

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

ENT. NORTHWEST, INC.
d/b/a THE HIDEAWAY
4909 NE HAZEL DELL AVE
VANCOUVER, WA 98663-1235

LICENSEE

LICENSE NO. 356307
AVN 1L9274B

LCB NO. 23,596

OAH NO. 2010-LCB-0019

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board issued a complaint dated April 20, 2010, alleging that on or about October 1, 2009 the above-named Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to a person(s) under the age of twenty-one (21), contrary to RCW 66.44.270 and/or WAC 314-11-020(1); and that on or about October 1, 2009, the above-named Licensee, or an employee(s) thereof, allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits to persons under the age of twenty one (21), contrary to RCW 66.44.310 and/or WAC 314-11-020(2).

2. A formal hearing took place, at the Licensee's request, on June 30, 2011 before Assistant Deputy Chief Administrative Law Judge Gina L. Hale.

3. The Licensee appeared and was represented by William Baumgartner, Attorney at Law. Assistant Attorney General Brian Considine represented the Enforcement Division of the Board.

4. On August 11, 2011, Assistant Deputy Chief Administrative Law Judge Gina L. Hale entered her Findings of Fact, Conclusions of Law and Initial Order, sustaining the Board's Complaint.

5. The Licensee's Petition for Review was timely filed by the Licensee on August 30, 2011. In the Petition for Review, the Licensee states that exception is taken to two conclusions in "Section IV" of the Initial Order entered on March 3, 2011, parenthetically referenced as (Ex. B). Attached to Licensee's Petition for Review were several documents, with separator pages designated as Tab A, Tab B, and Tab C. The Board interprets these as the documents that Licensee refers to in the petition as "Exhibits" A, B, and C. Tab B is on top of the Initial Order entered on March 3, 2011, which was an order denying the Licensee's Motion to Suppress and Dismiss in this, and another case involving the Licensee.

6. The Licensee does not take any exception to the Findings of Fact in the Initial Order, but asserts that the evidence submitted by Enforcement at the hearing should have been suppressed and not considered by the ALJ. In addition, Licensee's Petition for Review cites to documents that, while part of the record because they were submitted in support of Licensee's Motion to Suppress, were not admitted at the hearing as substantive evidence.

7. Enforcement's Response to Licensee's Petition for Review was filed on September 6, 2011.

The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE;

IT IS HEREBY ORDERED that the Initial Order for case 23,596 is adopted, but that in the second paragraph of the Initial Order, the word "was" in the phrase "a person under the age of 21 years to be was served alcohol in violation of..." is deleted, and in Conclusion of Law No. 7, the word "it's" is replaced with the word "its".

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,596 is sustained and that the liquor license privileges granted to ENT. Northwest, Inc. d/b/a The Hideaway at 4909 NE Hazel Dell

Avenue in Vancouver, Washington, License 356307, are hereby suspended for a term of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of five hundred dollars (\$500.00) due within 30 days of this order. If timely payment is not received, suspension will take place from 10:00 a.m. on November 10, 2011 until 10:00 a.m. on November 15, 2011. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

Washington State Liquor Control Board

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 20th day of September, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD

Ruth Maxine Kurose

[Signature]

Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to the Washington State Liquor Control Board, Attn: Kevin McCarroll, 3000 Pacific Avenue Southeast, PO Box 43076, Olympia, WA 98504-3076, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board's office. RCW 34.05.010(6). A copy shall also be sent to Mary M. Tennyson, Senior Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for

reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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

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

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

LCB NO. 23,596
OAH NO. 2010-LCB-0019

NORTHWEST INC
d/b/a THE HIDEAWAY
4909 NE HAZEL DELL AVE
VANCOUVER, WA 98663-1235

DECLARATION OF SERVICE BY MAIL

LICENSEE

LICENSE NO. 356307-1L
AVN NO. 1L9274B

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

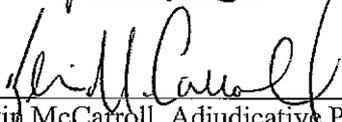
WILLIAM BAUMGARTNER, ATTORNEY
FOR LICENSEE
112 W 11TH STREET STE 150
VANCOUVER, WA 98660-3359

