

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

RED BULL NIGHT CLUB LLC d/b/a  
RED BULL NIGHT CLUB  
542 S MAIN STREET  
COLVILL, WA 99114-2504

LICENSEE

LICENSE NO. 359273  
AVN NO. 4Q3067A

LCB NO. L-24,743  
OAH NO. 2013-LCB-0030

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated May 10, 2013, alleging that on or about March 8, 2013, the above-named Licensee, or employee(s) thereof, served and/or sold liquor to an apparently intoxicated person on the licensed premises, and/or allowed an apparently intoxicated person(s) to consume liquor on the licensed premises, contrary to RCW 66.44.200 and WAC 314-16-150.
2. The Licensee made a timely request for a hearing, and an administrative hearing was held on April 18, 2014 before Administrative Law Judge Mark H. Kim with the Office of Administrative Hearings.
3. At the hearing, the Enforcement Division of the Board was represented by Assistant Attorney General Isaac Williamson. The Licensee, Red Bull Night Club, LLC d/b/a Red Bull Night Club, was represented by Elizabeth Matney, Managing Member. Mike Matney, Co-Managing Member was present.
4. On June 19, 2014 Administrative Law Judge Mark H. Kim entered his Findings of Fact, Conclusions of Law and Initial Order in this matter which dismissed the Complaint.

5. On July 3, 2014, the Enforcement Division of the Board, through Assistant Attorney General Isaac Williamson, filed a Motion to Extend the Time for Filing a Petition for Review in this matter. The Motion was supported by the Declaration of Isaac Williamson.
6. On July 9, 2014, the Board issued its Order Granting Enforcement Division's Motion to Extend the Filing Time for Petition for Review.
7. On July 30, 2014, Enforcement Division's Petition for Review of Initial Order was received. No reply to the petition was received.
8. 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 Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order are REVERSED. The Board modifies the Findings of Fact, Conclusions of Law and Initial Order as follows:

The Board adopts page 1 and 2 of the Initial Order, up to and including the Recital and Issue Statement. The **ORDER SUMMARY** is modified to read: The Board's Complaint is sustained.

The Board adopts Findings of Fact Nos. 1. through 13 from the Initial Order. The Board rejects all other Findings of Fact in the Initial Order. Finding of Fact No. 22 improperly interprets the standard to be met to prove the alleged violation of sale to or allowing an apparently intoxicated person to consume liquor.

The Board hereby enters the following additional

FINDINGS OF FACT

14. Mr. Martin is known in the establishment, and witnesses testified that he has missing teeth and often “goofs around” with others, creating the appearance of instability when walking.

15. Witnesses testified that because Mr. Martin is a welder, he always has red eyes. There was no testimony to prove this conclusion, and the effect of welding on a welder’s eyes, when proper protection is used, is not a matter that is appropriate for judicial notice. Ms. Clark also assumed that Mr. Martin had been awake since the early hours of the date he was observed by Officer Matthews, but admitted her assumption was based on her knowledge of normal work hours at the place where Mr. Martin works, because her daughter also works there. However, she also testified that she did not know whether Mr. Martin worked that day, nor what hours he may have worked.

16. The ALJ concluded that Mr. Martin had only consumed one beer on the licensed premises. While it may be proper to conclude that he was *served* one beer by Ms. Hart, there was no testimony about whether others may have served Mr. Martin that evening, or whether he consumed alcoholic beverages outside of the licensed premises. Mr. Martin did not testify at the hearing, thus there is no way to determine whether he might have consumed other alcoholic beverages prior to his arrival at the Red Bull Nightclub, such as in the past, when the Ms. Hart stated that she refused service to Mr. Martin.

17. Ms. Hart, the bartender who served Mr. Martin a beer on March 8, 2013, acknowledged on cross-examination that the signs of intoxication observed by Officer Matthews are the signs of intoxication she would look for to determine if a person should be served or allowed to consume an

alcoholic beverage, yet stated those signs did not apply to Mr. Martin due to how he normally looks and acts. She could not explain how she could tell the difference, other than stating she would know by the way he looks at her. Her method of determining whether Mr. Martin is intoxicated is to “poke him or push him back” or to use her “playful mannerisms,” instead of relying on traditional signs of intoxication, because she knows him. However, she did not testify that she used these techniques before completing the sale to Mr. Martin on the night in question.

18. Ms. Hart’s description of Mr. Martin’s delay in retrieving money from his wallet to pay for the beer differed significantly from the description provided by Officer Matthews. Further, she did not observe Mr. Martin beyond that encounter because she was busy behind the bar.

19. Officer Matthews testified that he has observed individuals with speaking impediments, knee and back injuries, and intentionally goofing around and that, based on his training and experience, Mr. Martin was exhibiting signs of intoxication that are *not* consistent with disabilities or intentional behavior. Officer Matthews’ testimony was that Mr. Martin was walking as though intoxicated on the night in question, and that this walk was not consistent with that of a disabled individual. Officer Matthews testified that the slurred speech he heard from Mr. Martin differed from a speech impediment caused by missing teeth, and that Mr. Martin’s walk, and appearance was different from swaying or limping caused by a disability.

20. The record contains ample evidence that Mr. Martin was displaying numerous objective signs of intoxication while on the licensed premises. Officer Matthews observed Mr. Martin swaying and staggering, speaking with slurred speech, bloodshot watery eyes, a lack of focus and concentration, and overall demeanor of intoxication. The Licensee’s representative, Ms. Matney, conceded in her closing argument that overservice of alcohol is a problem because intoxicated persons can cause violence.

21. The Board finds that deference to the Licensee's bartender is not appropriate. Even if such deference were appropriate, it cannot overcome multiple objective signs of apparent intoxication based on little more than familiarity with a patron.

#### CONCLUSIONS OF LAW

The Board adopts Conclusions of Law Nos. 1 through 6 of the Initial Order. The Board enters the following additional Conclusions of Law:

7. What was observed by all who testified at the hearing who were present at the licensed premises on March 8, 2013 is not in dispute. Officer Matthews observed Mr. Martin displaying signs of apparent intoxication, including walking slowly and swaying, slurred speech, red and glassy eyes which the Licensee's bartender, Ms. McElreath and Ms. Hart also observed. While the latter testified that these signs were normal non-intoxicated behavior/appearance of Mr. Martin, they are signs of apparent intoxication. The Education and Enforcement Division of the Board need not prove an individual is actually intoxicated in order to sustain a violation of the Act.

