

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
(FORMERLY LOCATED AT 7201 NE
18TH STREET, VANCOUVER, WA
98661)

LICENSEE

LICENSE NO. 403213 (FORMERLY
365465)

AVN 1L9142A

LCB NO. 23,541
OAH NO. 2009-LCB-0058

FINAL ORDER OF THE BOARD
FOLLOWING
RECONSIDERATION

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

1. The Liquor Control Board issued a complaint dated November 29, 2010, alleging that on or about May 22, 2009, the above-named Licensee, or an employee(s) thereof, sold, served, gave, provided or otherwise supplied alcohol to an apparently intoxicated person(s) on a licensed premises, contrary to WAC 314-16-150(1) or in the alternative, that on or about May 22, 2009, the above-named Licensee, or an employee(s) thereof, allowed or permitted an apparently intoxicated person(s) to possess and/or consume alcohol on a licensed premises, contrary to WAC 314-16-150(2).
2. The Licensee made a timely request for a hearing.

FINAL ORDER OF THE BOARD
FOLLOWING RECONSIDERATION
LCB NO. 23,541
DODGE CITY BAR & GRILL
LICENSE 365465

3. A hearing took place on February 3, 2011 before an administrative law judge with the Office of Administrative Hearings.

4. Attorney at Law Ben Shafton represented Dodge City Saloon, Inc, d/b/a Dodge City Bar & Grill, and owner Ray Kutch. Assistant Attorney General Gordon Karg represented the Enforcement and Education Division of the Board.

5. On April 12, 2011, Assistant Deputy Chief 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 timely Petition for Review on April 28, 2011. The Enforcement Division had previously filed a motion on April 19, 2011 to extend the time for filing its response due to the Assistant Attorney General's unavailability from April 22, 2011 through May 3, 2011. The Board entered an order granting Enforcement's request and extended the time to filing its response to within ten days of May 3, 2011. Enforcement filed a Response to Licensee's Petition for Review on May 12, 2011.

7. The Board entered a Final Order dated June 7, 2011, affirming the Initial Order and imposing a five (5) day suspension or a monetary penalty of two-thousand five hundred (\$2,500.00) dollars. On June 16, 2011, the Board received a joint Petition for Reconsideration from the Licensee and the Enforcement Division. In the Petition, the parties agreed that since a prior violation that the Board has alleged the Licensee had committed was reversed upon the Licensee's appeal to Superior Court, the penalty imposed by the Board's June 7, 2011 Final Order was incorrect. The parties agree that the proper penalty for the instant violation (AVN 1L9142A) should be the standard penalty of five hundred dollars (\$500.00) or a five (5) day suspension of the liquor license privileges. The Board agrees with the parties.

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 Findings of Fact, Conclusions of Law included in the Initial Order of the administrative law judge for case 23,541 is adopted, but the penalty imposed in the Initial Order is modified as set out below:

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,541 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 Blvd, in Vancouver, Washington, License No. 403213 (Formerly License No. 365465), are hereby suspended for a term of five (5) days effective from 10:00 a.m. on August 5, 2011, until 10:00 a.m. on August 10, 2011; HOWEVER, the suspension shall be vacated upon payment of a monetary penalty in the amount of five hundred dollars (\$500.00) due within 30 days of this order. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

Washington State Liquor Control Board

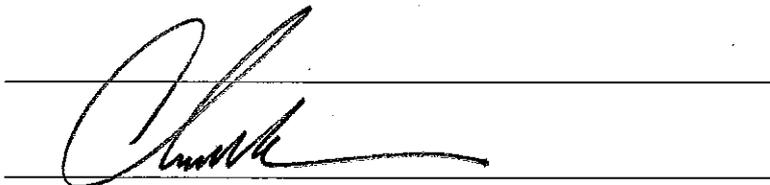
PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 21 day of June, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD





Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A

petition for reconsideration, together with any argument in support thereof, should be filed by mailing or

FINAL ORDER OF THE BOARD
FOLLOWING RECONSIDERATION
LCB NO. 23,541
DODGE CITY BAR & GRILL
LICENSE 365465

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

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**

June 22, 2011

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

Dodge City Saloon Inc, Licensee
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 FOLLOWING RECONSIDERATION

LICENSEE: Dodge City Saloon, Inc.

TRADE NAME: Dodge City Bar & Grill

LOCATION: 4250 E FOURTH PLAIN BLVD, VANCOUVER, WA 98661-5650

(FORMERLY LOCATED AT 7201 NE 18TH STREET, VANCOUVER, WA 98661)

LICENSE NO. 403213 (Formerly 365465)

ADMINISTRATIVE VIOLATION NOTICE NO: 1L9142A

LCB HEARING NO. 23,541

OAH DOCKET NO. 2009-LCB-0058

UBI: 601 396 219 001 0003

Dear Parties:

Please find the enclosed Declaration of Service by Mail and a copy of the order for the above-referenced matter.

The applicable monetary penalty is due by July 22, 2011. If payment is not received timely, then suspension will take place on the dates stated in the order.

The address for payments is WSLCB, P.O. Box 43085, Olympia, WA 98504-3085. Please label the check with your License Number and Administrative Violation Notice Number listed above. If you have any questions, please contact me at (360) 664-1602.

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
Amber Harris, WSLCB

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

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3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

LCB NO. 23,541
OAH DOCKET NO. 2009-LCB-0058

5 DODGE CITY SALOON, INC.
6 d/b/a DODGE CITY BAR & GRILL
7 4250 E FOURTH PLAIN BLVD,
8 VANCOUVER, WA 98661-5650
(FORMERLY LOCATED AT 7201 NE
18TH STREET, VANCOUVER, WA
98661)

DECLARATION OF SERVICE BY
MAIL

9 LICENSEE

10 LICENSE NO. 403213 (FORMERLY
11 365465)
12 AVN 1L9142A

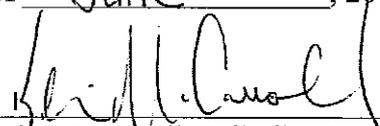
13 I certify that I caused a copy of the *FINAL ORDER OF THE BOARD FOLLOWING*
14 *RECONSIDERATION* in the above-referenced matter to be served on all parties or their counsel
15 of record by US Mail Postage Prepaid via Consolidated Mail Service for Licensees; by
16 Campus Mail for the Office of Attorney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

18 BEN SHAFTON, ATTORNEY FOR LICENSEE
19 900 WASHINGTON STREET, STE 1000
20 VANCOUVER, WA 98660-3455

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

21 DODGE CITY SALOON INC, LICENSEE
22 D/B/A DODGE CITY BAR & GRILL
4250 E FOURTH PLAIN BLVD
VANCOUVER, WA 98661-5650

23 DATED this 22nd day of June, 2011, at Olympia, Washington.

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25 
26 Kevin McCarroll, Adjudicative Proceedings Coordinator

DECLARATION OF SERVICE BY
MAIL

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

RECEIVED

JUN 16 2011

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

DODGE CITY SALOON INC., d/b/a
DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661

LICENSEE

LICENSE NO. 365465

OAH NO. 2009-LCB-0058
LCB NO. 23,541

ENFORCEMENT DIVISION AND
LICENSEE'S JOINT PETITION FOR
RECONSIDERATION

The Washington State Liquor Control Board, Education and Enforcement Division (Enforcement) by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GORDON KARG, Assistant Attorney General, and DODGE CITY SALOON INC., d/b/a DODGE CITY BAR & GRILL (Licensee), by and through its attorney, BEN SHAFTON, Attorney at Law, now jointly petition the Washington State Liquor Control Board (Board) to reconsider its Final Order in the above-captioned case and issue an Amended Final Order.

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). An administrative hearing in the above captioned case was held on February 3, 2011. After the hearing, the Tribunal issued an initial order in favor of sustaining the Complaint alleging the Licensee had violated WAC 314-16-150. See Proposed Finding of Fact, Conclusion of Law and Initial Order, OAH Docket No.

1 2009-LCB-0058, LCB Case No. 23, 541 (FOF/COL/Initial Order). The Licensee petitioned
2 the Board to review the initial order and Enforcement responded. The Board issued a Final
3 Order on June 7, 2011,¹ upholding the Complaint and adopting the Administrative Law
4 Judge's (ALJ) finding of fact and conclusion of law. The Board's Final Order imposed a five
5 (5) day suspension of the Licensee's liquor license, or a monetary penalty of two-thousand
6 five hundred dollars (\$2,500.00).

7 II. GROUNDS FOR RECONSIDERATION

8 Both Enforcement and the Licensee now assert the Board's Final Order contains an
9 error of law. Administrative Violation Notice (AVN) 1L9142A is the genesis of the instant
10 case. At the time AVN 1L9142A was issued, the Licensee had, within the preceding 24
11 months, been charged with a prior violation of WAC 314-16-150. As a result, per WAC 314-
12 29-020, the standard penalty in the instant case was a five (5) day suspension of the liquor
13 license or a two-thousand five hundred dollar (\$2,500.00) fine as it was the "second violation"
14 in a 24 month period.²

15 However, the previous or "first violation" which arose from AVN 1L7363A, and was
16 administratively adjudicated as LCB No. 22, 834/OAH No. 2008-LCB-0030 was ultimately
17 reversed and dismissed by the Clark County Superior Court on judicial review. *Memorandum*
18 *of Opinion and Order Reversing the Board's Decision (December 29, 2007 Occurrence)*, No.
19 10-2-00257-3. As a result, AVN 1L9142A, the instant case, became both factually and legally
20 the Licensee's first violation of this type in a 24 month period. The standard penalty for a first
21 time violation of this type is a five (5) day suspension of the liquor license, or a five hundred
22 dollar (\$500.00) penalty. WAC 314-29-020.

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25 ¹ The Final Order was served, via mail, on June 10, 2011.

26 ² WAC 314-29-020 has been amended since the issuance of AVN 1L914A, and the penalty for a second
violation of this type is now a seven (7) day suspension of the liquor license.

1 These are facts the parties are in complete agreement on. At hearing, the parties strived
 2 to make the ALJ aware of this procedural history and the appropriate penalty. In its Petition
 3 for Review of the Initial Order the Licensee noted this procedural history and argued that if a
 4 penalty was imposed it should be the standard penalty for a first-time violation. *Licensee's*
 5 *Petition for Review at 27-28.* In its response, Enforcement, agreeing on this one point, did not
 6 challenge the Licensee's assertions regarding penalty and requested the Board impose the
 7 standard penalty "of five hundred dollars (\$500.00) or a five (5) day suspension". *Enforcement*
 8 *Division's Response to Licensee's Petition for Review at 9.*

9 The instant case is both factually and legally the Licensee's first violation in a 24
 10 month period. There are no aggravating factors present in this matter that would call for any
 11 departure from the standard penalty. As a matter of law, there is no reason to impose any
 12 penalty other than the standard penalty set forth in WAC 314-29-020.

13 Both parties respectfully request the Board issue an Amended Final Order imposing the
 14 standard penalty for a first violation of this type within a 24 month period: five (5) day
 15 suspension of the liquor license, or a monetary penalty of five hundred dollars (\$500.00),
 16 WAC 314-29-020. Additionally, both parties respectfully request the Board expedite its
 17 consideration of this matter as its decision will more likely than not have a significant effect on
 18 the Licensee's determination as to filing a petition for judicial review.

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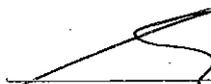
III. CONCLUSION

The violation upheld by the Board in this matter is the Licensee's first violation of this type in a 24 month period. Accordingly, we respectfully request the Board amend its Final Order to comport with the first-time standard penalty per WAC 314-29-020,

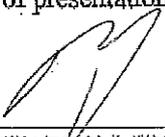
DATED this 16 day of June, 2011.

Presented by:

ROBERT M. MCKENNA
Attorney General


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

Approved as to form,
notice of presentation waived:


BEN SHAFFRON, WSBA #6280
Attorney at Law
Attorney for Licensee

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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
(FORMERLY LOCATED AT 7201 NE
18TH STREET, VANCOUVER, WA
98661)

LICENSEE

LICENSE NO. 403213 (FORMERLY
365465)

AVN 1L9142A

LCB NO. 23,541
OAH NO. 2009-LCB-0058

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated November 29, 2010, alleging that on or about May 22, 2009, the above-named Licensee, or an employee(s) thereof, sold, served, gave, provided or otherwise supplied alcohol to an apparently intoxicated person(s) on a licensed premises, contrary to WAC 314-16-150(1) or in the alternative, that on or about May 22, 2009, the above-named Licensee, or an employee(s) thereof, allowed or permitted an apparently intoxicated person(s) to possess and/or consume alcohol on a licensed premises, contrary to WAC 314-16-150(2).
2. The Licensee made a timely request for a hearing.

FINAL ORDER OF THE BOARD
LCB NO. 23,541
DODGE CITY BAR & GRILL
LICENSE 365465

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

3. A hearing took place on February 3, 2011 before an administrative law judge with the Office of Administrative Hearings.

4. Attorney at Law Ben Shafton represented Dodge City Saloon, Inc, d/b/a Dodge City Bar & Grill, and owner Ray Kutch. Assistant Attorney General Gordon Karg represented the Enforcement and Education Division of the Board.

5. On April 12, 2011, Assistant Deputy Chief 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 timely Petition for Review on April 28, 2011. The Enforcement Division had previously filed a motion on April 19, 2011 to extend the time for filing its response due to the Assistant Attorney General's unavailability from April 22, 2011 through May 3, 2011. The Board entered an order granting Enforcement's request and extended the time to filing its response to within ten days of May 3, 2011. Enforcement filed a Response to Licensee's Petition for Review on May 12, 2011.

7. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE; IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Initial Order for case 23,541 is adopted.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,541 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 Blvd, in Vancouver, Washington, License No. 403213 (Formerly License No. 365465), are hereby suspended for a term of five (5) days effective from 10:00 a.m. on July 22, 2011, until 10:00 a.m. on July 27, 2011; HOWEVER, the suspension shall be vacated upon payment of a monetary penalty in the amount of two thousand five hundred dollars (\$2,500.00) due within 30 days of this order. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

Washington State Liquor Control Board

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 7 day of June, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD







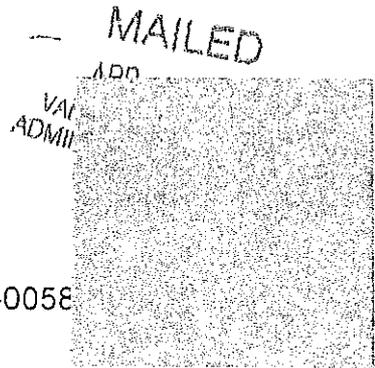
Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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

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

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



In the Matter of:

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

Licensee.

License No. 365465

OAH Docket No. 2009-LCB-0058
LCB Case No. 23,541

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
INITIAL ORDER

RECEIVED

APR 20 2011

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

PREHEARING MOTIONS

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

On November 18, 2010, the Licensee submitted an Omnibus Motion to Dismiss the Board's Complaint and to Suppress the Board's evidence.

Dismissal of the Complaint. The Licensee has moved for dismissal of the Complaint on the basis that Washington Administrative Code (WAC) 314-16-150(2) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Washington State Constitution because the regulation is impermissibly vague.

Dismissal of the Board's Evidence from an Agent or Law Enforcement Officer. If the Licensee's motion to dismiss was denied, the Licensee also moved for suppression of all testimony from any agent of the Liquor Control Board or other law enforcement officer on the basis that their presence on the premises violated the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution.

II. **Collateral Estoppel**

On January 18, 2011, the Licensee submitted its Prehearing Brief, and argued, for the first time, that the Board's case should be dismissed on the basis of the affirmative defense of Collateral Estoppel.

DISCUSSION

Omnibus Motion. 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.

Collateral Estoppel. The Amended Notice of Hearing, issued November 2, 2010, informed the parties of the hearing in the above-entitled matter which was scheduled for January 6 and 7, 2011.

In the section of the Amended Notice entitled "**DISPOSITIVE MOTIONS**," the parties were given a schedule for submitting their motions and responses. Motions were due by November 22, 2010. Responses were due by December 10, 2010, and oral arguments were to be heard December 15, 2010 at 8:15 a.m.

The Licensee did not submit their argument on Collateral Estoppel within any of those time frames and the argument presented in the Licensee's Prehearing Brief is deemed untimely.

DECISION SUMMARY

1. The Licensee's Motion to Suppress is **Denied**.
2. The Licensee's Motion to Dismiss is **Denied**.
3. The Licensee's dispositive argument on Collateral Estoppel is **Denied as Untimely**.

STATEMENT OF THE CASE

On May 28, 2009, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice (AVN) alleging that on May 22, 2009, the licensee, Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill, located at 7201 NE 18th Street, Vancouver, Washington, allowed or permitted an apparently intoxicated person to possess and / or consume alcohol on a licensed premises contrary to WAC 314-16-150(2) and assessing as the civil penalty a five (5) day license suspension or a monetary penalty of two thousand five hundred dollars (\$2,500.00) in lieu of suspension.

(The undersigned believes the amount of \$2,500 may be a typographical error, but has noted the figure as stated in the AVN issued on May 28, 2009.)

On November 17, 2009, the Board issued a formal written complaint alleging that "on or about May 22, 2009, the above-named Licensee, or employee(s) thereof, allowed or permitted an apparently intoxicated person to possess and / or consume alcohol on a licensed premises contrary to WAC 314-16-150(2)."

The Licensee filed a timely request for an administrative hearing.

On November 29, 2010, the Board issued an amended complaint alleging that "on or about May 22, 2009, the above-named Licensee, or employee(s) thereof, sold, served, gave, provided or otherwise supplied alcohol to an apparently intoxicated person(s) on a licensed premises contrary to WAC 314-16-150(1).

Or in the alternative:

That on or about May 22, 2009, the above-named Licensee, or employee(s) thereof, allowed or permitted an apparently intoxicated person to possess and / or consume alcohol on a licensed premises contrary to WAC 314-16-150(2)."

The matter came on for hearing pursuant to due and proper notice at Vancouver, Washington, on February 3, 2011, before Gina L. Hale, Assistant Deputy Chief - Administrative Law Judge (ALJ).

The Licensee, Dodge City Saloon, Inc. and owner Ray Kutch, were represented by Ben Shafton, Attorney at Law. Chris Blevins, and Erick Gill, appeared and presented testimony on behalf of the Licensee.

The Liquor Control Board - Enforcement Division (The Board) was represented by Gordon Karg, Assistant Attorney General. Captain Jennifer (Skoda) Dzubay, Officer Almir Karic, Officer Paul Magerl, and Officer John Wilson appeared and presented testimony on behalf of the Board.

Based upon the evidence presented, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. **Licensee.** Ray Kutch is the owner of Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill. In May 2009, the business was operated under license number 365465, at 7201 NE 18th Street, Vancouver, Washington, 98660.
2. **Washington State Liquor Control Board Authority.** The Liquor Control Board (Board) monitors licensees through a continuing program of premises checks and undercover operations. These monitoring processes use plainclothes officers who enter licensed establishments to determine whether a Licensee is serving apparently intoxicated patrons, or allowing apparently intoxicated patrons to possess alcohol in violation of the regulations.
3. **Undercover Operation / Premises Check.** The Licensee's busiest nights of operation are Thursday, Friday, and Saturday night, with the heaviest traffic on Thursday night. The Board's Enforcement officers had received several complaints about the Licensee from local law enforcement and members of the public. The Board chose to investigate how the Licensee operated when it was not obvious that law enforcement was present. The Board chose to use two undercover Enforcement officers from another jurisdiction to assist in the operation. The undercover officers were Captain Jennifer (Skoda) Dzubay and Officer John Wilson. Captain Skoda participated in the undercover operation and completed her report under the name Skoda and the undersigned will refer to her as Captain Skoda to avoid confusion.
4. The date selected for the operation was May 21, 2009. The Board intended to conduct other undercover checks at other establishments at the same time. The Licensee was one of several locations checked that evening.

5. **May 21 - 22, 2009, Incident.** At approximately 11:30 p.m., on May 21, 2009, Captain Skoda and Officer Wilson entered the Licensee's premises together. Their cover story was that they were cousins getting together before Officer Wilson was deployed with the military. After entering, they sat at a table and observed the crowd, the layout, and lighting. The lighting was dim, but sufficient, they were able to make out features in the patrons' faces.

6. Once seated, Captain Skoda saw a woman, later identified as Sheena Rice, head toward the bar. On her way towards the bar, Ms. Rice waked into a wall, stumbled, and laughed off the incident. She swayed as she walked and was talking loudly. Captain Skoda noted Ms. Rice's eyes were half closed and watery. Ms. Rice could be overheard telling her friend that she hurt her arm hitting the wall and Captain Skoda could also hear that Ms. Rice's speech was slurred.

7. Captain Skoda joined Ms. Rice at the bar. She saw Ms. Rice pull out a \$5 and heard her ask the bartender what could she get for that amount. Captain Skoda saw the bartender, Leah Skelton, serve Ms. Rice a Rockstar with vodka in a pint glass. Captain Skoda observed Ms. Rice walking away from the bar. She was having difficulty keeping her balance and swaying while standing in place. Captain Skoda suspected that she was under the influence.

8. Captain Skoda suggested to Officer Wilson that Ms. Rice was someone they should keep an eye on that evening as they observed other patrons that night. The two officers engaged Ms. Rice and her friend in conversation. Ms. Rice offered the officers a taste of her drink putting the glass in both their faces. She laughed a lot at things that did not appear to be humorous, and the officers heard that her speech continued to sound slurred. Captain Skoda concluded at that point that Ms. Rice was under the influence.

9. Ms. Rice's friend volunteered that Ms. Rice had a bad day at work and had gotten wasted, and that she not normally like that. Ms. Rice also volunteered to Officer Wilson that she was very drunk.

10. While in conversation with the undercover officers, Ms. Rice stopped a male patron walking past them and began to rub her body against his. The two danced briefly and he walked on. Ms. Rice and her friend then ran onto the dance floor where the officers lost sight of them.

11. The officers next saw Ms. Rice in the beer garden with four other women. A roving server was selling drinks in test tubes; Ms. Rice and the women at the table each consumed one of the drinks. The contents of the test tubes were unknown.

12. The officers saw a male in a Dodge City polo shirt talking with Ms. Rice in the beer garden. They understood him to be an employee of the Licensee, but did not observe him taking any action to indicate Ms. Rice should be cut off. One such action would have been to put a black "X" on the back of her hand.

13. The officers returned to the main area. Approximately 15 minutes later, they saw Ms. Rice and her friend at the bar with Ms. Skelton still on duty as the bartender. Ms. Rice and her friend took a shot of a drink which included raspberry vodka. Two more drinks were served and paid for

by Ms. Rice's friend. Ms. Rice pounded on the bar while she waited, had her eyes half open and swayed as she stood.

14. Captain Skoda shared her observations with Officer Wilson. He then contacted Officer Almir Karic, who was waiting outside with Officer Paul Magerl. The officers entered the premises at approximately 1:05 a.m. on May 22, 2009.

15. **Officer Almir Karic and Officer Paul Magerl.** Once inside, the officers were informed that Ms. Rice and Officer Wilson were near the disk jockey (DJ) booth. The officers also located the owner / Licensee, Ray Kutch, and made their presence known to him.

16. Officers Karic and Magerl observed Ms. Rice for three to five minutes as she was standing near the DJ booth. She had a glass drink in her hand. They also waited to see if any employees would take any steps to cut her off; no action was taken by any staff member.

17. They watched her move and go towards the DJ booth and saw that her eyelids were droopy, that she staggered, and that she swayed as she stood. Officer Karic saw Ms. Rice sit down her drink and go into the DJ booth. He observed her for several minutes and then had an employee get her out. He asked the he be given her drink also. Ms. Rice came out of the DJ booth without her drink and Officer Karic had to retrieve it himself. Officer Karic and Officer Magerl escorted Ms. Rice outside so that they could better hear her and be heard.

18. Officer Magerl took a photograph of Ms. Rice's hands to show that she had not been cut off because there was no "X" marked on either hand. While photographing her, Officer Magerl noticed a strong odor of alcohol. He also saw that Ms. Rice was swaying as she was standing and that she occasionally used a small tree to steady herself. Additionally, her eyes were half closed, glassy, and red, and her speech was slurred. Ms. Rice was very cooperative and gave a voluntary statement.

19. Officer Karic asked the bartender, Ms. Skelton, if she would provide a voluntary statement. She refused and said she wanted to review the surveillance tapes first.

20. **Ms. Rice's Drinks.** Over the course of the evening, the four officers saw Ms. Rice in possession of several different drinks. Some drinks were identified as alcoholic and for others, the contents were unknown. All of the officers reported that Ms. Rice had a strong odor of alcohol on her person.