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

ENT. NORTHWEST INC, LICENSEE
d/b/a THE HIDEAWAY
1819 NW 94TH ST
VANCOUVER, WA 98665-6306

NORTHWEST INC
d/b/a THE HIDEAWAY
4909 NE HAZEL DELL AVE
VANCOUVER, WA 98663-1235

DATED this 21st day of September, 2011, at Olympia, Washington.


Kevin McCarroll, Adjudicative Proceedings Coordinator



Washington State
Liquor Control Board

September 21, 2011

William Baumgartner, Attorney for Licensee
112 W 11th Street Ste 150
Vancouver, WA 98660-3359

ENT. Northwest Inc, Licensee
d/b/a The Hideaway
1819 NW 94th St
Vancouver, WA 98665-6306

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

RE: FINAL ORDER OF THE BOARD
LICENSEE: ENT. Northwest Inc
TRADE NAME: The Hideaway
LOCATION: 4909 NE Hazel Dell Ave, Vancouver, WA 98663-1235
LICENSE NO. 356307-1L
ADMINISTRATIVE VIOLATION NOTICE NO: 1L9274B
LCB HEARING NO. 23,596
OAH NO. 2010-LCB-0019
UBI: 602 388 936 001 0001

Dear Parties:

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

The applicable monetary penalty is due by October 21, 2011. If payment is not received timely, then suspension will take place as 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 Division, WSLCB
Teresa Young, WSLCB

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

RECEIVED

AUG 22 2011

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

MAILED
AUG 11 2011
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of:

ENT. Northwest, Inc.
dba The Hideaway

Licensee

License No. 356307

OAH No.: 2010-LCB-0019

LCB No.: 23,596

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

STATEMENT OF THE CASE

On October 6, 2009, the Washington State Liquor Control Board - Education and Enforcement Division (Enforcement or Board) issued an Administrative Violation Notice (AVN) to ENT Northwest, Inc., dba The Hideaway located at 1819 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington.

In the AVN, it was alleged that on October 1, 2009, the Licensee or an employee allowed a person under the age of 21 years to be served alcohol in violation of RCW 66.44.270(1), and that the Licensee or an employee allowed a person under the age of 21 years to frequent an off-limits area of the premises in violation of RCW 66.44.310.

The assessed penalty was a five (5)-day suspension or \$500 in lieu of suspension for the alleged first time violation.

On April 20, 2010, the Board issued a formal written Complaint alleging that:

(1) "on or about October 1, 2009, the above-named Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to a person (s) under the age of twenty-one (21), contrary to RCW 66.44.270 and/or WAC 314-11-020(1).

(2) on or about October 1, 2009, the above-named Licensee, or an employee(s) thereof, allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits to person (sic) under the age of twenty-one (21), contrary to RCW 66.44.310 and/or WAC 314-11-020(2)."

The Licensee filed a timely request for an administrative hearing.

The matter came on for hearing pursuant to due and proper notice at Vancouver, Washington, on June 30, 2011, before Gina L. Hale, Assistant Deputy Chief - Administrative Law Judge (ALJ).

The Licensee, ENT. Northwest, Inc. dba The Hideaway and owner Mark Otrumba, appeared and were represented by William Baumgartner, Attorney at Law.