8. Testimony about Mr. Martin's alleged physical issues, including conclusions that he has missing teeth as a result of a premature birth, and that he always has red eyes because he is a welder, was improper hearsay, and should not have been relied on by the Administrative Law Judge. Mr. Martin did not appear, nor did he testify at the hearing. Statements by acquaintances or even friends that he had told them he was born prematurely, and that affected his teeth, and therefore his speech, was improperly relied on by the Administrative Law Judge.

9. There is no support that foreseeability of harm must be demonstrated by Enforcement to establish a violation of WAC 314-16-150 or RCW 66.44.200. Foreseeability of harm is an element of tort law, designed to limit the scope of recoverable damages, and is not an element of

administrative violations. The ALJ drew language from *Barrett v. Lucky Seven Saloon, Inc.* 152 Wn. 2d 259, 96 P.3d 386 (2004) to support his conclusion that the “foreseeability of harm” is an element to be considered in whether the Board’s enforcement of the law in this case was proven. The Initial Order’s reliance on *Barrett* is misplaced. *Barrett* was a negligence case addressing the issue of whether RCW 66.44.200 sets the standard of care for civil liability of a business for harm caused by a person served alcohol by the business, and the court did not address whether foreseeability of harm is an element of an administrative violation against a licensee regulated by the Liquor Control Board. *Id.* at 390. In fact, if foreseeability of harm were to be considered, it could excuse an overservice violation where the Licensee asserts they knew the patron was a “quiet drunk” or knew the patron was not driving, whether because the patron always walked to the premises, or had a designated driver, or the patron could be transported home by taxi. The law contains no such qualifier on the violation, and the Board declines to add one in this case.

10. The liquor laws “shall be liberally construed” for the “protection of the welfare, health, peace, morals, and safety of the people of the state.” RCW 66.08.010. WAC 314-16-150 prohibits serving or selling alcohol to a person who is apparently intoxicated. This regulation was violated in this case. The language to be liberally construed is that “[n]o retail licensee shall give or otherwise supply liquor . . . to any person apparently under the influence of liquor. . . .” WAC 314-16-150. Thus, if liquor is provided, the only question is whether recipient is “apparently under the influence of liquor.”

11. The determination of whether a person *appears* to be intoxicated must be based on the person’s actions and demeanor as perceived by another person—there is no other way to establish how a person appears. The analysis necessarily relies on observations by law

enforcement officers and their “views” of a person’s actions and demeanor. There is no requirement that the observations be based on a person’s blood alcohol content, or portable breath test, as a person’s BAC does not always correlate with how a person appears. Officer Matthews testified to his observations of signs of intoxication Chad Martin was showing, and the Licensee’s witnesses did not dispute the Officer’s description of how Mr. Martin appeared, only provided reasons and excuses for why Mr. Martin might have been showing those signs that evening.

FINAL ORDER OF THE BOARD

Having reversed the Initial Order, with corrections and modifications, IT IS HEREBY ORDERED that the liquor license privileges granted to Red Bull Night Club, LLC dba, Red Bull Night Club are hereby suspended for a term of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of five-hundred dollars (\$500) due within 30 days of this order. If timely payment is not received, the suspension will take place from 10:00 a.m. on Thursday, January 8, 2015 until 10:00 a.m. on Tuesday, January 13, 2015. Failure to comply with the terms of this order will result in further disciplinary action.

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Payment in reference to this order should be sent to:

**Washington State Liquor Control Board  
Financial Division  
PO Box 43085  
Olympia, WA 98504-3085**

DATED at Olympia, Washington this 18 day of November, 2014.

WASHINGTON STATE LIQUOR CONTROL BOARD

*Sharon Foster*

*Debra K. Kinn*

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An

order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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

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



Washington State  
Liquor Control Board

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November 19, 2014

Red Bull Night Club LLC  
d/b/a Red Bull Night Club  
PO Box 462  
Kettle Falls, WA 98141-0462

Isaac Williamson, 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: Red Bull Night Club LLC**  
**TRADE NAME: Red Bull Night Club**  
**LOCATION: 542 S Main St, Colville, WA 99114-2504**  
**LICENSE NO. 359273**  
**LCB HEARING NO. L-24,743**  
**OAH NO. 2013-LCB-0030**  
**AVN NO. 4Q3067A**  
**UBI: 603-061-769-001-0001**

Dear Parties:

Please find the enclosed Final Order of the Board and Declaration of Service by Mail in the above-referenced matter. **The applicable monetary penalty is due by Monday, December 22, 2014. If payment is not received timely, then suspension will take place from 10:00 a.m. on Thursday, January 8, 2015 until 10:00 a.m. on Tuesday, January 13, 2015.**

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

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin McCarroll".

Kevin McCarroll  
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Spokane Enforcement and Education Division, WSLCB  
Jamie Marshall, Enforcement, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

RED BULL NIGHT CLUB LLC  
d/b/a RED BULL NIGHT CLUB  
542 S MAIN ST  
COLVILLE, WA 99114-2504

LICENSEE

LICENSE NO. 359273

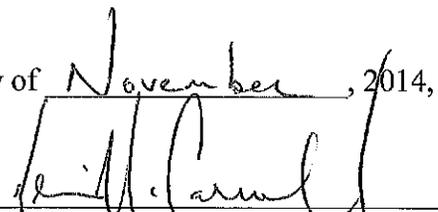
LCB NO. L-24,743  
OAH NO. 2013-LCB-0030

DECLARATION OF SERVICE BY  
MAIL

I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-referenced matter to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service for applicants and licensees, by electronic mail for WSLCB offices, and Campus Mail via Consolidated Mail Services for state offices on the date below to:

RED BULL NIGHT CLUB LLC d/b/a RED BULL NIGHT CLUB PO BOX 462 KETTLE FALLS, WA 98141-0462	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100, GCE DIVISION ISAAC WILLIAMSON, ASSISTANT ATTORNEY GENERAL
RED BULL NIGHT CLUB LLC d/b/a RED BULL NIGHT CLUB 542 S MAIN ST COLVILLE, WA 99114-2504	

DATED this 19<sup>th</sup> day of November, 2014, at Olympia, Washington.

  
Kevin McCarroll, Adjudicative Proceedings Coordinator

**RECEIVED**

JUL 17 2014

Liquor Control Board  
Board Administration

**MAILED**

JUN 19 2014

Office of Administrative Hearings  
Spokane

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

**In The Matter Of:**

RED BULL NIGHT CLUB, LLC  
dba RED BULL NIGHT CLUB,

**Licensee/Respondent.**

**OAH Docket No.:** 2013-LCB-0030

**Agency No.:** 24,743

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

**RECITAL**

A hearing in the above-entitled matter was conducted on April 18, 2014, at Colville, Washington, before Mark H. Kim, Administrative Law Judge with the Washington State Office of Administrative Hearings. The Licensee/Respondent, Red Bull Night Club, LLC, dba Red Bull Night Club, was represented by Elizabeth Matney, Managing Member. Mike Matney, Co-Managing Member was present. The Washington State Liquor Control Board was represented by Isaac Williamson, Assistant Attorney General.