21. Captain Skoda saw Ms. Rice with four drinks. Two alcoholic drinks, a Rockstar and vodka, and a raspberry vodka, were served by the bartender, Ms. Skelton. The third drink was in a test tube and the contents were unknown. The fourth drink was also served by the bartender, but Captain Skoda was not able to identify what, if any, alcohol was in the drink.

22. Officer Wilson saw Ms. Rice with three drinks. He saw the pint glass and test tube, but the contents were unknown. He saw a male buy a round of shots which the bartender served and Ms. Rice consumed. This drink was alcoholic.

23. Officer Karic and Officer Magerl both saw Ms. Rice with a drink while she was near the DJ booth. The contents of the drink were unknown.

24. **Signs of Apparent Intoxication.** Both law enforcement officials and staff who work in the liquor industry receive training in identifying apparently intoxicated patrons. The signs include, but are not limited to: slurred speech, flushed face, glassy / watery eyes, droopy eyes, talking loudly, odd behavior, lack of coordination / balance when standing or walking, staggering, stumbling, possession of alcohol, and a strong odor of alcohol.

25. Other signs which the officers reported regarding Ms. Rice were dancing with people she did not appear to know or who appeared not to know her, flirting, and laughing at things that did not seem humorous.

26. We find that no sign taken alone necessarily equates to apparent intoxication. In the present case, all four officers, Captain Skoda, Officer Wilson, Officer Karic, and Officer Magerl, noted one or more signs of intoxication as they observed Ms. Rice. Based on the situation taken as a whole and their personal observations, each officer concluded separately that Ms. Rice was an apparently intoxicated person.

27. **Cases Regarding Apparently Intoxicated Patrons.** Captain Skoda, Officer Wilson, Officer Karic, and Officer Magerl each received training in identifying apparently intoxicated patrons. In their careers, Captain Skoda has had over 100 cases, Officer Wilson over 1,000 cases, and Officer Karic over 2,000 cases where they have observed apparently intoxicated individuals. The officers also received training through their respective law enforcement organizations.

28. **Staff Members.** Captain Skoda and Officer Wilson saw Ms. Rice interact twice with the bartender and once with another male employee, and waited to see in any staff member would cut her off by placing an "X" on the back of her hand. No staff member cut off Ms. Rice. Because the officers were waiting to see how the staff would react, they did not break their cover and announce that they were law enforcement officers.

29. Both of the staff members who testified at the hearing indicated their knowledge and training to recognize some of the signs of apparent intoxication: slurred speech, lack of motor skills, and erratic behavior. Neither of them noted any such signs regarding Ms. Rice on the evening at issue. Ms. Rice was a regular customer and was known to have a bubbly personality. The staff member who was working the front door the night of the incident, Chris Blevins, noted that Ms. Rice's behavior and gait were "unremarkable." It was his understanding that when she was escorted out of the premises, there was an identification issue and not an apparently intoxicated issue.

30. Erick Gill was the bar manager at the time of the incident. He had no record of any staff member having interaction with Ms. Rice or Officer Karic.

31. The Licensee's witnesses also noted an understanding of the proper protocol if an apparently intoxicated patron was identified. If the patron came to the premises already intoxicated or "pre-funking," the roaming staff would be alerted to watch that person. Staff would be advised to mark the back of the patron's hand to indicate that they were cut off from further service. If they were

in possession of a drink, it would be removed from them. Additionally, staff might ask the patron's friend to drive them home. Neither witness believed Ms. Rice was intoxicated, nor were they aware that she was being perceived as apparently intoxicated and continuing to be served alcohol.

32. **Administrative Violation Notice.** Based on his personal observations, the reports of Captain Skoda and Officer Wilson, and a review of the Licensee's history, Officer Karic concluded that the issuance of an Administrative Violation Notice (AVN) was appropriate. On May 28, 2009, Officer Karic served the AVN at issue on the owner and Licensee, Ray Kutch.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction in this matter pursuant to Revised Code of Washington (RCW) 66.44, RCW 34.12, RCW 34.05 and Washington Administrative Code (WAC) 10-08, WAC 314-11, and WAC 314-12.

2. As a licensed retail seller of alcohol, the Licensee is subject to the jurisdiction of the Washington State Liquor Control Board. The Licensee is subject to the conditions and restrictions imposed by Title 66 RCW, WAC 314-11, and WAC 314-12. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an Administrative Law Judge pursuant to chapter 34.12 RCW. A proper hearing was provided in this case.

3. A license is a privilege and not a vested right. WAC 314-12-010.

4. Under the provisions of WAC 314-11-015(1)(a), liquor licensees are responsible for operation of the licensed premises in compliance with the liquor laws and rules of the board. If the licensee chooses to employ others in the operation of the business, any violations committed, or permitted, by those employees shall be treated by the board as violations committed, or permitted, by the licensee.

5. It is the duty and responsibility of the licensees to control the conduct of employees and patrons on the premises at all times. WAC 314-11-015(3).

6. Under the provisions of RCW 66.44.200(1), the sale of liquor to any person apparently under the influence of liquor is prohibited. Under WAC 314-16-150(1), it is a violation to give, sell and / or supply liquor to an **apparently intoxicated** person on a licensed premises. It is also a violation to allow or to permit an **apparently intoxicated** person to possess alcohol on a licensed premises. WAC 314-16-150(2). Emphasis added.

7. It need not be shown that the individual was actually intoxicated. The purpose of the regulation is to discourage and to prevent licensees and their staff from over-serving individuals. If a person appears intoxicated, the regulation is designed to guard against over-serving that individual.

8. In order for the AVN to be affirmed and the complaint sustained, the Board must show that the alleged violations occurred by a preponderance of the evidence.

9. The undersigned concludes that Ms. Rice was consuming and in possession of alcohol on the Licensee's premises on May 21 - 22, 2009. She was observed obtaining, consuming, and possessing alcoholic beverages on May 21 - 22, 2009 by Board law enforcement officers. As observed by four liquor enforcement officers, Ms. Rice was an apparently intoxicated person.

10. Therefore, the question to be addressed by the undersigned is whether or not Ms. Rice was apparently intoxicated when served by the bartender, Ms. Skelton, and whether or not, as the bartender and licensee's employee, she should have been reasonably expected to draw the same conclusion reached by the officers that Ms. Rice was intoxicated or apparently intoxicated at the time she served her.

11. On May 21 - 22, 2009, four trained and experienced liquor enforcement officers individually observed Ms. Rice exhibiting clear signs that she was intoxicated or apparently intoxicated (e.g., she exhibited slurred speech, pronounced difficulty walking and standing steadily, odor of alcohol, loud behavior, physical contact with a male who did not appear to know her, and her statement that she was drunk).

12. The first observation was by Captain Skoda shortly after she and Officer Wilson entered the premises. Ms. Rice was identified as a person to watch because she appeared intoxicated early on as Captain Skoda observed her being served the Rockstar with vodka by the bartender, Ms. Skelton. Ms. Rice continued to drink throughout the evening. Not all the drinks were clearly identified as alcoholic. However, at the time she received the drinks which were known to be alcoholic, she was continuing to exhibit the behavior of an apparently intoxicated person. At no time did any of the law enforcement witnesses describe Ms. Rice as anything other apparently intoxicated and as exhibiting signs of the same.

13. Based upon careful consideration of the evidence, including the demeanor and motivation of the parties, the reasonableness of the testimony, and the totality of the circumstances presented, the undersigned concludes that the version of events set forth by the Board witnesses is more credible. The undersigned concludes the Board has presented plausible evidence regarding the independent observations of four different officers.

14. Such persuades the undersigned both that Ms. Rice was, in fact, apparently intoxicated on May 21 - 22, 2009, and that the bartender is reasonably expected to have been aware of her apparent intoxication.

15. The undersigned concludes there exists a nexus between Ms. Rice's apparent intoxication and the alleged over service by this Licensee on May 21 - 22, 2009, and that the Board has established by a preponderance of credible evidence, that the Licensee, or an employee(s) thereof, served alcohol to an apparently intoxicated individual on May 21 - 22, 2009, in violation of RCW 66.44.200(1), WAC 314-11-035, and WAC 314-16-150(1) and (2).

From the foregoing Conclusions of Law, NOW THEREFORE, IT IS HEREBY ORDERED THAT

Initial Decision and Order

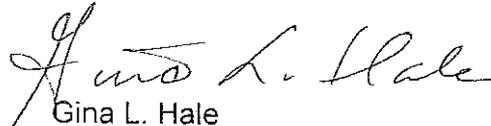
IT IS HEREBY ORDERED, that the Board's Amended Complaint dated November 29, 2010, is **SUSTAINED**.

The license privileges issued to the Licensee, Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill, located at 7201 NE 18th Street, Vancouver, Washington, License No. 365465, shall be suspended for a period of five (5) days to commence on a date to be set by the Board in its final order OR the Licensee may pay a monetary penalty of two thousand five-hundred dollars (\$2,500) in lieu of suspension on a date to be determined by the Board in its final order.

(The undersigned believes the amount of \$2,500 may be a typographical error, but has noted the figure as stated in the AVN issued on May 28, 2009. The ultimate penalty will be determined by the Board.)

DATED and mailed at Vancouver, Washington, this 12th day of April, 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.
Dodge City Bar & Grill
7201 NE 18th Street
Vancouver, WA 98660

Licensee 2nd Address:

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

INITIAL ORDER

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OFFICE OF ADMINISTRATIVE HEARINGS
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Olympia, WA 98504-0100

Department Contact:

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

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

23,541

Licensee's

Petition for Review

RECEIVED

APR 28 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 Docket No.: 2009-LCB-0058
LCB Case No.: 23,541

License/Permit No.: 365465

PETITION FOR REVIEW

COMES NOW Dodge City Saloon, Inc. (Dodge City) and petitions for review as follows:

STATEMENT OF FACTS

This citation is based upon events that occurred on May 21-22, 2009. Six officers of the Washington State Liquor Control Board (the Board) were involved in an undercover operation designed to see if they could observe a violation of WAC 314-16-150(2). Board officers focused on a woman identified as Sheena Rice. Other specific factual issues will be discussed in sections regarding each point raised.

DISCUSSION

I. The Regulation Violates Due Process because It Is Impermissibly Vague.

Dodge City moved to dismiss the complaint on this ground. This motion was denied.

The regulation in question, WAC 314-16-150(2) provides as follows:

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

1
2 Dodge City is entitled to due process of law under the Fourteenth Amendment to the United
3 States Constitution and Article I, Section 3 of the Washington State Constitution. A persons' right
4 to due process of law is violated if that person is charged with violating an impermissibly vague
5 enactment. A statute or regulation is impermissibly vague if it either (1) fails to sufficiently define
6 the offense so that people of "common intelligence" can understand what conduct is proscribed; or
7 (2) it fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *State*
8 *v. Halstien*, 122 Wn.2d 109, 116-117 (1993); *State v. Allenbach*, 136 Wn.App. 95 (2006); *State v.*
9 *Hanes*, 151 Wn.App. 428, 438 (2009). Under that test, WAC 314-16-150(2) is impermissibly
10 vague.
11

12 A person can only be said to be "apparently" under the influence if that person is displaying
13 certain signs that may be associated with alcohol intoxication. However, a person may display one
14 or more of these signs and not actually be under the influence. For example, unsteady gait may be a
15 sign of intoxication. However, it can also stem from some sort of physical condition. Boisterous
16 behavior can demonstrate that a person is under the influence. However, a person acting in that
17 fashion may be showing nothing more than pleasure at the result of a football or basketball game or
18 might simply be boisterous by nature. Sometimes watery eyes can show intoxication — but hay
19 fever sufferers often have watery eyes. One common sign of intoxication is the odor of intoxicants
20 emanating from a person's mouth. That could be present, however, after a person takes his or her
21 first swallow from a bottle of beer. A person's apparent drowsiness could indicate intoxication or a
22 lack of sleep.
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1 The lack of specificity of any signs of intoxication led the Court of Criminal Appeals of the
2 State Texas to find impermissibly vague a statute banning the selling of beer “showing evidence of
3 intoxication” in *Cotton v. State*, 686 S.W.2d 140 (Tex.Cr.App. 1985). In its opinion, the Court first
4 noted that it had previously dealt with a similar statute that prohibited the sale of alcoholic beverage
5 to an intoxicated person and concluded that the word “intoxicated” was not impermissibly vague
6 since it would be given its commonly understood meaning. It found a distinction between that
7 statute and the one under consideration. It stated:

9 Evidence of intoxication” encompasses specific conduct that, when
10 combined with other specific conduct which is also evidence of
11 intoxication, leads to the conclusion that a person is intoxicated or is
12 under the influence of alcohol to the degree that he may endanger
13 himself or another. But individual symptoms of intoxication, when
14 manifesting themselves alone instead of in concert, bear little relation to
15 ascertainable criminal conduct. Slurred speech, bloodshot eyes, a
16 staggering gait, or simple drowsiness are each individually “evidence of
17 intoxication,” but common experience teaches us that each may be
18 demonstrated by the intoxicated or the abstemious, the soused or the
19 sober. So is serving a person exhibiting one of these symptoms a
20 violation of the law or not? Similarly, since alcoholic breath is “evidence
21 of intoxication,” if while receiving a patron’s order for a second beer the
22 tavern owner detects the odor of the first on the customer’s breath, is it or
23 is it not a violation of (the statute) for the licensee to consummate the
24 sale of that second beer? . . .

19 . . . It is axiomatic that a criminal statute must “give the person of
20 ordinary intelligence a reasonable opportunity to know what is
21 prohibited, so that he may act accordingly.” . . . As currently enacted, a
22 retail dealer licensee must simply guess at the standard of criminal
23 responsibility. Further, “if arbitrary and discriminatory enforcement is to
24 be prevented, laws must provide explicit standards for those who apply
25 them.” (citing *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294,
33 L.Ed.2d 222 (1972)). It is not sufficient to leave enforcement to the
sound discretion of the police, trusting them to invoke the law only in
appropriate (whatever that means) cases. A criminal statute must itself

1 be precisely drawn so that it eliminates the risk of capricious application
2 rather than fosters it as the present statute does.

3 (Emphasis added.) 686 S.W.2d at 142-143.

4 The vice that the Court saw in *Cotton v. State, supra*, is applicable here. Board officers can
5 walk into any establishment, focus on the conduct of any person, profess to see some sort of
6 indication that might suggest that the person is under the influence, and issue a citation. The
7 licensee's security personnel may have encountered the person and concluded that he or she was not
8 under the influence after interacting with him or her for a sufficient length of time to make the
9 required determination. Nonetheless, the Board can haul Dodge City — or any other licensee —
10 into an administrative proceeding on the basis of the officer's professed observations. The
11 possibility of arbitrary or inconsistent enforcement abounds.

12 The problem with the regulation is exacerbated by the definition Washington courts have
13 given to the term "under the influence" in other contexts. In the seminal case of *State v. Hurd*, 5
14 Wn.2d 308 (1940), the Court noted that the phrase "under the influence of intoxicating liquor" for
15 the purposes of statutes prohibiting "driving under the influence" had been held in many other
16 jurisdictions to "cover any abnormal mental or physical condition, and the lessening in the slightest
17 or any degree of the accused's ability to operate a vehicle." It then held that the term "under the
18 influence of" had the "same significance, import, and breadth of meaning" as those holdings. 5
19 Wn.2d at 315-16. When "under the influence" is defined to include any divergence at all from
20 functioning without liquor, the probability of varying and arbitrary enforcement is increased.
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1 The regulation in question is clearly impermissibly vague primarily because it
2 unquestionably leads to arbitrary and inconsistent enforcement. It contains no guidelines or
3 specificity as to what constitutes "apparent" intoxication. Persons of common intelligence must
4 therefore guess as to what is proscribed.
5

6 For the reasons indicated, the regulation in question is impermissibly vague. On that basis,
7 the Complaint must be dismissed.

8 II. The Testimony of the Officers Must Be Suppressed.

9 a. Introduction.

10 Dodge City moved to suppress the testimony of Board Officers. This motion was
11 denied.
12

13 The testimony of Board officers in this matter must be suppressed because their
14 presence on the premises violated the Fourth Amendment to the United States Constitution and
15 Article I, Section 7 of the Washington State Constitution. This issue is subject to consideration in
16 administrative proceedings because evidence excludable on statutory or constitutional grounds must
17 be excluded. As RCW 34.05.452(1) states:
18

19 Evidence, including hearsay evidence, is admissible if in the judgment of
20 the presiding officer it is the kind of evidence on which reasonably
21 prudent persons are accustomed to rely in the conduct of their affairs.
22 The presiding officer shall exclude evidence that is excludable on
23 constitutional or statutory grounds or on the basis of evidentiary
24 privilege recognized in the courts of this state. The presiding officer may
25 exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(Emphasis added.) The testimony from Board agents should have been suppressed because they
were not lawfully on Dodge City's premises on the day of the incident.

1 b. Requirements for Valid Administrative Entry.

2 The Board claims that its agents and other law enforcement personnel were at
3 Dodge City's premises to conduct a "premises check," one type of administrative inspection that
4 the Board performs. These inspections are subject to the requirements of the Fourth Amendment to
5 the United States Constitution and Article I, Section 7 of the Washington State Constitution.
6

7 The Fourth Amendment to the United States Constitution bars "unreasonable
8 searches and seizures." Article 1, Section 7 of the Washington State Constitution — Washington
9 counterpart to the Fourth Amendment — speaks in different and more specific terms as follows:

10 No person shall be disturbed in his private affairs, or his home invaded,
11 without authority of law.

12 These two provisions apply co-extensively to administrative searches. *Centimark Corp v.*
13 *Department of Labor & Industries*, 129 Wn.App. 368, 375 (2005). They apply when governmental
14 agents enter upon private property to ascertain whether there is compliance with governmental
15 regulations. *City of Seattle v. McCready*, 123 Wn.2d 260 (1994).
16

17 Intrusion onto private property to conduct an administrative inspection can be
18 sanctioned by a properly issued warrant supported by probable cause. *Camara v. Municipal Court*,
19 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *City of Seattle v. McCready, supra*, 123
20 Wn.2d at 273. The Board did not obtain a warrant authorizing the action that it took on May 21-22,
21 2009. Therefore, it bears the burden of proof that its conduct falls into one of jealously guarded
22 exceptions to the warrant requirement. *State v. Manthe*, 102 Wn.2d 537 (1984).
23
24
25

1 Searches of regulated industries, such as in this case, can be conducted without a
2 warrant if three (3) requirements are met:

- 3 1. A substantial governmental interest is present that informs a
4 regulatory scheme pursuant to which the inspection is made;
- 5 2. The warrantless inspection must be necessary to further the
6 regulatory scheme; and
- 7 3. The inspection program in terms of the certainty and
8 regularity of its application must provide constitutionally
9 adequate substitutes for a warrant. Examples of such
10 substitutes are prior warning to the persons to be searched;
11 limitations on the scope of the search; and clear restraints on
12 the discretion of the investigating officers.

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

13 The most critical of these requirements is the presence of an adequate substitute for
14 a warrant in the regulatory scheme. As the Court of Appeals recently stated in *Seymour v.*
15 *Washington State Department of Health*, 152 Wn.App. 156, 167-68 (2009):

17 Reining in the power of the executive branch in conducting
18 administrative searches is a primary concern of courts reviewing such
19 statutory schemes. Where a statutory scheme is properly formulated
20 and followed, Fourth Amendment concerns are addressed by the
21 elimination of unreasonable searches. In such cases, "it is difficult to
22 see what additional protection a warrant requirement would provide .
23 . . . The discretion of Government officials to determine what
24 facilities to search and what violations to search for is thus directly
25 curtailed by the regulatory scheme. . ." A proper regulatory scheme,
"rather than leaving the frequency and purpose of inspections to the
unchecked discretion of Government officers . . . establishes a
predictable and guided . . . regulatory presence . . ." Hence, the person
subject to the inspection "is not left to wonder about the purposes of
the inspector or the limits of his task. . ." The "regulatory statute must

1 perform the two basic functions of a warrant: it must advise the owner
2 of the commercial premises that the search is being made pursuant to
3 the law and has a properly defined scope, and it must limit the
discretion of the inspecting officers. . .”

4 As will be discussed below, it is clear that the regulatory scheme is not sufficient to pass
5 constitutional muster.

6 c. RCW 66.28.090 Is Inadequate to Provide Laws Enforcement or the Board the Right
7 to Enter.

8 The Board may decide to take its authority to enter licensed premises from RCW
9 66.28.090(1). That statute provides as follows:

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

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

18 The director or any of his authorized representatives may at any time
19 visit and inspect the premises of each massage business
20 establishment in order to ascertain whether it is conducted in
21 compliance with the law, including the provisions of this chapter,
22 and the rules and regulations of the director. The operator of such
massage business shall furnish such reports and information as may
be required.

23 The second was RCW 18.108.190, which provides:

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

1
2 The Court ruled that these two statutes did not sufficiently delineate the purpose, scope, time, and
3 place of inspection. Therefore, the Court ruled that they violated the requirements of the Fourth
4 Amendment to the United States Constitution.

5 There is no greater specificity in RCW 66.28.090(1) than in former RCW
6 18.108.180 and RCW 18.108.190. In fact, there is less. The language of former RCW 18.108.180
7 allowed inspections to determine whether the business was being conducted in compliance with the
8 law. There is no such limitation in RCW 66.28.090(1). It allows Board officers to come onto
9 licensed premises for any reason or for no reason at all. It is therefore infirm and cannot support the
10 entry onto the premises and observations made by the Board officers.

11
12 d. The Board Cannot Rely on Any General Power of Enforcement in RCW
13 66.44.010(4).

14 The Board may argue that the right of its officers to be on Dodge City's premises
15 stems from its general duty to enforce the provisions of RCW 66 as set out in RCW 66.44.010(4).
16 That argument must be rejected. If the general enforcement power allowed Board agents to go onto
17 the premises of a licensee without a warrant, then there would have been no reason for the
18 enactment of RCW 66.28.090(1) and it would have been superfluous. Statutes cannot be construed
19 in such a way as to render any portion superfluous. *Kilian v. Atkinson*, 147 Wn.2d 16, 21 (2002);
20 *Hosea v. Toth*, 156 Wn.App. 263,267-68 (2010). Therefore, RCW 66.44.010(4) cannot be
21 construed to allow Board officers to go onto licensed premises without a warrant.
22
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1 In any event, there is nothing in RCW 66.44.010(4) that would meet the
2 requirements of the Fourth Amendment and Article I, Section 7 of the Washington State
3 Constitution as interpreted by *Washington Massage Foundation v. Nelson, supra*. It does nothing
4 more than give enforcement power. Interestingly, it allows Board agents to execute warrants that
5 are allowed by RCW 66.32.020. It contains no more limitations on scope of search than does RCW
6 55.28.090(1) or either of the statutes ruled upon in *Washington Massage Foundation v. Nelson,*
7 *supra*.

8
9 The statute on which the Board relies, RCW 66.44.010(4) allows Board officers to
10 be on the premises of a licensee if a warrant is obtained. The officers here did not obtain a warrant
11 before coming onto Dodge City's premises. The statute is not sufficiently specific to allow for a
12 warrantless entry. For these reasons, the Board cannot rely on RCW 66.44.010(4) to authorize the
13 presence of Board agents or law enforcement on Dodge City's premises on May 28, 2009.

14
15 e. Testimony from Board Agents and Law Enforcement Officers Must Be Suppressed.

16 Since RCW 66.28.090(1) and RCW 66.44.010(4) are not sufficient to satisfy
17 constitutional requirements, they cannot authorize the entry of Board or law enforcement officers
18 onto Dodge City's premises on the night in question. All observations that they made stemmed
19 from the unlawful entry onto the premises. In other words, they would have seen nothing if they
20 had not entered the premises. As the Court stated in *Seymour v. Washington State Department of*
21 *Health, supra*, evidence obtained as a result of administrative activities that violate the Fourth
22 Amendment to the United States Constitution and Article I Section 7 of the Washington State
23 Constitution must be suppressed.
24
25

1 f. Arguments the Board Is Expected to Make Must Be Rejected.

2 i. Dodge City Maintains a Reasonable Expectation of Privacy.