The Liquor Control Board - Enforcement Division, was represented by Brian Considine, Assistant Attorney General, Liquor Enforcement Officer Almir Karic, Liquor Enforcement Officer Paul Magerl, and [REDACTED] Investigative Aide, 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, License Number, and Location** - The Licensee, ENT. Northwest, Inc., dba The Hideaway, is the holder of license number 356307. This license was issued by the Washington State Liquor Control Board under the provisions of Revised Code of Washington (RCW) 66.24. The license was for an establishment located at 4909 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington.
- 2. Open to the Public and Conducting Business** - The Licensee was open to the public and conducting business at 4909 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington on October 1, 2009.
- 3. Patrons Under Age 21 Years** - The Licensee's premises are restricted to persons age 21 years or older. Signs are posted which say "No Minors."
- 4. Premises Checks, Compliance Checks, and Investigative Aides** - The Washington State Liquor Control Board - Enforcement Division monitors and regulates the conduct of licensees and their patrons to ensure compliance with applicable laws and administrative rules through a continuing program of premises checks and compliance checks. Enforcement also uses minors as Investigative Aides to assist in the compliance check program.
- 5. October 1, 2009, Compliance Check** - On October 1, 2009, the Enforcement Division conducted a compliance check with the assistance of minor Investigative Aide, [REDACTED]. On October 1, 2009, [REDACTED] was age 18.
- 6.** Prior to entering the Licensee's premises, [REDACTED] was checked by the Liquor Control Board Officers to be sure that he only had a valid Washington ID on his person. We find that [REDACTED] was carrying his vertical identification card which indicate that he turned age 18 on September 26, 2009.

7. When ██████████ entered the premises, no one was on duty checking identification at the door.

8. ██████████ was working on the inside with Enforcement Officer Paul Magerl. They made contact at the bar. As the two sat together, they were approached by the bartender.

9. The bartender asked ██████████ for his order, but did not ask his age or for any identification. The bartender served ██████████ a Bud Light which he paid for.

10. Once ██████████ was served, he left the drink on the bar with Officer Magerl, and went outside to complete his report.

11. Once ██████████ had exited the premises, Officer Almir Karic, the lead officer, entered the premises to serve the AVN.

12. Officer Karic made himself known to the bartender and took a statement from her in which she indicated that ██████████ was a regular and that is why she had not asked for his identification.

13. **Other Compliance Checks on October 1, 2009** - ██████████ participated in approximately 10 compliance checks that on the evening of October 1, 2009. He was served three to four times by the various other establishments. Some requested his identification and some did not.

14. We find that, as of the day of the hearing, ██████████ had never been on the Licensee's premises prior to October 1, 2009, or since.

15. **Licensee's Policy on Checking Identification** - The Licensee indicated that, prior to October 2009, the policy was to check the identification of anyone who appeared to be under the age of 40. We find that this policy was not uniformly practiced, nor was it a written policy.

16. The Licensee confirmed that no one was working the door that evening because they normally do not have a bouncer working at the door unless it is the weekend. October 1, 2009, was a Thursday.

17. **Identification Machine** - When the Licensee is using bouncers to check identification, they are to use an identification machine. The patron's identification is scanned by the machine and helps the employee know whether to admit or serve them.

18. When the bouncers are not working, bartenders use the machine and are to check the identification of the patrons.

19. **Licensee's Arguments** - The Licensee has argued that ██████████ was on the premises in violation of the law because of the signs which were posted saying "No Minors."

20. Additionally, the Licensee has argued that [REDACTED] was "deceptively mature" and that Enforcement used "entrapment" to find violations for issuing the AVNs against the Licensee.

21. The Licensee has made a third argument that there was no adequate chain of custody and that it is not clear that [REDACTED] was actually served alcohol..

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. 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.

7. In the present case, the Licensee has violated its one stated policy of not checking the identification of patrons who appear to be younger than the age 40. In the case at hand, there was no attempt to check the identification or the age of [REDACTED] at all, either by electronic or manual means.

8. The bartender believed [REDACTED] to be a regular. However, [REDACTED] credible testimony was that this was the first and only time he had entered the premises.

9. The Licensee has argued that [REDACTED] was deceptively mature. The undersigned concludes that this argument fails in that the Licensee had an internal policy to check all patrons who appeared to be under the age of 40, and that was not done here.