The LCB called witness Patrick Matthews, LCB Enforcement Officer, who testified. The Licensee called witnesses: April McElreath, bartender; Kathy Clark, patron, and Samantha Hart, bartender, who provided testimony.

The LCB's Exhibits 1 through 6 and the Licensee's Exhibit A were admitted into

evidence. The hearing record was kept open for submission of post-hearing documents from the parties. The LCB submitted its Post-Hearing Brief. The Licensee did not submit any post-hearing documents. The hearing record closed on May 2, 2014.

### **ISSUE**

Did the Licensee supply liquor to a person apparently under the influence of liquor in violation of Washington Administrative Code (WAC) 314-16-150?

### **ORDER SUMMARY**

The Licensee did not violate WAC 314-16-150.

**BASED ON THE EVIDENCE IN THIS MATTER, THE UNDERSIGNED MAKES THE FOLLOWING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER:**

### **FINDINGS OF FACT**

1. The Respondent and Licensee in this matter is Red Bull Night Club, LLC, dba Red Bull Night Club located at 542 S. Main Street, Colville, Washington. The Licensee's liquor license number is 359273. The Licensee is a night club.
2. Elizabeth Matney and Mike Matney are the Licensee's managing members.
3. On March 8, 2013, Patrick Matthews, LCB's Enforcement Officer, was conducting premises checks in the Stevens County area. He decided to stop and conduct a premises check at the Licensee's establishment.
4. Upon entry into the Licensee's premises, Officer Matthews observed two female bartenders working behind the bar. The female bartenders are April McElreath and Samantha Hart.
5. Kathy Clark, a patron, was present inside the premises.

6. Officer Matthews observed a male patron inside the premises. Officer Matthews later identified the male as Chad Martin.
7. Officer Matthews observed Mr. Martin walking slowly and swaying while walking. He heard Mr. Martin's speech to be slurred. Mr. Martin did not have a drink with him when Officer Matthews first observed him.
8. Officer Matthews observed Mr. Martin walking towards the bar and play fighting with a female patron. Mr. Martin went up to the bar and was greeted by Ms. Hart. Officer Matthews observed the two conversing. Ms. Hart placed a 12 ounce bottle of beer in front of Mr. Martin. Then he noticed Mr. Martin pull out his wallet and having difficulty pulling out money from the wallet.
9. After sitting at the bar for a moment, Mr. Martin took his bottle of beer and walked by Officer Matthews on his way to another part of the premises. Officer Matthews noticed Mr. Martin's eyes to be droopy, red, and glassy.
10. After observing Mr. Martin and the interaction with Ms. Hart, Officer Matthews concluded that there was an over service violation. Officer Matthews made contact with Ms. Hart and notified her that she served a person showing signs of intoxication. He also informed Ms. Matney of what occurred and his conclusion that there was a violation for over service.
11. On March 12, 2013, Officer Matthews served Ms. Matney with an administrative violation notice (AVN) number 4Q3067A, which alleged a violation of Washington Administrative Code 314-16-150.
12. On March 19, 2013, the Licensee, by Ms. Matney, filed an appeal of the AVN.

On May 10, 2014, the LCB issued its Complaint No. 24,743 alleging the violation provided in the AVN.

13. Mr. Martin is a regular patron of the Licensee's establishment. He is well known by the bartenders as well as by Ms. Clark who is a regular patron.

14. Mr. Martin has missing teeth as a result of being born prematurely.

15. Mr. Martin is known as "goofy Chad" by the bartenders and others that know him.

16. Mr. Martin works as a welder at a place where Ms. Clark's daughter works. He is also Ms. Hart's daughter's uncle. Ms. Hart has known Mr. Martin for approximately 13 years. Ms. McElreath has known Mr. Martin for approximately 5 years.

17. Mr. Martin is known to tease and flirt with females in the Licensee's establishment without being under the influence of liquor.

18. Even when he is not intoxicated, Mr. Martin is known to stumble and sway when walking, as well as bumping into people.

19. Because of his job as a welder, Mr. Martin's eyes are always red and glassy looking.

20. Due to her familiarity with Mr. Martin, Ms. Hart can tell the difference between intoxication and his normal behavior. She has had to cease serving Mr. Martin in the past when she believed he has had too much to drink.

21. At the time of Officer Matthews' premises check, Mr. Martin only had the one beer witnessed by Officer Matthews. Mr. Martin did not have alcoholic breath nor did Officer Matthews detect any because he was not in close proximity with Mr. Martin.

22. Mr. Martin was not intoxicated during Officer Matthews' premises check.

23. Officer Matthews, Ms. McElreath, and Ms. Hart have all been trained to recognize signs of intoxication.
24. Officer Matthews never interviewed Mr. Martin during the premises check.
25. Based on this Tribunal's observation of the witnesses at hearing and considering the consistency and content of their testimony, I find all witnesses to be credible.

### **CONCLUSIONS OF LAW**

1. The undersigned Tribunal has jurisdiction in this matter pursuant to Revised Code of Washington (RCW) 34.05 and Washington Administrative Codes (WAC) 314-42-051 and 314-42-095(1).
2. The administration of RCW Title 66 "is vested in the Liquor Control Board." RCW 66.08.020. Specifically, the Liquor Control Board is charged with the task of adopting rules to carry out the provisions of RCW Title 66. RCW 66.08.0501.
3. Licensees are responsible for operating the licensed premises in compliance with all liquor laws and rules contained within Title 66 RCW and Title 314 WAC. WAC 314-11-015(1)(a). Licensees are responsible for the conduct of its employees and patrons at all times they are on the licensed premises. WAC 314-11-015(3). Any violations committed by the Licensee's employees will be considered as having been permitted or committed by the Licensee. WAC 314-11-015(1)(a).
4. The primary purpose of the liquor enforcement laws are for the protection of the public. See RCW 66.08.010.
5. WAC 314-16-150 provides:

**No sale of liquor to minors, intoxicated persons, etc.**

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

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

(emphasis added).

6. Similarly, RCW 66.44.200(1) provides: "No person shall sell any liquor to any person apparently under the influence of liquor."

