty-one.

37. Officer Karic contacted Paranteau after Rowell exited the premise. Paranteau agreed she had served and sold alcohol to Rowell; agreed he was born in 1991; had doubts about whether he was twenty-one years of age; after completing the sale of alcohol to Rowell had decided he was under twenty-one year of age; and, she should not have served him; and, was going to check the "We ID" device to verify her concern, shortly before she observed Karic.

38. Officer Karic served an Administrative Violation Notice to the Licensee on April 1, 2010, for a violation of RCW 66.44.270(1) - furnishing alcohol to a person under twenty-one years of age.

39. On March 30, 2010, Mr. Karic cited Ms. Paranteau personally for violating RCW 66.28.270(1).

## **II. Findings of Fact - Regarding Mitigation of The Proposed Penalty**

The penalty assessed by the Board is based on a grid. Penalties which are assessed over a rolling two-year period increase in severity. For two violations within the rolling two-year period, the penalty is a seven-day suspension. The ultimate penalty is the loss of the license.

The Licensee has argued that the penalty proposed by the Board, a seven-day suspension, should be mitigated based on eleven factors and / or actions taken by the Licensee as noted in the Licensee's hearing brief. Three additional bases for mitigation of the penalty were argued at the hearing for a total of fourteen.

### **Licensee's Proposed Basis for Mitigation #1 - Dodge City requires all of it servers and security personnel to hold valid MAST Permits before starting employment.**

40. A MAST permit is a basic, minimum requirement for all licensees and servers and does not show that the Licensee has done something extra to ensure compliance. They would be unable to operate if their staff did not have MAST permits.

**Licensee's Proposed Basis for Mitigation #2 - Dodge City developed and enforces company policies specific to alcohol service that includes consequences for staff violations.**

41. The Licensee's specific policy noted as Licensee's Exhibit 10 was developed after the March 30, 2010, in response to the incident. Prior to March 30, 2010, the Licensee always had a policy which required staff to check vertical identification.

**Licensee's Proposed Basis for Mitigation #3 - Dodge City trains employee on liquor prior to them working with alcohol. It also trains security staff.**

42. A certain minimum level of training is required for the Licensee and their staff to work in the industry. We find that the Licensee has asked for additional training for their security and wait staff, which the Board's Enforcement and Education officers have provided.

**Licensee's Proposed Basis for Mitigation #4 - Dodge City has direct onsite supervision of employees.**

43. The owner / Licensee serves as the supervisor during the day and has a manager who supervises during the evenings. The day in question, the owner was onsite. He was in a lunch meeting for approximately 45 minutes during which time Mr. Rowell came into the lounge area and was served. The owner was physically present, but was not supervising the staff during the lunch hour rush.

**Licensee's Proposed Basis for Mitigation #5 - Dodge City cooperates with local law enforcement.**

44. The Licensee's representative in his prehearing arguments has painted a picture of hostility between the Licensee and law enforcement. The prehearing documents have used pejorative terms such as "shill" and "entrapment" to describe law enforcement's interactions with the Licensee. However, the Licensee himself, supported by Officer Karic's testimony, has shown that they have in fact cooperated with law enforcement when requested to do so and the Licensee has invited Officer Karic to provide additional training over the course of the business which he has done.

**Licensee's Proposed Basis for Mitigation #6 - Dodge City has changed business operations to eliminate problems.**

45. The Licensee has expanded its operations from a solely liquor-focused business to include a more food-focused business. Food specials are posted weekly. In particular, the Licensee has provided a specific draw for customers in their taco menu on Tuesdays. The prices are greatly reduced and the lunch crowd is quite heavy as a result.

46. In the present case, the Licensee placed one of their best staff members on duty for March 30, 2010, lunch rush, Donna Paranteau. Ms. Paranteau worked alone in servicing the public. Prior to March 30, 2010, she had never been cited during her career for serving a minor. She felt the staffing that day was adequate. At the hearing she stated, "I'm that good; I've done it lots of years." Ms. Paranteau also indicated at the hearing that the lunch crowd does not normally drink. The "I Detect" machine was not used; it is only used on Thursday, Friday, and Saturday nights. The Licensee is closed on Sundays.

47. Ms. Paranteau had a feeling that she had erred in not turning Mr. Rowell away. She planned to go back and check his identification against the machines with calendars. She did not do that because her focus was on serving and cashing out the customers present. When Mr. Rowell came to pay to her to pay for the beer, she again felt something was wrong, but simply wanted him out of the bar at that point. When she saw Officer Karic, her instinct that Mr. Rowell was underage was confirmed.

**Licensee's Proposed Basis for Mitigation #7 - Dodge City has implemented specific programs to eliminate specific problems.**

48. The Licensee provided a copy of a policy on how staff were to handle vertical identification cards. There was no date showing when the policy was written or when it became effective. The current written form of the policy was developed in response to the March 30, 2010, incident.

49. The policy states that during the periods when the "I Detect" machine is in use, the patron's vertical identification card is to be scanned using that machine. There is no description of what action is to be taken when a vertical identification is presented during times when the machine is not used. There is also a statement that the identification is to be viewed by two employees "in all cases" where the owner / Licensee is not present.

50. In the present case, the machine was not used to check the vertical identification because it was not a Thursday, Friday, or Saturday night. Additionally, Mr. Rowell's identification was not viewed by two employees even though the owner / Licensee was not actually on duty supervising.

**Licensee's Proposed Basis for Mitigation #8 - Dodge City has purchased an ID checking guide for all staff to use.**

51. The Licensee has purchased an "I Detect" machine which is used only on Thursday, Friday, and Saturday nights.

**Licensee's Proposed Basis for Mitigation #9 - Dodge City uses a roaming employee during peak business hours.**

52. No supervisor was actually roaming the premises during the lunch rush on Tuesday, March 30, 2010.

**Licensee's Proposed Basis for Mitigation #10 - Dodge City has purchased an identification scanner for proof of age.**

53. The Licensee has equipment, but uses it only on Thursday, Friday, and Saturday nights.

**Licensee's Proposed Basis for Mitigation #11 - Dodge City uses "Today's Date" signs to assist in policy compliance, age verification, and to ensure responsible conduct.**

54. The Licensee has the "Today's Date" signs which are not conveniently located for staff to see and use. Ms. Paranteau was going to use the machine to double check Mr. Rowell's age, but she never got back to that area. Her focus was on cashing out customers.

**Licensee's Proposed Basis for Mitigation #12 - Officer Karic believed Ms. Paranteau made an error and mis-read Mr. Rowell's identification.**

55. Officer Karic believed Ms. Paranteau made an error. Ms. Paranteau had concerns that she should not have served Mr. Rowell, and thought about double checking his identification a couple of times, but did not.

**Licensee's Proposed Basis for Mitigation #13 - The Licensee was moving from a purely alcohol-based business to a more food-based business.**

56. The Licensee has changed locations and added a focus on food to the business. Tuesdays are taco days with very inexpensive fare. The Licensee was aware that the Tuesday lunch time was very busy. A goal was to get the public in and out quickly. The Licensee used one of his most experienced wait staff members to serve the entire premises on Tuesday, March 30, 2010. She had never been cited for serving a minor. The Licensee has changed their business to deliberately draw more people in at certain times, but they do not use any of the machinery, equipment, or specific policies to identify underage patrons during the more food-focused times.

**Licensee's Proposed Basis for Mitigation #14 - The Licensee argues that prior violations were under a different license number and should not be counted for the purposes of assessing penalties within the rolling two-year time frame.**

57. The Licensee changed locations, but the ownership has remained the same for Dodge City Saloon, Inc. The old location operated under license number 365465. The current operation is conducted under license number 403213. Any penalty given in this case will take into consideration prior penalties assessed against the Licensee, Dodge City Saloon, Inc.

**SUMMARY JUDGMENT STANDARD**

Under CR 56 summary judgment is appropriate when "there is no genuine issue as to any material fact . . ." The moving party is entitled to judgment as a matter of law.

In the present case, the Board has the burden to show, by a preponderance of the evidence, that no genuine issue of material fact exists since they filed the Motion for Summary Judgment.

The undersigned concludes that the Board has met its burden by showing, by a preponderance of the evidence, that a person under age twenty-one (21) was served alcohol in violation of the law on March 30, 2010. There are no genuine issue as to any material fact left to address. The undersigned will address the issue of the potential mitigation of the penalty.

## DISCUSSION

### I. Neutral Factors

The Licensee's arguments that the minimum certification and training standards were met does not serve to mitigate any potential penalty. These things are required for the Licensee and their staff to be able to work in this industry. These actions do not show any additional or mitigating efforts made by the Licensee.

### II. Mitigating Factors

The undersigned concludes that the Licensee has shown several factors which could be considered for mitigating the proposed penalty. The Licensee has: a) expanded the focus of the business; b) developed a specific policy on handling vertical identification cards; c) required a roaming supervisor; d) purchased the "I Detect" and "Today's Date" machines; and e) requested additional training from the Board's Enforcement and Education officers. These actions show effort on the Licensee's part to minimize violations.

However, the problem in the present case is that even though the Licensee had policies and equipment in place, none of them were used during the compliance check which occurred on March 30, 2010.

### III. Aggravating Factors

The Licensee took steps to move from a solely alcohol-based business to a food-based business. However, they did not update their practices in response to the new format. The Licensee created opportunities for increased clientele, but did not increase staffing or supervision, nor did the Licensee feel it was necessary to use the identification equipment on days or times other than Thursday, Friday, or Saturday nights.

Even though the Licensee knew that Tuesdays were a very busy time because of the special low price for tacos, there was no additional staff on duty. The Licensee and Ms. Paranteau believed that staffing was adequate. Ms. Paranteau was good at her job and she had never been cited for serving a minor in the past. She also indicated that the lunch crowd normally did not drink.

The Licensee was present, but not actually functioning as a supervisor or roaming manager at the time of the incident. So, it cannot be argued that, at this known-to-be-busy time, there was active or adequate supervision or monitoring.

Ms. Paranteau noted her misgivings at several points during the time Mr. Rowell was on the premises; she noted her intention to double check his age. However, she believed her first duty was to cash out the customers who needed to leave and get back to work. If there had been more wait staff on duty, or an actual roaming supervisor, both tasks could have been more easily accomplished. In the alternative, she could have taken Mr. Rowell's identification with her when she went to cash out the customers and double checked his age at that time.

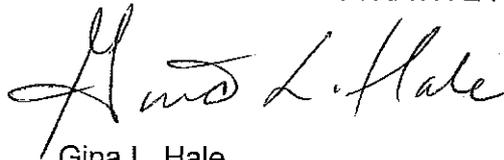
The Licensee was cited for a similar violation in 2008, and was aware that the Board conducted periodic compliance checks. The Board officers concluded that the Tuesday, high volume lunch rush provided a good opportunity to check the Licensee's compliance protocols. Knowing that they are subject to the compliance checks, it seems imprudent for the Licensee: a) not to use equipment which the Licensee already owned to double check age information; b) to limit the use of such equipment only to Thursday, Friday, and Saturday nights; c) not to have a second employee confirm the patron's age since the machines were not being used; and d) not to have a supervisor actively on duty at all times.

#### INITIAL DECISION AND ORDER

1. The Department's Motion for Summary Judgment is **Granted**.
2. The Licensee shall be assessed the penalty of suspension for seven (7) days based on this as the second violation within a rolling two-year period.

**DATED** and mailed at Vancouver, Washington, this 2nd day of Feb, 2011.

WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS



Gina L. Hale  
Assistant Deputy Chief  
Administrative Law Judge  
5300 MacArthur Blvd, Suite 100  
Vancouver, WA 98661  
Telephone: (360) 690-7189 or 1-800-243-3451  
FAX: (360) 696-6255

Mailed to:

Licensee:

Dodge City Saloon, Inc.  
d.b.a. Dodge City Bar & Grill  
4250 E Fourth Plain Blvd.  
Vancouver, WA 98661

Licensee Representative:

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

Assistant Attorney General:

Gordon Karg, AAG  
Office of the Attorney General  
1125 Washington Street SE  
MS: 40100  
Olympia, WA 98504-0100

Department Contact:

Kevin McCarroll  
Adjudicative Proceedings Coordinator  
Washington State Liquor Control Board  
PO Box 43076  
Olympia, WA 98504

INITIAL ORDER

F:\APPS\Specials\LCB\Dodge City 0041 - Order

Docket: 2010-LCB-0041

Page 11

OFFICE OF ADMINISTRATIVE HEARINGS

5300 MacArthur Boulevard, Suite 100

Vancouver, Washington 98661

(360) 690-7189 or 1-800-243-3451

## NOTICE TO PARTIES

Either the licensee or permit holder or the assistant attorney general may file a petition for review of the initial order with the Liquor Control Board within twenty (20) days of the date of service of the initial order. RCW 34.05.464 and WAC 10-08-211, 314-29-010(4)(b) and 314-42-080(1). The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and
- (iii) Be filed with the Liquor Control Board 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 of the other 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 response to that petition with the Liquor Control Board. WAC 314-42-080(3). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

The administrative record, the initial order, and any exceptions filed by the parties will be circulated to the board members for review. WAC 314-29-010(4)(c).