10. The undersigned takes Administrative Notice that [REDACTED] does not appear to be over the age of 40.

11. Regarding the Licensee's argument that no alcohol was actually served, the undersigned gives credence to the voluntary statement, provided contemporaneously to the incident, by the bartender that she did in fact serve alcohol. This statement was taken shortly after the incident when the bartender's memory would have been clear and her recollection good. The Licensee's argument fails because there has been no showing that the Licensee has a habit of advertising sales of alcohol but actually selling something other than alcohol.

12. In the present case, no one used any method to confirm [REDACTED] age and the result was that an 18 year old as allowed to enter the premises and to purchase and be served alcohol.

13. The undersigned concludes that the Liquor Control Board has met its burden by a preponderance of the evidence that the Licensee served a minor in violation of the regulations and statutes.

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

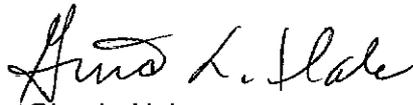
Initial Decision and Order

IT IS HEREBY ORDERED, that the Board's Complaint dated April 20, 2010, is **SUSTAINED**.

The license privileges issued to the Licensee, ENT. Northwest, Inc., dba The Hideaway, located at 4909 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington, license number 356307, 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 five hundred dollars (\$500) in lieu of suspension on a date to be determined by the Board in its final order.

DATED and mailed at Vancouver, Washington, this 11th day of August, 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:

ENT. Northwest, Inc.
dba The Hideaway
1819 NE Hazel Dell Avenue
Vancouver, WA 98663

Licensee's Representative:

William Baumgartner
112 West 11th Street, Suite 150
Vancouver, WA 98660

Assistant Attorney General:

Brian Considine, AAG
Office of the Attorney General
1125 Washington Street SE
PO Box 40100 (MailStop 40100)
Olympia, WA 98504-0100

Department Contact:

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

Barb Cleveland, OAH
Mail Stop: 42488

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

RECEIVED

AUG 30 2011

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In the Matter of:

ENT, Northwest, Inc.,
dba The Hideaway,

Licensee.

License No. 356307

OAH Nos.: 2010-LCB-0019

LCB Nos.: 23,596

LICENSEE'S PETITION FOR REVIEW

Licensee ENT, Northwest, Inc., dba The Hideaway ("Licensee" or "The Hideaway"), by and through its attorneys, William V. Baumgartner and Laurence R. Wagner of Baumgartner, Nelson & Price, PLLC, submits this petition for review of the Office of Administrative Hearing Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order entered in this matter on August 11, 2011. A copy of the Findings of Fact, Conclusions of Law and Initial Order is attached as Exhibit A.

NATURE OF THE CASE

As is reflected in the Statement of The Case contained in the Initial Order, this case arises out of a compliance check at the Hideaway on October 1, 2009, conducted by the Washington State Liquor Control Board ("WSLCB" or the "Board") - Education and Enforcement Division ("Enforcement"). Enforcement used a minor investigative aide to conduct this compliance check on premises posted off-limits to minors. As a result of this compliance check, Enforcement issued the Hideaway an Administrative Violation Notice ("AVN) for furnishing liquor to a minor in violation of RCW 66.44.270(1) and allowing a minor to frequent an off-limits area in violation of RCW 66.44.310.

1 **PROCEDURAL HISTORY**

2 On April 20, 2010, Enforcement issued a formal complaint against the Hideaway. On
3 or about June 17, 2010, Licensee filed a motion to suppress and dismiss this Complaint, on the
4 grounds that (1) the compliance check was unlawful, because it utilized a minor investigative
5 aide but was not conducted pursuant to any rule adopted by the WSLCB as required by both
6 RCW 66.08.030(1) and RCW 66.44.290; and (2) the compliance check was unlawful for the
7 additional reason that the minor investigative aide used by Enforcement in the compliance
8 check was deceptively mature in appearance. Licensee moved to suppress all evidence gained
9 through the unlawful compliance check and to dismiss the complaint on the grounds that there
10 was no admissible evidence to support it. Enforcement opposed this motion.