7. In the present matter, Officer Matthews observed what he believed to be signs of intoxication from Mr. Martin. That is, stumbling, having trouble with his wallet, slurred speech, and red and glassy eyes. However, the Licensee's bartenders, Ms. McElreath and Ms. Hart, observed similar signs but believed Mr. Martin was not under the influence of liquor because of their familiarity with Mr. Martin. That is, the signs observed by Officer Matthews were normal non-intoxicated behavior of Mr. Martin.

8. What was observed by all present at the licensed premises is really not in dispute. All witnesses provided credible testimony. The key issue is whether the LCB's laws and regulation support the argument asserted by the LCB. Specifically, whether a licensee has violated WAC 314-16-150 even if the patron served by the licensee is not intoxicated but is acting in a manner believed to be under the influence of liquor by an enforcement officer?

9. There is no case law concluding that the LCB must show actual intoxication in a case involving WAC 314-16-150. Nor is there any case law supporting the conclusion

that the subjective view of a LCB enforcement officer of what he or she believes are signs of intoxication is all that is needed to find that a licensee violated WAC 314-16-150. It is clear from the plain reading of WAC 314-16-150 that LCB is not required to show actual intoxication. The regulation states "*apparently* under the influence of liquor". However, the undersigned does not conclude that the enforcement officer's views are all that is required for a violation.

10. As stated above, the purpose of the liquor enforcement laws is primarily to protect the public. Over service of patrons could lead to altercations, drunk driving, and other public safety issues. Here, there was no foreseeable harm by the Licensee or its employees selling one beer to Mr. Martin. The bartenders are familiar with Mr. Martin and could distinguish between Mr. Martin's behavior when under the influence of liquor and when he is not. Although not provided in any case law that the undersigned could find, or any statute or regulation, some deference should be given to a licensee when the licensee is dealing with a regular patron especially in a case involving facts as they are in this case. If only Officer Matthews had spoken with Mr. Martin; or obtain more detail information from the bartenders; or observe Mr. Martin for an extended period of time, perhaps he would have come to the same conclusion as the bartenders. But that is not what was done here.<sup>1</sup>

11. Based on the foregoing, this Tribunal concludes that the Licensee did not violate WAC 314-16-150 because it is concluded that said regulation cannot rely solely on the subjective view of an enforcement officer. The underlying purpose of that regulation is

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<sup>1</sup> See Barrett V. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 271 (2004), citing Christen v. Lee, 113 Wn.2d 479: "in enacting the statute against furnishing intoxicating liquor to a person who appears intoxicated, the Legislature intended to protect against foreseeable hazards resulting therefrom."

to prevent the over service of intoxicated patrons thus protecting the public, and such purpose must be incorporated in finding whether a licensee has violated said regulation. Otherwise, one could envision allowing the affirmation of an alleged violation when an enforcement officer observes a sober patron with a disability, affecting his/her gait and speech, being served liquor by a licensee.

12. Accordingly, the Liquor Control Board's Complaint No. 24,743 and its associated Administrative Violation Notice No. 4Q3067A issued to the Licensee, Red Bull Night Club, LLC, dba Red Bull Night Club, should be dismissed.

#### INITIAL ORDER

NOW THEREFORE, IT IS ORDERED that the Liquor Control Board's Complaint No. 24,743 and its associated Administrative Violation Notice No. 4Q3067A issued to Red Bull Night Club, LLC, dba Red Bull Night Club (License No. 359273) are hereby dismissed.

DATED this 19th day of June, 2014, at Spokane Valley, Washington.



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MARK H. KIM  
Administrative Law Judge

## Appeal Rights

### Petition for Review:

Either the licensee or permit holder or the assistant attorney general may file a petition for the review of the initial order with the Liquor Control Board **within twenty (20) days** of the date of service of the initial order. RCW 34.05.464. WAC 10-08-211 and WAC 314-42-095.

The petition for review must: (i) Specify the portions of the initial order to which exception is taken; (ii) Refer to the evidence of record which is relied upon to support the petition; and (iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. **Within ten (10) days** after service of the petition for review, any of the other parties may file a response to that petition with the Liquor Control Board. WAC 314-42-095(2)(a) and (b). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

### Address for filing a petition for review with the board:

Washington State Liquor Control Board  
Attention: Kevin McCarroll,  
3000 Pacific Avenue, PO Box 43076  
Olympia, Washington 98504-3076.

**Final Order and Additional Appeal Rights:** The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

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

The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

### Certificate of Service

I certify that true copies of the foregoing document were served from Spokane Valley, Washington, upon the following as indicated:

Address: <b>Red Bull Night Club LLC</b> <b>Attn: Elizabeth Matney</b> <b>P.O. Box 462</b> <b>Kettle Falls, WA 99141-0462</b>	<input checked="" type="checkbox"/> First Class US Mail, postage prepaid
Address: <b>Isaac Williamson, AAG</b> <b>Office of the Attorney General</b> <b>P.O. Box 40100</b> <b>Olympia, WA 98504-0100</b>	<input checked="" type="checkbox"/> First Class US Mail, postage prepaid
Address: <b>Kevin McCarroll</b> <b>Washington State Liquor Control Board</b> <b>P.O. Box 43076</b> <b>Olympia, WA 98504-3076</b>	<input checked="" type="checkbox"/> First Class US Mail, postage prepaid

Date this 19<sup>th</sup> day of June, 2014.

  
\_\_\_\_\_  
Mark Kim  
Office of Administrative Hearings  
16201 E. Indiana Ave., Ste. 5600  
Spokane Valley, WA 99216  
(509) 456-3975 or (800) 366-0955  
Fax: (509) 456-3997

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

RED BULL NIGHT CLUB LLC d/b/a  
RED BULL NIGHT CLUB  
542 S MAIN STREET  
COLVILL, WA 99114-2504

LICENSEE

LICENSE NO. 359273  
AVN NO. 4Q3067A

LCB NO. L-24,743  
OAH NO. 2013-LCB-0030

ORDER GRANTING  
ENFORCEMENT DIVISION'S  
MOTION TO EXTEND THE  
FILING TIME FOR PETITION  
FOR REVIEW

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

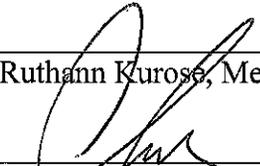
1. An Initial Order in this matter was issued by Administrative Law Judge Mark H. Kim on June 19, 2014. The Board received a copy of the Initial Order on June 24, 2014 but has not received the hearing file with the hearing record from the Office of Administrative Hearings.
2. On July 3, 2014, the Enforcement Division of the Board, through Assistant Attorney General Isaac Williamson, filed a Motion to Extend the Time for Filing a Petition for Review in this matter. The Motion was supported by the Declaration of Isaac Williamson.
3. The Board finds that the Enforcement Division has made a clear and convincing showing of good cause to extend the date for filing a Petition for Review, due to exigent circumstances.