Following this review, the board will enter a final order WAC 314-29-010(4)(d). Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10.08.215.

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598

# Petition for Review

RECEIVED

FEB 24 2011

LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION

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

In re: DODGE CITY BAR & GRILL; DODGE  
CITY SALOON, INC.,

OAH No. 2010-LCB-0041  
LCB Case No. 23,670

License/Permit No.: 403213

PETITION FOR REVIEW

COMES NOW Dodge City Saloon, Inc. (Dodge City) and petitions for review of the Findings of Fact and Conclusions of Law and Initial Order entered February 3, 2011. This petition is made pursuant to WAC 314-42-095 and WAC 10-08-211. So that there can be no confusion or misunderstanding, Dodge City takes exception to the following matters in the Findings of Fact and Conclusions of Law and Initial Order:

1. The denial of the motion to dismiss.
2. The denial of the motion to suppress.
3. The granting of the motion for summary judgment holding that a violation had occurred.
4. The assessment of a penalty of a seven day suspension.

Findings of Fact Nos. 1-39 are based upon a stipulation entered into by the parties. They are incorporated by reference. The facts stated in these Findings of Fact will be discussed as warranted

1 below. Findings of Fact Nos. 40-57 as well as other Findings of Fact relate to the penalty issue.  
2 These will be discussed below.

3 The following points are made in connection with this Petition for Review.

4 II. Prosecution of Dodge City Amounts to Violation of Article 1, Section 12 of the Washington  
5 State Constitution.

6 a. Relevant Facts.

7 This case arises out of what the Washington State Liquor Control Board (the Board)  
8 refers to as a "compliance check." The procedure involved sending Christopher Rowell, a person  
9 under the age of twenty-one years into Dodge City's premises and directing him to attempt to  
10 purchase a bottle of beer. Mr. Rowell was given money by Board officers to make this purchase.  
11

12 This procedure amounts to a "controlled purchase program." It is identical in  
13 purpose and scope to an "in-house controlled purchase program" and defined by the Board in WAC  
14 314-21-005(1) as follows:  
15

16 Per RCW 66.44.290, an in-house controlled purchase program is a  
17 program that allows retail liquor licensees to use 18, 19, or 20 year old  
18 persons to attempt to purchase alcohol for the purpose of evaluating the  
19 licensee's training program regarding the sale of liquor to persons twenty-  
one years of age.

20 The legislature authorized "in-house" or "private" controlled purchase programs in  
21 RCW 66.44.290. The legislative mandate included the following language in RCW 66.44.290(1):

22 . . . Violations occurring under a private-controlled purchase program  
23 authorized by the liquor control board may not be used or criminal or  
24 administrative prosecution.  
25

1 In short, the Board cannot prosecute any violations that occur in the context of an "in-house  
2 controlled purchase" program.

3 Under this regulatory scheme, the institution of criminal or administrative  
4 prosecutions based upon what occurs in a "compliance check" creates two classes of licensees as  
5 set forth below:

- 6 1. Licensees that have a violation that occurs in a "in-house" controlled  
7 purchase program; and
- 8 2. Licensees that have a violation in a controlled purchase program  
9 conducted by the Board and which the Board calls a "compliance  
10 check."

11 The latter is subject to criminal and administrative prosecution while the former is not.

12 b. Argument.

13 The Board cannot prosecute administratively or criminally any activity arising out of  
14 a "compliance check" because to do so would violate Article 1 Section 12 of the Washington State  
15 Constitution, which provides as follows:

17 No law should be passed granting to any citizen, class of citizens, or  
18 corporation other than municipal, privileges or immunities which upon  
19 the same terms shall not equally belong to all citizens or corporations.

20 This provision is Washington's equal protection clause.

21 In order for there to be a violation of Article 1 Section 12, the court must determine  
22 (1) whether the governmental action applies equally to all members within the designated class; (2)  
23 whether there are reasonable grounds to distinguish between those within and without the class; and  
24 (3) whether the classification has a rational relationship to the purpose of the legislation.  
25

1 *Convention Center Coalition v. City of Seattle*, 107 Wn.2d 370, 378-79 (1986); *Holbrook, Inc. v.*  
2 *Clark County*, 112 Wn.App. 354, 368 (2002).

3           The Court has found several enactments violative of this provision. For example, it  
4 held unlawful a statute allowing veterans to peddle goods without procuring a license while non-  
5 veterans were required to have a license in *Larson v. City of Shelton*, 37 Wn.2d 481 (1950). In  
6 *Simpson v. State*, 26 Wn.App. 687 (1980), the Court held that a use tax exemption for private  
7 automobiles obtained while the person was a resident of another state but did not afford the same  
8 exemption to persons who acquired their vehicle while residents of a foreign country was violative  
9 of Article 1 Section 12. The Court could find no rational basis for allowing the exemption only to  
10 residents of the United States. Finally, in *Washington Public Employees Association v. State*, 127  
11 Wn.App. 254 (2005), the Court ruled that the failure of the State to pay equal salaries for what  
12 amounted essentially to equal work violated Article 1, Section 12 of the Washington State  
13 Constitution as well as the Equal Protection Clause of the United States Constitution.

14           In this case, the three part test necessitates a finding of a violation of Article 1,  
15 Section 12. First of all, the class is persons with licenses the Board issues to sell alcoholic  
16 beverage. The governmental action does not apply to all licensees equally. There is no prosecution  
17 when the violation occurs in the context of an “in-house” controlled purchase program. By  
18 contrast, there is prosecution when the violation occurs in a controlled purchase program conducted  
19 by the Board—one of its “compliance checks.”

20           Secondly, there are no rational grounds to distinguish between violations occurring  
21 in an “in-house” controlled purchase program and a controlled purchase done as a part of a Board  
22  
23  
24  
25

1 compliance check. In either case, the employee of a licensee has provided alcoholic beverage to a  
2 person under the age of twenty-one years in violation of RCW 66.44.270(1).

3  
4 Third, the classification has no rational basis to the purpose of authorizing “in-  
5 house” controlled purchase program. The Board cannot argue that immunizing violations occurring  
6 in “in-house” programs will assist in the training of employees. As the regulation states, “in-house”  
7 controlled purchase programs are not instituted to assist with training but rather to show an  
8 employer how effective the training has been. The Board’s “compliance checks” fulfill the same  
9 function — showing a licensee how effective training programs have been. Since both programs  
10 show how effective training has been, there is no rational basis for prosecuting violations that occur  
11 in one context but not in another since training in the form of an “in-house” controlled purchase  
12 program is the same for training purposes as of one of the Board’s “compliance checks.”

13  
14 Since this prosecution violates Article 1, Section 12 of the Washington State  
15 Constitution, it cannot proceed. The Complaint should be dismissed on that basis.

16 III. All Evidence Must Be Suppressed.

17 a. Factual Statement.

18  
19 What happened in this case is not particularly disputed. Board officers directed Mr.  
20 Rowell to go into Dodge City’s premises during a busy lunch hour and attempt to purchase  
21 alcoholic beverage. There is a restaurant area in Dodge City’s establishment that may be frequented  
22 by persons under the age of twenty-one years. There is also a bar or lounge area that is off limits to  
23 under-aged persons. There were signs present that clearly marked the area as off limits to persons  
24 under the age of twenty-one years. Board officers could have directed Mr. Rowell to go into the  
25

1 restaurant area and order an alcoholic beverage there. For reasons that have not yet been made  
2 clear, they told him to go into the bar. Donna Paranteau, a busy server, checked Mr. Rowell's  
3 identification but, inexplicably, did not perceive that he was under the age of twenty-one years. She  
4 brought him a Bud Light.

5  
6 This "compliance check" was one of several conducted by Board officers and Mr.  
7 Rowell on March 30, 2010. When Board officers left board offices with Mr. Rowell in tow, they  
8 had not determined that they would conduct a "compliance check" at Dodge City's premises.

9 As is relevant to the question of suppression of evidence, the Board did not obtain a  
10 warrant before entering Dodge City's premises and also did not obtain Dodge City's consent to  
11 sending Mr. Rowell in.

12  
13 b. Argument.

14 i. Standard for Admission of Evidence.

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

19  
20 The presiding officer shall exclude evidence that is excludable on  
21 constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts  
22 of this state. RCW 34.05.452(1). All of the Board's evidence was obtained in violation of the  
23 Fourth Amendment to the United States Constitution and of Article 1, Section 7 of the Washington  
24 State Constitution. The evidence should therefore have been excluded.  
25

1           ii.       The Test for Validity of the Search.

2                               The Fourth Amendment to the United States Constitution prohibits  
3 unreasonable searches and seizures. Article 1, Section 7 of the Washington State Constitution  
4 precludes governmental interference in a person's private affairs without lawful authority. These  
5 two provisions apply co-extensively to administrative searches. *Centimark Corp v. Department of*  
6 *Labor & Industries*, 129 Wn.App. 368, 375 (2005). They apply when governmental agents enter  
7 upon private property to ascertain whether there is compliance with governmental regulations. *City*  
8 *of Seattle v. McCready*, 123 Wn.2d 260 (1994).

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

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

17                               Searches of regulated industries can be conducted without a warrant if three  
18 (3) requirements are met:

- 19                               1.       A substantial governmental interest that informs a regulatory  
20                               scheme pursuant to which the inspection is made;
- 21                               2.       The warrantless inspection must be necessary to further the  
22                               regulatory scheme; and

1                   3.     The inspection program in terms of the certainty and  
2                             regularity of its application must provide constitutionally  
3                             adequate substitutes for a warrant. Examples of such  
4                             substitutes are prior warning to the persons to be searched;  
                              limitations on the scope of the search; and clear restraints on  
                              the discretion of the investigating officers.

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

7                   The first of these requirements is the existence of a regulatory scheme. As  
8     noted above, the regulatory scheme must provide an adequate substitute for a warrant. As the Court  
9     of Appeals recently indicated in *Seymour v. Washington State Department of Health*, 152 Wn.App.  
10    156, 167-68 (2009):

11                             Reining in the power of the executive branch in conducting  
12                             administrative searches is a primary concern of courts reviewing  
13                             such statutory schemes. Where a statutory scheme is properly  
14                             formulated and followed, Fourth Amendment concerns are  
15                             addressed by the elimination of unreasonable searches. In such  
16                             cases, “it is difficult to see what additional protection a warrant  
17                             requirement would provide . . . . The discretion of Government  
                              officials to determine what facilities to search and what violations  
                              to search for is thus directly curtailed by the regulatory scheme. . .”

18                             A proper regulatory scheme, “rather than leaving the frequency  
19                             and purpose of inspections to the unchecked discretion of  
20                             Government officers . . . establishes a predictable and guided . . .  
21                             regulatory presence . . .” Hence, the person subject to the  
22                             inspection “is not left to wonder about the purposes of the  
23                             inspector or the limits of his task. . .” The “regulatory statute must  
24                             perform the two basic functions of a warrant: it must advise the  
25                             owner of the commercial premises that the search is being made  
                              pursuant to the law and has a properly defined scope, and it must  
                              limit the discretion of the inspecting officers. . .”



1 (3) An in-house controlled purchase program authorized  
2 under this section shall be for the purposes for employee  
3 training and employer self-compliance checks. An  
4 employer may not terminate an employee solely for first-  
5 time failure to comply with company policies regarding  
6 the sale of alcohol during an in-house controlled  
7 purchase program authorized under this section.

8 The amendment of RCW 66.44.290(1) did the following things:

- 9 1. It authorized licensees to conduct in-house controlled  
10 purchase programs but forbade employers from  
11 discharging an employee who failed to comply with  
12 company policies regarding sale of alcohol during  
13 such a controlled purchase.
- 14 2. It immunized persons between the ages of eighteen  
15 and twenty-one years from criminal prosecution  
16 based upon participation in a controlled purchase  
17 program. The immunization applies only to  
18 programs authorized by the Board and based upon  
19 regulations the Board promulgates.
- 20 3. It precluded violations occurring during a private  
21 controlled purchase control program from being the  
22 subject any criminal or administrative prosecution.
- 23 4. It required the Board to promulgate regulations to  
24 govern controlled purchase programs.