3 The Board may argue that the operator of an establishment such as Dodge
4 City has no reasonable expectation of privacy because it allows the public onto its premises. In *Lo-*
5 *Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979), the Supreme Court
6 ruled that a business that allows access to the public does not lose the reasonable expectation of
7 privacy or all protection from administrative or other searches under the Fourth Amendment.
8

9 In that case, the State seized certain materials in an adult bookstore based
10 upon a warrant the Court determined was infirm. The State attempted to get around this problem
11 by arguing that the display of the items at issue to the general public in areas of the store open to
12 them eliminated any reasonable expectation of privacy that the store had against governmental
13 intrusion and that therefore, no warrant was needed. The Court rejected that argument. It stated:
14

15 But there is no basis for the notion that because a retail store
16 invites the public to enter, it consents to wholesale searches and
17 seizures that do not conform to Fourth Amendment guarantees...
18 The Town Justice (the officer executing the warrant) viewed the
19 films, not as a customer, but without the payment a member of
20 the public would be required to make. Similarly, in examining
the books and in the manner of viewing the containers in which
the films were packaged for sale, he was not seeing them as a
customer would ordinarily see them.

21 442 U.S. at 329.

22 By no stretch were Board officers acting as ordinary customers. They were
23 not present for the purpose of enjoying the entertainment that Dodge City provides. They claimed a
24 right to be on the premises only because RCW 66.28.090(1). In the absence of this statute, Dodge
25

1 City would exclude them. Since the officers were present in an official capacity, their presence can
2 only be justified only by a warrant or an exception to the warrant requirement. Neither is present
3 here.

4
5 ii. Dodge City Did Not Give Consent to the Officers' Presence.

6 The Board is expected to argue that Dodge City consented to the officers
7 being on the premises. Nothing could be further from the truth. As indicated, the officers were
8 present only because of statutes and regulations requiring licensees to allow them to be present. As
9 RCW 66.28.090(1) states:

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

15 And RCW 66.28.090(2) provides:

16 Every person, being on (licensed) premises and having charge
17 thereof, who refuses or fails to admit a liquor enforcement
18 officer, inspector or peace officer demanding to enter therein in
19 pursuance of this section in the execution of his/her duty, or
20 who obstructs or attempts to obstruct the entry of such liquor
enforcement officer, inspector or officer of the peace. . . shall
be guilty of a violation of this title.

21 Finally, WAC 314-11-090 states:

22 Does the Board have the right to inspect my premises?

23 Per RCW 66.28.090, the following must be available to
24 inspection at all times by the board and any law enforcement
officer:
25

1 Our situation is no different. The Board cannot demonstrate consent by
2 mere acquiescence to an assertion of statutory authority coupled with the threat of license
3 suspension if access is not given.
4

5 g. Dismissal Is Warranted.

6 It is submitted that the Board will not be able to produce any other evidence in
7 support of its allegations if Board and law enforcement officers are not allowed to testify.
8 Therefore, the Complaint should be dismissed.

9 III. The Board Is Collaterally Estopped from Pursuing This Violation.

10 a. Introduction.

11 Dodge City brought this issue to the attention of the presiding officer. She refused
12 to consider it.
13

14 b. Relevant Facts.

15 Board Officer Karic issued a citation to Ms. Rice on May 22, 2009, for violation of
16 RCW 66.44.200(2)(a), apparently. The citation refers to "RCW 66.44.200" and then contains the
17 following language:
18

19 Purchase/consumption/possession of alcohol by an apparently
20 intoxicated person in liquor licensed establishment.

21 These allegations reflect the elements of RCW 66.44.200(2)(a) as will be discussed below.

22 When Officer Karic issues a ticket of this type, he places the citation in a receptacle
23 in the parking lot of the Clark County Jail for delivery to and filing with the Clark County District
24
25

1 Court. He further indicates that he regularly works with and converses with staff of the Clark
2 County Prosecuting Attorney's office in connection with the tickets that he issues.

3 A violation of RCW 66.44.200(2)(a) is an infraction punishable by a \$500.00 fine.¹
4
5 RCW 66.44.200(2)(b). Once a citation for a civil infraction is issued, the person charged may
6 request a hearing. RCW 7.80.080. At the hearing, the Court may consider the citation and any
7 other written report made under oath submitted by the enforcement officer who issued the notice in
8 lieu of the officer's personal appearance at the hearing. RCW 7.80.100(2). The burden is on the
9 state to establish the commission of the civil infraction by a preponderance of the evidence in such
10 proceedings. RCW 7.80.100(3).

11
12 As was her right, Ms. Rice requested a hearing on the infraction notice. She
13 retained Beau Harlan, a Vancouver attorney, to represent her.

14 The matter came on for hearing on July 13, 2009. The matter was dismissed
15 because Board officers submitted no sworn statement in support of the infraction. In other words,
16 the matter was dismissed for lack of evidence.

17
18 c. Argument.

19 For collateral estoppel or issue preclusion to bar a claim or issue there must be an
20 identity of issues; a final judgment on the merits; the party to be estopped must be identical or in
21 privity with a party to the prior action; and the application of the doctrine will not work an injustice.
22 *Pederson v. Potter*, 103 Wn.App. 62 (2000). Each of those requirements is met here.

23
24
25 ¹ On the citation, Mr. Karic stated the penalty was \$1,025.00 for this offense. It is not clear how this was computed.

1 First of all, we have an identity of issues. The infraction charged Ms. Rice with
2 being in possession of, purchasing, or consuming alcoholic beverage when she was apparently
3 intoxicated. The complaint here charges Dodge City with permitting the behavior for which Ms.
4 Rice was charged in the infraction. In both cases, there must be proof that Ms. Rice purchased,
5 consumed, or possessed alcoholic beverage when she was apparently under the influence.
6

7 Second, the result is a judgment on the merits. A hearing date was set for the
8 infraction. The infraction was found not have been committed based upon a lack of evidence.
9 Under such circumstances, a dismissal amounts to an adjudication on the merits. Tegland *Civil*
10 *Procedure* 14A Wash.Prac. §35:45.
11

12 The Board cannot argue that this element should not apply because it did not have a
13 fair opportunity to litigate its case. It had the perfect opportunity to litigate. It simply failed to
14 submit evidence to support its case.

15 There is also an identity of parties. Mr. Karic, a Board employee, issued the citation
16 to Ms. Rice. The parties are therefore the same.
17

18 Application of the doctrine of collateral estoppel will work no injustice here.
19 Questions of injustice for the purposes of collateral estoppel focus, once again, on whether the party
20 against whom collateral estoppel is to be applied had a fair opportunity in the first proceeding. For
21 example, in *Hadley v. Maxwell*, 144 Wn.2d 306 (2001), the Court held that a finding in a contested
22 infraction proceeding could not be used to collaterally estop the defendant in a later personal injury
23 action arising out of the same incident. The Court noted that a minor traffic infraction does not give
24 rise to sufficient consequences "that would call for a full litigation effort." It noted that people
25

1 often plead guilty to traffic charges for reasons of expediency even though they may believe
2 themselves to be innocent. 144 Wn.2d at 312.

3 These considerations do not apply here. The Board was not a defendant in the
4 matter involving Ms. Rice. To the contrary, its agent initiated the action. All the Board's officer
5 had to do was to attach an affidavit or a declaration under penalty of perjury to the infraction notice
6 that he issued. He failed to perform this simple, uncomplicated step. The Board has not valid
7 complaint here.
8

9 In any event, and as the Court noted in *Hadley v. Maxwell, supra*, the purpose of the
10 doctrine of collateral estoppel is to promote judicial economy and prevent inconvenience and even
11 harassment of the parties. 144 Wn.2d at 311. Pursuing an administrative remedy against Dodge
12 City in light of the dismissal of Ms. Rice is simply not unjust in anyway.
13

14 The Board may place heavy reliance on *Jow Sin Quan v. Washington State Liquor*
15 *Control Board*, 69 Wn.2d 373 (1966). In that case, the Board attempted to suspend the retail
16 license of the operator of a grocery store whose wife was alleged to have sold beer on three separate
17 Sundays in violation of a criminal statute that then was in force. The wife was acquitted of the
18 criminal charges after the Board commenced administrative proceedings but before the
19 administrative hearing. The Board found that Mrs. Quan had indeed sold the beers in violation of
20 the statute and cancelled Mr. Quan's permit.
21

22 Mr. Quan contended that the Board's decision was arbitrary and capricious "in that
23 Mrs. Quan's acquittal of the . . . criminal charges constituted . . . constituted a bar of the
24 administrative proceedings against the licensee, Mr. Quan." 69 Wn.2d at 381. The Court found
25

1 nothing arbitrary or capricious about the decision. It stated, in essence, that administrative and
2 criminal proceedings arising out of the same conduct could proceed on parallel paths.

3 Importantly, the Court did not decide the case by reference to the doctrine of
4 collateral estoppel. The phrase “collateral estoppel” or “issue preclusion” simply does not appear in
5 the opinion. It does not appear that Mr. Quan contended that the Board was collaterally estopped
6 for finding that the Sunday sales had occurred by his wife’s acquittal of criminal charges.
7

8 An opinion is not authority on a point not mentioned therein and does not appear to
9 be suggested to the Court by which the opinion was rendered. *Continental Mutual Savings Bank v.*
10 *Elliott*, 166 Wash. 283, 300 (1932); *Etco, Inc. v. Department of Labor & Industries*, 66 Wn.App.
11 302, 207 (1992). Since the Court in *Jow Sin Quan v. Washington State Liquor Control Board*,
12 *supra*, never considered or addressed the question of whether the criminal conviction collaterally
13 estopped the administrative proceedings, the opinion in that case is not helpful here.
14

15 d. Conclusion.

16 Sheena Rice was the person that the Board claimed possessed or consumed alcohol
17 while she was apparently under the influence in violation of WAC 314-16-150(2). The Board
18 charged her with possessing, consuming, or purchasing alcoholic beverage while apparently under
19 the influence in violation of RCW 66.44.200. The Clark County District Court found that she did
20 not commit that violation. Therefore, and as a matter of law, she did not possess, consume, or
21 purchase alcoholic beverage while she was apparently intoxicated. Therefore, Dodge City cannot
22 be found to have violated WAC 314-16-150(2) because the Board did not prove the existence of
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1 any other person who possessed alcoholic beverage while under the influence. The citation must be
2 dismissed on that basis.

3 V. The Violation Was Not Committed.

4 Dodge City specifically believes that Findings of Fact Nos. 3, 5-28, and Conclusions of Law
5 3, 7, and 9-15.

6
7 The Board's case rests on the testimony of Officers Karic, Magerl, Skoda-Dzubay, and
8 Wilson. Their testimony must be rejected because it is simply not credible.

9 Officers Wilson and Skoda-Dzubay testified that they were on the premises in an
10 undercover capacity and made observations of Ms. Rice for approximately one hour. During the
11 first part of their observations, they testified that they concluded that both Ms. Rice was under the
12 influence and that she was either being served by Dodge City personnel or was in possession of
13 liquor. Each considers "over service" of patrons to be an important public safety matter.
14 Nonetheless, and incredibly, they took no action to alert other Board officers to take action
15 regarding Ms. Rice for a substantial period of time. Furthermore, they did not suggest to any Dodge
16 City employee that Ms. Rice was under the influence and should be cut off. At the hearing, the
17 Board suggested that complaining to a Dodge City employee would jeopardize their "cover."
18 However, Officer Skoda-Dzubay acknowledged that it would not. The failure of these officers to
19 act promptly means that they did not make the observations they claimed to have made. Otherwise,
20 they would have taken steps to deal with what they considered to be a public safety matter in a
21 prompt fashion.
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1 One other matter deserves serious scrutiny. Officer Wilson prepared a report in which he
2 incorrectly reported Dodge City's address. He used Dodge City's address as of September of 2009,
3 4250 E Fourth Plain, Vancouver. He claimed to have prepared this report on a date when Dodge
4 City was still operating at 7201 E 18th Street. The incorrect address on his report shows that he
5 prepared the report later. If he had simply testified that he prepared the report at a later time and
6 made a mistake as to the address, one could be more understanding. However, Officer Wilson
7 continued with his position that he prepared the report several days after the incident and when
8 Dodge City was still located at 4250 E 18th Street. This one factor calls the testimony of this officer
9 into serious question.
10

11 Officers Skoda-Dzubay and Wilson ultimately asked Officers Karic and Magerl to come
12 into the premises and contact Ms. Rice. Officer Karic testified that he observed Ms. Rice pass by
13 two Dodge City employees who did nothing to remove a drink that she was carrying. The officers
14 did not, however, take any steps to identify who these Dodge City employees might although they
15 recognize that identification of witnesses is an important part of their evidence gathering
16 procedures. Finally, Dodge City inquired of its security personnel after the incident to see if any
17 had contacted or observed Ms. Rice. None had.
18

19 The failure of Officers Karic and Magerl to identify the Dodge City security personnel who
20 allegedly were in position to observe Ms. Rice amounts to a failure to preserve evidence. This
21 requires an adverse inference to the Board. *Pier 67, Inc. v. King County*, 89 Wn.2d 379 (1977). In
22 this case, that inference would be that Dodge City personnel were not in a position to observe Ms.
23 Rice on the night in question and did not interact with her or that any alleged intoxication on the
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25

1 part of Ms. Rice was not sufficiently "apparent" to Dodge City personnel at the time when Mr.
2 Magerl and Mr. Karic claimed to have made their observations. If the alleged intoxication is not
3 "apparent" then the violation cannot stand. On this basis, there can be no violation based upon the
4 observations of Officers Magerl and Karic.
5

6 The lack of credibility of Board officers must be contrasted with that of Chris Blevins,
7 Dodge City's doorman on the evening in question. He had been acquainted with Ms. Rice before
8 May 21-22, 2009. He observed her as she exited the premises in the company of Officers Karic and
9 Magerl. Her condition to him appeared to be unremarkable. He believed that the officers were
10 concerned that Ms. Rice might be under the age of twenty-one years. He did not believe that she
11 presented any issue concerning apparent intoxication.
12

13 In short, the Board failed to produce any credible evidence to support the charges that were
14 made here. On that basis, the complaint should be dismissed.

15 VI. The Presiding Officer Did Not Require Proof by Clear and Convincing Evidence.

16 a. Introduction.

17 The Presiding Officer ruled that the proper burden of proof is the preponderance of
18 evidence in Conclusion of Law No. 8 as opposed to the clear and convincing standard. The
19 Presiding Officer also stated that the license "is a privilege and not a vested right" in Conclusion of
20 Law No. 3. Both these rulings were incorrect.
21

22 b. The Clear and Convincing Evidence Standard Is Required.

23 Dodge City's right to due process of law as guaranteed by the Fourteenth
24 Amendment to the United States Constitution and Article 1, Section 3 of the Washington State
25

1 Constitution requires proof by clear and convincing evidence before its license can be suspended.
2 This conclusion necessarily follows from the decisions by the Supreme Court in *Nguyen v.*
3 *Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001) and *Ongom v. Department of Health*,
4 159 Wn.2d 132, 148 P.3d 1029 (2006).

5
6 In *Nguyen v. Department of Health, supra*, the Court held that considerations of
7 due process required that any interference with a physician's license to practice medicine be
8 supported by clear and convincing evidence. In *Ongom v. Department of Health, supra*, it ruled
9 that the convincing evidence standard also applied to proceedings to suspend the license of a
10 nursing assistant. Based upon these two holdings, the Court of Appeals appears to have accepted
11 the notion that the clear and convincing standard applies to all proceedings to suspend or revoke
12 any professional license. *Chandler v. Office of Insurance Commissioner*, 141 Wn.App. 639, 644,
13 173 P.3d 275 (2007) — license of an insurance agent. Division Two of the Court of Appeals had
14 come to that same conclusion prior to the decision in *Ongom v. Department of Health, supra*. *Nims*
15 *v. Board of Professional Engineers and Land Surveyors*, 113 Wn.App. 499, 53 P.3d 52 (2002). In
16 both *Ongom v. Department of Health, supra*, and *Nguyen v. Department of Health, supra*, the Court
17 adopted a three part test set out by the Supreme Court of the United States in *Mathews v. Eldredge*,
18 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), identifying three factors to be employed to
19 determine what burden of proof should be applied. These are the following:

- 22 1. The nature of the property interest;
- 23 2. The risk of an erroneous deprivation of that interest through the
- 24 procedures used; and

1 3. The government's interest in the added fiscal and administrative
2 burden that the increased burden of proof might cause.

3 *Nguyen v. Department of Health, supra*, 144 Wn.2d at 526-7; *Ongom v. Department of Health,*
4 *supra*, 159 Wn.2d at 138.

5 No viable distinction can be made between Dodge City's retail liquor license on the
6 one hand and the physician's license and nursing assistant's license of Dr. Nguyen and Ms. Ongom,
7 respectively. Just as the ability of a professional to practice his or her occupation is valuable as the
8 Court noted in *Ongom v. Department of Health, supra*, and *Nguyen v. Department of Health, supra*,
9 Dodge City's retail liquor license is also valuable. It allows Dodge City to pursue its chosen
10 business. Furthermore, Dodge City has expended considerable effort and capital in its business. It
11 has employees dependent upon it for their livelihood. The value of the license cannot be
12 questioned.
13

14 There is also no distinction as to the second factor — erroneous deprivation of
15 rights. In *Ongom v. Department of Health, supra*, the Court stated that the risk was no different
16 based upon the profession at issue — medical doctor versus nursing assistant. 159 Wn.2d at 140.
17 There can also be no difference in the risk of erroneous deprivation of a license between a nursing
18 assistant on the one hand and a retail liquor licensee on the other.
19

20 The third and final factor is the fiscal burden on the governmental agency that might
21 follow from the increased burden of proof. In *Ongom v. Department of Health, supra*, the Court
22 noted that a change in the burden of proof does not affect the cost of the hearing in anyway. 159
23 Wn.2d at 151. It also questioned whether a lesser burden of proof is in the public interest. It stated
24
25

1 that the public's proper concern lies in obtaining an accurate result and the requirement of clear and
2 convincing evidence advances that goal. *Ongom v. Department of Health, supra*, 159 Wn.2d at
3 141-42.

4
5 The conclusion that the license is "a privilege and not a vested right" as stated in
6 Conclusion of Law No. 3 is belied by RCW 66.08.150. That statute requires a hearing before a
7 license can be suspended in RCW 66.08.150(1). If the license was indeed a privilege that the Board
8 could take away as it saw fit, the legislature would not have required a hearing prior to suspension.

9 The Board is expected to argue that Dodge City's license is a "business" license as
10 opposed to a "professional" license. That distinction is not particularly helpful because it will not
11 stand the scrutiny of the three part test the Court adopted from *Mathews v. Eldredge, supra*. As
12 discussed above, Dodge City's retail liquor license is just as valuable as a professional license; the
13 risk of erroneous deprivation of that license is the same as in the professional license setting; and
14 the heightened burden of proof presents no fiscal burden. In this regard, the Courts of Florida found
15 no distinction between a professional license and a business license. In *Ferris v. Turlington*, 510
16 So.2d 292 (Fla. 1987), the Court held that the clear and convincing evidence standard applied in an
17 action to revoke the license of a teacher. It subsequently held that the same test was applicable in
18 an action to revoke a business license including a retail liquor license. This holding led the Florida
19 Court of Appeals to rule that the clear and convincing evidence standard also applied in a
20 proceeding to suspend a store's license to sell liquor. *Pic N' Save Central Florida, Inc. v.*
21 *Department of Business Regulation*, 601 So.2d 245 (Fla.App. 1992).

1 The Board may seek to rely on the Court's decision in *Brunson v. Pierce County*,
2 149 Wn.App. 855, 205 P.3d 963 (2009). In that case, the Court held that the clear and convincing
3 evidence standard did not have to be applied to proceedings to revoke the license of exotic dancers.
4 In coming to its conclusion, the Court distinguished *Ongom v. Department of Health, supra*, and
5 *Nguyen v. Department of Health, supra*, on the basis that exotic dance licenses do not require any
6 schooling or qualifying examination. It noted that a person could obtain such a license simply by
7 paying a required fee, providing a notarized signature with identifying information, a photograph,
8 fingerprints, social security number, and proof of age. 149 Wn.App. at 866, *fn. 7*. The
9 requirements for Dodge City to obtain a liquor license are hardly that minimal. Any applicant for a
10 retail liquor license must present information concerning criminal history. The Board may conduct
11 a financial investigation to verify the source of the funds used for acquisition and start up of the
12 business together with the applicant's right to the real and personal property upon which the
13 business will be operated. The Board also inspects the proposed premises to see if the applicant is
14 in compliance with all necessary requirements. WAC 314-07-020. A licensee must go to the
15 trouble and expense to acquire, equip, and develop the premises upon which the business will be
16 operated. After the licensee has gone to this expense, the Board conducts an inspection to ensure
17 that they are satisfactory. If they are not, the license can be denied. WAC 314-07-020(8). For a
18 corporation such as Dodge City, all corporate officers or shareholders with more than 10% of the
19 outstanding stock must qualify. WAC 314-07-035. The Board can deny a license if a local law
20 enforcement authority objects for any reason. WAC 314-07-060(2).
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1 The Supreme Court may shortly give guidance on this issue when it decides *Hardee*
2 *v. Department of Social and Health Services*, 152 Wn.App. 48, 215 P.3d 214 (2009), review
3 granted *Hardee v. Department of Social and Health Services*, 168 Wn.2d 1006, 226 P.3d 781
4 (2010). The issue presented in that case is whether the clear and convincing evidence standard
5 applied in proceedings to revoke a home daycare operator's license. The Court of Appeals noted
6 the following in its decision:

8 The license issued to Hardee was in the nature of a site license,
9 obtainable by the licensee's completion of twenty clock hours of basic
10 training approved by the Washington State Training and Registry
11 System.

12 152 Wn.App. at 56. It ruled that the holdings in *Ongom v. Department of Health, supra*, and
13 *Nguyen v. Department of Health, supra*, were limited to professional licenses as opposed to the
14 "site license" at issue in this case. In coming to its decision, the Court did not give any careful
15 analysis of the three part test set out in *Mathews v. Eldredge, supra*. We will have to await the
16 Supreme Court's determination of *Hardee v. Department of Social and Health Services, supra*,
17 which will hopefully give a definitive answer to the issue presented here.

18 Finally, the Board may argue that the clear and convincing standard need not apply
19 because it will seek only a monetary penalty. That argument lacks merit because the Board will
20 seek license suspension for the second violation within two years and cancellation of the license for
21 the fourth violation within two years. WAC 314-29-020. Therefore, each violation amounts to
22 "nail in the coffin" that can lead to ultimately cancellation of a liquor license. It makes no sense
23 only to require clear and convincing evidence in the proceeding where the Board actually seeks
24

1 suspension when its regulation seeks suspension as the sole sanction only when there has been a
2 previous violation. Since each violation can lead to suspension or cancellation, clear and
3 convincing evidence must be required for all violations.
4

5 c. The Facts of This Case Show That This Issue Is Not Merely Academic.

6 This case is involved conflicting testimony on whether Ms. Rice was actually or
7 apparently under the influence of liquor at any particular time on the evening in question and
8 exactly what Dodge City personnel did or saw with respect to Ms. Rice. As indicated above, the
9 testimony from Board witnesses is not credible. The evidence is also in conflict. When there is
10 conflicting evidence, there is a danger of an erroneous determination unless the trier of fact utilizes
11 a higher standard of proof than preponderance of the evidence. That is the case here. For that
12 reason, the clear and convincing evidence standard must be used.
13

14 VII. Penalty.

15 The Presiding Officer determined to recommend a penalty consisting of a five-day
16 suspension or a \$2,500.00 fine. That penalty is not in keeping with the provisions of WAC 314-29-
17 020. The parties agreed at the hearing that the penalty would be \$500.00 if a violation was found.
18 If any penalty is imposed, therefore, it should a \$500.00 fine.
19

20 The Presiding Officer based her decision concerning the penalty on a statement in the
21 Administrative Violation Notice indicating that the penalty should be a five-day suspension or a
22 \$2,500.00 fine. The Presiding Officer noted that this may have been a typographical error. She was
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24
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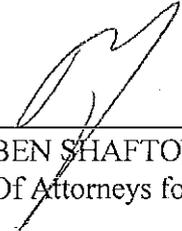
1 correct. This was Dodge City's first violation of this type within a two year period.² The standard
2 penalty for violations under the terms of WAC 314-29-020 for this type of violation is a five-day
3 suspension or a \$500.00 monetary penalty in lieu of that suspension. That is the proper penalty to
4 be assessed here as the parties agreed, as indicated above.
5

6 If the Board decides to uphold the violation, Dodge City will opt for the \$500.00 fine. The
7 Board's order should correct the penalty to conform to the terms of WAC 314-29-020.

8 CONCLUSION

9 For the reasons set out above, the complaint should be dismissed. If the claim is upheld, the
10 penalty should be a \$500.00 fine.