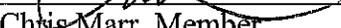
The Board hereby ORDERS that the Enforcement Division's Motion is granted. Enforcement may file a Petition for Review within twenty (20) days from the date the Enforcement Division receives a copy of the recording of the hearing from the Office of Administrative Hearings. When the copy of the recording is received by Mr. Williamson, he will notify the Licensee and the Board's

Adjudicative Proceedings Coordinator so that all parties are on notice of when the twenty days will begin to run.

DATED this 9 day of July, 2014.

  
\_\_\_\_\_  
Sharon Foster, Chair

  
\_\_\_\_\_  
Ruthann Kurose, Member

  
\_\_\_\_\_  
Chris Marr, Member



**Bob Ferguson**  
**ATTORNEY GENERAL OF WASHINGTON**  
Government Compliance & Enforcement Division  
PO Box 40100 • Olympia, WA 98504-0100 • (360) 664-9006

**RECEIVED**  
**JUL 30 2014**  
Liquor Control Board  
Board Administration

**FAX COVER SHEET**

Date: July 30, 2014

Please deliver the following 14 page(s), including cover sheet

**TO:** LIQUOR CONTROL BOARD (360) 586-3190  
Attn: Kevin McCarroll

**RE:** Red Bull Night Club, LLC d/b/a Red Bull Night Club  
OAH No. 2013-LCB-0030 / LCB No. L-24,743

**COMMENTS:**

Please find **Enforcement's** Petition for Review of the Initial Order in the above matter.  
A hard copy has been sent out this morning via interoffice mail.

**FROM:** ISAAC WILLIAMSON, Assistant Attorney General

Fax Number: 360-664-0229

Voice Number: 360-664-0542

If there is a problem receiving this fax, please call Rose Johnson at (360) 586-3357.

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**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

RED BULL NIGHT CLUB LLC D/B/A  
RED BULL NIGHT CLUB

542 S. MAIN ST.  
COLVILLE, WA 99114-2504

LICENSEE

LICENSE NO. 359273  
AVN NO. 4Q3067A

OAH NO. 2013-LCB-0030  
LCB NO. L-24,743

ENFORCEMENT DIVISION'S  
PETITION FOR REVIEW OF THE  
INITIAL ORDER

The Washington State Liquor Control Board's Education & Enforcement Division (Enforcement), by and through its attorneys, ROBERT W. FERGUSON, Attorney General, and ISAAC WILLIAMSON, Assistant Attorney General, and pursuant to RCW 34.05.464 and WAC 314-29-010, submits the following petition for review of the Findings of Fact, Conclusions of Law, and Initial Order issued in this matter by Administrative Law Judge MARK KIM, on June 19, 2014, in the above-captioned case.

**I. PROCEDURAL BACKGROUND**

On May 10, 2013, the Board issued a formal complaint to the Licensee, Red Bull Night Club, LLC, d/b/a Red Bull Night Club (Licensee), alleging that on or about March 8, 2013, the Licensee and/or an employee thereof, served and/or sold liquor to an apparently intoxicated person on the licensed premises, and/or allowed an apparently intoxicated person(s) to consume liquor on the licensed premises, contrary to RCW 66.44.200 and WAC 314-16-150.

1 This case was heard and considered by an Administrative Law Judge (ALJ) in Colville,  
2 Washington on April 18, 2014. After a full evidentiary hearing, the ALJ entered Findings of Fact  
3 and Conclusions of Law, in its Initial Order issued on June 19, 2014. In the Initial Order, the ALJ  
4 dismissed the Liquor Control Board's Complaint. Enforcement respectfully takes exception to the  
5 Initial Order of the ALJ, as set forth below.

## 6 II. FACTUAL BACKGROUND

7 On March 8, 2013, Liquor Enforcement Officer Patrick Matthews conducted a premise  
8 check at the Red Bull Nightclub. [00:33:10]<sup>1</sup>. He observed the sale of alcohol to an individual,  
9 later identified as Chad Martin, who was exhibiting objective signs of intoxication prior to, during,  
10 and after the sale. [00:35:50]. He first observed Mr. Martin staggering as he walked within a foot  
11 of Officer Matthews and then towards the bar. [00:36:35]. Officer Matthews observed that Mr.  
12 Martin had bloodshot glassy eyes and slurred speech. [00:36:35]. He then watched as Mr. Martin  
13 was served a bottle of beer. [00:37:30]. Mr. Martin lacked focus and had difficulty retrieving, and  
14 removing money from, his wallet. [00:37:50]. Officer Matthews observed Mr. Martin  
15 immediately after the purchase swaying and staggering with bloodshot and glassy eyes.  
16 [00:38:45]. Due to officer safety, Officer Matthews did not contact Mr. Martin directly.  
17 [01:38:00]. Officer Matthews testified, in his training and experience, Mr. Martin appeared  
18 intoxicated. [00:42:44]. Following a conversation with the Licensee, Officer Matthews issued an  
19 administrative violation notice for serving alcohol to an apparently intoxicated person.

20 Mr. Martin did not testify. The Licensee's witnesses testified that Mr. Martin is a regular  
21 patron who is known to the Licensee. [01:01:10, 01:06:12, 01:21:30]. According to these  
22 witnesses, Mr. Martin exhibits signs of intoxication on a day-to-day basis regardless of  
23 intoxication. [01:01:40, 01:06:40]. The bartender who served Mr. Martin explained that he has  
24 been "cut-off" on numerous occasions. [01:26:08]. Mr. Martin, a.k.a. "Goofy Chad," is  
25

26 <sup>1</sup> Citations are to the audio recording of the hearing conducted on April 18, 2014, by the Office of  
Administrative Hearings and are to the [hour:minute:second].