25 The Board is expected to argue that the immunization contained in RCW 66.44.290(1) applies only  
to private in-house purchase control programs.

Such a construction is not warranted by the statute's plain language  
in the second and third sentences. They read:

This section does not apply to person between the ages of  
eighteen and twenty-one years who are participating in a  
controlled purchase program authorized by the liquor

1 control board under rules adopted by the Board.  
2 Violations occurring under a private, controlled purchase  
3 program authorized by the liquor control board may not  
be used for criminal or administrative prosecution.

4 As can be seen, the legislature made no reference to private controlled purchase programs in the  
5 second sentence but did in the third. It did not, by its terms, limit the exemption created in the  
6 second sentence to private, in-house programs. It thus decriminalized persons participating in the  
7 Board's "compliance checks" but only if the person was over the age of eighteen years and only if  
8 the Board promulgated administrative rules regarding "compliance checks." The third sentence  
9 effectively eliminates prosecution of or administrative sanction against the person who may have  
10 sold alcoholic beverage to the underage person or that person's employer. But that exemption only  
11 applies where the violation occurs in a private, in-house controlled purchase program. There is no  
12 exemption provided if the controlled purchase program is not private or in-house—such as in a  
13 "compliance check" conducted by the Board. Therefore, the clear language of RCW 66.44.290(1)  
14 authorized the Board's "compliance checks" but only on certain conditions—that the minor  
15 involved in the "compliance check" be over the age of eighteen years and that the Board  
16 promulgate regulations.

17  
18  
19 The Board's argument would violate another canon of statutory  
20 construction—it would add the term "private" or "in-house" to the second sentence of RCW  
21 66.44.290(1). This, of course, is impermissible. When the legislature omits language from a  
22 statute, intentionally or inadvertently, the Court will not read into the statute the language that may  
23 have been omitted. *State v. Moses*, 145 Wn.2d 370, 374 (2002).



1 adopted rules as required by RCW 66.44.290(1) for the sort of “controlled purchase” program  
2 involved in the December 2, 2008, incidents. Therefore, the Board’s actions were not authorized.  
3 The Court affirmed the dismissal on the basis that the State could not produce admissible evidence  
4 in light of the suppression. The Court’s opinion is attached. The State chose not to appeal the  
5 ruling.  
6

7 The Board must follow the holding of the Clark County Superior  
8 Court. All evidence from Board agents, including The Shill, must be suppressed.

9 3. Board Agents May Not Lawfully Enter Licensed Premises.

10 As a Board agent, and irrespective of his age, Mr. Rowell entered  
11 Dodge City premises without lawful authority. His doing so represents yet another reason why all  
12 testimony from all Board agents must be suppressed.  
13

14 The Board purports to take its authority to enter licensed premises  
15 from RCW 66.28.090(1). That statute provides as follows:

16 All licensed premises used in the manufacture, storage,  
17 or sale of liquor or any premises or parts of premises  
18 used or in any way connected, physically or otherwise,  
19 with the licensed business and/or any premises where a  
20 banquet permit has been granted, shall at all times be  
open to inspection by any liquor enforcement officer,  
inspector, or peace officer.

21 The Supreme Court of Washington considered similarly worded statutes in *Washington Massage*  
22 *Foundation v. Nelson*, 87 Wn.2d 948 (1976). The first of these was RCW 18.108.180, which  
23 provided as follows:

24 The director or any of his authorized representatives  
25 may at any time visit and inspect the premises of each

1                                   message business establishment in order to ascertain  
2                                   whether it is conducted in compliance with the law,  
3                                   including the provisions of this chapter, and the rules  
4                                   and regulations or the director. The operator of such  
                                  message business shall furnish such reports and  
                                  information as may be required.

5   The second was RCW 18.108.190, which provides:

6                                   State and local law enforcement personnel shall have  
7                                   the authority to inspect the premises at any time  
8                                   including business hours.

9   The Court ruled that these two statutes did not sufficiently delineate the purpose, scope, time, and  
10   place of inspection. Therefore, the Court ruled that they violated the requirements of the Fourth  
11   Amendment to the United States Constitution.

12                                   There is no greater specificity in RCW 66.28.090(1) than in former  
13   RCW 18.108.180 and RCW 18.108.190. In fact, there is less. The language of former RCW  
14   18.108.180 allowed inspections to determine whether the business was being conducted in  
15   compliance with the law. There is no such limitation in RCW 66.28.090(1). It allows Board  
16   officers to come onto licensed premises for any reason or for no reason at all. It is therefore infirm  
17   and cannot support the entry onto the premises and observations made by the Board officers.  
18

19                                   Mr. Rowell had no lawful authority to enter Dodge City's premises.  
20   For that reason as well, his testimony together with that of any other Board agent should be  
21   suppressed.  
22

23  
24   ///  
25



1 The enforcement direction given in RCW 66.44.010 is general in  
2 nature. The legislative direction as to “controlled purchase” programs in RCW 66.44.290(1) tends  
3 to limit the broad grant of enforcement power set out in RCW 66.44.010 in that it limits what can  
4 and cannot be done in “controlled purchase” programs. Clearly, RCW 66.44.290(1) is more  
5 specific than RCW 66.44.010 because the former sets the rules and limitations for a certain  
6 enforcement method. Therefore, RCW 66.44.290(1) controls. The grant of enforcement authority  
7 contained in RCW 66.44.010 does not override the legislature’s limitations on “controlled  
8 purchase” programs in RCW 66.44.290 and its failure to authorize “controlled entry” programs.  
9

10 Furthermore, all statutes must be construed in such a way as to  
11 render them constitutional. *State ex rel. Faulk v. CSG Job Center*, 117 Wn.2d 493 (1991). The  
12 Washington State Constitution states that there can be no intrusion into the private affairs of any  
13 person without lawful authority in Article I Section 7. The Board’s argument would allow it to  
14 utilize “compliance checks” as in this case when the legislature has not granted it the authority to do  
15 so. The argument must be rejected on that basis as well.  
16

17 The State attempted to justify the “compliance checks” on the basis  
18 of RCW 66.44.010 in *State v. Colavecchio, et al, supra*. The Court properly rejected that argument.  
19

20 5. The Regulatory Scheme is Inadequate Because It Allows Random  
21 Inspections.

22 As the Court noted in *Seymour v. Washington State Department of*  
23 *Health, supra*, a proper regulatory scheme establishes a predictable and guided regulatory presence  
24 and does not leave the frequency and purpose of inspections to the unchecked discretion of  
25

1 government officers. 152 Wn.App. 167-8. If the Board's "compliance check" on March 30, 2010,  
2 was somehow authorized by the regulatory scheme as a general proposition, then the scheme is  
3 infirm because it allows government officers the unchecked discretion to conduct random  
4 inspections.

5  
6 On several occasions, the Supreme Court has held that random  
7 intrusions upon a person's private affairs violate the Fourth Amendment to the United States  
8 Constitution or Article 1, Section 7 of the Washington State Constitution. *State v. Marchand*, 104  
9 Wn.2d 434 (1985) — holding that spot checks for driver's licenses violated the Fourth  
10 Amendment's ban on unlawful searches and seizures but did not reach the question of whether the  
11 practice violated Article 1, Section 7 of the Washington State Constitution; *City of Seattle v.*  
12 *Mesiani*, 110 Wn.2d 454 (1988) — ruling that stopping all motorists at sobriety check points  
13 violated both the Fourth Amendment to the United States Constitution and Article 1, Section 7 of  
14 the Washington State Constitution; *State v. Jordan*, 160 Wn.2d 121 (2007) — deciding that random  
15 searching of a motel registry violates Article 1, Section 7; *York v. Wahkiakum School District*, 163  
16 Wn.2d 297 (2008) — ruling that random drug testing of student athletes Article 1, Section 7. On  
17 that basis alone, the Board's "compliance checks" must be held to be constitutionally infirm.  
18

19  
20 The regulatory scheme does nothing to eliminate the randomness of  
21 the "compliance check" because it does not require some articulated suspicion before the Board  
22 conducts a "compliance check." That randomness is demonstrated here. The Board went into  
23 Dodge City's premises only because it was checking business on Fourth Plain Boulevard in  
24  
25

1 Vancouver on that day. Before Board officers left Board offices, it had not determined that it was  
2 going to do a "compliance check" at Dodge City.

3 iv. Dodge City Had a Reasonable Expectation of Privacy.

4 The Board may argue that Dodge City had no reasonable expectation of  
5 privacy because any person could come onto its premises and see what was occurring or had  
6 occurred. This argument lacks merit for a number of reasons.

7  
8 Mr. Rowell's entry into the premises specifically violated Dodge City's  
9 reasonable expectation of privacy and its rights to control its own premises. At Mr. Karic's  
10 direction, Mr. Rowell took a seat in the bar or lounge area. He did so notwithstanding the fact that  
11 Dodge City had placed signs in the entrance to the lounge area to the effect that those premises  
12 were specifically off limits to persons under the age of twenty-one years. While certain members of  
13 the public could come into the bar area, Mr. Rowell was not one of them since he claims to be  
14 under the age of twenty-one years on March 30, 2010. That one consideration should end the  
15 discussion. Based upon the signs it posted, Dodge City had a reasonable expectation that persons  
16 under the age of twenty-one years would obey the law and not come into the bar.  
17  
18

19 The test to determine if a person has a reasonable expectation of privacy is  
20 based on the following two questions:

- 21 1. Did the person exhibit an actual (subjective) expectation of  
22 privacy by seeking to preserve something as private?
- 23 2. Does society recognize that expectation as reasonable?

1 *State v. Young*, 123 Wn.2d 173, 189-94 (1994). Both those questions must be answered in the  
2 affirmative. Dodge City demonstrated its desire to keep Mr. Rowell off the premises by posting  
3 signs indicating that the lounge area is off limits to persons under the age of (21) years. The  
4 expectation that Mr. Rowell would not enter the premises is unquestionably one that society is  
5 willing to recognize. The legislature has criminalized Mr. Rowell's conduct in RCW 66.44.310 by  
6 making it a misdemeanor for him to be on restricted premises. In the same statute it has  
7 criminalized a licensee allowing persons under the age of twenty-one (21) years to be on restricted  
8 premises. RCW 66.44.310(1)(a), (b). Dodge City was doing nothing more than attempting to  
9 comply with statutory requirements.  
10

11  
12 In any event, the Court in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99  
13 S.Ct. 2319, 60 L.Ed.2d 920 (1979), ruled that a business that allows access to the public does not  
14 lose the reasonable expectation of privacy or all protection from administrative or other searches  
15 under the Fourth Amendment. In that case, the State seized certain materials in an adult bookstore  
16 based upon a warrant the Court determined was infirm. The State attempted to get around this  
17 problem by arguing that the display of the items at issue to the general public in areas of the store  
18 open to them eliminated any reasonable expectation of privacy that the store had against  
19 governmental intrusion and that, therefore, no warrant was needed. The Court rejected that  
20 argument. It stated:  
21

22  
23 But there is no basis for the notion that because a retail store  
24 invites the public to enter, it consents to wholesale searches  
25 and seizures that do not conform to Fourth Amendment  
guarantees... The Town Justice (the officer executing the  
warrant) viewed the films, not as a customer, but without the

1 payment a member of the public would be required to make.  
2 Similarly, in examining the books and in the manner of  
3 viewing the containers in which the films were packaged for  
4 sale, he was not seeing them as a customer would ordinarily  
5 see them.

6 442 U.S. at 329.

7 By no stretch were Board officers or Mr. Rowell, acting as ordinary  
8 customers. They were there for one purpose — to see if Mr. Rowell could entrap a Dodge City  
9 employee into selling him alcoholic beverage. The Board recognizes that these activities were part  
10 of some sort of administrative inspection.

11 v. A Search Occurred.

12 The Board argues that no search occurred. It claims that since members of  
13 the public could see that Mr. Rowell had unlawfully entered the bar and his interaction with Donna  
14 Paranteau, Dodge City's bartender/waitress at the time that no search occurred. That argument  
15 must be rejected.

16 The question of whether a search occurred depends on whether the officer  
17 making the observations was validly in a position to do so. As has been stated:  
18

19 As a general proposition, it is fair to say that when a law  
20 enforcement officer is able to detect something by utilization of  
21 one or more of his (or her) senses while lawfully present at the  
22 vantage point where those senses are used, that detection does  
23 not constitute a "search". . .

24 *State v. Seagull*, 95 Wn.2d 898, 901 (1981); *State v. Young*, *supra*.