11 DATED this 26 day of April, 2011.

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15 _____
16 BEN SHAFTON, WSB #6280
17 Of Attorneys for Dodge City
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23 ² Dodge City had been cited for a similar violation in LCB No. 22,834, OAH No. 2008-LCB-0030 based on events that
24 occurred on December 29, 2007. A Petition for Review was filed in that matter to the Clark County Superior Court in
25 *Dodge City Saloon, Inc. v. Washington State Liquor Control Board*, No. 10 2 00257 3. The Superior Court entered an
order reversing the Board's decision and ordering that the complaint be dismissed. A copy of that Order is attached to
this Petition. This incident therefore becomes Dodge City's first violation within a two year period.

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 REVERSING
WASHINGTON STATE LIQUOR	)	BOARD'S DECISION
CONTROL BOARD,	)	(DECEMBER 29, 2007
	)	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 deals with the review of the decision of the Washington State Liquor Control Board in LCB22, 834 and OAH No. 2008-LCB-0030. 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 has 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 reversed.

FACTUAL AND PROCEDURAL HISTORY

Dodge City Saloon, Inc., is the holder of a liquor license issued by the Washington State Liquor Control Board. On December 28-29, 2007, petitioner was operating the Dodge City Saloon, located at 7201 NE 18th Street, Vancouver, Washington. Liquor Control Board enforcement officers Almir Karic and Paul Magerl entered the public portion of the saloon during its normal business hours.

Karic observed a patron, Dan Thrasher, leaning against the front counter inside the premises. Thrasher had glassy eyes, dilated pupils, droopy eyelids, and appeared sleepy. He swayed and his head bobbed during his contact with Karic, and he slurred his words. Karic associated these observations with alcohol intoxication.

One of petitioner's employees, Donna Paranteau, was on duty at the entrance to the Dodge City Saloon. She advised Karic that she had also observed Thrasher exhibit signs of intoxication, including staggering and wobbling. Both Paranteau and Karic advised Thrasher that he could not drink at the establishment, and Paranteau was waiting for a security person to mark Thrasher's hand with a pen, to indicate that he was "cut off". Paranteau signaled the nearest employee serving alcohol, Raveena Battan, that Thrasher could not be served.

Before his hand was marked, Thrasher left the front counter, and headed into the bar. He passed Battan's location, contacted another server, and purchased a bottle of beer. Paranteau, Karic and Magerl observed Thrasher purchase the alcohol. Paranteau immediately signaled Battan to intercept Thrasher, and take the beer from him. Battan

dumped the beer in the garbage, 30 to 50 seconds after Thrasher had received it.

Thrasher did not consume any of the beer.

Based on this incident, the Board issued a complaint charging Dodge City Saloon, Inc., with a violation of WAC 314-16-150(2). A hearing was held on the violation before an Administrative Law Judge in January, 2009. The Administrative Law Judge found that Dodge City Saloon, Inc., had violated the regulation, and assessed a penalty of \$500.00 in lieu of license suspension. Dodge City petitioned the Board for review. The Board adopted the decision of the administrative law judge. Dodge City Saloon, Inc., filed this timely appeal.

DECISION

1. WAC 314-16-150(2) provides that “no licensee shall permit any person apparently under the influence of liquor to physically possess liquor on licensed premises.” There was insufficient evidence to establish that Dodge City Saloon, Inc., permitted Thrasher to physically possess liquor. Permit means that the licensee acquiesces in or fails to prevent prohibited activity, or circumstances that would foreseeably lead to prohibited activity. *Oscars, Inc. v. Washington State Liquor Control Board*, 101 Wn. App. 498, 506, 3 Pac 3rd 813 (2000).

Substantial evidence does not support the Board’s conclusion that Dodge City permitted Thrasher to physically possess liquor on its premises. The evidence is to the contrary. Dodge City employees took active steps to keep alcohol out of Thrasher’s possession. Employees advised Thrasher not to consume alcohol on the premises, and sought a security person to mark Thrasher’s hand, to indicate that he was “cut off”. When Thrasher convinced an unwitting employee to sell him a bottle of beer, other

employees immediately noticed and immediately removed the beer from Thrasher's control. The 30 to 50 seconds that Thrasher fleetingly controlled the bottle does not qualify as permissive possession under Washington law.

The petitioner is entitled to relief from the Board's order, pursuant to RCW 34.05.570(4). It is unnecessary to address the other factual and legal disputes raised by the parties in their briefing.

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, 834 and OAH No. 2008-LCB-0030 are reversed.

2. This matter is remanded to the Washington State Liquor Control Board, to dismiss the underlying complaint in the above-referenced cases, and for other proceedings consistent with this opinion.

DATED this 13th day of October, 2010.

/s/ ROBERT A. LEWIS

Judge Robert A. Lewis

MAILED
APR 12 2011
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

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

In the Matter of:

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

Licensee.

License No. 365465

OAH Docket No. 2009-LCB-0058
LCB Case No. 23,541

PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
INITIAL ORDER

PREHEARING MOTIONS

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

On November 18, 2010, the Licensee submitted an Omnibus Motion to Dismiss the Board's Complaint and to Suppress the Board's evidence.

Dismissal of the Complaint. The Licensee has moved for dismissal of the Complaint on the basis that Washington Administrative Code (WAC) 314-16-150(2) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Washington State Constitution because the regulation is impermissibly vague.

Dismissal of the Board's Evidence from an Agent or Law Enforcement Officer. If the Licensee's motion to dismiss was denied, the Licensee also moved for suppression of all testimony from any agent of the Liquor Control Board or other law enforcement officer on the basis that their presence on the premises violated the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution.

II. Collateral Estoppel

On January 18, 2011, the Licensee submitted its Prehearing Brief, and argued, for the first time, that the Board's case should be dismissed on the basis of the affirmative defense of Collateral Estoppel.

DISCUSSION

Omnibus Motion. 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.

Collateral Estoppel. The Amended Notice of Hearing, issued November 2, 2010, informed the parties of the hearing in the above-entitled matter which was scheduled for January 6 and 7, 2011.

In the section of the Amended Notice entitled "**DISPOSITIVE MOTIONS**," the parties were given a schedule for submitting their motions and responses. Motions were due by November 22, 2010. Responses were due by December 10, 2010, and oral arguments were to be heard December 15, 2010 at 8:15 a.m.

The Licensee did not submit their argument on Collateral Estoppel within any of those time frames and the argument presented in the Licensee's Prehearing Brief is deemed untimely.

DECISION SUMMARY

1. The Licensee's Motion to Suppress is **Denied**.
2. The Licensee's Motion to Dismiss is **Denied**.
3. The Licensee's dispositive argument on Collateral Estoppel is **Denied as Untimely**.

STATEMENT OF THE CASE

On May 28, 2009, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice (AVN) alleging that on May 22, 2009, the licensee, Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill, located at 7201 NE 18th Street, Vancouver, Washington, allowed or permitted an apparently intoxicated person to possess and / or consume alcohol on a licensed premises contrary to WAC 314-16-150(2) and assessing as the civil penalty a five (5) day license suspension or a monetary penalty of two thousand five hundred dollars (\$2,500.00) in lieu of suspension.

(The undersigned believes the amount of \$2,500 may be a typographical error, but has noted the figure as stated in the AVN issued on May 28, 2009.)

On November 17, 2009, the Board issued a formal written complaint alleging that "on or about May 22, 2009, the above-named Licensee, or employee(s) thereof, allowed or permitted an apparently intoxicated person to possess and / or consume alcohol on a licensed premises contrary to WAC 314-16-150(2)."

The Licensee filed a timely request for an administrative hearing.

On November 29, 2010, the Board issued an amended complaint alleging that "on or about May 22, 2009, the above-named Licensee, or employee(s) thereof, sold, served, gave, provided or otherwise supplied alcohol to an apparently intoxicated person(s) on a licensed premises contrary to WAC 314-16-150(1).

Or in the alternative:

That on or about May 22, 2009, the above-named Licensee, or employee(s) thereof, allowed or permitted an apparently intoxicated person to possess and / or consume alcohol on a licensed premises contrary to WAC 314-16-150(2)."

The matter came on for hearing pursuant to due and proper notice at Vancouver, Washington, on February 3, 2011, before Gina L. Hale, Assistant Deputy Chief - Administrative Law Judge (ALJ).

The Licensee, Dodge City Saloon, Inc. and owner Ray Kutch, were represented by Ben Shafton, Attorney at Law. Chris Blevins, and Erick Gill, appeared and presented testimony on behalf of the Licensee.

The Liquor Control Board - Enforcement Division (The Board) was represented by Gordon Karg, Assistant Attorney General. Captain Jennifer (Skoda) Dzubay, Officer Almir Karic, Officer Paul Magerl, and Officer John Wilson appeared and presented testimony on behalf of the Board.

Based upon the evidence presented, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. **Licensee.** Ray Kutch is the owner of Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill. In May 2009, the business was operated under license number 365465, at 7201 NE 18th Street, Vancouver, Washington, 98660.

2. **Washington State Liquor Control Board Authority.** The Liquor Control Board (Board) monitors licensees through a continuing program of premises checks and undercover operations. These monitoring processes use plainclothes officers who enter licensed establishments to determine whether a Licensee is serving apparently intoxicated patrons, or allowing apparently intoxicated patrons to possess alcohol in violation of the regulations.

3. **Undercover Operation / Premises Check.** The Licensee's busiest nights of operation are Thursday, Friday, and Saturday night, with the heaviest traffic on Thursday night. The Board's Enforcement officers had received several complaints about the Licensee from local law enforcement and members of the public. The Board chose to investigate how the Licensee operated when it was not obvious that law enforcement was present. The Board chose to use two undercover Enforcement officers from another jurisdiction to assist in the operation. The undercover officers were Captain Jennifer (Skoda) Dzubay and Officer John Wilson. Captain Skoda participated in the undercover operation and completed her report under the name Skoda and the undersigned will refer to her as Captain Skoda to avoid confusion.

4. The date selected for the operation was May 21, 2009. The Board intended to conduct other undercover checks at other establishments at the same time. The Licensee was one of several locations checked that evening.

5. **May 21 -22, 2009, Incident.** At approximately 11:30 p.m., on May 21, 2009, Captain Skoda and Officer Wilson entered the Licensee's premises together. Their cover story was that they were cousins getting together before Officer Wilson was deployed with the military. After entering, they sat at a table and observed the crowd, the layout, and lighting. The lighting was dim, but sufficient, they were able to make out features in the patrons' faces.

6. Once seated, Captain Skoda saw a woman, later identified as Sheena Rice, head toward the bar. On her way towards the bar, Ms. Rice waked into a wall, stumbled, and laughed off the incident. She swayed as she walked and was talking loudly. Captain Skoda noted Ms. Rice's eyes were half closed and watery. Ms. Rice could be overheard telling her friend that she hurt her arm hitting the wall and Captain Skoda could also hear that Ms. Rice's speech was slurred.

7. Captain Skoda joined Ms. Rice at the bar. She saw Ms. Rice pull out a \$5 and heard her ask the bartender what could she get for that amount. Captain Skoda saw the bartender, Leah Skelton, serve Ms. Rice a Rockstar with vodka in a pint glass. Captain Skoda observed Ms. Rice walking away from the bar. She was having difficulty keeping her balance and swaying while standing in place. Captain Skoda suspected that she was under the influence.

8. Captain Skoda suggested to Officer Wilson that Ms. Rice was someone they should keep an eye on that evening as they observed other patrons that night. The two officers engaged Ms. Rice and her friend in conversation. Ms. Rice offered the officers a taste of her drink putting the glass in both their faces. She laughed a lot at things that did not appear to be humorous, and the officers heard that her speech continued to sound slurred. Captain Skoda concluded at that point that Ms. Rice was under the influence.

9. Ms. Rice's friend volunteered that Ms. Rice had a bad day at work and had gotten wasted, and that she not normally like that. Ms. Rice also volunteered to Officer Wilson that she was very drunk.

10. While in conversation with the undercover officers, Ms. Rice stopped a male patron walking past them and began to rub her body against his. The two danced briefly and he walked on. Ms. Rice and her friend then ran onto the dance floor where the officers lost sight of them.

11. The officers next saw Ms. Rice in the beer garden with four other women. A roving server was selling drinks in test tubes; Ms. Rice and the women at the table each consumed one of the drinks. The contents of the test tubes were unknown.

12. The officers saw a male in a Dodge City polo shirt talking with Ms. Rice in the beer garden. They understood him to be an employee of the Licensee, but did not observe him taking any action to indicate Ms. Rice should be cut off. One such action would have been to put a black "X" on the back of her hand.

13. The officers returned to the main area. Approximately 15 minutes later, the saw Ms. Rice and her friend at the bar with Ms. Skelton still on duty as the bartender. Ms. Rice and her friend took a shot of a drink which included raspberry vodka. Two more drinks were served and paid for

by Ms. Rice's friend. Ms. Rice pounded on the bar while she waited, had her eyes half open and swayed as she stood.

14. Captain Skoda shared her observations with Officer Wilson. He then contacted Officer Almir Karic, who was waiting outside with Officer Paul Magerl. The officers entered the premises at approximately 1:05 a.m. on May 22, 2009.

15. **Officer Almir Karic and Officer Paul Magerl.** Once inside, the officers were informed that Ms. Rice and Officer Wilson were near the disk jockey (DJ) booth. The officers also located the owner / Licensee, Ray Kutch, and made their presence known to him.

16. Officers Karic and Magerl observed Ms. Rice for three to five minutes as she was standing near the DJ booth. She had a glass drink in her hand. They also waited to see if any employees would take any steps to cut her off; no action was taken by any staff member.

17. They watched her move and go towards the DJ booth and saw that her eyelids were droopy, that she staggered, and that she swayed as she stood. Officer Karic saw Ms. Rice sit down her drink and go into the DJ booth. He observed her for several minutes and then had an employee get her out. He asked the he be given her drink also. Ms. Rice came out of the DJ booth without her drink and Officer Karic had to retrieve it himself. Officer Karic and Officer Magerl escorted Ms. Rice outside so that they could better hear her and be heard.

18. Officer Magerl took a photograph of Ms. Rice's hands to show that she had not been cut off because there was no "X" marked on either hand. While photographing her, Officer Magerl noticed a strong odor of alcohol. He also saw that Ms. Rice was swaying as she was standing and that she occasionally used a small tree to steady herself. Additionally, her eyes were half closed, glassy, and red, and her speech was slurred. Ms. Rice was very cooperative and gave a voluntary statement.

19. Officer Karic asked the bartender, Ms. Skelton, if she would provide a voluntary statement. She refused and said she wanted to review the surveillance tapes first.

20. **Ms. Rice's Drinks.** Over the course of the evening, the four officers saw Ms. Rice in possession of several different drinks. Some drinks were identified as alcoholic and for others, the contents were unknown. All of the officers reported that Ms. Rice had a strong odor of alcohol on her person.

21. Captain Skoda saw Ms. Rice with four drinks. Two alcoholic drinks, a Rockstar and vodka, and a raspberry vodka, were served by the bartender, Ms. Skelton. The third drink was in a test tube and the contents were unknown. The fourth drink was also served by the bartender, but Captain Skoda was not able to identify what, if any, alcohol was in the drink.

22. Officer Wilson saw Ms. Rice with three drinks. He saw the pint glass and test tube, but the contents were unknown. He saw a male buy a round of shots which the bartender served and Ms. Rice consumed. This drink was alcoholic.

23. Officer Karic and Officer Magerl both saw Ms. Rice with a drink while she was near the DJ booth. The contents of the drink were unknown.

24. **Signs of Apparent Intoxication.** Both law enforcement officials and staff who work in the liquor industry receive training in identifying apparently intoxicated patrons. The signs include, but are not limited to: slurred speech, flushed face, glassy / watery eyes, droopy eyes, talking loudly, odd behavior, lack of coordination / balance when standing or walking, staggering, stumbling, possession of alcohol, and a strong odor of alcohol.

25. Other signs which the officers reported regarding Ms. Rice were dancing with people she did not appear to know or who appeared not to know her, flirting, and laughing at things that did not seem humorous.

26. We find that no sign taken alone necessarily equates to apparent intoxication. In the present case, all four officers, Captain Skoda, Officer Wilson, Officer Karic, and Officer Magerl, noted one or more signs of intoxication as they observed Ms. Rice. Based on the situation taken as a whole and their personal observations, each officer concluded separately that Ms. Rice was an apparently intoxicated person.

27. **Cases Regarding Apparently Intoxicated Patrons.** Captain Skoda, Officer Wilson, Officer Karic, and Officer Magerl each received training in identifying apparently intoxicated patrons. In their careers, Captain Skoda has had over 100 cases, Officer Wilson over 1,000 cases, and Officer Karic over 2,000 cases where they have observed apparently intoxicated individuals. The officers also received training through their respective law enforcement organizations.

28. **Staff Members.** Captain Skoda and Officer Wilson saw Ms. Rice interact twice with the bartender and once with another male employee, and waited to see in any staff member would cut her off by placing an "X" on the back of her hand. No staff member cut off Ms. Rice. Because the officers were waiting to see how the staff would react, they did not break their cover and announce that they were law enforcement officers.

29. Both of the staff members who testified at the hearing indicated their knowledge and training to recognize some of the signs of apparent intoxication: slurred speech, lack of motor skills, and erratic behavior. Neither of them noted any such signs regarding Ms. Rice on the evening at issue. Ms. Rice was a regular customer and was known to have a bubbly personality. The staff member who was working the front door the night of the incident, Chris Blevins, noted that Ms. Rice's behavior and gait were "unremarkable." It was his understanding that when she was escorted out of the premises, there was an identification issue and not an apparently intoxicated issue.

30. Erick Gill was the bar manager at the time of the incident. He had no record of any staff member having interaction with Ms. Rice or Officer Karic.

31. The Licensee's witnesses also noted an understanding of the proper protocol if an apparently intoxicated patron was identified. If the patron came to the premises already intoxicated or "pre-funking," the roaming staff would be alerted to watch that person. Staff would be advised to mark the back of the patron's hand to indicate that they were cut off from further service. If they were

in possession of a drink, it would be removed from them. Additionally, staff might ask the patron's friend to drive them home. Neither witness believed Ms. Rice was intoxicated, nor were they aware that she was being perceived as apparently intoxicated and continuing to be served alcohol.

32. **Administrative Violation Notice.** Based on his personal observations, the reports of Captain Skoda and Officer Wilson, and a review of the Licensee's history, Officer Karic concluded that the issuance of an Administrative Violation Notice (AVN) was appropriate. On May 28, 2009, Officer Karic served the AVN at issue on the owner and Licensee, Ray Kutch.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction in this matter pursuant to Revised Code of Washington (RCW) 66.44, RCW 34.12, RCW 34.05 and Washington Administrative Code (WAC) 10-08, WAC 314-11, and WAC 314-12.

2. As a licensed retail seller of alcohol, the Licensee is subject to the jurisdiction of the Washington State Liquor Control Board. The Licensee is subject to the conditions and restrictions imposed by Title 66 RCW, WAC 314-11, and WAC 314-12. Proceedings involving agency action are adjudicative proceedings under chapter 34.05 RCW. The Board has authority to assign such proceedings to an Administrative Law Judge pursuant to chapter 34.12 RCW. A proper hearing was provided in this case.

3. A license is a privilege and not a vested right. WAC 314-12-010.

4. Under the provisions of WAC 314-11-015(1)(a), liquor licensees are responsible for operation of the licensed premises in compliance with the liquor laws and rules of the board. If the licensee chooses to employ others in the operation of the business, any violations committed, or permitted, by those employees shall be treated by the board as violations committed, or permitted, by the licensee.

5. It is the duty and responsibility of the licensees to control the conduct of employees and patrons on the premises at all times. WAC 314-11-015(3).

6. Under the provisions of RCW 66.44.200(1), the sale of liquor to any person apparently under the influence of liquor is prohibited. Under WAC 314-16-150(1), it is a violation to give, sell and /or supply liquor to an **apparently intoxicated** person on a licensed premises. It is also a violation to allow or to permit an **apparently intoxicated** person to possess alcohol on a licensed premises. WAC 314-16-150(2). Emphasis added.

7. It need not be shown that the individual was actually intoxicated. The purpose of the regulation is to discourage and to prevent licensees and their staff from over-serving individuals. If a person appears intoxicated, the regulation is designed to guard against over-serving that individual.

8. In order for the AVN to be affirmed and the complaint sustained, the Board must show that the alleged violations occurred by a preponderance of the evidence.

9. The undersigned concludes that Ms. Rice was consuming and in possession of alcohol on the Licensee's premises on May 21 - 22, 2009. She was observed obtaining, consuming, and possessing alcoholic beverages on May 21 - 22, 2009 by Board law enforcement officers. As observed by four liquor enforcement officers, Ms. Rice was an apparently intoxicated person.

10. Therefore, the question to be addressed by the undersigned is whether or not Ms. Rice was apparently intoxicated when served by the bartender, Ms. Skelton, and whether or not, as the bartender and licensee's employee, she should have been reasonably expected to draw the same conclusion reached by the officers that Ms. Rice was intoxicated or apparently intoxicated at the time she served her.

11. On May 21 - 22, 2009, four trained and experienced liquor enforcement officers individually observed Ms. Rice exhibiting clear signs that she was intoxicated or apparently intoxicated (e.g., she exhibited slurred speech, pronounced difficulty walking and standing steadily, odor of alcohol, loud behavior, physical contact with a male who did not appear to know her, and her statement that she was drunk).

12. The first observation was by Captain Skoda shortly after she and Officer Wilson entered the premises. Ms. Rice was identified as a person to watch because she appeared intoxicated early on as Captain Skoda observed her being served the Rockstar with vodka by the bartender, Ms. Skelton. Ms. Rice continued to drink throughout the evening. Not all the drinks were clearly identified as alcoholic. However, at the time she received the drinks which were known to be alcoholic, she was continuing to exhibit the behavior of an apparently intoxicated person. At no time did any of the law enforcement witnesses describe Ms. Rice as anything other apparently intoxicated and as exhibiting signs of the same.

13. Based upon careful consideration of the evidence, including the demeanor and motivation of the parties, the reasonableness of the testimony, and the totality of the circumstances presented, the undersigned concludes that the version of events set forth by the Board witnesses is more credible. The undersigned concludes the Board has presented plausible evidence regarding the independent observations of four different officers.

14. Such persuades the undersigned both that Ms. Rice was, in fact, apparently intoxicated on May 21 - 22, 2009, and that the bartender is reasonably expected to have been aware of her apparent intoxication.

15. The undersigned concludes there exists a nexus between Ms. Rice's apparent intoxication and the alleged over service by this Licensee on May 21 - 22, 2009, and that the Board has established by a preponderance of credible evidence, that the Licensee, or an employee(s) thereof, served alcohol to an apparently intoxicated individual on May 21 - 22, 2009, in violation of RCW 66.44.200(1), WAC 314-11-035, and WAC 314-16-150(1) and (2).

From the foregoing Conclusions of Law, NOW THEREFORE, IT IS HEREBY ORDERED THAT

Initial Decision and Order

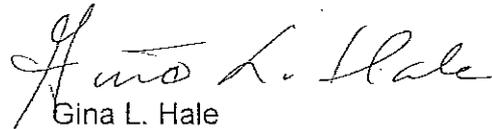
IT IS HEREBY ORDERED, that the Board's Amended Complaint dated November 29, 2010, is **SUSTAINED**.

The license privileges issued to the Licensee, Dodge City Saloon, Inc., d.b.a. Dodge City Bar & Grill, located at 7201 NE 18th Street, Vancouver, Washington, License No. 365465, shall be suspended for a period of five (5) days to commence on a date to be set by the Board in its final order OR the Licensee may pay a monetary penalty of two thousand five-hundred dollars (\$2,500) in lieu of suspension on a date to be determined by the Board in its final order.

(The undersigned believes the amount of \$2,500 may be a typographical error, but has noted the figure as stated in the AVN issued on May 28, 2009. The ultimate penalty will be determined by the Board.)

DATED and mailed at Vancouver, Washington, this 12th day of April, 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.
Dodge City Bar & Grill
7201 NE 18th Street
Vancouver, WA 98660

Licensee 2nd Address:

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

INITIAL ORDER

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OFFICE OF ADMINISTRATIVE HEARINGS

5300 MacArthur Boulevard, Suite 100

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

Licensee's Representative:

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Washington State Liquor Control Board
PO Box 43076
Olympia, WA 98504

INITIAL ORDER

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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

23,541

**Order Granting
Enforcement's Motion
to Extend Filing Time**

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

DODGE CITY SALOON, INC
d/b/a DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661-7325

LICENSEE

LICENSE NO. 365465

LCB NO. 23,541
OAH NO. 2009-LCB-0058

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

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

1. An Initial Order in this matter was issued by Administrative Law Judge Gina L. Hale on April 12, 2011.
2. On April 19, 2011, the Enforcement Division of the Board, through Assistant Attorney General Gordon Karg, filed a Motion to Extend the Time for Filing a Reply to a Petition for Review in this matter.
3. The Licensee has not filed a Petition for Review; however, opposing council has indicated that they intend to file one.
4. Assistant Attorney General Gordon Karg will not be available during the interim of April 22, 2011 through May 3, 2011 in order to reply timely to a Petition for Review.
5. On April 19, 2011, the Licensee's attorney Ben Shafton submitted a reply to the motion indicating no objection.