1 essentially in a perpetual state of apparent intoxication due to a litany of maladies and personality  
2 quirks. The Licensee's witnesses testified that not only does he have some sort of unsubstantiated  
3 disability, which causes him to stumble, stagger, and sway, but he intentionally stumbles, staggers,  
4 and sways because he is "goofy." [01:01:40, 1:07:18, 01:13:35, 01:17:25, 01:19:00, 01:21:50,  
5 01:30:03]. Further, he intentionally fumbles with his wallet and struggles to get money.  
6 [01:22:55]. These non-medical witnesses claim that Mr. Martin has a speech impediment,  
7 resulting from his unsubstantiated premature birth. [01:01:40; 01:07:55, 01:14:25]. Their  
8 testimony was that this impediment results in speech that is distinguishable from slurred speech.  
9 [01:08:44, 01:29:05]. Finally, they asserted that Mr. Martin is a welder by trade and his eyes are  
10 permanently bloodshot and glassy. [01:01:55, 01:15:45].

11 No medical witnesses testified. No welders testified. Mr. Martin did not testify. The  
12 witnesses did not contradict the Officer's observations. The bartender who made the sale asserted  
13 simply that she can tell when Mr. Martin is actually intoxicated because she has known him for  
14 thirteen years. [01:21:35]. She testified that she can tell when he is intentionally exhibiting signs  
15 of intoxication and when he is not actually intoxicated. [01:26:55, 01:30:48]. She made the  
16 determination that Mr. Martin was not intoxicated after less than one minute. [01:28:18].

17 Officer Matthews explained that his observations of Mr. Martin were not consistent with  
18 the proffered excuses. [01:38:50]. He explained he has had the opportunity to observe disabled  
19 individuals and that his observations of Mr. Martin were consistent with intoxication, not  
20 disability. [01:40:10]. Similarly, Officer Matthews testified that his observation of Mr. Martin's  
21 speech was not consistent with a speaking impediment. [01:40:00]. Also, that the observed signs  
22 of intoxication were not consistent with a person who is intentionally swaying, staggering, goofing  
23 around, or merely flirting; rather, his actions and demeanor were consistent with an intoxicated  
24 person. [01:40:10].

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### III. ASSIGNMENTS OF ERROR

1. Enforcement assigns error to Finding of Fact 22, in that it finds that Mr. Martin was not intoxicated. This finding fails to specify whether Mr. Martin was not "apparently" intoxicated or "actually" intoxicated. If it addresses actual intoxication it is not relevant. If it addresses apparent intoxication then it goes to the ultimate legal conclusion and enforcement assigns error because it lacks support in the record.
2. Enforcement assigns error to Conclusion of Law 9, in that it concludes that "an enforcement officer's views" are insufficient to establish a violation.
3. Enforcement assigns error to Conclusion of Law 10, in that it adds the tort element of foreseeable harm to RCW 66.44.200 and WAC 314-16-150.
4. Enforcement assigns additional error to Conclusion of Law 10, in that it concludes licensees are entitled to deference when determining whether a patron is apparently under the influence of liquor.
5. Enforcement assigns additional error to Conclusion of Law 10, in that it creates a requirement that liquor officers place themselves in situations dangerous to themselves and the public by requiring them to interview potentially dangerous patrons regardless of whether officers have assistance or backup for scene control and safety.
6. Enforcement assigns error to Conclusion of Law 11, in that it concludes that there was no violation in this case because a violation of WAC 314-16-150 cannot be sustained based on the subjective view of an enforcement officer. Conclusion of Law 11 disregards numerous objective signs of intoxication that are consistently used throughout law enforcement.
7. Enforcement assigns additional error to Conclusion of Law 12, in that it incorrectly holds that the Board's complaint and associated Administrative Violation Notice should be dismissed.

### IV. DISCUSSION

Pursuant to WAC 314-42-095(2)(a), any party, upon receipt of an initial order, may file exceptions within twenty days of service of the order. The reviewing officer (including the agency head reviewing an initial order) "shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing[.]" RCW 34.05.464(4). Therefore, the Washington State Liquor Control Board is not bound by the ALJ's Initial Order.

The Washington State Legislature mandates that the laws and regulations governing the liquor industry "shall be liberally construed" for the "protection of the welfare, health, peace, morals, and safety of the people of the state." RCW 66.08.010. The sale of alcohol is a highly regulated industry. *Jow Sin Quan v. Washington State Liquor Control Bd.*, 69 Wn.2d 373, 382,

1 418 P.2d 424 (1966). Further, there exists no right to sell or purchase alcohol. A license to sell  
2 alcohol is a privilege to engage in what would otherwise be an illegal activity. *Id.*

3 **A. Enforcement Presented Substantial Objective Evidence From Which The Only**  
4 **Reasonable Conclusion Is That An Apparently Intoxicated Person Was Served**  
5 **Alcohol.**

6 The ALJ incorrectly concluded, as a matter of law, "that the enforcement officer's views"  
7 are insufficient to sustain a violation of WAC 314-16-150. Initial Order, Conclusions of Law ¶ 9.  
8 Similarly, the ALJ incorrectly concluded that WAC 314-16-150 "cannot rely solely on the  
9 subjective view of an enforcement officer." Initial Order, Conclusion of Law ¶11. These  
10 conclusions inaccurately characterize the officer's testimony as "subjective" and categorically  
11 disregard all objective signs of intoxication. Enforcement takes exception to the conclusion that  
12 observations of a person's actions and demeanor are insufficient to support a violation.

13 First, these conclusions preclude Enforcement's ability to enforce WAC 314-16-150, in all  
14 but the most unlikely of scenarios, which is contrary to plain language and legislative intent that  
15 liquor law "shall be liberally construed" for the "protection of the welfare, health, peace, morals,  
16 and safety of the people of the state," RCW 66.08.010. The language to be liberally construed is  
17 that "[n]o retail licensee shall give or otherwise supply liquor . . . to any person apparently under  
18 the influence of liquor. . . ." WAC 314-16-150. Thus, if liquor is provided, the only question is  
19 whether recipient is "apparently under the influence of liquor."

20 The determination of whether a person *appears* to be intoxicated must be based on the  
21 person's actions and demeanor as perceived by another person—there is no other way to establish  
22 how a person appears. The analysis necessarily relies on observations by law enforcement officers  
23 and their "views" of a person's actions and demeanor. It cannot rely solely on a person's blood  
24 alcohol content ("BAC") because high BAC does not always correlate with the appearance of

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1 intoxication. This is unlike actual intoxication, which can be demonstrated either solely by BAC  
2 or an individual's actions and demeanor.<sup>2</sup>

3 It is unclear what evidence a tribunal could expect, beyond the "subjective views" provided  
4 here, when a violation of WAC 314-16-150 is alleged. It is unclear what other evidence officers  
5 could gather, which would be sufficient for the tribunal in a case such as this. More importantly,  
6 WAC 314-16-150 requires only the appearance of intoxication. The only scintilla of guidance  
7 provided is speculation by the ALJ that "[i]f only Officer Matthews had spoken with Mr. Martin;  
8 or obtain[sic] more detail[sic] information from the bartenders; or observe[sic] Mr. Martin for an  
9 extended period of time, perhaps he would have come to the same conclusion as the bartenders."  
10 Initial Order, Conclusion of Law ¶10. However, even if Officer Matthews' safety concerns for not  
11 contacting Mr. Martin were unfounded<sup>3</sup> and speaking to him would have been reasonable, under  
12 the ALJ's conclusion it would have been a fruitless endeavor to do so. Further, Officer Matthews  
13 engaged in a discussion with the Licensee and heard detailed information; however, based on his  
14 observations he was not swayed. [01:41:13].