25 Conversely, when a law enforcement officer makes an observation from a  
forbidden place or point, a search has occurred and that search violates the Fourth Amendment to

1 the United States Constitution and Article 1, Section 7 of the Washington State Constitution. For  
2 example, in *State v. Dykstra*, 84 Wn.App. 186 (1996), police officers escorted the defendant home  
3 from a drunk driving offense at 3:30 a.m. and insisted on accompanying the defendant to his back  
4 porch. While there, they were able to observe marijuana on his kitchen counter through a window.  
5 The officers then entered the residence and searched. The Court held, among other things, that the  
6 officers had no right to be on the defendant's back porch when they observed the marijuana. This  
7 observation therefore amounted to an unlawful search.

8  
9 Mr. Rowell and other Board agents did not have the authority to make the  
10 observations that they made because they had unlawfully entered and remained on Dodge City's  
11 premises. Mr. Rowell had no right to be in the bar area because he was under the age of twenty-one  
12 (21) years. RCW 66.44.310(1)(b). Furthermore, the regulatory scheme did not allow for anyone to  
13 be on Dodge City's premises to conduct a controlled purchase program as discussed above.  
14

15 Since any observations were necessarily made from a vantage point where  
16 Board officers had no right to be, an unlawful search occurred. For this reason, any testimony  
17 concerning observations made by Board officers must be suppressed  
18

19 vi. The Complaint Should Be Dismissed.

20 Since all evidence from Board agents must be suppressed, the Board will be  
21 able to produce no other evidence. Therefore, the charges must be dismissed.  
22

23 ///  
24  
25

1 IV. The Doctrines of Collateral Estoppel and Judicial Estoppel Requires Dismissal of the  
2 Complaint.

3 a. Collateral Estoppel.

4 As indicated above, Board agents sought to charge Ms. Paranteau with violation of  
5 RCW 66.44.270(1). It has charged Dodge City with violation of the same statute. The charges  
6 against Ms. Paranteau were dismissed. That dismissal requires dismissal of the complaint here.  
7

8 The issue is governed by the doctrine of collateral estoppel. For collateral estoppel  
9 to bar a claim or issue, there must be an identity of issues; a final judgment on the merits; the party  
10 to be estopped is identical or in privity with a party to the prior action; application of the doctrine  
11 will not work an injustice. *Pederson v. Potter*, 103 Wn.App. 62 (2000). Each of those  
12 requirements is met here.  
13

14 First of all, we have an identity of issues here. Both the criminal action filed against  
15 Ms. Paranteau and the complaint filed here charge a violation of RCW 66.44.270(1). As matter of  
16 law Dodge City is responsible for the actions of its employees. WAC 314-11-015(1)(a) Therefore,  
17 if Ms. Paranteau is guilty of the violation, so is Dodge City. Conversely, if she is innocent, Dodge  
18 City cannot be held to have committed a violation.  
19

20 We also have a final decision on the merits. All charges against Ms. Paranteau were  
21 dismissed with prejudice. The State has not reserved the right to prosecute her again as it would if  
22 the charges were dismissed without prejudice. This represents a final judgment on the merits  
23 because the determination is conclusive. Many courts have held that a dismissal with prejudice has  
24 collateral estoppel affect. Counsel's research has not disclosed any Washington case specifically  
25

1 dealing with this issue. However, courts in other jurisdictions have held that the voluntary  
2 dismissal of prejudice amounts to a final judgment on the merits for purposes of collateral estoppel.  
3 *W&W Lumber of Palm Beach, Inc. v. Town & Country Builders, Inc.* 35 S.3d 79 (Fla.App. 2010);  
4 *Van Slambrouck v. Marshall Field & Co.*, 98 Ill.App.3d 485, 424 N.E.2d 679 (1981); *Miller*  
5 *Building Corp v. NBBJ North Carolina, Inc.*, 129 N.C.App. 97, 497 S.E.2d 433 (1998).  
6

7 The Board may argue there has been no final determination on the merits because it  
8 did not have a fair opportunity to litigate in the Clark County District Court action. However, the  
9 Board brought the citation in the name of the State of Washington. The Board is obviously a state  
10 agency. RCW 66.08.012. As the plaintiff in the Clark County District Court action, the State had  
11 every opportunity to litigate. It simply chose not do so recognizing the infirmity of the charges.  
12

13 The parties are identical in this case. The Board is the party to be precluded. One of  
14 its agents wrote the citation upon which Ms. Paranteau was prosecuted. The Board may wish to  
15 argue that a deputy prosecuting attorney sought the dismissal of the complaint rather than an  
16 attorney representing the Board. That is not meaningful. For collateral estoppel purposes, there is  
17 no difference between a prosecuting attorney and an administrative agency. As the Court stated in  
18 *Thompson v. Department of Licensing*, 138 Wn.2d 783, 793 (1999):  
19

20 The third part of the analysis asks whether the same party or parties in  
21 privity with the parties from the first action are involved in both  
22 proceedings. They were. In the district court action, the prosecutor was  
23 the State of Washington in the person of a Clark County deputy  
24 prosecuting attorney. In the administrative action, the State of  
25 Washington appeared in the person of the Department of Licensing.  
Although the Department argued in the Court of Appeals the Clark  
County deputy prosecutor, appearing for the State, and the Department  
itself, are two different entities for the purpose of the privity question, . . .

1 . . . it has since abandoned that untenable argument and has failed to  
2 repeat it . . . In *State v. Cleveland*, . . . the Court of Appeals considered  
3 the identity of the parties in a collateral estoppel analysis and said, "It is  
4 immaterial that in the dependency proceeding, the State was represented  
5 by the Attorney General and in the criminal prosecution was represented  
6 by the county prosecuting attorney." As we said in *State v. Dupard*, . . .  
7 "The same sovereign is involved in both instances." . . . The same  
8 parties were involved in both proceedings here.

9 The final element for the application of the doctrine of collateral estoppel is whether  
10 an injustice will be created by the application of the doctrine. This issue is limited to the procedural  
11 aspects of the litigation sought to be give preclusive effect. The determination is based on whether  
12 the party against whom collateral estoppel is to be applied had a fair opportunity and incentive to  
13 litigate in the first proceeding. The issue is whether there was any procedural unfairness in the first  
14 proceeding. *Thompson v. Department of Licensing, supra*, 138 Wn.2d at 795-796.

15 In this case, the Board can claim no procedural unfairness. An arm of the state, the  
16 Clark County Prosecuting Attorney's office, chose to dismiss this matter without prejudice. That  
17 was the state's choice presumably based on a perception that it would not prevail. There is no  
18 injustice here.

19 b. Judicial Estoppel.

20 The Board is also judicially estopped to proceed with the Complaint because of Ms.  
21 Paranteau's dismissal.

22 A party is judicially estopped to take a position when that party took a contrary  
23 position the court accepted in a prior proceeding that resulted in a final judgment. Since the  
24 doctrine of judicial estoppel promotes respect for the courts and is utilized to avoid inconsistency,  
25

1 duplicity, and waste of time, it is not necessary that the party taking the inconsistent position have  
2 received a benefit or that the other party relied to its detriment on the position taken. *Johnson v. Si-*  
3 *Cor, Inc.*, 107 Wn.App. 902 (2001).

4  
5 By dismissing the complaint against Ms. Paranteau, the State of Washington took  
6 the position that Ms. Paranteau was not guilty of a violation of RCW 66.44.270(1). The Clark  
7 County District Court clearly accepted that position because it entered an order dismissing her case  
8 with prejudice. The judgment was most certainly final. The State of Washington through the  
9 Board cannot now assert that Ms. Paranteau was indeed guilty of the offense because of the position  
10 it previously took in dismissing the action against her. It is judicially estopped from taking that  
11 position. For that reason, the Complaint must be dismissed.

12  
13 V. The Doctrine of Entrapment Requires Dismissal.

14 The Board has charged Dodge City with violation of RCW 66.44.270(1). That statute, of  
15 course, is a crime. Dodge City is entitled to utilize the defense of entrapment. Application of that  
16 defense requires that the complaint be dismissed.

17  
18 Entrapment is a defense to any prosecution of an offense. RCW 9A.16.070(1). No  
19 Washington case has decided whether entrapment is also available as a defense in licensing  
20 proceedings. Other jurisdictions have concluded that the defense is in fact available. *Fumusa v.*  
21 *Arizona State Board of Pharmacy*, 25 Ariz.App. 584, 545 P.2d 432 (1976), disapproved on other  
22 grounds, *Sarwark v. Thorneycroft*, 123 Ariz. 23, 597 P.2d 9 (1979); *Patty v. Board of Medical*  
23 *Examiners*, 9 Cal.3d 356, 508 P.2d 1121, 107 Cal.Rptr. 473 (1973); *One Way Fare v. State,*  
24 *Department of Consumer Protection*, 2005 W.L. 701695 (Conn.Super. 2005) — applying the rule  
25

1 to liquor license proceedings; *Smith v. Pennsylvania State Horse Racing Commission*, 517 Pa. 233,  
2 535 A.2d 596 (1988). These decisions are based on the fact that no societal interest is served by  
3 any governmental agency committing a crime in pursuit of enforcing licensing statutes. Entrapping  
4 people into violations also does not serve the dignity with which administrative proceedings should  
5 be clothed. *Patty v. Board of Medical Examiners, supra*, 9 Cal.3d at 363-67.  
6

7 There are two elements of the defense of entrapment. These are the following:

- 8 1. The criminal design originated in the mind of law enforcement officials, or  
9 any person acting under their direction; and
- 10 2. The actor was lured or induced to commit a crime which the actor had not  
11 otherwise intended to commit.

12 RCW 9A.16.070(1). In this context, inducement is governmental conduct that creates a substantial  
13 risk that an otherwise law-abiding citizen would commit the offense. Predisposition or lack thereof  
14 may be inferred from a defendant's history of involvement of the type of criminal activity for which  
15 he has been charged combined with his ready response to the inducement. *State v. Hansen*, 69  
16 Wn.App. 750, 764 *fn.* 9 (1993).

17 Both elements of the defense are clearly satisfied here. The criminal design, sale of  
18 alcoholic beverage to a person under the age of twenty-one years, clearly originated in the mind of  
19 Board officers. They directed Mr. Rowell to enter Dodge City's establishment, to disregard clear  
20 statements that he was entering areas that were off limits to him, and to ask for purchase of  
21 alcoholic beverage. Had they not taken that step, there would have been no violation.  
22

23 The actor in this case, Ms. Paranteau, was lured into committing a crime she did not  
24 otherwise did not intend to commit. This is demonstrated by two factors. First of all, she asked Mr.  
25

1 Rowell to produce identification. This demonstrated that she was interested in ascertaining  
2 whether, in fact, he was twenty-one years old. Secondly, Ms. Paranteau has no history of serving  
3 under aged persons.

4  
5 Dodge City as a corporate entity also has no proclivity to serve under aged persons. On  
6 Thursday through Saturday nights, it asks its customers to produce identification. It then places that  
7 identification into the "IDetect" machine that determines its validity and advises Dodge City's  
8 personnel whether the person producing the identification is twenty-one years of age. Dodge City  
9 has also posted the "We I.D." mechanism on its wall. Finally, it posts signs indicating what  
10 portions of its premises are off limits to under aged persons. Possibly the best indication that  
11 Dodge City has no proclivity to serve under aged persons lies in its passing of the Board's previous  
12 unlawful "compliance checks."

13  
14 The Board is expected to argue that Dodge City, as a corporation, cannot be entrapped.  
15 Obviously, a corporation can only act through its agents. Furthermore, Dodge City is responsible  
16 for the conduct of its agents. WAC 314-11-015(1)(a). If Dodge City is responsible for Ms.  
17 Paranteau's conduct, it is entitled to utilize any theory that would absolve her from any violation,  
18 including entrapment. Stated more simply, the Board cannot on the one hand say that Dodge City  
19 is responsible for Ms. Paranteau's conduct but then preclude Dodge City from utilizing a defense  
20 that would absolve her.

21  
22 In this case, all of the elements of entrapment are clearly met. For that reason, the  
23 complaint should be dismissed.