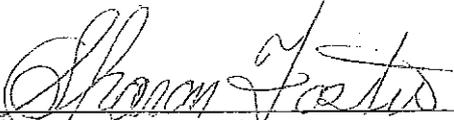
ORDER GRANTING MOTION
LCB NO 23,541
DODGE CITY BAR & GRILL
LICENSE NO 365465

Washington State Liquor Control Board
3000 Pacific Ave, S.E.
P.O. Box 43076
Olympia, WA 98504-3076
Phone: 360-564-1802

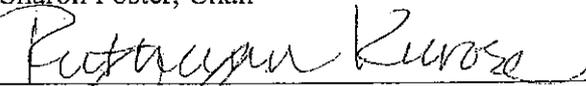
6. The Board finds that the Enforcement Division has made a clear and convincing showing of good cause to extend the date for filing a Reply to a Petition for Review, due to exigent circumstances.

The Board hereby ORDERS that the Enforcement Division's Motion is granted. Enforcement may file a Reply to the Licensee's anticipated Petition for Review within ten days of May 3, 2011.

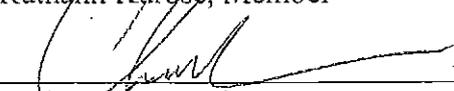
DATED this 26 day of April, 2011.



Sharon Foster, Chair



Ruthann Kurose, Member



Chris Marr, Member

23,541

Enforcement's Reply to
Petition for Review



RECEIVED

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LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

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WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

DODGE CITY SALOON INC., d/b/a
DODGE CITY BAR & GRILL
7201 NE 18TH STREET
VANCOUVER, WA 98661

LICENSEE

LICENSE NO. 365465

OAH NO. 2009-LCB-0058
LCB NO. 23,541

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

The Washington State Liquor Control 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 the Licensee's petition for review (Petition).

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 November 17, 2009, the Board issued a Complaint alleging that on or about May 22, 2009, the Licensee, or an employee(s) thereof, allowed or permitted an apparently intoxicated person to possess and/or consume alcohol on a licensed premises, contrary to WAC 314-16-150(2). The Complaint was amended to allege that on or about May 22, 2009, the above-named Licensee, or an employee(s) thereof, sold, served, gave, provided or otherwise supplied alcohol to an apparently intoxicated person(s) on

1 a licensed premises, contrary to WAC 314-16-150(1), with the "possess or consume" charge
2 in the alternative.

3 The issuance of the Complaint was based upon the reported observations of liquor
4 enforcement officers who were present in both the public portions of the Licensee's premises
5 and outside the premises on May 22, 2009. The Licensee timely requested a hearing on the
6 matter. The Licensee delayed the hearing by approximately ten (10) months, over
7 Enforcement's objections, through various requests and motions to the Tribunal. A hearing
8 was finally held on February 3, 2011. After the hearing, the Tribunal issued an initial order in
9 favor of sustaining the Complaint. *See Proposed Finding of Fact, Conclusion of Law and*
10 *Initial Order*, OAH Docket No. 2009-LCB-0058, LCB Case No. 23, 541 (FOF/COL/Initial
11 Order). The Licensee petitioned the Board to review the final order, Enforcement now
12 responds.

13 II. ARGUMENT IN RESPONSE

14 The Licensee's multiple arguments as well as its continuing belief that the Board has no
15 lawful authority to regulate Dodge City's sale of alcohol, are well known. The Licensee has
16 raised some or all of these arguments in three (3) previous cases. *In The Matter of Dodge City*
17 *Saloon Inc.*, LCB Case No's 22, 834; 22, 849; 23, 670. Additionally, these arguments are
18 essentially the same as those raised by the Licensee in the hearing below, all of which were
19 thoroughly responded to by Enforcement. The majority of these arguments have been found to
20 be without any legal merit by the Administrative Law Judge (ALJ), or this Board, or the Clark
21 County Superior Court, or all three. *Id*; *See also Dodge City Saloon Inc. v. Washington State*
22 *Liquor Control Board*, No. 10-2-00257-3¹. The one exception is the Licensee's collateral
23 estoppel motion, which was dismissed by the ALJ as untimely, and which the Licensee cannot
24 resurrect now. Initial Order at 1-2; Petition at 14-18. As the majority of these issues have

25 _____
26 ¹ A copy of the Clark County Superior Court's order affirming the Board's decision is attached for
reference.

1 already been briefed in the pleading below, and defeated in previous matters by multiple
2 adjudicative bodies, Enforcement's response will incorporate other briefing by reference as
3 necessary in the interest of judicial economy.

4 **A. WAC 314-16-150(2) Is Constitutionally Sound**

5 As it did in its "omnibus motion to dismiss and motion to suppress" the Licensee again
6 argues WAC 314-16-150(2) is "impermissibly vague". Petition at 2. Enforcement responded
7 to the Licensee's assertion in its pleading below: *Enforcement Division's Response to*
8 *Omnibus Motion* (Enf. Resp. to Motion) at 3-5. The Licensee's argument is not substantially
9 different and Enforcement now incorporates by reference its briefing below on this issue.

10 Enforcement notes that the Licensee's argument relies extensively on a Texas state
11 court opinion: *Cotton v. State*, 686 S.W.2d 140 (Tex.Cr.App. 1985). Petition at 3. Case law
12 generated by other state courts cannot act as law or binding authority on Washington courts
13 and tribunals. See *Rickert v. State Public Disclosure Com'n*, 129 Wn. App. 450, 467, 119 P.3d
14 379 (2005) (holding that a Pennsylvania state court opinion was not binding precedent in
15 Washington). Thus, the case law offered by Licensee here is non-binding and cannot act as
16 law or authority. This is especially so given that *Washington State* case law has already
17 provided authority on this issue, authority the Licensee's petition does not disclose to the
18 Board, which cannot be ignored or overturned by extra-jurisdictional opinion.

19 The only other authority the Licensee cites to is *State v. Hurd*, 5 Wn. 2d 308 (1940).
20 Petition at 4. The Licensee suggests this case demonstrates how Washington courts have
21 interpreted "under the influence" as that term appears and is used in WAC 314-16-150. *Id.* at
22 4. *Hurd* is over sixty (60) years old and interprets the language of a criminal statute that no
23 longer exists. See *Hurd*, 5 Wn. 2d at 313. Additionally, the facts in that case dealt with
24 driving while under the influence and has no bearing on liquor laws or rules and certainly has
25 no relation to WAC 314-16-150. *Id.* at 310.

1 In contrast, Washington courts have recently discussed the term “apparently under the
2 influence of liquor” as it is used in RCW 66.44.200 and WAC 314-16-150. Specifically,
3 *Barrett v. Lucky Seven Saloon*, 152 Wn. 2d 259, 96 P.3d 386 (2004) and *Faust v. Albertson*,
4 143 Wn. App. 272, 280, 178 P.3d 358 (2008) *overturned on other grounds by Faust v.*
5 *Albertson*, 167 Wn. 2d 531, 222 P.3d 1208 (2009). The Licensee pointedly ignores these
6 cases, and their holdings on how Washington courts define “apparently under the influence of
7 liquor” as it is used in WAC 314-16-150.

8 To be “apparently under the influence of liquor” means that a person is “seemingly
9 drunk” whether or not they are actually at some particular blood alcohol level. *Faust*, 143 Wn.
10 App. at 280. This is a concept persons of common intelligence can understand and apply. *See*
11 *State v. Maciolek*, 101 Wn. 2d 259, 265, 676 P.2d 996 (1984). Our State Supreme Court in
12 *Barrett* concluded that the term “apparently under the influence of liquor” was an appropriate
13 standard of duty for commercial hosts in a civil-negligence context; and furthermore was an
14 appropriate standard to put before a Trier of Fact. *Barrett* 152 Wn. 2d. at 273-75. Licensee’s
15 proffered “authority” to support its argument is either not binding or not relevant. The term is
16 not vague, has been found to an acceptable standard of culpability in Washington courts, and
17 the Licensee’s motion below was properly dismissed.

18 **B. The Licensee Fails To Demonstrate It Had A Reasonable Expectation Of Privacy**
19 **Or That An Unconstitutional Search Took Place In The Instant Case**

20 Again, the Licensee asserts an unlawful “search” of their premise occurred. The
21 Licensee has raised this same issue, with the same argument, on multiple occasions, before
22 administrative law judges, the Board, and the Clark County Superior Court. It has always
23 failed or been ignored as not relevant. *See In The Matter of Dodge City Saloon Inc.* LCB
24 Case No’s 22, 834; 22, 849; 23, 670; *Dodge City Saloon Inc. v. Washington State Liquor*
25 *Control Board*, No. 10-2-00257-3. Additionally, Enforcement responded to this argument in
26 its pleadings below. *See* Enf. Resp. to Motion at 5-12. Enforcement now incorporates that

1 argument by reference here as its response to this portion of the Licensee's Petition.
2 Enforcement will not expend additional resources, at this stage of proceedings, to further
3 comment on an argument that has failed in front of every adjudicative body it has been
4 presented to. The Licensee's motion was properly dismissed by the ALJ.

5 **C. Licensee's Collateral Estoppel Claim Was Not Properly Raised And Therefore**
6 **Not Part Of The Record.**

7 The Licensee asserts that "Dodge City brought this issue to the attention of the
8 providing officer. She refused to consider it." Petition at 14. This is a misrepresentation of the
9 ALJ's actions and Initial Order in this matter. On the contrary, the ALJ directly considered
10 this issue in its Initial Order. Initial Order at 1-2.

11 The Licensee raised the dispositive issue of collateral estoppel in its "prehearing brief".
12 *See Prehearing Brief*, OAH No. 2009-LCB-0058, and LCB No. 23,541 (Prehearing Brief). As
13 the ALJ held in its Initial Order, the Licensee was directed to make all dispositive motions by
14 November 22, 2010, and it failed to raise this issue prior to that date. Initial Order at 2; *See*
15 *also* RCW 34.05.437(1). As a result, the collateral estoppel issue was dismissed as untimely.
16 Initial Order at 2. Again, the Licensee seeks to ignore the lawful order of the ALJ, and the
17 rules and laws governing these proceedings. This issue is stricken, untimely, and may not be
18 raised again. Enforcement would respectfully request the Board specifically find that this issue
19 has not been raised before it, is stricken from the record, and not an issue subject to judicial
20 review as a result, per RCW 34.05.554.²

21 **D. Enforcement's Witnesses Are Credible And The Licensee Provides No Evidence**
22 **or Supportable Argument to The Contrary**

23 The Licensee argues the entirety of Enforcement's admitted witness testimony "must
24 be rejected because it is simply not credible." Petition at 19. A reviewing board or officer
25 "shall give due regard to the presiding officer's opportunity to observe witnesses" when

26 ² If the Board chooses to consider this issue as having been raised before it, Enforcement now
incorporates by reference its argument set forth in its pleading below in response to the Licensee's petition. *See*
Enforcement Division's Reply to Prehearing Brief, OAH No. 2009-LCB-0058, and LCB No. 23,541 at 6-8.

1 | considering witness credibility. RCW 34.051.464(4). The ALJ in this matter found no issue
2 | with the credibility or veracity of Enforcement's witnesses. *See Generally* FOF 1-27.
3 | Moreover, while the Licensee goes on to make many assertions about the conduct of those
4 | witnesses, the Licensee's argument does not provide a single citation to the record.³ Petition at
5 | 19-20. The Licensee provides nothing to support its version of what testimony was presented.
6 | *Id.* The Licensee's argument must be ignored because it has failed to provide the Board with
7 | any reference to anything that would support its version of reality. *Id.* The Licensee's
8 | argument must be rejected on this basis alone.

9 | Even if it had supported its assertions with evidence, the Licensee's arguments would
10 | fail. The Licensee first argues that two (2) undercover officers in its establishment did not
11 | immediately contact the Licensee's employees, or outside officers, when they observed a
12 | patron who was apparently intoxicated and served alcohol. Petition at 19. The Licensee goes
13 | on to assert that because over-service of patrons is a public safety issue it follows that "the
14 | failure of these officers to act promptly means that they did not make the observations they
15 | claimed to have made." Petition at 19. This conclusion makes no sense. Even if the Licensee
16 | could make a reasonable argument that the officers made a poor public policy decision, which
17 | they did not as they were waiting to see if the Licensee's employees would act to correct the
18 | issue, this does not explain why their testimony is untruthful.⁴ The Licensee provides a
19 | conclusion with no explanation.

20 | The Licensee goes on to assert that Officer Wilson's report, which he admitted he
21 | included the incorrect address for the licensee on, calls into questions his credibility because
22 | the address he included on his report was the location the Licensee moved to in September of

23 | ³ The entire proceeding and the testimony of all witnesses was audio recorded by the ALJ. The Licensee
24 | now seeks to call into the question the veracity and honesty of Washington state certified peace officers, a serious
25 | allegation. The Licensee could have acquired the record and made proper citation. Instead, it accuses public
26 | servants of lying and could not be bothered to support its accusations with any proof.

26 | ⁴ Arguably, had the officers acted immediately, as the Licensee suggests they should have, the Licensee
would have undoubtedly asserted the officers did not provide adequate time for the Licensee's employees to
recognize the problem and correct the violation.

1 2009. Petition at 20. The Licensee's claims are nebulous and unsupported by any specific
2 facts or citation to record. The Licensee fails to establish or cite to any evidence as to exactly
3 when Officer Wilson drafted his report. *Id.* The Licensee fails to establish or cite to any
4 evidence as to exactly when it initially applied for a change of location such that its new
5 address (4250 E. Fourth Plain, Vancouver, WA) would have appeared in Board records
6 creating the possibility of confusion. *Id.* This is particularly so in the case of Officer Wilson
7 as he is not ordinarily assigned to Vancouver, and is not familiar with the city or the location of
8 the Licensee's premises.

9 Finally, the Licensee suggests that because two of Enforcement's witnesses, Officers
10 Karic and Magerl, did not identify two of the Licensee's employee's, it amounts to a "failure to
11 preserve evidence". The Licensee raised this issue in its Prehearing Brief. Prehearing Brief at
12 3-4. Enforcement responded to this argument in its reply to the prehearing brief and now
13 incorporates that argument herein by reference. *See Enforcement Division's Reply to*
14 *Prehearing Brief*, OAH No. 2009-LCB-0058, and LCB No. 23,541 at 3-4. Additionally, we
15 note that the bartender who served alcohol to the apparently intoxicated patron was identified
16 by Enforcement officers. FOF 7, 13, 19. That employee, Leah Skelton, refused to talk with or
17 make a statement to Enforcement officer's on the early morning in question. FOF 19. The
18 Licensee presented witnesses to testify on its behalf, but did not present Ms. Skelton to refute
19 the allegations of what the officer's observed. Initial Order at 3.

20 The Licensee suggests the testimony of Chris Blevins somehow supports its
21 contentions. Petition at 21. It makes this based on Mr. Blevins having briefly seen the
22 apparently intoxicated person exit the establishment in custody. *Id.* However, the Licensee
23 cannot demonstrate that Mr. Blevins observed the apparently intoxicated patron for any length
24 of time, or observed the patron inside the establishment at any time, or observed her carefully
25 or in a close enough proximity to discern her behavior with any certainty. *Id.* The Licensee's
26 credibility arguments are unsupported, illogical, and should be dismissed.

1 **E. The ALJ Applied The Correct Evidentiary Standard**

2 The Licensee argues the ALJ should have applied the “clear and convincing evidence”
3 standard in this matter. Petition at 21. Like many of the Licensee’s other arguments, this
4 issue has been raised before multiple adjudicative bodies, on multiple occasions. *See In The*
5 *Matter of Dodge City Saloon Inc.* LCB Case No’s 22, 834; 22, 849; 23, 670; *Dodge City*
6 *Saloon Inc. v. Washington State Liquor Control Board*, No. 10-2-00257-3. It has always
7 failed. The Licensee’s petition presents no new argument or authority. No Washington case
8 supports the Licensee’s assertion. On the contrary, every relevant Washington case has held
9 that, in the context of permit or licensing proceedings, absent a statutory exception, the clear
10 and convincing standard only applies to professional licenses issued to an individual. *See e.g.*
11 *Nguyen v. Department of Health*, 144 Wn. 2d 516, 29 P.3d 689 (2001); *Ongom v. State Dep’t*
12 *of Health, Office of Prof’l Standards*, 159 Wn. 2d 132, 148 P.3d 1029; *(Bonneville v. Pierce*
13 *County*, 148 Wn. App. 500, 517, 202 P.3d 309 (2008); *Brunson v. Pierce County*, 149 Wn.
14 App. 855, 205 P.3d 963 (2009); *Hardee v. State Dep’t of Social & Health Services*, 152 Wn.
15 App 48, 215 P.3d 214 (2009).

16 Enforcement will not waste the Board’s time, as the Licensee does, by asserting new
17 response to an already defeated argument. Instead, Enforcement directs the Board to
18 Enforcement’s brief filed in Clark County Superior Court, Case No. 10-2-00257-3 and
19 incorporates all relevant argument therein by reference. Additionally, Enforcement directs the
20 Tribunal’s attention to the subsequent order of the Clark County Superior Court specifically
21 rejecting Licensee’s assertions regarding the standard of evidence it now raises before the
22 Board.⁵ The ALJ applied the correct standard of evidence in this matter.

23 ///

24
25
26 ⁵ Both Enforcement’s brief and the Court’s order are attached to the response for ease of references.

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 18th 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 [REDACTED]. As of the date of the compliance check [REDACTED] 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. [REDACTED] 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 [REDACTED] before allowing him to proceed as part of the compliance check. Both the state identification card and the license were in Mr. [REDACTED] wallet. However, Lt. Edmonds only saw the identification card. It was his believe (sic) that [REDACTED] only had one piece of identification on him.

7. [The Board finds] that [REDACTED] 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 [REDACTED] indicated that his date of birth was October 9, 1990, and that he would turn 18 on October 9, 2008. [REDACTED] went to the door of the Dodge City Saloon, for the purpose of attempting to enter. Liquor Control officers observed [REDACTED] 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 [REDACTED] 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 [REDACTED] told him to pay the \$5.00 cover fee inside the establishment, and allowed him to enter. Inside, [REDACTED] 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 [REDACTED] 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 [REDACTED] 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^d 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 13th day of October, 2010.

/s/ ROBERT A. LEWIS

Judge Robert A. Lewis

STATE OF WASHINGTON
CLARK COUNTY SUPERIOR COURT

DODGE CITY SALOON, INC.,

NO. 10-2-00257-3

Petitioner,

RESPONDENT'S BRIEF

v.

WASHINGTON STATE LIQUOR
CONTROL BOARD,

LCB CASE NO. 22, 849
(MAY 16, 2008 VIOLATION)

Respondent.

The Washington State Liquor Control Board (Respondent/Board)¹ by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and GORDON KARG, Assistant Attorney General, now responds to the Petitioner's Brief in the above-captioned matter.

I. STATEMENT OF THE CASE

Dodge City Saloon, Inc. (Petitioner) is the holder of a liquor license issued by the Respondent. Administrative Record for Liquor Control Board Case No. 22, 849 (AR) 501. The Petitioner's entire premise is restricted from allowing any person under the age of twenty one to enter and remain. AR 52-53. On the evening of May 16, 2008 Board enforcement officers, a Board investigative aide, [REDACTED] (IA), and Vancouver police officers engaged in a series of compliance checks. AR 193, 501-02. The checks were part of

¹ Throughout this briefing the Liquor Control Board will be referred to as "Board" when discussing its authority, past action and when identifying its officers and agent. It will be referred to as "Respondent" for procedural purposes within the context of this judicial review action.

1 the Respondent's ongoing lawful duty to monitor licensed establishments by testing their
2 compliance with liquor laws and rules prohibiting minors from entering and purchasing
3 alcohol. AR 50-52,501; *see also* RCW 66.44.010. The Petitioner's establishment was one
4 premise that a compliance check was conducted at. AR 501. The IA participating in this
5 compliance check was seventeen years old at the time and was carrying his vertical
6 Washington State Driver's License and his vertical Washington State Identification card. AR
7 502. Both pieces of identification were issued to the IA, were valid, and clearly indicated he
8 was under the age of twenty one. AR 502.

9 On that evening, the IA, under the direction of Board officers, approached the front
10 door of the Petitioner's establishment. AR 450, 503. At the door the IA encountered
11 Mr. Jeffery Hilker, the Petitioner's employee. AR 450, 503. When requested by Mr. Hilker,
12 the IA presented his valid identification. AR 450, 503. Mr. Hilker examined the license for 15
13 to 25 seconds, put it under a "black light" to test its authenticity, and then allowed the IA to
14 enter the premises. AR 450, 503. The IA paid a five dollar cover charge inside the
15 establishment and another employee stamped his hand. AR 450, 503.² The IA entered the
16 main public area of the licensed premise, purchased alcohol, was never asked to leave and left
17 the premises approximately three minutes later. AR 87, 503.

18 The IA's interaction with Mr. Hilker, his entrance into the Petitioner's premises and his
19 exit approximately three minutes later was observed by both Officers Almir Karic of Liquor
20 Enforcement and Officer Spencer Harris of the Vancouver Police Department, while they were
21

22 ² Much of the Petitioner's recitation of facts includes conjecture, accusation and what frequently seems
23 like argument. For example, the Petitioner states: "according to both Mr. Hilker and Mr. Kutch, [REDACTED]
24 offered money to get into the premises." May 16 Brief at 5. This is clearly intended to insinuate that the IA
25 attempted to bribe the Petitioner's employees to gain entrance. However, this is contrary to the statements of the
26 Petitioner's own employees. Mr. Hilker's statement explicitly notes the IA was trying to give him money for the
cover charge, which the IA ultimately did pay inside. AR 450. It was never recognized as any type of bribe or
attempted bribe by either of the Petitioner's witnesses. AR 172, 450. The Petitioner's recitation of "facts"
improperly seeks to create the illusion of some sinister plot against it or argue about the credibility of certain
witnesses or facts as found, none of which is the subject of debate in this proceeding.

1 parked in a vehicle on a public street. AR 113-14, 198-200. The IA's entrance into the
2 premise was also observed by Officers Diane Peters of Liquor Enforcement and Jeremy Free of
3 the Vancouver Police Department, while both were sitting in the establishment's public service
4 area in an undercover capacity. AR 125-127. The Petitioner was charged administratively
5 with a violation of allowing a person under the age of twenty one to remain in a licensed
6 premise off-limits to persons under the age of twenty one as provided in RCW 66.44.310(1)(a)
7 and WAC 314-11-020(2).³ AR 246.

8 The Petitioner requested a formal hearing. AR 459-406. Prior to hearing, the
9 Petitioner filed a motion to suppress, a motion to dismiss and a motion for continuance—all
10 were denied. AR 500. The Board filed a motion in limine that was withdrawn at hearing. AR
11 500. A formal hearing was conducted on May 14-15, 2009. AR 500. The ALJ issued an
12 Initial Order with finding of facts and conclusions of law on October 9, 2009 in favor of the
13 Respondent. AR 352-360. The Respondent issued its final order on December 29, 2009 which
14 adopted the decision of the ALJ. AR 551-554. The Petitioner then sought Judicial Review of
15 the Respondent's final order in this Court.

16 II. ISSUES

17 Respondent notes that the Petitioner never denies that all elements of the violation have
18 been met by the facts in the record. The Petitioner never substantially argues there is
19 insufficient evidence in the record demonstrating that: the IA was under the age of twenty one
20 at the time of the violation; that the Petitioner's licensed premise has been designated by the
21 Board as off-limits to persons under the age of twenty one; that it is a violation of liquor rule
22 and law to allow a person under the age of twenty one entry into its licensed premise; that an
23
24

25 ³ WAC 314-11-015(1)(a): "Liquor licensees are responsible for the operation of their licensed premises in
26 compliance with the liquor laws and rules of the board (Title 66 RCW and Title 314 WAC). Any violations committed or
permitted by employees will be treated by the board as violations committed or permitted by the licensee."

1 employee allowed the minor to enter and remain in the licensed premise. All elements of the
2 violation have been met and the Petitioner, without doubt, has violated the law.