15 Assuming Officer Matthews spoke with Mr. Martin and still decided that Mr. Martin  
16 appeared intoxicated, the observations drawn from that conversation would be of no different  
17 character than the observations already made by Officer Matthews, and which the ALJ disregards  
18 as "subjective views," and categorically inadequate in supporting a violation. Thus, the ALJ's  
19 conclusion that WAC 314-16-150 "cannot rely solely on the subjective view of an enforcement  
20 officer" renders the WAC unenforceable given the record presented here.

21 Second, the record is replete with substantial evidence of objective signs of intoxication,  
22 which the ALJ disregards as "subjective views." The ALJ's conclusion fails to acknowledge that  
23 the record provided ample testimony regarding objective signs of intoxication—bloodshot glossy  
24

<sup>2</sup>See RCW 46.61.502, which provides that a BAC of .08 alone establishes a violation.

<sup>3</sup>Officer Matthews testified that it is contrary to policy to contact an unknown, possibly drunk individual, with an unknown criminal history, in an enclosed and possibly hostile environment, due to officer safety concerns. Officer Matthews also testified that he did not have a partner or backup available and that he has previously seen individuals approached that became violent towards the officer.

1 eyes; swaying, staggering, and stumbling as he walked; slurred speech; flirtatious behavior; and  
2 inability to retrieve money from his wallet—signs that the licensee's witnesses did directly  
3 contradict.

4 Thus, the tribunal's conclusion either inaccurately characterizes objective signs of  
5 intoxication as "subjective views," or simply chooses to ignore them. Either way, WAC 314-16-  
6 150 is unenforceable unless the Licensee agrees that it committed a violation. Enforcement will  
7 rarely, if ever, have evidence beyond its observations of an individual's actions and demeanor.

8  
9 **B. Giving Deference To Licensees Is Contrary To Legislative Intent And Akin To  
Establishing An Honor Based Enforcement System.**

10 The ALJ incorrectly concludes that "some deference should be given to a licensee when the  
11 licensee is dealing with a regular patron especially in a case involving facts as they are in this  
12 case." Initial Order, Conclusion of Law ¶10. While the ALJ does not elaborate, "the facts as they  
13 are in this case," presumably refers to the licensee's assertion that Mr. Martin has a litany of  
14 maladies and personality quirks. Enforcement takes exception to the conclusion that licensees are  
15 entitled to deference under these facts. This conclusion is directly contradictory to the legislative  
16 mandate that the rules be liberally construed for the "protection of the welfare, health, peace,  
17 morals, and safety of the people of the state."

18 Here, in the face of numerous objective signs of intoxication, the ALJ concluded the  
19 licensee's opinion that Mr. Martin was not intoxicated trumped the enforcement officer's overall  
20 assessment of the actions and demeanor of Mr. Martin, simply because Mr. Martin is a regular.  
21 Ms. Hart, the bartender that served Mr. Martin, testified that "I know the difference in Chad Martin  
22 between being drunk and sober." [1:26:20]. When asked how she can tell the difference her  
23 response was "I can tell by the way he's looking at me breathing at me there's just a little.. there's  
24 a difference between [inaudible]." [1:26:43]. She explained that she is able to tell whether Chad  
25 Martin is intoxicated because she has known him for twelve years, but could not explain how she  
26 can tell the difference. Rather, she explained that "a normal drunk person would be impaired . . .

1 so bloodshot eyes and staggering those are all signs of intoxication yes, but with Chad Martin we  
2 understand that those are part of his disabilities." [1:26:43]. Her method of determining whether  
3 Mr. Martin is intoxicated is to "poke him or push him back" or to use her "playful mannerisms,"  
4 instead of relying on traditional signs of intoxication, because she knows him. [1:27:28].  
5 However, she did not testify that she used these techniques during the thirty second to one minute  
6 encounter she had with Mr. Martin. [1:28:05]. Further, she did not observe Mr. Martin beyond  
7 that encounter because she was busy behind the bar. [01:27:45]. She also testified that Mr. Martin  
8 has a unique style of walking, which is not similar to that of an intoxicated person. [1:30:32].  
9 Officer Matthews' testimony was that Mr. Martin was walking as though intoxicated on the night  
10 in question, and that this walk was not consistent with that of a disabled individual. [1:39:35].

11 It is telling that the Licensee's case centered on Mr. Martin's day-to-day appearance rather  
12 than on the night in question. Mr. Martin did not testify. No medical experts or welders testified.  
13 The only evidence that Mr. Martin has disabilities that result in a perpetual state of appearing  
14 intoxicated is the self-serving testimony of the Licensee's non-medical witnesses. This testimony  
15 is directly contradicted by Officer Matthews. He explained that he has observed individuals with  
16 speaking impediments, knee and back injuries, and intentionally goofing around and that, based on  
17 his training and experience, Mr. Martin was exhibiting signs of intoxication that are *not* consistent  
18 with disabilities or intentional behavior. [1:39:35].

19 The ALJ disregarded the testimony of Officer Matthews, an enforcement officer with  
20 substantial training and experience, instead deferring to a bartender with an interest in supporting  
21 her employer and who has less training and experience. The record contains numerous objective  
22 signs of intoxication. The officer observed swaying and staggering, slurred speech, bloodshot  
23 watery eyes, a lack of focus and concentration, and overall demeanor of intoxication. Ms. Hart  
24 testified that she is familiar with Mr. Martin and just knows when he is intoxicated. Enforcement  
25 respectfully submits that, even if deference is appropriate, it should not overcome multiple  
26 objective signs of apparent intoxication based on little more than familiarity with a patron.

1 **C. Foreseeability Of Harm Is Not An Element Of RCW 66.44.200 Or WAC 314-16-150.**

2 The ALJ incorrectly concluded as a matter of law that there was no foreseeable harm here  
3 "by the Licensee or its employees selling one beer to Mr. Martin." Initial Order, Conclusion of  
4 Law ¶10. Enforcement takes exception to this conclusion of law.