24  
25 ///

1 VI. The Board Engaged in Outrageous Conduct.

2 The legislature has made it clear that an entity facing suspension of a liquor license is  
3 entitled to due process of law. This conclusion follows from RCW 66.08.150 that allows an  
4 adjudicative proceeding on any attempt to suspend a license. Due process of law is violated when  
5 governmental conduct is sufficiently outrageous. Outrageousness can be found when law  
6 enforcement personnel instigate the violation at issue. *State v. Lively*, 130 Wn.2d 1 (1996). Several  
7 factors must be evaluated to determine whether the governmental conduct is sufficiently  
8 outrageous. These are:  
9

- 10 (1) Whether the police conduct instigated a crime or merely infiltrated ongoing  
11 criminal activity.
- 12 (2) Whether the defendants' reluctance was overcome by pleas, sympathy,  
13 promises of excessive profits, or persistent solicitation.
- 14 (3) Whether the government controls the criminal activity or simply allows the  
15 criminal activity to occur.
- 16 (4) Whether the police motive was to prevent crime or protect the public.
- 17 (5) Whether the government conduct itself amounted to criminal activity or  
18 conduct "repugnant to a sense of justice."

19 *State v. Lively, supra*, 131 Wn.2d at 22. When these factors are considered, it is clear that the  
20 Board's conduct was outrageous.

21 First of all, the Board obviously instigated the offense. Prior to this time, Ms. Paranteau had  
22 never been charged with any violation involving allowing underage persons on the premises. It is  
23 apparent that no violation would have occurred had not the Board asked Mr. Rowell to come onto  
24 Dodge City's premises to attempt to purchase beer. Secondly, it is clear that the Board controlled  
25

1 the activity. It directed Mr. Rowell to enter the premises, go into an area that was off limits to him,  
2 and attempt to purchase alcoholic beverage. Nothing would have happened had the Board not  
3 made this direction. It was also clear that the Board was not trying to prevent crime or protect the  
4 public. It simply was trying to create violations of law that it could then prosecute.  
5

6 Finally, and most importantly, the government conduct itself amounted to criminal activity  
7 and conduct "repugnant to a sense of justice." The Board directed Mr. Rowell to commit a number  
8 of violations of criminal law. Board officers told him to go into the bar which was off limits to him  
9 and despite the presence of a sign stating the area was off limits to persons under the age of twenty-  
10 one years. Mr. Rowell's conduct of going into the bar amounted to a violation of RCW 9A.52.070  
11

12 — First Degree Trespass. That statute provides as follows:

13 A person is guilty of criminal trespass in the first degree if he knowingly  
14 enters or remains unlawfully in a building.

15 The definition of "enters or remains unlawfully" provides in pertinent part:

16 A person "enters or remains unlawfully" in or upon premises when he has  
17 not been licensed, invited, or otherwise privileged to so enter or remain.

18 A license or privilege to enter or remain in a building which is only partly  
19 open to the public is not a license or privilege to enter or remain in that part  
of the building which is not open to the public. . .

20 Mr. Rowell's entry into the bar area was not authorized because the he was under the age of twenty-  
21 one (21) years. Under the definition of "enters or remains unlawfully," includes entering into a  
22 portion of the building not open to the public. Mr. Rowell therefore trespassed when he entered the  
23 bar area. Mr. Rowell was also guilty of RCW 66.44.310(1)(b) — entering restricted premises.

24 The Board also directed Mr. Rowell to purchase alcoholic beverage while on the premises. This  
25

1 violated RCW 66.44.270(2)(a), the statute that prohibits any person under the age of twenty-one  
2 years to acquire any liquor.

3           Simply put, a state agency should not solicit violations of law by minors. When it does, any  
4 action that it brings should be dismissed. Doing so will bring home to the Board that the laws of  
5 the State of Washington are to be followed by everyone, including state agencies.  
6

7 **VII. The Penalty Should Be Mitigated.**

8           a. Penalty Standards.

9           The Findings of Fact, Conclusions of Law, and Initial Order assess a seven day  
10 suspension as a penalty. This is likely based on the provisions of WAC 314-29-020, one of the  
11 Board's penalty regulations. The schedules in these regulations are guidelines only. As WAC  
12 314-29-015 states:  
13

14                           The following schedules are meant to serve as guidelines. Based on  
15 mitigating or aggravating circumstances, the liquor control board  
16 may impose a different penalty than the standard penalties outlined  
17 in these schedules.

18 The Board also discusses mitigating circumstances in WAC 314-29-015(a) and (c) as follows:

19                           **(a) Mitigating Circumstances.** Mitigating circumstances that may  
20 result in fewer days of suspension and/or a lower monetary option may  
21 include demonstrated business policies and/or practices that reduce the  
22 risk of future violations. Examples include: having a signed  
23 acknowledgment of the business' alcohol policy on file for each  
24 employee; having an employee training plan that includes annual  
25 training on liquor laws. . .

                          (c) In addition to the examples in (a) . . . of this subsection, the liquor  
control board will provide and maintain a list of business practices for  
reference as examples where business policies and/or practices may  
influence mitigating and/or aggravating circumstances. The established

1 list will not be all inclusive for determining mitigating and/or  
2 aggravating circumstances, and may be modified by the liquor control  
3 board. The list shall be accessible to all stakeholders and the general  
4 public via the internet.

5 A number of the numerated mitigating circumstances apply to Dodge City. None of  
6 the stated aggravating circumstances apply to Dodge City. Therefore, mitigation of the penalty is  
7 warranted.

8 The presence of stated mitigating circumstances and absence of stated aggravating  
9 circumstances will be discussed below.

10 b. Mitigating Circumstances.

11 The chart below sets out the mitigating circumstances applicable to Dodge City and  
12 discusses them briefly. Despite the fact that the presence of each of these is uncontested, some  
13 were not the subject of findings of fact in the Findings of Fact, Conclusions of Law, and Initial  
14 Order. The chart points out which of the circumstances were actually found to be present.  
15

Mitigating Factor	Discussion	Finding of Fact
Requirement of all servers and security personal to hold valid MAST permits before starting employment	This is Dodge City's policy. The key here is that the permits are required before employment, not after a person is hired.	Finding of Fact No. 40: The finding, however, ignores the fact that Dodge City employees are required to have the MAST permits <u>before</u> starting employment, which is the essence of the mitigating factor.
Development and enforcement of company policies specific to alcohol service that includes consequences for staff violation.	The undisputed testimony was that Dodge City has a policy prohibiting service to under-aged persons. There are consequences for violation of	Finding of Fact No. 41: This finding of fact simply does not address the undisputed testimony concerning Dodge City's policy and the

Mitigating Factor	Discussion	Finding of Fact
	this policy. Once again, it is undisputed that Ms. Paranteau was suspended for seven days after the incident.	consequences. Rather, it refers to a policy developed in response to this incident which is discussed below.
Train employees on liquor laws prior to their working with alcohol and training of security staff.	All Dodge City employees receive such training. This has been provided by the Board on some occasions. The key here is that the training takes place before an employee starts work.	Finding of Fact No. 42: Training is found to have occurred but the finding ignores the key point in the stated mitigating circumstance, that the training occur before an employee begins working.
Onsite supervision of employees.	Ray Kutch, Dodge City's principal, was present at the time of the incident that forms the basis of this complaint. If he sees a patron who appears to him to be under the age of twenty-one years, he asks employees if the patron's identification has been checked. There is also a manager who is present during times when Mr. Kutch is not present.	Finding of Fact No. 42: The finding acknowledges that supervision occurs. It goes on to state, however, that supervision was found to absent because Mr. Kutch was having lunch at the time instead of standing over Ms. Paranteau and observing her every move. From the time Mr. Rowell entered Dodge City's premises until the time he left, consumed no more than five to ten minutes. Finding that supervision was absent because the supervisor did not happen to be looking over the employee's shoulder for one five to ten minute period makes no sense.
Cooperation with local law enforcement.	Dodge City's cooperation with local law enforcement is undisputed. As was testified, local enforcement law personnel often ask Dodge City	Finding of Fact No. 43: The finding emphasizes cooperation with Board officers as opposed to local law enforcement but

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

Mitigating Factor	Discussion	Finding of Fact
	<p>personnel to be on the lookout for certain individual or certain vehicles. Dodge City personnel cooperate and provide whatever information they have and follow up if more information is acquired. The relationship is good. This is undisputed.</p>	<p>nonetheless finds cooperation to be present.</p>
<p>Change of business operations to eliminate problems.</p>	<p>Dodge City has made a number of changes to its operation. When it moved from 7201 NE 18<sup>th</sup> Street to its current location, it now emphasizes the sale of food. A person possessing a Washington State vertical identification card may or may not be under the age of twenty-one years. Such cards are issued to persons under the age of twenty-one years. However, the person may have reached his or her twenty-first birthday and not yet obtained a horizontal identification card. Dodge City purchased a "IDECT" machine to see if all pieces of identification including vertical cards are valid and if the bearer is over twenty-one years. This machine has been in general use on Thursday-Saturday nights, Dodge City's peak times of business. Dodge City has instituted a new policy that requires all vertical cards to go through the "IDECT" machine no matter when the card is produced. The new policy also</p>	<p>Finding of Fact No. 44: The finding recognizes the change to a more food-based operation but does not take into account purchase of additional identification devices as discussed below as well as the new policy on vertical identification cards instituted after the March 30, 2010, incident.</p>

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

Mitigating Factor	Discussion	Finding of Fact
	<p>requires that the person bearing the card orally represent that he or she is over the age twenty-one years to two Dodge City employees and that approval for service be given by Mr. Kutch if present and by the manager on site if he is not.</p>	
<p>Implementation of specific programs to eliminate specific problems.</p>	<p>The discussion of Dodge City's business practices as discussed above are incorporated here.</p>	<p>Findings of Fact Nos. 48-50: These findings discuss the policy concerning vertical identification that Dodge City initiated in response to this incident. Finding of Fact No. 50 incorrectly states that the policy requires the identification to be viewed by two employees. It requires the person carrying the identification to state in the presence of two employees that he or she is over the age of twenty-one years. That finding correctly states that two employees did not view the identification. It appears to assume that the new policy was in place on March 30, 2010, when it was not developed until later.</p>
<p>Purchase of ID checking guide for all staff to use.</p>	<p>Dodge City has made two such purchases. In May of 2008, it purchased an "IDETECT" device that had been in use on Thursday-Saturday evenings. It also has the "We ID" device posted near the area where one comes onto the premises.</p>	<p>Finding of Fact No. 51.</p>

Mitigating Factor	Discussion	Finding of Fact
<p>Use of a roaming employee during peak business hours.</p>	<p>One of Dodge City's managers is onsite during peak business hours to oversee employee operations. There are roaming security staff persons on Thursday-Saturday nights, Dodge City's peak business hours.</p>	<p>Finding of Fact No. 52: The fact that Dodge City has roaming security staff during peak business hours was found to be the case. Dodge City's peak hours are Thursday, Friday, and Saturday evenings. The finding appears to be critical of Dodge City because Ray Kutch was eating lunch instead of roaming and overseeing Ms. Paranteau's every move during the very few minutes that Mr. Rowell was on the premises.</p>
<p>Purchase of an identification scanner for proof of age verification.</p>	<p>As indicated, Dodge City has purchased the "IDTECT" machine.</p>	<p>Finding of Fact No. 53: Dodge City uses the machine to check the identification of all patrons on Thursday, Friday, and Saturday nights. The finding appears to be critical of Dodge City for not using the machine to check the identification of all lunch hour customers. The machine was not in use during the lunch hour at that time because lunch hour customers generally do not drink alcoholic beverage and under-aged persons generally do not seek admission at that time.</p>
<p>Use of "Today's Date" signs to assist in policy compliance, age verification, and to ensure responsible conduct.</p>	<p>The "We ID" machine or sign was present on March 30, 2010.</p>	<p>Finding of Fact No. 54: This is found to be present. The finding appears to be critical of Dodge City because it</p>

Mitigating Factor	Discussion	Finding of Fact
		orients the machine to view by persons entering the premises. This practice is followed by many licensees. It is designed to let people know that they will not be served unless they are of age.

As indicated, the list of mitigating circumstances the Board has authored is not exclusive. Others were found to exist. First of all, it is clear that Ms. Paranteau simply made an error in her reading of the identification card. Finding of Fact No. 55. She had never been cited for serving under-aged persons prior to this instance. Findings of Fact Nos. 23, 56. She was an experienced server able to handle the lunch crowd by herself. Finding of Fact No. 56.

The Board has listed aggravating circumstances. These are failing to cooperate with local law enforcement or liquor control board employees; engaging in high risk activities; and failing to enforce company policies with either staff or patrons. There were no findings that any of these aggravating circumstances were present, and, in fact, none were.

The Board recognizes that unique circumstances present during the violation may serve to mitigate any penalty. Those are certainly present here. Ms. Paranteau asked Mr. Rowell for identification. This shows that she recognized that he might not be of lawful age and was interested in not serving him if that proved not to be the case. According to Board officer Karic, she simply made a mistake in reading the identification card that was produced. In short, we have an employee who was interested in fulfilling her responsibilities rather than a server who simply did not care about the age of the patrons she was serving.