3 The Petitioner has failed to provide the Court with an outline of the issues its brief
4 presents. As best can be discerned, the issues raised by the Petitioner are:

- 5 1. The testimony of the IA should be suppressed because his entrance into the public
6 portions of the Petitioner's premise inexplicably constitutes an unlawful search.
- 7 2. That RCW 66.44.290 does not allow for liquor enforcement officers to enforce
8 liquor laws, an argument contrary to the plain language and legislative intent of
9 RCW 66.44.290, the statutory scheme as a whole and Washington State case law.
- 10 3. That the ALJ erred in not dismissing the case on the Petitioner's affirmative defense
11 of entrapment even though the entrapment statute it is not legally or factually
12 applicable in the instant matter.
- 13 4. An assertion that the ALJ erred in denying the motion for continuance which the
14 Petitioner does not support with either authority or analysis and fails to demonstrate
15 any error or grounds for remand.
- 16 5. An assertion that the liquor enforcement officers engaged in "outrageous conduct"
17 even though the Petitioner fails to meet its heavy burden under Washington State
18 law in demonstrating such conduct.
- 19 6. An assertion that the ALJ applied an inappropriate evidentiary standard even
20 though Petitioner's argument fails to meet any of the requirements for a higher
21 standard or cite to controlling Washington State case law contrary to its position.

22 III. ARGUMENT IN RESPONSE

23 A. Standard Of Review

24 The Petitioner bears the burden of demonstrating the invalidity of agency action on
25 judicial review. RCW 34.05.570(1)(a). "To reverse an administrative order, a reviewing court
26 must find that the order (1) is based on an error of law; (2) is based on findings not supported

1 by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is
2 beyond the statutory authority; or (6) the agency has engaged in an unlawful procedure or
3 decision making process or has failed to follow a prescribed procedure.” RCW 34.05.570(3);
4 *Tin v. Criminal Justice Training Commission*, 154 Wn. App. 252, 260, 223 P.3d 1221(2009);
5 *see also Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The
6 Petitioner fails to meet its burden and the Respondent’s final order in the matter should be
7 sustained.

8 **B. Respondent Fails To Specify What Evidence It Seeks To Suppress Nor Does It**
9 **Demonstrate Any Viable Legal Or Factual Grounds For Suppression Of Any**
10 **Evidence**

11 While not entirely clear, the Petitioner appears to argue the entrance of the IA on the
12 licensed premise is an unlawful search. Petitioner’s Brief May 16, 2008 Occurrence (May 16
13 Brief) at 21-22. The petitioner does not define what evidence in particular would be
14 suppressed on these grounds. Cryptically, the Petitioner only states: “without evidence from
15 [REDACTED] [the IA], a Board agent, there would be no evidence and the matter would be
16 necessarily dismissed.” *Id.* at 22. It makes little sense to suggest either that all of the IA’s
17 testimony could be suppressed on these grounds, or to argue that all evidence would be
18 suppressed on these grounds given there was testimony from four different law enforcement
19 officers in addition to the IA.

20 Despite the Petitioner’s severe imprecision, it does assert that some type of undefined
21 “search” took place that allegedly violated the Fourth Amendment to the United States
22 Constitution and Article I, Section 7 of the Washington State Constitution. *Id.* The Petitioner
23 bears the burden of proving it had a reasonable expectation of privacy. *State v. Evans*, 159
24 Wn.2d 402, 409, 150 P.3d 105 (2007) (defendant must “exhibit an actual (subjective)
25 expectation of privacy by seeking to preserve something as private”). The Petitioner fails to
26 demonstrate it has a reasonable expectation of privacy in any of the locations Liquor
Enforcement Officers or their agents were present in. The Petitioner fails to demonstrate any

1 law enforcement officer or agent disturbed its private affairs or conducted a search as that term
2 is defined by law.

3 1. **Elements of an unreasonable search claim.**⁴

4 The Fourth Amendment to the Federal constitution provides protection against
5 warrantless searches and seizures. *State v. Carter*, 151 Wn.2d 118, 127, 85 P.3d 887.
6 Establishing that a “search” within the ambit of Fourth Amendment protection occurred
7 requires the party seeking protection demonstrate it has “a justifiable, reasonable, or legitimate
8 expectation of privacy” in the thing or location examined. *Id.*; see also *State v. Crandall*, 39
9 Wn. App. 849, 852, 697 P.2d 250 (1985). Additionally, the party asserting the Fourth
10 Amendment protection must also establish its subjective expectation of privacy. *Carter* 151
11 Wn.2d at 127.

12 Similarly, Article I, Section 7 of the Washington State Constitution provides that “[n]o
13 person shall be disturbed in his private affairs, or his home invaded, without authority of law.”
14 This provision protects a person's home and private affairs from warrantless searches. *Carter*
15 151 Wn.2d at 126; *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). An unlawful
16 search occurs when the State has unreasonably intruded into a person's private affairs. *Carter*
17 151 Wn.2d at 126. A search must be conducted pursuant to a warrant, or else meet one of the
18 exceptions to the warrant requirement. *Carter* 151 Wn.2d at 126; *State v. Myrick*, 102 Wn.2d
19 506, 510-11, 688 P.2d 151 (1984).

20 “The Fourth Amendment’s prohibition against unreasonable searches applies to
21 administrative inspections of private commercial property.” *Seymour v. State Dep’t. of Health,*
22 *Dental Quality Assurance Commission*, 152 Wn. App 156, 164-65, 216 P.3d 1039 (2009);

23 _____
24 ⁴ Much of this argument, and argument regarding the standard of evidence, is identical to that provided in
25 *Respondent’s Brief, LCB Case No. 22, 834, December 29, 2007 violation*. However, because both parties have
26 agreed to write separate briefing for each agency action challenged, and for the sake of completeness and
continuity, the complete analysis is included in both briefs.

1 | *citing Donovan v. Dewey* 452 U.S. 594, 598, 101 S. Ct. 2534, 69 L.Ed.2d 262 (1981); *see also*
2 | *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S. Ct. 1816, 56 L.Ed.2d 305 (1978); *See v. City of*
3 | *Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L.Ed.2d 943 (1967). Article I, Section 7 provides no
4 | greater protection than its federal counterpart in the context of administrative searches. *See*
5 | *Centimark Corp. v. Dep't of Labor & Industries*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005).
6 | Therefore, the protections of Article I, Section 7 apply to administrative searches coextensively
7 | with those of the Fourth Amendment. *Seymour* 152 Wn. App at 165.

8 | **2. The Petitioner fails to demonstrate a search occurred.**

9 | The protections of Article I, Section 7 are triggered only when a governmental official
10 | disturbs a party's private affairs or a person's home is invaded. *Carter* 151 Wn.2d at 126; *see*
11 | *also City of Seattle v. McCready*, 123 Wn.2d 260, 270, 868 P.2d 134 (1994). "The
12 | constitutional right to privacy does not apply to areas in which there is no reasonable
13 | expectation of privacy." *Centimark*, 129 Wn. App. at 375. A party does not have a privacy
14 | interest in "what is voluntarily exposed to the public." *Carter* 151 Wn.2d at 126. The Fourth
15 | Amendment also does not protect what a person knowingly exposes to the public. *Katz v.*
16 | *United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967); *State v. Vriezema*, 62
17 | Wn. App. 437, 441, 814 P.2d 248 (1991). No search occurs when law enforcement officers are
18 | able to detect something while in a place where the general public could also detect the same
19 | thing; when no private affair has been disturbed or invaded, no search has occurred. *Carter*
20 | 151 Wn.2d at 126; *see also State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994) ("what is
21 | voluntarily exposed to the general public and observable without the use of enhancement
22 | devices from an unprotected area is not considered part of a persons private affairs").

23 | An owner or operator of a business has an expectation of privacy in commercial
24 | property. *Seymour* 152 Wn. App at 165; *citing New York v. Burger*, 482 U.S. 691, 699-700,
25 | 107 S. Ct. 2636, 96 L.Ed.2d 601 (1987). But that expectation of privacy in a commercial
26 | property is less significant than the expectation of privacy in an individual's home. *Centimark*

1 129 Wn. App. at 376. Moreover, this expectation of privacy in commercial property does not
2 extend to that which an owner or operator of a business voluntarily exposes to the public. *See*,
3 *See* 387 U.S. at 545.

4 In *See v. City of Seattle*, the appellant challenged the attempted warrantless search of
5 his locked, commercial warehouse.⁵ *Id.* at 540. The search was intended to be part of a
6 routine, city-wide administrative code enforcement inspection conducted by City of Seattle
7 officials. *Id.* The warehouse owner argued that a warrantless inspection of his warehouse
8 would violate his Fourth Amendment rights. *Id.* at 542. The Supreme Court compared its
9 previous holdings in cases involving administrative subpoenas for books and records. *Id.* at
10 544-45. After its analysis, the court held that “administrative entry, without consent, upon the
11 portions of commercial premises *which are not open to the public* may only be compelled
12 through prosecution or physical force within the framework of a warrant procedure” (emphasis
13 added). *Id.* at 545.

14 Following *See*, in *Marshall v. Barlow's Inc.*, 436 U.S. 307, 309-10, 98 S. Ct. 1816, 56
15 L.Ed.2d 305 (1978) the United States Supreme Court considered the Fourth Amendment
16 protections afforded a commercial property where a Occupational Safety and Health Act
17 (OSHA) inspector sought to search the non-public areas of a plumbing and electrical business.
18 In concluding that the non-public areas of the business were subject to Fourth Amendment
19 protection the court also held that “what is observable by the public is observable, without a
20 warrant, by the Government inspector as well.” *Id.* at 315. The Supreme Court reaffirmed this
21 holding several years later in *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S. Ct.
22 1819, 90 L.Ed.2d 226 (1986). In *Dow Chemical* the court considered the Fourth Amendment
23 implications of Environmental Protection Agency inspectors photographing a large chemical
24

25 ⁵ The appellant was arrested and fined for refusing entry into the warehouse. *See* 387 U.S. at 542. The
26 protection sought by the appellant was not exclusion of evidence, but relief from prosecution for his denying the
inspector entry into the warehouse absent a warrant. *Id.*

1 processing plant from the air as part of an administrative inspection. *Id.* at 229-30. The court
2 noted again that while owners of commercial property have an expectation of privacy, with
3 regards to regulatory inspections, any portion of commercial property observable by the public
4 may be observed by a government agent without a warrant. *Id.* at 238.

5 In the instant matter, the Petitioner runs a business it holds open to the public. The IA
6 entered the public portion of the Petitioner's premise. AR 87, 125. The IA presented his own
7 identification, indicating his true age and was allowed into the Petitioner's public service area,
8 along with other members of the public. AR 84-87, 450. Officer Diana Peters and Vancouver
9 Police Officer Jeremy Free both entered the Petitioner's premise in an undercover capacity.⁶
10 A.R. 125-127. No evidence was presented and no facts were found showing the IA or any
11 officer ever entered a portion of the Petitioner's commercial property that was not open to the
12 general public or limited only to employees. The Petitioner never argues, and no evidence in
13 the record supports, any contention of this being a private location open only to those invited.
14 On the contrary, the Petitioner's own representation is that the retail sale of alcohol is its
15 "chosen business", thus making it incumbent that it entices every member of the drinking-age
16 public it can accommodate to enter its premises and purchase alcohol. May 16 Brief at 29.

17 The Petitioner has no reasonable expectation of privacy in the portions of its premise it
18 holds open to the public and those portions of the premise observable by the general public are
19 also observable by Liquor Enforcement Officers and their agents without a warrant. *See*, 387
20 U.S. at 545; *Marshall*, 436 U.S. at 315; *Dow Chemical*, 476 U.S. at 238. Because the officers
21 and the IA in this matter never intruded upon any reasonable privacy interest of the Petitioner,
22 no "search" occurred. *Carter* 151 Wn.2d at 126. The protections of the Fourth Amendment to
23

24
25 ⁶ The Petitioner has failed to identify the testimony of any law enforcement officer as evidence that
26 would be excluded under its unsupportable claim. Undoubtedly, the Petitioner will use its reply brief as an
opportunity to litigate this, even though it would be a separate and new issue raised for the first time on review
and not appropriate for a reply brief.

1 the United States Constitution and Article I, Section 7 of the Washington State Constitution are
2 not triggered. *Id.* There are no grounds to suppress any testimony.

3 **3. Even if the Petitioner's erroneous legal argument had any validity, most of
4 the evidence would still not be excluded.**

5 Petitioner now argues only that the testimony of [REDACTED] should be suppressed and
6 that without his testimony, the Respondent's final order should be set aside. May 16 Brief at
7 22. However, the breadth of testimony sought to be suppressed has little connection to any
8 observations made by the IA while in the licensed premise. Therefore, while suppression of
9 any testimony is not legally supported in this case, even if it was, much of the testimony sought
10 to be excluded is not the fruit of observations made inside the Petitioner's premise.

11 Officer Almir Karic, and Vancouver Police Officer Spencer Harris observed
12 [REDACTED] interact with Mr. Jeffery Hilker and enter the Petitioner's premise while seated in
13 a vehicle on a public street. AR 113-14, 198-200. Both officers also observed [REDACTED]
14 exit the Petitioner's premise from the same location. *Id.* These observations were made from a
15 place open to the public, and had no connection to any asserted search. *Id.* Similarly, any of
16 the IA's actions or observations prior to entering the Petitioner's establishment, for example
17 his interactions with Mr. Hilker at the entrance, would also have been made while he was in an
18 area open to the general public. AR 84-87. The uncontroverted facts, as evidenced by the
19 observation of Officers Karic, Harris, and the IA, all made while located in places open to the
20 public and public view, demonstrates that the IA was allowed to enter a portion of the
21 Petitioner's premise that was off-limits to persons under the age of twenty one. Even if the
22 Petitioner's argument had a scintilla of validity, most of the evidence in the record would not
23 be excluded and would be sufficient to meet every element of the violation charged.⁷

24
25 ⁷ Respondent anticipates that Petitioner's reply will suggest that the IA's presence on the licensed
26 premise was unlawful because he was seventeen years of age at the time. Such an argument still fails to establish
that a *search* took place while the IA and the officers were in clearly public places.

1 4. **Analysis of RCW 66.28.090(1) is unnecessary.**

2 The bulk of the Petitioner's argument on the issue of Board agents entering into the
3 public portions of its business focuses on the alleged constitutional invalidity of
4 RCW 66.28.090(1). *See* Dec. 29 Brief at 7-10. However, this Court need never reach the issue
5 as the statute is not implicated in the facts here, nor does the Respondent need to rely upon
6 RCW 66.28.090(1) for its officers or agents to enter the public portions of the Petitioner's
7 establishment or make observations from public areas outside the Petitioner's establishment.

8 **C. Liquor Enforcement Officers Have Legislative Authority To Enforce All Liquor
 Laws And Rules And RCW 66.44.290 Does Not Limit Or Hinder That Authority**

9 The Petitioner's brief conflates its unlawful search argument with its arguments
10 regarding RCW 66.44.290. However, while the Petitioner's brief is somewhat unclear, it
11 appears to assert that neither Board rule nor RCW 66.44.290 allows for liquor enforcement
12 officers to engage in "compliance checks" or "controlled entry" operations, and additionally,
13 officers violated the statute by employing an investigative aide who was seventeen years old.
14 May 16 Brief at 13-15. These arguments, however, are meaningless as they rely on a faulty
15 legal premise.

16 The Board and its officer's authority to conduct a compliance check is not derived from
17 RCW 66.44.290 nor does it dictate, limit or hinder Board enforcement activities in any way.
18 The plain language of the statute and its legislative history conclusively demonstrate this. The
19 Enforcement Division of the Board is a law enforcement agency with statutory, rule and case
20 law authority to enforce liquor laws and rules using the same methods as any other law
21 enforcement agency. Because the Legislature deliberately avoided including the Board or its
22 officers within the ambit of RCW 66.44.290, the Board's general enforcement authority, rules
23 and relevant case law control here.

24 Furthermore, RCW 66.08.010 provides that the "entire title [RCW 66] shall be deemed
25 an exercise of the police power of the state, for the protection of the welfare, health, peace,
26

1 | morals, and safety of the people of the state, and all its provisions shall be liberally construed
2 | for the accomplishment of that purpose.” The Petitioner’s narrow view of RCW 66.44.290 is
3 | not a “liberal” construction and is ultimately detrimental to the welfare, health and safety of
4 | Washington State citizens.

5 | **1. The language of RCW 66.44.290 does not apply to or control Board**
6 | **enforcement activities.**

7 | When reviewing the meaning of a statute, to determine an agency’s authority or for any
8 | other purpose, the first step is to look to the plain meaning of the statute’s terms. *See Thurston*
9 | *County v. Cooper Point Association*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002). The plain
10 | meaning of a statute should be “discerned from all that the Legislature has said in the statute
11 | and related statutes which disclose legislative intent about the provision in question.” *Cooper*
12 | *Point Association*, 148 Wn.2d at 12, quoting *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*,
13 | 146 Wn.2d 1, 11, 43 P.3d 4 (2002); *Manro*, 125 Wn. App at 173. Any consideration of the
14 | statutory language of RCW 66.44.290 must be done in the context of the entire statute and its
15 | purpose. Finally, a court should construe agency rules in a rational, sensible manner, giving
16 | meaning to the underlying policy and intent and avoid interpretations that are unlikely or
17 | absurd. *See Odyssey Healthcare Operating BLP v. Washington State Dep’t of Health*, 145 Wn.
18 | App. 131, 185 P.3d 652 (2008) quoting *Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d
19 | 931 (2003).

20 | The plain language of RCW 66.44.290 clearly indicates that it only applies to private
21 | in-house controlled purchase programs conducted by liquor licensees. *See* RCW 66.44.290(1)-
22 | (3). The statute speaks only of “controlled purchase programs authorized by the Board” and
23 | “in-house” or “private” controlled purchase programs. *Id.* The only “controlled purchase
24 | programs” requiring Board authorization or rule-making referenced in RCW 66.44.290 are
25 | private, in house programs. *Id.* Neither the Enforcement division of the Board, nor its
26 | authority to enforce all liquor laws or rules is referenced or implicated in the language of the

1 statute. See RCW 66.44.290. Undoubtedly, the Petitioner's reply will attempt to argue that
2 because RCW 66.44.290(1) references "controlled purchase programs" it applies to all Board
3 enforcement activities as well. This argument ignores the controlling law which dictates that
4 the statutory language must be considered in the context of the *entire* statute. *Cooper Point*
5 *Association*, 148 Wn.2d at 12. The Petitioner cannot "cherry-pick" one or two words or
6 phrases and reasonably assert they alone determine the entire purpose of the statute or
7 constrain the entire statutory scheme of RCW 66. Additionally, if separating the language of
8 RCW 66.44.290(1) from the rest of the statute is the Petitioner's basis for arguing it applies to
9 Liquor Enforcement activities, then they must concede that RCW 66.44.290(2) and (3) *do not*
10 apply to enforcement activities of the Board or its officers. The language of those sections
11 clearly discusses only in-house, employer conducted programs.

12 Here, the plain language of RCW 66.44.290 when considered in its entirety refers only
13 to controlled purchase programs conducted by licensees for the purpose of in-house, self
14 regulation—nothing in the entire statutory scheme indicates it was promulgated to limit or
15 hinder the Board, or its officers, in enforcing liquor laws and rules.

16 **a. The Petitioner's argument fails to consider the application of the**
17 **actual language of RCW 66.44.290(1) to the facts of this case**

18 Petitioner also argues that the Board's Officers may not employ or utilize an
19 investigative aide under the age of eighteen. May 16 Brief at 14-15. The Petitioner relies on
20 the following language in RCW 66.44.290(1) in an attempt to support its argument:

21 (1) Every person under the age of twenty-one years who purchases or attempts to
22 purchase liquor shall be guilty of a violation of this title. This section does not apply to
23 persons between the ages of eighteen and twenty-one years who are participating in a
24 controlled purchase program authorized by the liquor control board under rules adopted
25 by the board. Violations occurring under a private, controlled purchase program
26 authorized by the liquor control board may not be used for criminal or administrative
prosecution.

The plain language of the statute refutes the Petitioner's assertion.

1 The above quoted section provides that it is a violation of the law for a person less than
2 twenty one years of age to purchase or attempt to purchase alcohol. RCW 66.44.290(1). The
3 statute goes on to provide two immunities: 1) the statute does not apply to persons younger
4 than twenty one, but between the ages of twenty one and eighteen who participate in controlled
5 purchase programs authorized by the Board and under board rules; 2) violations occurring in a
6 private controlled purchase program may not be used for criminal or administrative
7 prosecution. *Id.*

8 Even if RCW 66.44.290(1) applied to Board enforcement activities, which it does not,
9 the only result under the facts in this case is that [REDACTED] would not be subject to the
10 immunities in the statute. RCW 66.44.290(1). Therefore, if this section of the statute was
11 applied to the facts here in a total legal vacuum, as the Petitioner seems to suggest is
12 appropriate, the only result would be that [REDACTED] could be subject to criminal prosecution
13 for a violation of RCW 66.44.290. Fortunately, other laws exist that relate to this matter.
14 Because [REDACTED] activities were at the direction of law enforcement officers, he would
15 have a complete defense from criminal conviction under the entrapment defense statute at
16 RCW 9A.16.070(1)(a).

17 Nothing about this statute dictates the methods by which Enforcement may, as a law
18 enforcement agency, go about enforcing the laws and rules it has been authorized to enforce by
19 the Legislature and the Board. Even if RCW 66.44.290(1) applied, it would have no effect in
20 the instant case as under these facts the IA would still be immune from prosecution.

21 **2. The legislative history of Amended RCW 66.44.290 demonstrates the law**
22 **was never intended to apply to or control Board enforcement activities.**

23 The Petitioner references the intent and purpose of the legislature to support its
24 argument. May 16 Brief at 12-15. However, the Petitioner fails to cite to any documented
25 legislative history. Contrary to the unsupported assertions of the Petitioner, the *actual*
26

1 legislative history of RCW 66.44.290 clearly shows that the statute was not promulgated with
2 the intent to have it apply to or restrict the Board's liquor enforcement activities.

3 RCW 66.44.290, with its current amendments, was introduced to the legislature as S.B.
4 5604 by Senators Spanel and Gardner. S.B. 5604, 57th Leg., Reg. Sess. (Wash. 2001). Senator
5 Harriet Spanel and the Senate Committee's nonpartisan staff, testifying at the Senate
6 Committee hearing on S.B. 5604, specified that the purpose of the bill's amendments was
7 solely to provide licensees the ability to conduct internal controlled purchase programs. *See*
8 *An Act Relating to Allowing the Liquor Control Board to Authorize Controlled Purchase*
9 *Programs and Amending RCW 66.44.290: Hearing on S.B. 5604 Before the S. Comm. on*
10 *Labor, Commerce and Fin. Inst., 57th Leg. (2001) at 00:29:16 (audio recording of hearing).*⁸
11 Larry Mount, representing a licensee, and Jan Gee representing the Washington State Food
12 Industry also testified at the Senate Committee hearing. *Id.* at 00:30:00 (audio recording of
13 hearing). Both individuals indicated that they supported the bill, not to replace liquor
14 enforcement compliance checks, but to allow licensees to do their own internal checks to
15 increase compliance with the law and assist Liquor Enforcement's efforts. *Id.* at 00:30:02-
16 00:33:01 (audio recording of hearing).

17 The House Committee on Commerce and Labor also held a hearing on S.B. 5604. *See*
18 *An Act Relating to Allowing the Liquor Control Board to Authorize Controlled Purchase*
19 *Programs and Amending RCW 66.44.290: Hearing on S.B. 5604 Before the H. Comm. on*
20 *Commerce and Labor, 57th Leg. (2001).*⁹ The House Committee's nonpartisan staff introduced
21 the bill to the committee pointing out that the Board enforcement officers currently conduct
22 controlled purchases from Licensees as a part of its regulatory compliance program. *Id.* at

23 ⁸ Available at Audio Recording of Senate Com. Hearing 2/26/01, <http://www.tvw.org> (go to "media
24 archives"; then "audio/video archives"; then to "Senate Committees, 2001"; then to Audio Recording of Public
Hearing on February 26, 2001).

25 ⁹ Available at Audio Recording of House Com. Hearing 3/28/01, <http://www.tvw.org> (go to "media
26 archives"; then "audio/video archives"; then to "House Committees, 2001"; then to "Commerce and Labor"; then
to Audio Recording of Public Hearing on March 28, 2001).

1 00:33:43-00:34:05 (audio recording of hearing).¹⁰ Then, Jan Gee, Larry Mount, Joe Daniels
2 representing the United Food and Commercial Workers, Michael Transue representing the
3 Washington Restaurant Association, and Larry Phillips representing the Liquor Control Board,
4 testified at the hearing. *Id.* at 00:33:43-00:45:30 (audio recording of hearing). All individuals
5 indicated that they supported the bill to allow liquor establishments to also conduct their own
6 internal checks to self-regulate the sale of alcohol by their employees. *Id.* at 00:36:52-00:45:30
7 (audio recording of hearing).