5 This conclusion adds an element that does not exist in administrative violations such as the  
6 one at issue here. There is no support that foreseeability of harm must be demonstrated by  
7 Enforcement to establish a violation of WAC 314-16-150 or RCW 66.44.200. Foreseeability of  
8 harm is an element of torts, designed to limit the scope of recoverable damages, and is not an  
9 element of administrative violations. The Initial Order's reliance on *Barrett v. Lucky Seven*  
10 *Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004), is misplaced. *Barrett*, was a negligence case  
11 addressing the issue of whether RCW 66.44.200 sets the standard of care for civil liability, not  
12 whether foreseeability of harm is an element of an administrative violation against a licensee  
13 regulated by the Liquor Control Board. *Id.* at 390. There is no support for the conclusion that  
14 foreseeability of harm is relevant in an over service case.

15 Further, there is no way to know whether Mr. Martin was being served his first beer of the  
16 night or about to consume his tenth. He did not testify. He could have consumed a number of  
17 beers before arriving at the Red Bull Nightclub, as he had been known to do in the past. [1:26:19]  
18 (explaining Mr. Martin has previously been refused service after coming from another drinking  
19 establishment).

20 **D. The Initial Order Requires Enforcement To Establish Actual Intoxication.**

21 The ALJ correctly concluded as a matter of law that WAC 314-16-150 does not require  
22 enforcement to show actual intoxication. Initial Order, Conclusion of Law ¶9. The ALJ also  
23 found that the patron in this case "was not intoxicated," without noting if the finding refers to  
24 actual or apparent intoxication. Initial Order, Finding of Fact ¶22. Read as a whole, the Initial  
25 Order requires Enforcement to prove actual intoxication. The conclusions of law discussed  
26

1 above—that an officer's views cannot sustain a violation; that licensees are entitled to deference;  
2 and that enforcement must demonstrate foreseeable harm—all indirectly require Enforcement to  
3 establish actual intoxication.

4 First, if an officer's observations of a patron's actions and demeanor are insufficient to  
5 sustain a violation then enforcement must demonstrate actual intoxication. There is no other  
6 evidence, aside from the licensee's admission of guilt, an enforcement officer could collect that  
7 would satisfy the tribunal. Officers would need to administer some sort of Blood Alcohol Content  
8 tests to determine actual intoxication.

9 Second, if licensees are entitled to deference, then an enforcement officer must collect  
10 evidence of actual intoxication in order to overcome that deference. Otherwise, the enforcement  
11 officer's objective observations will be defeated by the licensee's assertion of familiarity. The  
12 ALJ's conclusion that licensees are entitled to deference wholly disregards usage of the term  
13 "apparent" in defining the type of intoxication required for a violation. Deference means that  
14 though a patron *appears* intoxicated, he may nonetheless be served if the licensee, for whatever  
15 reason, believes that the patron is not *actually* intoxicated. The appearance of intoxication should  
16 not rely on a subjective opinion of actual intoxication, but rather objective signs of apparent  
17 intoxication such as those observed here.

18 Third, if "there was no foreseeable harm by the Licensee or its employees selling one beer  
19 to Mr. Martin," then it is unclear how enforcement can issue a violation if it can only demonstrate  
20 that one drink was sold, and the licensee claims the patron was not actually intoxicated. The  
21 number of drinks consumed is *not* relevant to the appearance of intoxication. *See Ensley v.*  
22 *Mollmann*, 155 Wn. App 744, 756, 230 P.3d 599 (2010) (citations omitted). Thus, to overcome  
23 the conclusion that there is no foreseeable harm from serving only one beer, Enforcement would  
24 need show service of multiple drinks or prove actual intoxication.

25 The apparent intoxication standard is to the benefit of both parties. It is difficult to know  
26 how much alcohol a patron has consumed and would be unfair to penalize a licensee for not

1 knowing a patron's actual intoxication upon entering the establishment. The "apparent  
2 intoxication" standard requires licensees only to evaluate a patron's appearance, not determine a  
3 patron's actual level of intoxication. This standard protects a licensee that serves a heavy drinker  
4 who, though actually intoxicated, does not appear intoxicated. This standard also saves a licensee  
5 the burden of extensive training and costly equipment that would be required if licensees had to  
6 determine actual intoxication prior to a sale; for example, by administering field sobriety tests or  
7 portable breath tests.

8 Under the "apparent intoxication" standard, actual intoxication is not relevant. Here, Mr.  
9 Martin was exhibiting numerous objective signs of intoxication. Having demonstrated these signs,  
10 Enforcement has satisfied its burden by a preponderance of the evidence.

#### 11 V. CONCLUSION

12 The Tribunal's Initial Order is internally inconsistent, counter to the legislative intent  
13 behind Chapter 66.08 RCW, and unfairly holds Enforcement to an unenforceable standard. Under  
14 the Initial Order Enforcement would need to establish actual intoxication, overcome a licensee's  
15 deference, and somehow prove foreseeability of harm. This is not what RCW 66.44.200 or WAC  
16 314-16-150 requires. While the ALJ correctly concluded that actual intoxication is not necessary  
17 to sustain a violation, he then went on to circumvent that conclusion by adding elements and  
18 conditions that are not present in either RCW 66.44.200 or WAC 314-16-150. Officers'  
19 observations are sufficient to support a violation. The ALJ's introduction of a tort element is  
20 unsupported and counters the legislative intent that liquor law be liberally construed to protect the  
21 welfare, health, peace, morals, and safety of the people of the state.

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The record shows that the Licensee served an individual who, at a minimum, was swaying, staggering, had red watery eyes, slurred speech, and lacked focus and concentration. The Licensee disregarded these objective signs of apparent intoxication. Therefore, the Enforcement Division respectfully requests that the Initial Order not be adopted in this matter, that the complaint be sustained, and the standard penalty be imposed.

DATED this 29th day of July, 2014.

ROBERT W. FERGUSON  
Attorney General

*Jim Kantis Elley #26846*  
FOR: ISAAC WILLIAMSON, WSBA #43921  
Assistant Attorney General  
Attorneys for the Washington State Liquor  
Control Board Enforcement Division

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**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

US Mail Postage Prepaid via Consolidated Mail Service

RED BULL NIGHT CLUB  
ELIZABETH MATNEY  
PO BOX 462  
KETTLE FALLS, WA 99144

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29 day of July, 2014, at Olympia, WA.



ROSE JOHNSON  
Legal Assistant