1           At the time, Ms. Paranteau was busy fulfilling her responsibilities to other patrons  
2 — to get them in, fed, and out so that they could return to work in a timely fashion. That is the  
3 probable reason that she made the mistake that she made. As the Findings of Fact, Conclusions of  
4 Law, and Initial Order recognizes, patrons during the lunch hour generally do not drink alcoholic  
5 beverage. Furthermore, persons under the age of twenty-one years generally do not come into  
6 establishments serving alcoholic beverage during the lunch hour. They tend to attempt entry in  
7 the evening hours. Her mistake is quite understandable under these circumstances. Findings of  
8 Fact, Conclusions of Law, and Initial Order are critical of Dodge City for not having more  
9 servers on duty at the time of the incident. Hopefully, the Board does not require its licensees to  
10 maintain staffing levels that envision the Board's conduct of a "compliance check" during the  
11 noon hour.  
12

13  
14           After Ms. Paranteau initially provided the bottle of Bud Light to Mr. Rowell, she  
15 had misgivings concerning his age. She intended to confront Mr. Rowell after she had attended  
16 to other customers. Mr. Rowell obtained the beer and was directed by Board officers to leave the  
17 premises after he had done so. Had he acted as any other customer would, Ms. Paranteau would  
18 have confronted him and checked his identification again. She would have then removed the  
19 beverage from him and probably direct him to leave. Mr. Rowell frustrated this effort by leaving  
20 early. Obviously, Mr. Rowell's purpose was not to actually consume alcoholic beverage.  
21 Rather, he was simply seeing if he could create a violation that would otherwise had not  
22 occurred.  
23  
24  
25

1 Two other matters deserve discussion. First of all, the penalty was premised on a  
2 prior violation occurring in May of 2008. That matter is currently before the Court of Appeals.  
3 No final order should be issued until the mandate is returned. If Dodge City is successful on the  
4 appeal, it should not face a penalty based on a violation that was overturned. Secondly, Dodge  
5 City acquired a new license since that violation based on a change of location and the noted  
6 change in operations. A penalty should not be assessed based upon the prior violation because  
7 Dodge City has obtained a new license.  
8

9 c. Conclusion.

10 The Board has formulated mitigating factors. In this case, a great many are  
11 present. If the Board does not mitigate the penalty under these circumstances, it should revise its  
12 regulations to eliminate the possibility of any mitigation.  
13

14 There are several alternatives that the Board should consider. These are the  
15 following:

- 16 1. A monetary penalty as opposed to suspension;
- 17 2. Suspension for fewer than seven days;
- 18 3. Suspension on consecutive Mondays or Tuesdays as opposed to  
19 consecutive days.  
20

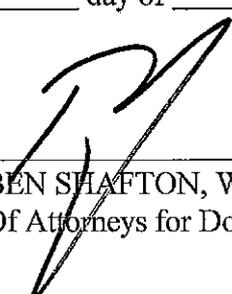
21 ///

22 ///

1 CONCLUSION

2 For the reasons stated above, the complaint should be dismissed. Alternatively, the  
3 penalty should be mitigated.

4 RESPECTFULLY SUBMITTED this 16 day of FEB, 2011.

5  
6  
7   
8 \_\_\_\_\_  
9 BEN SHAFTON, WSB #6280  
10 Of Attorneys for Dodge City  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

COF

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,	)	Nos. 09-1-00725-9
	)	09-1-00724-1
Plaintiff	)	09-1-00723-3
	)	
vs.	)	MEMORANDUM OPINION
	)	
ANTHONY J. COLAVECCHIO;	)	
SHAWN K. CAVANAUGH; and	)	
CODY G. JONES	)	
	)	
Defendants.	)	

This case is an appeal by the Plaintiff State of Washington from a decision of the Clark County District Court granting Defendants' Motions to Suppress Evidence and Dismiss pursuant to CrRLJ 8.3(b). The cases of the three Defendants were consolidated for hearing in District Court and before this court on appeal. This court affirms the decision of the District Court with the exception of the portion of the decision which concludes there was misconduct pursuant to CrRLJ 8.3 (b).

1 The facts are not in dispute. The District Court concluded the compliance checks  
2 conducted by enforcement officers of the Washington State Liquor Control Board (WSLCB)  
3 utilizing a minor to enter premises restricted to adults were unlawful. The District Court  
4 suppressed the evidence and further found the conduct amounted to misconduct pursuant to  
5 CrRLJ 8.3(b).  
6

7 The sale of alcoholic beverages is a highly controlled industry in the State of  
8 Washington, governed by RCW Title 66 and WAC Title 314. These laws and rules prohibit  
9 minors from entering the three premises involved in these cases. The WSLCB has not adopted  
10 rules for a controlled purchase program utilizing minors to purchase liquor, with the exception  
11 of RCW 66.44.290 which provides for an in-house controlled purchase program which may be  
12 undertaken by an employer.  
13

14 The State relies upon the general enforcement provisions of Title 66 RCW and  
15 Enforcement Division Policy #287. However, the Enforcement Policy was not adopted  
16 according to the requirements for adoption of regulations as set forth in RCW 66.08.030, or by  
17 statute, in contrast to the specific provisions of RCW 66.44.290. This court concurs with the  
18 decision of the District Court which found the controlled purchase program utilized in these  
19 investigations was not authorized, and therefore in violation of specific provisions regarding  
20 minors in the premises and attempting to purchase alcohol.  
21  
22

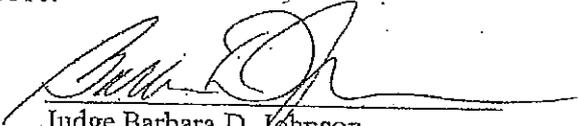
23 The second issue presented was whether the minor investigative aide was "deceptively  
24 mature in appearance" in violation of WAC 314-21-025. It is noted Policy #287 was not  
25 brought to the attention of the District Court, but utilizes the same language. The court  
26 concluded in Finding of Fact No. 2.6 the minor was deceptively mature in appearance. Under  
27

1 RALJ 9.1, the superior court shall accept the factual determinations of the trial court which are  
2 supported by substantial evidence. Although the record on this issue leaves something to be  
3 desired, consisting of photocopies of photographs of the aide and the affidavits of the  
4 defendants, this court finds the evidence is sufficient to support the conclusion of the trial court.

5  
6 This court upholds the decision of the trial court to grant the motion to suppress  
7 evidence. Based upon this decision, State would be unable to utilize the evidence regarding the  
8 defendants serving the minor aide, which would presumably result in dismissal of the case.

9 However, the trial court also found the enforcement actions constituted misconduct under  
10 CrRLJ 8.3(b). With the additional information of authorization under Policy #87, this court  
11 concludes the investigation by the Enforcement Division of the WSLCB utilizing a minor aide  
12 falls short of the standard of "governmental misconduct" which would warrant dismissal  
13 pursuant to CrRLJ 8.3(b). Dismissal is not justified when suppression of evidence is an  
14 adequate remedy, State v. McReynolds, 104 Wn.App. 560, 579, 17 P.3d 608 (2000).  
15  
16  
17  
18

19 DATED this 21st day of March, 2010.

20  
21   
22 Judge Barbara D. Johnson  
23  
24  
25  
26  
27

# Reply to Petition for Review

RECEIVED

FEB 28 2011

LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION

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

**STATE OF WASHINGTON  
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

OAH NO. 2010-LCB-0041

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

LCB NO. 23,670

ENFORCEMENT DIVISION'S  
REPLY TO LICENSEE'S PETITION  
FOR REVIEW OF INTIAL ORDER

LICENSEE

LICENSE NO. 403213

The Washington State Liquor Control Board (Board), Education and Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GORDON KARG, Assistant Attorney General, now responds to Dodge City's Petition for Review (Lic. Pet.).

**I. STATEMENT OF THE CASE**

Dodge City Saloon Inc., (Licensee) is the holder of a liquor license issued by the Washington State Liquor Control Board (Board). On June 21, 2010, the Board issued a Complaint alleging that on or about March 30, 2010, the above named Licensee, or employee(s) thereof, sold, supplied or otherwise provided alcohol to a person under the age of twenty-one (21) in violation of RCW 66.44.270(1). The issuance of the Complaint was based upon the reported observations and actions of liquor enforcement officers and an investigative

1 aide (IA)<sup>1</sup> when they were present in the public portions of the Licensee's premise on March  
2 30, 2010, conducting a compliance check. In the course of that compliance check, the  
3 Licensee has stipulated that its employee sold a minor an alcoholic beverage. Finding of Fact,  
4 Conclusion of Law and Initial Order (FOF/COL/Initial Order) 29-34. The Licensee timely  
5 requested a hearing on the matter. The Licensee filed several dispositive motions, some in the  
6 guise of a "motion to suppress and dismiss" others as a "hearing brief" and "supplemental  
7 hearing brief".<sup>2</sup> Initial Order at 1. All were denied. *Id.* The parties stipulated to the facts  
8 and Enforcement filed a motion for summary judgment based upon that stipulation. Initial  
9 Order 2-5. At hearing, the Licensee presented minimal evidence and argued mitigating  
10 factors. *Id.* at 5. After the hearing, the ALJ granted Enforcement's summary judgment  
11 motion and endorsed a standard seven (7) day suspension of the liquor license as this is the  
12 second such violation in a two (2) year period. Initial Order at 10. The Licensee petitioned  
13 the Board for review of the Initial Order, and Enforcement now responds.

## 14 II. REPLY TO PETITION

### 15 A. Licensee's Legal Arguments are Unsupportable

16 The Licensee's multiple arguments as well as its continuing belief that the Board has no  
17 lawful authority to effectively enforce liquor laws and rules or regulate Dodge City's sale of  
18 alcohol, are well known. The Licensee has raised some or all of these arguments in two (2)  
19 previous cases. *In The Matter of Dodge City Saloon Inc. LCB Case No's 22, 834; 22, 849.*  
20 On each occasion, they have been found to be without any legal merit by the Administrative  
21

22 <sup>1</sup> Licensee's counsel refers to the Investigative Aide involved in this case as a "shill". Motion at 1-2. In  
23 common parlance, a "shill" is a derogatory term. Licensee's counsel has represented the Licensee in a similar  
24 matter (See Case No. 2008-LCB-0051) and is familiar with the proper terminology for these state employees.  
25 Counsel's excuse for using this term is disingenuous and the use itself is deliberately insulting.

26 <sup>2</sup> The Licensee filed a "supplemental hearing brief" four days prior to hearing raising a new dispositive  
motion for the first time challenging the constitutionality of RCW 66.29.090 on equal protection grounds. The  
issue was untimely and not formally ruled on by the ALJ. Enforcement contends this argument was rejected, not  
timely and not part of the record for the purpose of Board or Judicial review.

1 Law Judge (ALJ), this Board, and the Clark County Superior Court. *Id.*; *See also Dodge City*  
2 *Saloon Inc. v. Washington State Liquor Control Board, No. 10-2-00257-3*<sup>3</sup>.

3 The Licensee provides no substantial new argument. Enforcement has thoroughly  
4 responded to each of these arguments in the record below and now incorporates those  
5 arguments herein by reference. *See In the Matter of Dodge City Saloon, LCB Case No. 23,670,*  
6 *Enforcement's Response to the Licensee's Motion to Dismiss; Enforcement's Reply to*  
7 *Licensee's Rejoinder and Hearing Brief; Enforcement's Reply to Enforcement's Supplemental*  
8 *Hearing Brief.* The only new argument the Licensee raises is its assertions regarding the  
9 compliance check being unlawful due to its "randomness". Licensee's Petition (Lic. Pet.) at  
10 16-18. This argument was not raised below.

11 Case law the Licensee primarily relies upon for this new argument involves the privacy  
12 interests of individuals who were subject to unreasonable search and seizure in a criminal  
13 context. *See State v. Marchand, 104 Wn.2d 434, 706 P.2d 225 (1985); City of Seattle v.*  
14 *Messiani, 110 Wn.2d 454, 755 P.2d 775 (1988); State v. Jorden, 160 Wn.2d 121, 156 P.3d 893*  
15 *(2007); York v. Wahkiakum School District, 163 Wn.2d 297, 178 P.3d 995 (2008).* These cases  
16 do not involve regulatory inspections, or inspections of a pervasively regulated industry subject  
17 to continuous government oversight, such as the sale of alcohol. *Washington Massage*  
18 *Foundation v. Nelson, 87 Wn.2d at 952-54* (noting that the sale of alcohol is a pervasively  
19 regulated industry). They are not relevant or authoritative here.