8 Subsequently, before final passage in the House of Representatives, the Chair and Vice
9 Chair of the House Committee on Commerce and Labor addressed the members informing
10 them that the bill authorized liquor licensees to run *in-house* “sting” operations to ensure that
11 their employees were not prone to sell liquor to minors. *See An Act Relating to Allowing the*
12 *Liquor Control Board to Authorize Controlled Purchase Programs and Amending*
13 *RCW 66.44.290: Hearing on S.B. 5604 Before the H. Comm. on Commerce and Labor, 57th*
14 *Leg. (2001) at 00:40:33-00:43:56 (audio recording of hearing).*¹¹

15 “The fundamental objective” in construing and interpreting statutes is to ascertain the
16 legislative intent. *Amburn v. Daly*, 81 Wn.2d 241, 501 P.2d 178 (1972); *Williams v. Pierce*
17 *County*, 13 Wn. App. 755, 758, 537 P.2d 856 (1975). Clearly, this legislative history shows
18 that the legislature is aware of the Board’s use of compliance checks. If the legislature had
19 intended for RCW 66.44.290 to pertain to Liquor Enforcement’s use of compliance checks, it
20 would have directly addressed the use of such compliance checks in the statute when it

21
22 ¹⁰ The House nonpartisan staff gives a detailed description of the Board’s current practice, current
23 industry practices, and a summary of how the bill will affect the current law. *See An Act Relating to Allowing the*
24 *Liquor Control Board to Authorize Controlled Purchase Programs and Amending RCW 66.44.290: Hearing on*
25 *S.B. 5604 Before the H. Comm. on Commerce and Labor, 57th Leg. (2001), Available at Audio Recording of*
26 *House Com. Hearing 3/28/01, <http://www.tvw.org> (go to “media archives”; then “audio/video archives”; then to*
“House Committees, 2001”; then to “Commerce and Labor”; then to Audio Recording of Public Hearing on
March 28, 2001 at 00:33:43-00:35:33).

¹¹ *Available at Audio Recording of House Floor Debate 4/12/01 at 9:00 a.m., <http://www.tvw.org> (go to*
“media archives”; then “audio/video archives”; then to “House Floor, 2001”; then to Audio Recording of Floor
Debate on April 12, 2001, at 9:00 a.m.).

1 amended RCW 66.44.290 in 2001. It did not. Instead, it continued to allow the Board to rely
2 on its broad police powers when enforcing provisions of Title 66 RCW and its own rules. See
3 RCW 66.44.010.

4 The plain meaning and legislative history of RCW 66.44.290, proves that the purpose
5 and intent of the law is to allow licensees to conduct their own in-house controlled purchase
6 programs, and the minors they utilize in such programs are immune from prosecution. Nothing
7 suggests this was intended to replace or affect Board compliance checks and the Respondent's
8 authority to conduct compliance checks is not derived from, or related to, RCW 66.44.290.

9 **3. Because RCW 66.44.290 does not apply to liquor enforcement operations**
10 **or its agents, other statutory, rule and case authority to enforce all liquor**
11 **laws and rules controls.**

12 The Petitioner asserts that the Respondent cannot rely on its general enforcement
13 authority because RCW 66.44.290 "sets the rules and limitations for a certain enforcement
14 method." May 16 Brief at 19. The Petitioner fails to explain how RCW 66.44.290 sets forth
15 any "enforcement method". The statute never discusses enforcement methods of any liquor
16 laws and rules, and explicitly states "an in-house controlled purchase program authorized
17 under this section shall be for the purposes of employee training and employer self compliance
18 checks." RCW 66.44.290(3).

19 Where "two statutes dealing with the same subject matter are in apparent conflict"
20 preference is given to the more specific statute. *Etco, Inc. v. Dep't of Labor*, 66 Wn. App. 302,
21 306, 831 P.2d 1133 (1992). Here, though, the language and documented legislative intent of
22 RCW 66.44.290, as set forth in the previous sections, demonstrates the subject matter of the
23 statute is: 1) the criminalizing the purchase or attempted purchase of alcohol by minors and
24 two immunities from that crime; 2) authorization and parameters for *in-house* controlled
25 purchase programs run by employers; and 3) the punishment for a violation the statute. None
26 of this subject matter relates to the authority of the Board's officers to enforce all liquor laws
and rules as provided by RCW 66.44.010(4) and WAC 314-29-005(1). None of the subject

1 matter sets forth an “enforcement method” as asserted by the Petitioner. May 16 Brief at 19.
2 Because RCW 66.44.290 and RCW 66.44.010(4) do not deal with the same subject matter—
3 there cannot be a conflict and the only applicable statute, RCW 66.44.010, controls. *Etco, Inc.*,
4 66 Wn.App. at 306.

5 The Petitioner also argues that RCW 66.44.290 does not authorize “controlled entry
6 programs” and as a result the Board is forbidden from engaging in them. May 16 Brief at 14.
7 This argument is inconsistent with the Petitioner’s own logic. *Id.* at 19. If RCW 66.44.290
8 does not specifically apply to “controlled entry programs” then by the Petitioner’s own
9 reasoning it cannot conflict with the general enforcement authority of RCW 66.44.010 and the
10 general provision controls. *Id.*; *See also Etco, Inc.*, 66 Wn. App. at 306.

11 While the Petitioner now appears to admit it violated the law by selling alcohol to the
12 IA, that violation was not charged or ruled on by the ALJ or the Respondent. AR 246, 505,
13 553. The Petitioner was charged with allowing a minor to enter a restricted premise. AR 246.
14 RCW 66.44.290 does not refer to the issue of a minor entering a restricted premise. The
15 prohibition on allowing a minor to enter and remain in a restricted premise is controlled by
16 RCW 66.44.310(1)(a) and WAC 314-11-020(2). Neither the statute nor rule set out methods
17 for their enforcement. RCW 66.44.310(1)(a); WAC 314-11-020(2).

18 Therefore, the relevant authority to be applied to the facts here rests in the statute which
19 directs the Board and its officers to enforce all liquor laws; the rule which empowers all liquor
20 enforcement officers to enforce all Board rules; and binding case law which explicates the
21 types of investigative methods law enforcement officers, including liquor enforcement officers,
22 may engage in.

23 a. **The Enforcement Division is a law enforcement agency with**
24 **statutory, regulatory and case law authority to enforce all liquor**
laws and rules and engage in regulatory compliance checks.

25 Officers of the Washington State Liquor Control Board are limited purpose law
26 enforcement officers. They have broad police powers to enforce the laws and rules in

1 Washington relating to alcohol. RCW 66.44.010(4); WAC 314-29-005(1). The Board's
2 enforcement division is essential to fulfilling the Board's mandate to regulate and control
3 alcohol sale and distribution in Washington State. See RCW 66.08.050.

4 Both the Legislature and Washington courts have long held that without doubt the
5 Board has broad constitutional and statutory authority to regulate and control the dispensation
6 of alcoholic beverages. RCW 66.08.050; *Cosro Inc.*, 107 Wn.2d at 757; *Anderson, Leech &*
7 *Morris, Inc.*, 89 Wn.2d at 694; *Jow Sin Quan v. Washington State Liquor Control Board*, 69
8 Wn.2d 373, 379, 418 P.2d 424 (1966) (The Supreme Court recognized that the Board
9 possesses broad constitutional and statutory authority to protect the "public health, safety and
10 morals."); *Sukin v. Washington State Liquor Control Board*, 42 Wn. App. 649, 653, 710 P.2d
11 814 (1985) ("The dominion of the Board over the regulation, supervision and licensing of
12 liquor is broad and extensive"); *Corral Inc., v. Washington State Liquor Control Board*, 17
13 Wn. App. 753, 760-761, 566 P.2d 214 (1977).

14 Washington State courts have continually held the equally important ruling that a liquor
15 license is not a vested property right but merely representative of a privilege granted by the
16 state. *Jow Sin Quan*, 69 Wn.2d at 382; *Scottsdale Insurance Co. v. Int'l Protective Agency,*
17 *Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001). As a result, the liquor business has
18 historically been subject to close regulation, supervision and inspection. *Washington Massage*
19 *Foundation v. Nelson*, 87 Wn.2d 948, 951, 558 P.2d 231 (1976), citing *Colonnade Catering*
20 *Co. v. United States*, 397 U.S. 72, 90 S. Ct. 774; 25 L. Ed. 60 (1970); *Jow Sin Quan*, 69 Wn.2d
21 at 382.

22 The Washington State Legislature has specifically authorized the Board to "appoint and
23 employ ... liquor enforcement officers" who "shall have the power, under the supervision of
24 the board, to enforce the penal provisions of this title and the penal laws of this state relating to
25 the manufacture, importation, transportation, possession, distribution, and *sale of liquor.*"
26 RCW 66.44.010(4) (emphasis added). Based upon this express grant of authority, the Board

1 has created the Washington State Liquor Enforcement and Education Division. Furthermore,
2 the Board has also explicitly authorized all enforcement officers to enforce the Board's
3 administrative rules codified in Title 314 WAC. WAC 314-29-005(1).

4 Washington courts have consistently held that law enforcement may utilize undercover
5 operations or deceitful conduct to afford a person with an opportunity to violate the law. *See*
6 *State v. Athan*, 160 Wn.2d 354, 371, 377, 158 P.3d 27 (2007); *State v. Enriquez*, 45 Wn. App.
7 580, 585, 725 P.2d 1384 (1986); *State v. Smith*, 101 Wn.2d 36, 43, 677 P.2d 100 (1984); *State*
8 *v. Swain*, 10 Wn. App. 885, 889, 520 P.2d 950 (1974); *State v. Gray*, 69 Wn.2d 432, 418 P.2d
9 725 (1966). "Public policy allows for some deceitful conduct and violation of criminal laws by
10 the police in order to detect and eliminate criminal activity." *State v. Lively*, 130 Wn.2d 1, 20,
11 921 P.2d 1035 (1996); *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973).

12 Washington Courts have consistently ruled that law enforcement may use a decoy or
13 informer when affording a person with an opportunity to violate the law. *See Emerson*, 10 Wn.
14 App. at 242, 517 P.2d 245; *Gray, supra*; *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d
15 967 (1948); *State v. Littooy*, 52 Wash. 87, 100 Pac. 170 (1909). Specifically, the Court in *Gray*
16 stated "the use of a decoy or informer to present an opportunity for commission of a crime
17 does not constitute entrapment." *Gray*, 69 Wn.2d at 432.

18 In *Playhouse Inc. v. Liquor Control Board*, 35 Wn. App. 539, 667 P.2d 1136 (1983)
19 liquor enforcement officers, in the course of enforcing Board regulations, entered a licensed
20 premise unannounced, and while in an apparently undercover capacity purchased "table
21 dances" with public funds. The officers later charged the licensee with a violation of a liquor
22 Board rule prohibiting "suggestive, lewd and/or obscene conduct on the licensed premise"¹²
23 without first alerting the licensee of the alleged activity. *Id.* at 541. After an administrative
24 hearing, the Board entered a final order sustaining the allegations in the complaint. *Id.* at 540.

25 ¹² The specific rule that was violated in *Playhouse*, WAC 314-16-125, no longer exists in the rule scheme
26 and has been replaced with WAC 314-11-050.

1 On appeal, the court considered whether the officer's conduct was so violative of due process
2 that it should be dismissed. *Playhouse Inc.*, 35 Wn. App. at 542. The Court held that "the use
3 of undercover agents and limited police participation in unlawful enterprises, are not
4 constitutionally prohibited" and affirmed the final order of the Board.¹³ *Id.* The *Playhouse*
5 decision establishes that liquor enforcement officers, like other police officers, may use
6 undercover agents and some unlawful conduct when enforcing liquor rules. *See Id.*

7 Therefore, the authority of the Board's officers to conduct the compliance check at
8 issue in the instant matter was derived through the Board's authorization to employ and use
9 liquor enforcement officers, RCW 66.44.010(4), WAC 314-29-005(1). Neither the Legislature
10 nor the Board has promulgated laws or rules micromanaging how Board officers enforce the
11 law or the investigative methodology they use. As a result, Washington case law explicating
12 lawful police conduct and enforcement techniques control this matter.

13 In conducting this compliance check, Board officers used a decoy to provide an
14 opportunity for the Respondent's employees to either comply or not comply with the law,
15 nothing more. AR 502-503. The Petitioner's employee, Mr. Hilker, was provided with the
16 LA's actual identification which stated his date of birth and stopped him prior to entering the
17 establishment to inspect that identification. AR 450, 502-503. The Petitioner's employee was
18 provided with the opportunity and the information necessary to not violate the law, and
19 proceeded to do so anyway. *Id.* The Petitioner's brief on review has provided no viable or
20 binding legal argument to the contrary. The authority provided above demonstrates that any
21 use of a decoy or any limited deceitful conduct or criminal conduct on the part of Enforcement
22 or its agents in this matter was lawful. The investigation techniques used were not unlawful or
23 violative of due process.

24
25 ¹³ The *Playhouse* court also held that the conduct engaged in by the liquor officers "could not be
26 accurately characterized as 'shocking to the universal sense of justice'." *Playhouse Inc.*, 35 Wn. App. at 542.

1 **4. The Opinion in *State v. Colavecchio, Cavanaugh and Jones* is Not Binding**
2 **Authority and Is Distinguishable.**

3 The Petitioner states that another department of the Clark County Superior Court ruled
4 on this issue. May 16 Brief at 17. In *Colavecchio* the Court upheld a district court's decision
5 to suppress evidence gained as a result of a controlled purchase of alcohol by an investigative
6 aide. May 16 Brief at 17-18. The Petitioner insinuates, without actually asserting, that the
7 *Colavecchio* opinion should control here. May 16 Brief at 18.

8 Unpublished opinions are not a part of Washington's common law, they are not
9 considered as authority in the court of appeal and "they should not be considered in the trial
10 court". *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005); *see also*
11 *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 470, 229 P.3d 735 (2010) (unpublished
12 opinions have no precedential value and the court will not consider them). "Trial judges can
13 be presumed to know that other trial court rulings are not precedential." *Oltman v. Holland*
14 *America Line USA*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008). Furthermore, it is even more
15 fundamental that an unpublished appellate opinion cannot be cited to for authority. GR 14.1;
16 *see also State v. Kirwin*, 165 Wn.2d 818, 831 n.3, 203 P.3d 1044 (2009); *Oltman*, 163 Wn.2d
17 at 248 n.9; *Johnson*, 126 Wn. App. at 519; *State v. Olsson*, 78 Wn. App. 202, 207 n.2, 895 P.2d
18 867 (1995). The opinion in *Colavecchio* is not a published case, and whether it is considered a
19 trial court opinion, or an appellate opinion issued by a Superior Court, it is not binding
20 authority and cannot be relied on by the Petitioner here. The opinion applies and controls only
21 the case that was before it when the Court ruled.

22 More importantly, the *Colavecchio* opinion is factually and legally distinguishable and
23 cannot even act as persuasive authority in the instant matter. First, the issue in *Colavecchio*
24 involved criminal charges arising from purchases of alcohol by a minor investigative aide at
25 three locations. *State v. Colavecchio, Cavanaugh and Jones*, 09-1-00725-9; 09-1-00724-1; 09-
26 1-00723-3 at 2. No purchase of alcohol was charged in the instant matter. Second, the ruling

1 in *Colavecchio* is narrow and minimal. The Court's opinion stated only the following holding
2 on the matter of "controlled purchases":

3 The State relies upon the general enforcement provisions of Title 66 RCW and
4 Enforcement Division Policy #287 - However, the Enforcement Policy was not
5 adopted according to the requirements for adoption of regulations as set forth in
6 RCW 66.08.030, or by statute, in contrast to the specific provisions of RCW
7 66.44.290. This court concurs with the decision of the District Court which
8 found the controlled purchase program utilized in these investigations was not
9 authorized, and therefore in violation of specific provisions regarding minors in
10 the premises and attempting to purchase alcohol.

11 *Colavecchio* at 2.

12 In short, the Court only held that because Division Policy #287 was not promulgated as
13 Board rule it could not be relied on by the State as authorization for the "controlled purchase"
14 at issue in that case. *Id.* In the instant case the Respondent agrees that a policy is not a rule
15 and it does not rely on any Board policy for its authority to use the investigative methods at
16 issue here. As set out above, the Respondent relies upon statutes, rules and case law not
17 evaluated or ruled on in the *Colavecchio* opinion.

18 Respondent anticipates the Petitioner will attempt to argue in its reply that the Court's
19 opinion in *Colavecchio* is much more, but that argument cannot hold up to reality. Every
20 paragraph in the Court's three page opinion, other than the one quoted above, either sets out
21 the district court procedural history, established law or a different legal issue entirely.
22 Respondent also anticipates that the Petitioner will argue the *Colavecchio* Court has already
23 ruled against some of the arguments presented here. However, even if the Petitioner could cite
24 to the case as authority, it could only rely on what the Court *actually held* it cannot conjecture
25 as to what other things the Court considered and attempt to pass it off as authority.

26 The Petitioner cannot cite to the opinion as authority. The Respondent's argument is
materially and substantively different from the holding in the *Colavecchio* opinion. The
Respondent respectfully requests this Court consider the Respondent's argument on its own

1 merits and not be persuaded by an unpublished, narrow opinion, ruling on an argument and
2 facts substantially different from those presented here.

3 **D. Entrapment Is Not Available As An Affirmative Defense In This Matter, And**
4 **Would Not Apply Even If Available**

5 The Petitioner argues that not only was the affirmative defense of entrapment available
6 in a civil administrative adjudication but that the facts in this case support a finding that
7 entrapment occurred and both the ALJ and the Respondent "misinterpreted the law" in not
8 dismissing the case on that defense. May 16 Brief at 22. None of the Petitioner's assertions is
9 supportable in law or fact.

10 RCW 9A.16.070(1) provides that "in any prosecution for a crime" entrapment is a
11 defense. Here, the Petitioner has not been charged with a crime and the instant matter is not a
12 criminal prosecution. Tacitly recognizing these procedural facts, the Petitioner attempts to
13 argue that the entrapment defense may be raised in a civil administrative adjudication based
14 upon case law from extra-jurisdictional courts. May 16 Brief at 22-23. In short, the Petitioner
15 suggests that the opinions of courts from other states, interpreting other laws, should overrule
16 the plain language of the Washington state legislature which has clearly stated entrapment is a
17 defense available only for "prosecution for a crime". May 16 Brief at 22-23; *See also*
18 RCW 9A.16.070(1).

19 Case law generated by other state courts cannot act as law or binding authority on
20 Washington courts and tribunals. *See Rickert v. State Public Disclosure Comm'n*, 129 Wn.
21 App. 450, 467, 119 P.3d 379 (2005) (holding that a Pennsylvania state court opinion was not
22 binding precedent in Washington). Thus, the case law offered by Petitioner here is non-
23 binding and cannot be used authority. Because of this, these opinions cannot be used to
24 interpret Washington State statutes, and most certainly cannot be used to subvert the plain
25 language of a statute.

26 "If a statute is clear on its face, its meaning is to be derived from the plain language of

1 the statute alone.” *State v. M.C.*, 148 Wn. App. 968, 971, 201 P.3d 413 (2009). The plain
2 language of RCW 9A.16.070(1) demonstrates the defense of entrapment is only available in
3 criminal prosecutions, and as a result, is not available to the Petitioner in a civil administrative
4 proceeding in Washington.

5 Even if the affirmative defense of entrapment were available to the Petitioner here, it
6 would bear the burden of proof to establish entrapment occurred. *Lively*, 130 Wn.2d at 14.
7 The Petitioner could not meet its burden under the facts in this case. RCW 9A.16.070(2)
8 provides that: “The defense of entrapment is not established by a showing only that law
9 enforcement officials merely afforded the actor an opportunity to commit a crime.” *See also*,
10 *State v. Swain*, 10 Wn. App 885, 889, 520 P.2d 950 (1974) (“mere solicitation by a police
11 officer or other state agent to commit the crime is not entrapment”).

12 Mr. Hilker, an employee of the Petitioner, was merely afforded an opportunity to
13 commit a violation of the liquor laws and rules.¹⁴ Enforcement’s investigative aide requested
14 only to be allowed in the premises, and provided his own identification, which demonstrated
15 his true age. AR 450, 502-503. At that point, it was entirely up to the Petitioner’s employee,
16 not the investigative aide or the Enforcement officers on scene, as to whether he was going to
17 allow a minor to enter the licensed premise.

18 The opportunity to violate the law provided to Mr. Hilker was no different then if a
19 peace officer provides an opportunity for an individual to sell or deliver illicit drugs or engage
20 in any other illegal activity. *See e.g. State v. Trujillo*, 75 Wn. App. 913, 919, 883 P.2d 320
21 (1994) (police informant merely afforded defendant an opportunity deliver cocaine, which was
22 not entrapment despite the defendant’s reluctance to commit the crime). Mr. Hilker was
23 afforded an opportunity to violate the law and when provided that opportunity he did by
24

25 ¹⁴ Interestingly, the Petitioner claims “Dodge City” was entrapped. May 18 Brief at 22. The Petitioner
26 provides no explanation, no case law, indicating how a *corporation* can be entrapped in a non-criminal, regulatory
inspection.

1 allowing the investigative aide into the Petitioner's establishment. AR 450, 502-503.
2 Additionally, nothing establishes that Mr. Hilker was reluctant to allow [REDACTED] into the
3 establishment. *Id.* All the evidence in the record establishes that under the same
4 circumstances had the IA been acting entirely on his own, unrelated to any Board enforcement
5 operation, the Petitioner's employees would still have allowed him to enter the establishment
6 and purchase alcohol. AR 86-87, 113-14, 198-200, 450, 502-503. Entrapment is not a defense
7 available to the Petitioner in this matter and if it was the Petitioner cannot meet their burden of
8 proof necessary to establish entrapment occurred.

9 **E. Mr. Hilker's Refusal To Cooperate With The Petitioner Was Not Grounds For A
10 Continuance And His Statement Was Already Admitted As Evidence**

11 The Petitioner asserts the ALJ erred in denying a motion for continuance of the
12 administrative hearing below. May 16 Brief at 24. While not entirely clear, it appears the
13 Petitioner asserts the actions of the ALJ violated RCW 34.05.449(2) by preventing Mr. Hilker
14 from testifying on behalf of the Petitioner. The Petitioner's argument is not supported by any
15 substantial law, citation to the record, or actual analysis. The Petitioner fails to fully articulate
16 what its argument was in the motion below or why the denial of that motion was in error.

17 Now, the Petitioner states that "Mr. Hilker, quite understandably declined to testify so
18 as to preserve his privilege against self incrimination." May 16 Brief at 24. The Petitioner had
19 the authority to subpoena Mr. Hilker to testify at the hearing and to seek enforcement of the
20 subpoena if necessary. RCW 34.05.446(1); WAC 10-08-120(1). The ALJ's denial of the
21 motion for continuance had nothing to do with Mr. Hilker not testifying; the Petitioner failed to
22 exercise their right to subpoena a witness and now seeks to claim it was the error of another.

23 The Fifth Amendment privilege permits a person to refuse to testify at a criminal trial,
24 or to refuse to answer official questions asked in any other proceeding, where the answer might
25 tend to incriminate him or her in future criminal proceedings. *King v. Olympic Pipeline*, 104
26 Wn. App. 338, 349, 16 P.3d 45 (2000). Importantly, Washington courts have held that:

1 There is no blanket Fifth Amendment right to refuse to answer questions based
2 on an assertion that any and all questions might tend to be incriminatory. The
3 privilege must be claimed as to each question and the matter submitted to the
4 court for its determination as to the validity of each claim.

5 *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981). Furthermore, knowing and
6 voluntary statements, of any kind, made to law enforcement agents are not barred by the Fifth
7 Amendment privilege. See *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L.Ed.2d
8 694 (1966). Mr. Hilker's Fifth Amendment privilege would not have provide him a right to
9 simply refuse to answer any question asked in the course of the proceedings below. *Arndt*, 28
10 Wn. App. at 532. Had the Petitioner subpoenaed Mr. Hilker, he would still have been required
11 to appear and testify at the hearing.

12 Mr. Hilker's Fifth Amendment privilege would only extend to answering questions
13 where the answer might incriminate him criminally. *Olympic Pipeline*, 104 Wn. App. at 349.
14 Mr. Hilker had already made a knowing, voluntary, non-incriminating statement to an
15 enforcement officer that was admitted at hearing without objection from either party. AR 450.
16 The statement is not protected under the Fifth Amendment privilege. Everything the Petitioner
17 now claims Mr. Hilker would have testified to that was so vital to its case is either contained in
18 his sworn statement which became part of the evidentiary record, or is non-incriminating and
19 he would have been obliged to testify to it at hearing. See May 16 Brief at 7, 24. The
20 Petitioner claims that "Jeffrey Hilker was Dodge City's most important witness". *Id.* at 24.
21 But this claim is disingenuous as the Petitioner knew or should have known that it was free to
22 subpoena Mr. Hilker and he could have provided non-incriminating testimony.