20 The only authority the Licensee cites to involving a regulatory inspection, *Seymour v.*  
21 *Washington Dept. of Health, 152 Wn.App. 156, 167, 216 P.3d 1039 (2009),* does not support  
22 the Licensee's position. Lic. Brief at 21. The Court in *Seymour* never held that a random or  
23 unannounced inspection of a pervasively regulated business is unconstitutional or unlawful.  
24 *Seymour, 152 Wn.App. at 167.* On the contrary, the *Seymour* Court quoted *Nelson's* holding

25 <sup>3</sup> A copy of the Clark County Superior Court's order affirming the Board's decision is attached for  
26 reference.

1 that unannounced inspections are valid if authorized by statute. *Id.* at n.5. Moreover, as set  
2 forth in Enforcement's briefing below, no "search" of any part of the Licensee's commercial  
3 premise subject which it had a reasonable expectation of privacy in occurred here.  
4 *Enforcement's Response to the Licensee's Motion to Dismiss at 10-15.* Therefore, whether the  
5 compliance check here was "random" or not is irrelevant. Even if a "search" occurred, the  
6 Board has statutory authority to inspect the Dodge City's premises at any time and its  
7 compliance check was authorized by statute. RCW 66.28.090.

8 **B. There Are No Mitigating Factors Sufficient to Reduce Penalty**

9 The Licensee insists mitigating factors present here should limit the penalty sought by  
10 Enforcement. Lic. Pet. at 37. The standard penalties outlined in WAC 314-29 are meant to  
11 serve as guidelines. WAC 314-29-015. The Board *may* impose a different penalty based upon  
12 mitigating or aggravating circumstances. *Id.* Some of those mitigating factors are set forth in  
13 WAC 314-29-015. The application of Mitigating factors is discretionary and they should not  
14 be examined in a vacuum but rather applied to the unique facts in each case. *See Id.* The  
15 majority of factors presented here are not mitigating generally, or do not specifically mitigate  
16 any of the facts in this matter or are outweighed by the Licensee's conduct and history.

17 **1. MAST permits are required by law**

18 The Licensee suggests that because its servers and security personal are required to  
19 have MAST permits, this should mitigate its violation of the law. Lic. Pet. at 31. Anyone who  
20 serves or handles alcohol, or supervises such activity for the Licensee, is required to have a  
21 MAST permit. WAC 314-17-030. Ensuring employees have a MAST permit is not a  
22 mitigating factor as they must have a MAST permit within sixty (60) days of employment by  
23 law. *Id.* The Licensee suggests that because it requires its employees to have a MAST permit  
24 before they are employed is a mitigating factor. Lic. Pet. 32. The Licensee's assertion  
25  
26

1 amounts to nothing more than mere compliance with the law by having their employees obtain  
2 MAST permits prior to the prescribed time. This is not a mitigating factor.

3 **2. There was no onsite supervision of employees**

4 The Licensee asserts there was onsite supervision of its employee. Lic. Pet. at 32. This  
5 is inaccurate. It had a single waitress to handle what its own witnesses characterized as a busy  
6 lunch service. FOF 46. The waitress had to cover a lounge room, a dining room, and a  
7 games/pool room. FOF 13. Mr. Kutch, the owner, was not supervising any employee during  
8 this busy lunch service, but was, instead, eating lunch. FOF 43, 52. The Licensee argues that  
9 Mr. Kutch's failure to supervise his employee should be a mitigating factor even though the  
10 "supervisor did not happen to be looking over the employee's shoulder" when the employee  
11 admittedly sold alcohol to a minor. Lic. Pet. at 32. This argument fails to grasp the point.  
12 There was no supervisor at all during what was found to be a peak business period. FOF 45.  
13 The "supervisor" was having lunch and not supervising anything. FOF 43, 52. The Licensee  
14 only assigned a single server to deal with every patron in its large premise, during one of its  
15 peak business hours, and failed to provide any onsite supervision or even assistance to this one  
16 loan employee. This is not a mitigating factor.

17 **3. The Licensee has a hostile relationship with the Board**

18 The Licensee's assertion that it cooperates with law enforcement is disingenuous. The  
19 Licensee has continually insisted, in this case and previous cases, that the Board has no  
20 authority to enter its premises or conduct compliance checks. *See e.g. Licensee's Motion to*  
21 *Suppress and Dismiss.* On previous occasions the Licensee has held the position that neither  
22 Board enforcement officers nor Vancouver police officers are welcome on its premises. *See*  
23 *e.g. In The Matter of Dodge City Saloon Inc. LCB Case No. 22, 849.* The Licensee has openly  
24 used derogatory terms for its agents. *See Licensee's Motion to Suppress and Dismiss* at 1-2.  
25 The Licensee has provided no subjective or corroborating evidence that it cooperates with local  
26 law enforcement, such as the Vancouver Police Department or the Clark County Sheriff's

1 Office. FOF 44. While the Licensee has requested training from Board officers, and training  
2 has been provided on multiple occasions, the training apparently has been ignored.

3 There is no mitigating factor here. The Licensee's relationship with the Board is one of  
4 disdain and hostility, not cooperation. The Licensee's conduct and statements seem to indicate  
5 the opposite of "cooperating with law enforcement".

6 **4. Identification scanners, "we ID" signs, and strict identification review**  
7 **polices were not effectively in use under the facts here**

8 The Licensee suggests it has purchased and used an identification scanner. Lic. Pet. at  
9 33-34. Similarly, the Licensee argues it uses a "We ID" device, which indicates what a  
10 person's birth-date would be for them to be at least twenty-one (21) years of age on the day in  
11 question. Lic. Pet. at 35. Finally, the Licensee claims it has changed its business operations to  
12 include a more strict identification and supervision policy. Pet. Lic. at 33-34. When  
13 considered in the light of the facts here, none of these factors are mitigating.

14 The Licensee has purchased an identification scanner, an "IDECT" device; however,  
15 that device was not in use during its busy "lunch rush". FOF 46, 50. The Licensee's  
16 representation is that the device is used during Dodge City's "peak times of business". Lic.  
17 Pet. at 33. However, the Licensee has also represented, and it was found as fact, that it  
18 changed its format to be more food-service oriented, thus shifting at least one of its peak times  
19 to "lunch rush". Lic. Pet. at 33-34. Despite the facts that lunch is a peak time for the Licensee,  
20 that they only saw fit to have one server cover the entire restaurant, and that server had no  
21 effective onsite supervision, they chose to not assist their employee by using the "IDECT"  
22 machine at that time. FOF 43, 45, 46, 50. A scanner device of this nature is useless unless  
23 used. The sale of alcohol to a minor might have been avoided had the Licensee made it  
24 available to the only server it had on duty. Purchasing such a device and failing to use it  
25 prudently is not a mitigating factor.

1 Similarly, the Licensee had an automated "today's date" type sign indicating the  
2 minimum date of birth for a twenty-one (21) year old person on that day. FOF 20,21,54.  
3 However, the device is located near the front-entrance way, where no server or other employee  
4 can view it easily or at all. FOF 21, 54. The Licensee admits this sign was for the benefit of  
5 patrons, not as an aide to assist its employees in not serving minors. Lic. Pet. at 36. This  
6 admission belies the use of the device as a mitigating factor. Had the Licensee placed this  
7 device where its only server on duty during a busy lunch rush could have easily referred to it,  
8 the sale of alcohol to a minor might have been avoided. Indeed, the Licensee's server testified  
9 that she had intended to double check the date using the device, but never got to the front  
10 entrance area because her focus was on serving and cashing out customers. FOF 37, 54.

11 Finally, the strict policies regarding double checking vertical identification was not in  
12 place when this violation occurred and were only implemented after the violation. FOF 48;  
13 Lic. Pet. at 33. Had this been the Licensee's first violation, this change in policy might be seen  
14 in a favorable light. However, this was not the first time a minor had been allowed into the  
15 restricted portions of the Licensee's establishment and served alcohol. Finding of Fact,  
16 Conclusions of Law and Initial Order at 10. These responses are too little, too late. The  
17 Licensee was aware it had a history of serving minors and these polices were not implemented  
18 until after it violated the law again.

### 19 III. CONCLUSION

20 The Licensee's legal arguments remain unsupported by law or facts and raises issues  
21 which have been defeated by the Board and the Clark County Superior Court. The Licensee  
22 suggests its penalty should be mitigated. No mitigation of penalty is appropriate when the  
23 Licensee had a busy lunch hour that it staffed with a single server to cover three separate  
24 service areas. No mitigation is appropriate when the owner was eating lunch during this busy  
25 period rather than supervising or assisting his loan server. No mitigation is appropriate when  
26

1 the Licensee failed to make readily available or implement tools, devices and polices which  
2 might have prevented the sale of alcohol to a minor here. Accordingly, Enforcement  
3 respectfully requests the Board adopt the ALJ's granting of summary judgment to  
4 Enforcement and endorsement of the standard penalty, a seven (7) day suspension of the  
5 liquor license.

6 DATED this 28 day of February, 2011.

7 ROBERT M. MCKENNA  
8 Attorney General

9  
10   
11 \_\_\_\_\_  
12 GORDON KARG, WSBA #37178  
13 Assistant Attorney General  
14 Attorneys for Enforcement, Washington State  
15 Liquor Control Board  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR CLARK COUNTY

DODGE CITY SALOON, INC.,	)	
	)	NO. 10-2-00257-3
Petitioner,	)	
vs.	)	MEMORANDUM OF OPINION
	)	AND ORDER AFFIRMING
WASHINGTON STATE LIQUOR	)	BOARD'S DECISION
CONTROL BOARD,	)	(MAY 16, 2008, OCCURRENCE)
	)	
Respondent.	)	

This matter came on regularly before the undersigned judge of the above-entitled court on the petition for review filed January 20, 2010, by Dodge City Saloon, Inc. This order decides the review of the final orders of the Washington State Liquor Control Board in LCB22, 849 and OAH No. 2008-LCB-0051. The petitioner was represented by and through its attorneys, Caron, Colven, Robison and Shafton, P.S. The respondent was represented by and through its attorney, the Attorney General's Office of Washington State.

The court considered the records and files herein, and the oral argument presented to the court on August 6, 2010. The court further considered the written arguments of the

parties and is fully advised. For the reasons stated below, the Board's decision should be affirmed.

### FACTUAL AND PROCEDURAL HISTORY

Dodge City Saloon, Inc., is the holder of a liquor license issued by the Washington State Liquor Control Board. On May 16, 2008, petitioner was operating the Dodge City Saloon, located at 7201 NE 18<sup>th</sup> Street, Vancouver, Washington. The saloon's entire premises is restricted; with limited exceptions, no person under the age of 21 is allowed to enter and remain.

The Liquor Control Board monitors licensees through a continuing program of compliance checks. Investigative aides under the age of 21 attempt to enter licensed establishments, or to make controlled purchases of liquor from bar owners holding liquor licenses. These operations are supervised by a commissioned officer of the Board. If an employee allows a minor to enter an "off limits" area, the licensee is cited and the Board is notified.

According to the findings adopted by the Board,

3. On or about May 16, 2008, the Board, with the assistance of its investigative aides, began a series of compliance checks. The licensee was one of several establishments checked during the course of the evening.
4. The investigative aide assigned to attempt to enter the licensee's establishment was Christopher Mangan. As of the date of the compliance check, Mr. Mangan was age 17. His date of birth is October 9, 1990.
5. It is the Board's practice to allow their investigative aides to carry one piece of identification during the compliance check. Mr. Mangan had two forms of photographic identification on him at the time of the compliance check. He carried his Washington State identification card, Exhibit 1, and his vertical driver's license, Exhibit 9. A vertical license is issued to individuals under the age of 21.

6. Lt. Mark Edmonds, Liquor Control Board Officer, searched Mr. Mangan before allowing him to proceed as part of the compliance check. Both the state identification card and the license were in Mr. Mangan's wallet. However, Lt. Edmonds only saw the identification card. It was his believe (sic) that Mr. Mangan only had one piece of identification on him.

7. [The Board finds] that Mr. Mangan had two pieces of identification on his person at the time he participated in the compliance check. Both documents were his own and they were accurate.

Both pieces of identification carried by Mangan indicated that his date of birth was October 9, 1990, and that he would turn 18 on October 9, 2008. Mangan went to the door of the Dodge City Saloon, for the purpose of attempting to enter. Liquor Control officers observed Mangan, both from vantage points outside the premises, and, later, when he was inside the saloon.

At the front door, a Dodge City Saloon employee, Jeffrey Hilker, looked at Mangan's identification card for 15 to 25 seconds. He put it under a black light in an attempt to determine if it was fake. He then handed the identification card to Mangan, told him to pay the \$5.00 cover fee inside the establishment, and allowed him to enter. Inside, Mangan paid the cover fee and received a stamp on his hand. During the three minutes he was inside the premises, he was not asked to leave.

After Mangan left the establishment, Liquor Control Board enforcement officers served an administrative violation notice on the Dodge City Saloon bartender. The enforcement officer also cited Hilker for violation of RCW 66.44.310(1)(a). That statutory section, and WAC 314-11-020(2), prohibit a licensee from allowing persons under the age of 21 to enter or remain in a portion of their premises that is off limits.

Dodge City Saloon, Inc., contested the administrative violation notice, and sought a hearing. Prior to the hearing, it moved to suppress all testimony by Mangan and Board

enforcement personnel, and to dismiss the case. These motions were denied. Dodge City also moved for a continuance, to allow Hilker to testify at a time when he would not have a privilege against self-incrimination. The Administrative Law Judge denied the request for a continuance, but admitted a statement from Hilker which detailed his expected testimony.

Following the hearing, the Administrative Law Judge found Dodge City Saloon, Inc., in violation, and assessed the penalty of a seven-day license suspension. After Dodge City petitioned for review, the Board adopted the Administrative Law Judge's findings and conclusions, and issued a final order. Dodge City Saloon, Inc., filed this timely appeal.

#### DECISION

1. A substantial portion of the briefing in this case deals with the scope and meaning of exceptions contained in RCW 66.44.290. That statute criminalizes purchases or attempts to purchase alcoholic beverages by persons under the age of 21. The petitioner is not charged with a violation of RCW 66.44.290, and the application of these exceptions is not before the court, unless the statute's language can be found to implicitly control the Board's actions in enforcing other portions of RCW Title 66; or other provisions in the Washington Administrative Code. The court does not find that the Legislature intended such a broad reading of the statute.

2. The Washington State Liquor Control Board has broad police powers to enforce state laws and rules relating to alcohol. This includes the authority to appoint officers who have the power to enforce the penal and administrative provisions of the code. RCW 66.44.010(4). Subject to constitutional restrictions, these officers may

utilize undercover operations or deceitful conduct which allows licensees an opportunity to violate (or obey) the law. These undercover operations may include the use of decoys and informants. *Playhouse, Inc., v. Liquor Control Board*, 35 Wn. App. 539, 667 P.2<sup>d</sup> 1136 (1983); *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002).

3. The evidence obtained in this case should not have been excluded, and the suppression motion was properly denied. The parties have discussed a decision from Department 6 of the Clark County Superior Court, which is persuasive but not binding authority. That case can be distinguished, because it involved prosecutions for the sale of alcohol, which directly implicated RCW 66.44.290.

4. RCW 9A.16.070(1) allows a criminal defendant to assert entrapment “in any prosecution for a crime”. This statute does not apply to administrative proceedings. No Washington case has indicated that a common law defense of entrapment can be asserted in civil or administrative proceedings, although principles of equity may allow the trier of fact to take entrapment into account in certain extreme situations.

5. Entrapment is an affirmative defense, and Dodge City Saloon, Inc., would bear the burden of establishing that entrapment occurred. Presenting an opportunity for a licensee to either violate or not violate the law does not, in itself, establish entrapment. Although the Administrative Law Judge did not make express findings with regard to the affirmative defense, a conclusion that the law has been violated necessarily implies a rejection of the defense.

6. The Administrative Law Judge did not abuse her discretion in this administrative proceeding, by denying the request for a continuance. Hilker’s testimony was admitted into evidence, albeit in written form. There is no indication when his live

testimony would have been available, and Dodge City Saloon did not establish that direct examination would have revealed additional facts not contained in the written statement. The ruling did not deny Hilker's testimony to Dodge City, and a remand for a new hearing is not warranted.

7. The Board also properly denied the motion to dismiss for outrageous governmental misconduct. The actions of enforcement officers were within their lawful authority, as described above. While the use of a 17-year old is troubling, there is nothing outrageous about the idea of making controlled attempts to purchase alcohol, or to enter off-limits premises. The Legislature has specifically authorized licensees to conduct similar in-house programs, indicating that they do not believe such conduct is inherently repugnant to a basic sense of justice.

8. The Administrative Law Judge applied the correct burden of proof in this case.

#### **ORDER**

Based on the records and files herein, and the decision noted above, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The final orders of the Washington State Liquor Control Board in Case Nos. LCB22, 849 and OAH No. 2008-LCB-0051 are affirmed.
2. This matter is remanded to the Washington State Liquor Control Board, for additional proceedings consistent with this opinion.

DATED this 13<sup>th</sup> day of October, 2010.

**/s/ ROBERT A. LEWIS**

\_\_\_\_\_  
Judge Robert A. Lewis

## Rejoinder on Petition for Review

**RECEIVED**

MAR 11 2011

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

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

In re: DODGE CITY BAR & GRILL; DODGE  
CITY SALOON, INC.,

License/Permit No.: 403213

OAH No. 2010-LCB-0041  
LCB Case No. 23,670

REJOINDER ON PETITION FOR REVIEW

INTRODUCTION

In the Petition for Review, Dodge City Saloon, Inc. (Dodge City) raised two categories of points. The first category dealt with Dodge City's liability for the violation in question. The second dealt with the appropriate penalty.

Dodge City sees no reason to make any further response to the Enforcement Division of the Washington State Liquor Control Board's (the Board) arguments in the Enforcement Division's Reply to Licensee's Petition for Review of Initial Order as those points were addressed in Dodge City's Petition for Review. The Board should be aware, however, that the Superior Court Opinion upon which the Board relies is currently on appeal in *Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, Court of Appeals Division Two No. 4154-6-II.

1 With regard to the second category, Dodge City has raised most of the necessary points and  
2 issues in its Petition for Review. This Rejoinder will be limited to two relatively narrow issues that  
3 concern the penalty.

4 DISCUSSION

5  
6 I. Dodge City's Alleged Hostility to the Board.

7 First of all, Finding of Fact No. 44 belies any notion of hostility emanating from Dodge City  
8 toward the Board. As is stated in pertinent part:

9 . . .the Licensee himself, supported by Officer Karic's testimony has shown  
10 that they have in fact cooperated with law enforcement requests when  
11 requested to do so and the Licensee has invited Officer Karic to provide  
additional training over the course of the business which he has done.

12 Despite this finding the Board's Enforcement Division perceives — as evidenced by its response —  
13 that hostility exists.

14 The position of the Board's Enforcement Division juxtaposed with Finding of Fact No. 44  
15 should raise significant questions for the Board to investigate. These include but are certainly not  
16 limited to why the Board's Enforcement Division feels that hostility exists. The Board should also  
17 be interested as to whether this supposed hostility comes only from Dodge City or is shared by  
18 other licensees in Clark County. In fact, Board members may wish to meet with Clark County  
19 licensees to learn more about how the Board's Enforcement Division is perceived in Clark County.

20 The effort may well be illuminating for Board members.

21  
22  
23  
24 ///

1 II. The Overriding Policy Question.

2 In this case, the alleged violation occurred because the Board officers sent Christopher  
3 Rowell into Dodge City's establishment with directions to see if he could purchase a beer. There is  
4 no reason to believe that such any violation would have occurred in the absence of the Board's  
5 attempt to have it occur. As was found, Donna Paranteau had never, at least to her knowledge,  
6 served a person under the age of twenty-one (21) years.  
7

8 Therefore, this case raises overriding policy questions as follow that the Board must  
9 address:

- 10 1. Should a retail license be suspended based upon a violation that the Board  
11 created and that would never have occurred were it not for Board activity?
- 12 2. If such a suspension is to be allowed, should it be substantially mitigated?

13 Suspension of a retail license based upon conduct that the Board discovers but does not  
14 create is certainly understandable. On the other hand, suspension based upon violations the Board  
15 causes to occur are subject to significant question. All retail licensees, Dodge City included, are  
16 owners of legitimate businesses. They do their best to comply with all laws and to operate their  
17 businesses in a responsible fashion. They are not criminals who pose a serious threat to the  
18 community and should not be regarded as such. All retail licensees wish to have a constructive  
19 relationship with the Board. Hopefully, that is the Board's goal as well. Enforcement of Board  
20 created violations does nothing to promote such a constructive atmosphere.  
21  
22

23  
24 ///

1 CONCLUSION

2 As discussed in the Petition for Review, this is a case that calls out for mitigation.

3 Alternatively, the Board should give serious consideration to removing from its regulations all  
4 reference to any possible mitigation of the penalty.  
5

6 DATED this 9 day of MARCH, 2011.

7  
8   
9 \_\_\_\_\_  
10 BEN SHAFTON, WSB #6280  
11 Of Attorneys for Dodge City Saloon, Inc.  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

# Motion to Strike Rejoinder

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

STATE OF WASHINGTON  
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:  
  
DODGE CITY SALOON INC., d/b/a  
DODGE CITY BAR & GRILL  
4250 E. FOURTH PLAIN BLVD.  
VANCOUVER, WA 98661  
  
LICENSEE  
  
LICENSE NO. 403213

OAH NO. 2010-LCB-0041  
  
LCB NO. 23,670  
  
ENFORCEMENT DIVISION'S  
MOTION TO STRIKE LICENSEE'S  
REJOINDER

The Washington State Liquor Control Board (Board), Education and Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GORDON KARG, Assistant Attorney General, now moves to strike from the record Dodge City's Rejoinder on Petition for Review (Rejoinder).

I. MOTION

Dodge City Saloon Inc., (Licensee) timely petitioned the Board for review of the Initial Order in the above-captioned case. Enforcement timely replied. Now, the Licensee has filed a "Rejoinder". There is no procedural or legal support for this filing. It is inappropriate and in violation of Board procedural rules, the Administrative Procedures Act, and the Model Rules. The Licensee, again, abuses the administrative process to raise issues not before the Administrative Law Judge (ALJ) below and take "another bite of the apple". The Rejoinder

1 should be stricken from the record and not considered by the Board or any other reviewing  
2 adjudicative body.

## 3 II. MEMORANDUM

4 A reviewing officer or panel shall give the parties an opportunity to present written  
5 argument upon review of an initial order. RCW 34.05.464 (6). Under the Model Rules, any  
6 party may file a petition for review of an agency order, and any party may file a reply to that  
7 petition. WAC 10-08-211. Board administrative proceedings are conducted under WAC  
8 Chapter 10-08 unless the Board adopts a different procedure by rule. WAC 314-42-040.  
9 WAC 314-42-095 in pertinent part states:

10 "Either the licensee, permit holder, or the assistant attorney general may file a petition  
11 for review of the initial order with the liquor control board within twenty days of the  
12 date of service of the initial order . . .

13 Within ten days after service of the petition for review, any party may file a reply with  
14 the liquor control board and copies of the reply must be mailed to all other parties or  
15 their representatives at the time the reply is filed.

16 The administrative record, the initial order, and any petitions for review and replies  
17 filed by the parties will be circulated to the board members for review."

18 No procedural administrative rule provides that a party, after filing a petition for  
19 review, may file a "rejoinder". See e.g. WAC 314-42-095 Compare RAP 10.1(b) (allowing for  
20 the filing of appellants' brief, respondents brief and then a reply brief from the appellant). The  
21 Licensee cites to no authority which permits it to file any additionally briefing in this matter.  
22 The Licensee filed its petition, Enforcement replied, and that is all the rules provide for.

23 Furthermore, the Licensee uses this inappropriate action to raise argument it failed to  
24 raise below. The Licensee did the same in its Petition for Review by raising an entirely new  
25 issue never brought before the ALJ in the proceeding below. See Licensee's Petition for  
26 Review at 16-18 (raising a new argument regarding the "randomness" of compliance checks)  
The Petition for Review is not an opportunity for the Licensee to reargue its case, or assert  
issues it lacked the forethought or preparedness to raise in the proceeding below.

III. CONCLUSION

The Licensee's Rejoinder should be stricken, along with the argument it raises in its Petition for Review for the first time. No rule provides for the filing of a "rejoinder". The Licensee's rejoinder and any entirely new arguments the Licensee failed to raise before the ALJ should be stricken from the administrative record in this matter and not considered by this Board, or any other reviewing adjudicative body.

DATED this 11 day of March, 2011.

ROBERT M. MCKENNA  
Attorney General

  
GORDON KARG, WSBA #37178  
Assistant Attorney General  
Attorneys for Enforcement, Washington State  
Liquor Control Board

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