23 Instead of subpoenaing Mr. Hilker, the Petitioner made what appears to be a strategic
24 decision to seek a potentially permanent stay of proceedings. The motion never expressed
25 when Mr. Hilker would be willing to testify, provided no time frame for how long the stay
26 would be and was effectively indefinite. AR 409-411. Moreover, the Respondent would have
been severely prejudiced by even a modest-length stay as one of its primary witnesses, the IA,

1 would have been physically unavailable as of July 2009, approximately two months after the
2 scheduled hearing date. AR 419. The Petitioner cannot show the ALJ erred, or the Board
3 erred in not remanding the case, when it could have subpoenaed Mr. Hilker but chose not to,
4 failed to set out a reasonable time frame for the stay requested, and the Respondent would have
5 been severely prejudiced by a stay any long than approximately two months.

6 Additionally, the Petitioner's brief states: "the Board's tactic in prosecuting Mr. Hilker
7 is quite troubling. It had the effect of denying his testimony to Dodge City." May 16 Brief at
8 25. This claim is inflammatory and false. The Board did not prosecute Mr. Hilker; its officer
9 cited him and the prosecution of that criminal citation was entirely up to the Clark County
10 Prosecutor and outside the control of the Board. See AR 451. Moreover, as noted above,
11 Mr. Hilker's citation in no way prevented his being subpoenaed to testify in support of the
12 Petitioner. The Petitioner insinuates the Board conspired to deprive it of a witness—it is a
13 baseless accusation.

14 The Petitioner did not bother to move for a stay on this basis until ten days prior to the
15 scheduled hearing. AR 411. Mr. Hilker's citation was issued almost a full year prior to the
16 administrative hearing. AR 411. Had the Petitioner thought Mr. Hilker's situation was a
17 serious issue it could have raised it in a timely manner. Instead it chose not to exercise its
18 subpoena rights, wait until the last minute to raise an unsupportable motion, and now claims its
19 failures are the wrong-doing of others. The Petitioner's arguments should be ignored.

20 **F. The Petitioner Fails To Demonstrate "Outrageous Conduct" On The Part Of The**
21 **Respondents' Officers**

22 The Petitioner also argues the actions of the Board officers in this matter were
23 sufficiently outrageous to constitute a violation of its Due Process rights and as a result, the
24 Board's final order must be dismissed. May 16 Brief at 25. To support this contention
25 Petitioner relies on a single Washington Supreme Court opinion: *State v. Lively*, 130 Wn.2d 1,
26 921 P.2d 1035 (1996). In doing so, the Petitioner has failed to carefully apply *Lively* or

1 compare the facts in that case to this matter. The Board officer's conduct in this matter does
2 not even approach meeting the stringent standards of "outrageousness" set forth in *Lively*.

3 An "outrageous conduct" argument is based upon the principle that the conduct of law
4 enforcement officers and their agents may be "so outrageous that due process principles would
5 absolutely bar the government from invoking judicial processes to obtain a conviction."
6 *Lively*, 130 Wn.2d at 19, 921 P.2d 1035; quoting *United States v. Russell*, 411 U.S. 423, 431-
7 32, 93 S. Ct. 1637, 1643, 36 L.Ed.2d 366 (1973); see also *Playhouse Inc.*, 35 Wn. App. at 542.
8 In determining whether police conduct violates due process a court must conclude that the
9 conduct is "so shocking that it violates fundamental fairness." *Lively*, 130 Wn.2d at 19; *State*
10 *v. Myers*, 102 Wn.2d 548, 551, 689 P.2d 38 (1984). The Supreme Court in *Lively* held that "a
11 due process claim based on outrageous conduct requires more than a mere demonstration of
12 flagrant police conduct." *Lively*, 130 Wn.2d at 20. The Court also held that a dismissal based
13 on outrageous conduct must be reserved for only the most egregious circumstances and "it is
14 not to be invoked each time the government acts deceptively." *Id.*

15 The *Lively* case is the only instance where the Washington Supreme Court dismissed a
16 conviction based upon the "outrageous conduct" principle. In *Lively* a police informant
17 attended Alcoholics Anonymous (AA) meetings. *Id.* at 26. The informant befriended a woman
18 who was a recovering addict, developed a live-in relationship with her, and convinced her,
19 despite her apparent reluctance, to arrange drug sales to him through her former underworld
20 contacts. *Id.* The Washington Supreme Court found that having police agents attend AA
21 meetings to lure recovering drug-addicts to commit illegal acts was repugnant to a sense of
22 justice. *Id.*

23 In *Lively*, the recovering drug-addict contacted by the police informant would have
24 likely never engaged in illegal drug sales or trafficking but for the intervention of the police
25 agent. *Lively*, 130 Wn.2d at 26. The same cannot be said in the instant matter. All evidence in
26 the record indicates that had the IA engaged in the exact same conduct entirely on his own, the

1 Petitioner's employees would still have unhesitatingly allowed him to enter and purchase
2 alcohol. AR 86-87, 113-14, 126-127, 198-200, 450, 502-503. The record demonstrates that
3 this would have been the result whether or not there was any Board involvement.

4 No violation of law committed by the Petitioner's employees was instigated or
5 controlled by Enforcement. The Petitioner's employee was given an opportunity to comply or
6 not comply with the law. Here, the employee was free to refuse admittance to the IA on the
7 grounds he was a person under the age of twenty-one, instead he chose to violate the law by
8 allowing him to enter the Petitioner's premise. *Id.* There is no evidence proving the employee
9 was coerced, bribed, or deceived.¹⁵ *Id.* The Board's officer's used a decoy to create an
10 opportunity for the Petitioner's employee to violate the law, all valid enforcement actions
11 which cannot be considered outrageous under the standards of *Lively*. *See Lively*, 130 Wn.2d
12 at 20; *see also Playhouse Inc.*, 35 Wn. App. at 542 (where undercover liquor enforcement
13 officers purchasing "table dances" with public funds was not "shocking to the universal sense
14 of justice".)

15 The Petitioner also suggests the conduct of Enforcement is outrageous because the
16 investigative aide violated various laws, and is now exposed to criminal prosecution for
17 participating in the compliance check. May 16 Brief at 26-27. Here, the Board's officers and
18 agent acted in the furtherance of the Board's established duty to test and investigate the
19 Petitioner's compliance with liquor laws and rules. *See* RCW 66.44.010(4); WAC 314-29-
20 005(1); *Playhouse Inc.*, 35 Wn. App. at 542. As an agent of the Board, under the direction and
21 supervision of the Board officers, the IA is protected from prosecution under the legal principle
22 that law enforcement may engage in limited criminal acts to detect and eliminate violations of
23 the law. *See Lively*, 130 Wn.2d at 20; *Playhouse Inc.*, 35 Wn. App. at 340. Even if that

24 ¹⁵ The Petitioner has necessarily conceded that the investigative aide was under the age of twenty-one,
25 and presented some type of valid identification, at the time he was allowed to enter the premises. Because there
26 has been a finding of fact that the IA displayed his own, true identification, Petitioner cannot rely on any assertion
of false identification to support its argument that a deception took place.

1 reasoning did not apply to the IA here, he would still have a complete statutory defense from
2 criminal liability because he was directed to commit these acts by law enforcement officers.
3 See RCW 9A.16.070(1)(a). The Petitioner's umbrage at the actions and youth of the IA is
4 baseless because there is no realistic possibility of his prosecution under the law.

5 Any criminal conduct here was minimal, and conducted in the furtherance of the Board
6 officer's lawful duty. By the very standards set forth in *Lively*, this conduct cannot rise to the
7 level of "outrageousness." See *Lively*, 130 Wn.2d at 19-20.

8 **G. The Administrative Law Judge Applied The Burden Of Proof Required Under**
9 **Washington State Law**

10 The Petitioner incorrectly asserts that the ALJ applied the wrong standard of evidence
11 in the administrative proceeding below. May 16 Brief at 28. In making its assertion, the
12 Petitioner relies primarily on the reasoning and holdings set out in *Nguyen v. Department of*
13 *Health*, 144 Wn.2d 516, 29 P.3d 689 (2001) and *Ongom v. State Dep't of Health, Office of*
14 *Prof'l Standards*, 159 Wn.2d 132, 148 P.3d 1029. The Petitioner recognizes that under
15 *Nugyen* and *Ongom* "the clear and convincing standard" applies only to "proceedings
16 involving suspension or revocation of a professional license." May 16 Brief at 29. The
17 Petitioner incorrectly argues that there is no distinction between a "professional license" and a
18 "business license". *Id.* at 29. The Petitioner now asks this Court to ignore Washington case
19 law contrary to its assertions and find that a liquor license is equivalent to a "professional
20 license" when no fact or law supports such an outcome.

21 **1. Liquor licenses are distinctly different from professional licenses.**

22 In Washington State, the preponderance of evidence standard used in civil proceedings
23 is applied in administrative hearings unless otherwise mandated by statute or due process
24 principles. *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); see
25 also *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 518, 173 P.3d 259 (2007) (noting that civil
26

1 driver's license suspension proceedings have a lower burden of proof than the parallel criminal
2 proceeding); *Bonneville v. Pierce County*, 148 Wn. App. 500, 517, 202 P.3d 309 (2008)
3 (holding that "because courts generally apply the preponderance standard in all civil matters"
4 an administrative hearing examiner's use of the preponderance standard satisfied due process).
5 A specific, non-statutory¹⁶, exception to the general rule in *Thompson* was created by the
6 Washington State Supreme in *Nguyen* and *Ongom* for professional license disciplinary
7 proceedings. See *Nguyen*, 144 Wn.2d at 524, 29 P.3d 689; *Ongom v. Dep't of Health*, 159
8 Wn.2d 132, 148 P.3d 1029. In creating this exception to the general rule, the court established
9 only that professional license revocation proceedings are held under a clear and convincing
10 evidence standard. *Nguyen*, 144 Wn.2d at 534, 29 P.3d 689 ("the constitutional minimum
11 standard of proof in a *professional* disciplinary proceeding for a medical doctor must be
12 something more than a mere preponderance" emphasis added); *Ongom*, 159 Wn.2d at 139;
13 142, 148 P.3d 1029 ("The minimum constitutional standard of proof in a *professional*
14 disciplinary hearing is clear and convincing evidence" emphasis added).

15 The Petitioner argues that there is no distinction between a professional license and a
16 liquor license. May 16 Brief at 29. Others have made similar arguments in challenging
17 rulings resulting from proceedings involving non-professional licenses—all have failed.

18 In *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (2009) erotic dancers
19 holding a license required by Pierce County ordinance appealed their suspension of said
20 licenses after an administrative hearing. The dancers argued that their due process rights were
21 violated when the hearing examiner applied the preponderance of the evidence standard in the
22 proceeding below. *Id.* at 862. The dancers, just as the Petitioner in the instant matter, relied on
23 both *Nguyen* and *Ongom* to support their argument. *Id.* at 862-63. The Washington State
24 Court of Appeals, Division Two, noted that the *Nguyen* and *Ongom* opinions only applied to

25 ¹⁶ The Petitioner never argues that any statute mandates a different evidentiary burden in liquor license
26 administrative hearings.

1 | the revocation or suspension of professional licenses. *Id.* at 865. The Court held that
2 | RCW 18.118.020 established what constitutes a “professional license” in Washington State:

3 | ‘Professional license’ means an individual, nontransferable authorization to
4 | carry on an activity based on qualifications which include: (a) Graduation from
5 | an accredited or approved program, and (b) acceptable performance on a
6 | qualifying examination or series of examinations.

6 | *Brunson*, 149 Wn. App. at 865. The Court held that because no Washington court had
7 | extended the same due process guarantees to erotic dance permit holders; and because the
8 | license required no schooling or qualifying examination, the dancers were not holders of a
9 | professional license and their argument failed. *Id.* at 866.

10 | Similarly, in *Hardee v. State Dep’t of Social & Health Services*, 152 Wn. App 48, 215
11 | P.3d 214 (2009)¹⁷ a home daycare operator argued that due process required the review of a
12 | home child daycare license revocation be conducted under the clear and convincing standard.
13 | Just as the Petitioner does now, the home daycare operator in *Hardee* relied on *Ongom* and
14 | *Ngyuen* to support its argument. *Id.* at 55. The Court of Appeals, noted that neither *Ongom*
15 | nor *Ngyuen* compelled the application of clear and convincing standard to home daycare
16 | license review, because those cases both involved the professional license of a particular
17 | individual. *Id.* at 56. Citing to *Brunson*, the Court held that the daycare license was more in
18 | the nature of an occupational license than a professional license, and therefore the application
19 | of the preponderance standard in the proceeding below was appropriate. *Id.* at 56-57.

20 | Furthermore, in *Bonneville*, 148 Wn. App. 500, 202 P.3d 309 the appellant held a
21 | conditional use permit, issued by Pierce County, to conduct a business out of his home. *Id.* at
22 | 504. County investigators alleged the permit holder violated several use permit conditions. *Id.*
23 | at 505-06. After an administrative hearing, the hearing examiner concluded, by a
24 |

25 | ¹⁷ *Hardee* has been accepted for review by the Washington State Supreme Court and will most likely be
26 | argued in the Fall of 2010.

1 preponderance of the evidence, that the permit holder had violated three conditions of the use
2 permit and subsequently revoked the permit. *Id.* at 506.

3 On appeal, the appellant contended that the County had violated his Due Process rights
4 when the hearing officer failed to apply the clear, cogent and convincing standard of proof.
5 *See Bonneville*, 148 Wn. App. at 515. In doing so, the appellant relied, in part on *Nguyen*. *Id.*
6 at 516. Division Two of the Washington State Court of Appeals held that the reliance was
7 misplaced as the interest at issue in *Nguyen* was far more significant a property interest,
8 namely, a professional medical license. *Id.* The Court went on to note that the preponderance
9 standard satisfied due process “when the interest at stake was a 14-day involuntary civil
10 commitment.” *Id.* at 517, citing *In re Det. of LaBelle*, 107 Wn.2d 196, 220-21, 728 P.2d 138
11 (1986). The Court held that “if the preponderance standard met due process for a 14-day
12 involuntary civil commitment . . . it surely meets due process for revoking a conditional land
13 use permit.” *Id.* The Court concluded by reasserting the general rule: that the preponderance
14 standard generally applies to all civil matters, including administrative proceedings. *Id.*

15 Contrary to the Petitioner’s argument, Washington courts have established a stark
16 distinction between a professional license and other types of licenses issued by the state. A
17 liquor license does not convey a legal right to carry on an activity based upon graduation from
18 an accredited program and a qualifying exam; rather, it conveys only the privilege to sell
19 alcohol out of a licensed business. RCW 66.24.010. Liquor licenses are issued to business
20 entities, not individuals. RCW 66.24.010; WAC 314-07-010(4); WAC 314-07-035. A liquor
21 license is transferrable when ownership of the licensed business entity changes. WAC 314-07-
22 080. In short, a liquor license fails to meet any of the criteria established by the *Brunson* court
23 for what qualifies as a “professional license.” *Id.* at 865-66. Accordingly, neither *Nguyen* nor
24 *Ongom* applies to administrative proceedings involving liquor licenses.

1 2. **The clear and convincing evidence standard applies only to individual**
2 **interests where more is at stake than a “mere monetary interest”**

3 The Petitioner also attempts to argue the Washington State Supreme Court’s analysis in
4 *Ngyuen* and *Ongom* establishes “there is no distinction to be made” between a professional
5 license and its liquor license.¹⁸ The Respondent has demonstrated above that Washington
6 courts have made a clear distinction between a professional license and other types of state
7 issued licenses. However, even if such clear, binding, authority did not exist, Petitioner’s
8 specific application of the *Ngyuen* and *Ongom* analysis to the instant matter still fails.

9 The intermediate clear, cogent and convincing evidence standard is only imposed when
10 some particularly important individual interest is at stake in a civil matter. *See Addington v.*
11 *Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *Nguyen*, 144 Wn.2d at 524-
12 25, 29 P.3d 689. This intermediate standard is generally confined to a narrow category of
13 adjudications such as the indefinite civil commitment of an individual or the revocation of an
14 individual’s professional license. *See Addington*, 441 U.S. at 424; *Nguyen*, 144 Wn.2d at 524,
15 29 P.3d 689; *Ongom*, 159 Wn.2d at 139; 142, 148 P.3d 1029. In *Nguyen* the Washington State
16 Supreme Court specifically held that due process requires the clear and convincing standard in
17 civil adjudications only when necessary “to protect particular important individual interests.”
18 *Bang Nguyen*, 144 Wn.2d at 525. The Court went on to note that the standard was only
19 appropriate when “the individual interests at stake are more substantial than mere loss of
20 money.” *Id.* at 527-28.

21 The Petitioner agrees that “Dodge City” is a corporation and not an individual. May 16
22 Brief at 30. Liquor licenses do not represent an individual property interest, but rather a
23 property interest held by a recognized business entity conducting business in Washington
24

25 ¹⁸ The Petitioner cites to the test set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 983, 47 L.Ed.2d
26 18 (1976) but relies on the Washington State Supreme Court’s analysis and its application of *Mathews* in *Ngyuen*
and *Ongom* in an attempt to support its position. *See* May 16 Brief at 29-30.

1 State. WAC 314-07-035. Individuals who have some potential control over a business entity
2 applying for a liquor license, the “true parties in interest”, must be investigated for potentially
3 troubling criminal or liquor law violation history before the business applicant can be issued a
4 liquor license. WAC 314-07-035, 040, 045. The Petitioner suggests that because of this
5 background check, its officers and shareholders each hold liquor licenses. May 16 Brief at 30.
6 The Petitioner’s assertion is incorrect; none of these individuals holds a liquor license in their
7 name.¹⁹ Because no individual property right is at issue here, the Petitioner’s argument fails.

8 Even if an individual did hold a liquor license, this alone is not sufficient to
9 demonstrate the clear and convincing standard is applicable to administrative proceedings
10 against them. For the heightened standard to be applied there must be an important, substantial
11 individual interest at stake that is more than “a mere loss of money”. *Addington*, 441 U.S. at
12 424; *Nguyen*, 144 Wn.2d at 524, 29 P.3d 689. The interest at stake in this matter, and in all
13 liquor license hearings, is always the same - “a mere loss of money”.

14 The Petitioner suggests that its interest is similar to an individual’s interest in a
15 professional license because “the license allows Dodge City to pursue its chosen business” and
16 it has an interest in preserving its “good name”. May 16 Brief at 29-30. Respondent notes
17 initially, that there are no facts in the record indicating the Petitioner’s “chosen business” is
18 purely the sale of alcohol. Nothing in the record indicates the Petitioner is unable to generate
19 income from the sale of food; other beverages or as an entertainment venue.

20 Moreover, the Court in *Ongom* held that both Dr. Nguyen and Ms. Ongom had a liberty
21 interest in their *professional* reputations and only that *professional* discipline was stigmatizing
22 to an individual. *Ongom*, 159 Wn.2d at 139. Neither *Ongom* nor *Nguyen* support or even
23 apply to the Petitioner’s assertion that its interests are in any way similar to that of an
24 individual holding a professional license; a liquor license is not a professional license by law.

25 ¹⁹ A liquor license may be held by a sole proprietor, but that license is still held by a business entity with
26 a separate license to conduct business in Washington State and the proprietor is the only true party in interest.

1 | See *Brunson*, 149 Wn. App. at 865. The Petitioner provides no Washington case authority to
2 | support the contention that a corporation, holding a liquor license, is legally considered to have
3 | the same liberty interests at stake in a judicial proceeding as an individual human holding a
4 | professional license.²⁰ The Petitioner has provided no evidence below that “Dodge City” has a
5 | reputation in the community that would be affected by the outcome of the current matter. Nor
6 | has the Petitioner provided any evidence below that there are any stigmatizing effects to
7 | whatever reputation they have in any discipline it might receive for violation of a liquor law.

8 | Furthermore, the sale of alcohol is a highly regulated industry, not only in Washington
9 | State, but throughout the nation. See *Colonnade Catering Corp.*, 397 U.S. 72; see also *Jow Sin*
10 | *Quan*, 69 Wn.2d at 382. A license to engage in the retail sale of liquor does not constitute a
11 | vested property right, but rather “a temporary permit, in the nature of a privilege, to engage in a
12 | business that would otherwise be unlawful.” *Id.*; see also *Scottsdale Insurance Co. v. Int’l*
13 | *Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001) (noting that a liquor
14 | license is “merely representative of a privilege granted by the state”).

15 | The Petitioner also argues that the higher standard applies because the hearing below
16 | could have resulted in a suspension rather than a monetary penalty. May 16 Brief at 31. Its
17 | implication being that a suspension represents something other than a “mere loss of money”.
18 | To support its argument, it claims the Supreme Court held in *Ongom* that the precise outcome
19 | of a proceeding does not matter, instead “the key is whether suspension can occur”. *Id.* This is
20 | not an accurate characterization of the Court’s analysis.

21 |
22 |
23 | ²⁰ Petitioner again attempts to sway this Court with authority from another jurisdiction in the form of two
24 | opinions from Florida state courts: *Ferris v. Turlington*, 510 So.2d 292, 12 Fla. L. Weekly 393 (Fla. 1987) and *Pic*
25 | *N’ Save Central Florida Inc., v. Dep’t of Business Regulations*, 601 So.2d 245, 17 Fla. L. Weekly D1379 (Fla.
26 | App. 1992). Again, we note that case law generated by other state courts cannot act as law or binding authority
on Washington courts and tribunals. *Rickert* 129 Wn. App. at 467. Thus, the case law offered by Petitioner here
is non-binding and cannot act as law or authority here. This is especially so given that *Washington State* case law
has already provided authority on this issue and cannot be ignored or overturned by extra-jurisdictional opinion.

1 As noted above, in *Ongom* the court held that professional discipline is stigmatizing,
2 whether the individual stigmatized is a doctor or a nursing assistant, and as a result: "it is more
3 than a mere loss of money and is thus entitled to a higher standard of proof." *Ongom*, 159
4 Wn.2d at 139; *Citing Addington*, 441 U.S. at 424; *Nguyen*, 144 Wn.2d at 524-25, 29 P.3d 689.
5 The court then went on to note that it made no difference that Ongom's professional license
6 was suspended and Nguyen's was indefinitely revoked. *Ongom*, 159 Wn.2d at 139. It made
7 no difference in *Nguyen* and *Ongom* because the stigma of professional discipline, the
8 substantial interest at stake, existed whether the professional license is suspended or revoked.

9 Here, the only interest at stake is monetary. The only result of a liquor license
10 suspension is a temporary loss of revenue from alcohol sales, it is no different than a set
11 monetary penalty in terms of the interest at stake. The Petitioner also suggests revocation of
12 the license is potentially at stake because if they continue to violate the law, they might have
13 their license revoked. May 16 Brief at 31. However, this was not the interest that was actually
14 at issue in the instant matter. AR 505. Revocation of the Petitioner's license was not a
15 possible outcome in the proceeding below and even if it was, permanent loss of revenue from
16 alcohol sales, a monetary loss, associated with the revocation of the license would be the only
17 interest at stake. *See* AR 394. In short, the Supreme Court's reasoning in *Ongom* supports the
18 Respondent in this matter; because the only interest at stake is a "mere loss of money" it makes
19 no difference if the outcome of the proceeding below had been a monetary penalty, suspension
20 or revocation of the license.

21 In the administrative proceeding below, the ALJ applied the preponderance of the
22 evidence standard, as required by law. AR 505. The burden of demonstrating that some other
23 evidentiary standard should have been applied is borne entirely by the Petitioner. The
24 Petitioner fails to meet this burden and its arguments are contrary to Washington State law.
25 Nothing indicates a liquor license in any way qualifies as or is even vaguely similar to a
26 professional license. The preponderance of the evidence standard is the appropriate burden of

1 proof in this matter, just as in all other administrative hearings absent statute or other legal
2 authority to the contrary. *Thompson*, 138 Wn.2d 783 at 797.

3 **IV. CONCLUSION**

4 The Petitioner has the burden of proving the invalidity of the Respondent's agency
5 action in this matter. The Petitioner has failed to demonstrate any reason why the agency
6 action is invalid by law. Accordingly, the Respondent respectfully requests the Court sustain
7 the agency action and find the final order valid.

8 DATED this 14 day of July, 2010.

9 ROBERT M. MCKENNA
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