11 By Findings of Fact, Conclusions of Law and Initial Order entered on March 3, 2011,
12 ALJ Gina L. Hale denied this motion. A true copy of this initial order is attached as Exhibit B.

13 An administrative hearing was then conducted by ALJ Hale on June 30, 2011. By
14 Findings of Fact, Conclusions of Law and Initial Order dated August 11, 2011, ALJ Hale
15 sustained the Board's Complaint.

16 **STATEMENT OF EXCEPTIONS**

17 Licensee takes exception to the following portions of the Initial Order entered on March
18 3, 2011 (Ex. B):

19 1. Licensee takes exception to the conclusion in Section IV of the Initial Order that:
20 "The alcohol industry is a disfavored and highly regulated industry." (Ex. B, pg. 4.) While the
21 alcohol industry is highly regulated, neither party cited to and Licensee is not aware of any
22 authority supporting the conclusion that the alcohol industry is "disfavored."

23 2. Licensee also takes exception to the conclusion in Section IV of the Initial Order
24 that the WSLCB has the authority to use minor investigative aides to enter onto premises posted
25 off limits to minors without promulgating additional rules allowing its officers to do so. (Ex. B,
26 pg. 4.) The statutes in RCW Title 66 and regulations in WAC Title 314 prohibit minors from

1 entering onto premises restricted to adults, and the WSLCB has not adopted any rule according
2 to the requirements of RCW 66.08.030, or pursuant to any other statute, allowing liquor control
3 officers to utilize minors to purchase liquor on premises posted off limits to minors.

4 Therefore, the compliance check of Licensee's premises, which are restricted to adults, was
5 unlawful and all evidence obtained from the compliance check must be suppressed.

6 3. Licensee also takes exception to the Administrative Law Judge's failure in her
7 March 3, 2011 Initial Order to address the additional basis for Licensee's motion to suppress
8 that the compliance check was also unlawful because the minor investigative aide used by
9 Enforcement in the compliance check was deceptively mature in appearance.

10 4. Licensee also takes exception to ALJ Hale's conclusions of law number 9 and 10
11 in her August 11, 2011 Initial Order (Ex. A, pgs. 4-5), in which she concluded that Licensee's
12 argument that the minor investigative used by Enforcement was deceptively mature in
13 appearance fails because the aide appeared to be under the age of 40 and Licensee had an
14 internal policy of checking all patrons who appeared to be under the age of 40. A minor may be
15 deceptively mature in appearance and still appear under the age of 40. Enforcement's use of a
16 deceptively mature appearing minor in a compliance check is still unlawful regardless of
17 whether Licensee had an internal policy of checking all individuals who appeared to be under
18 the age of 40.

19 **EVIDENCE OF RECORD RELIED ON**

20 Licensee relies on findings of fact numbers 1 through 13 of the August 11, 2011 Initial
21 Order (Ex. A, pgs. 2-3) and the undisputed facts set out in Section II of the March 3, 2011
22 Initial Order. (Ex. B, pgs. 2-3.) In addition, Licensee relies on the Declaration of William V.
23 Baumgartner in Support of Licensee's Motion to Suppress and Dismiss, and the exhibits
24 attached to it: Exhibit A, a copy of the Clark County Superior Court's Memorandum Opinion
25 in Case Nos. 09-1-00725-0, 09-1-00724-1, and 09-1-00723-3; Exhibit B, a copy of the WSLCB
26 Property/Narrative Report for the compliance check at The Hideaway on October 1, 2009; and

1 Exhibit C, a copy of video surveillance of The Hideaway showing the compliance check on
2 October 1, 2009.

3 The Hideaway holds a liquor license and operates a facility located in Vancouver,
4 Washington. These premises are restricted to people over 21 years of age. On October 1, 2009,
5 Enforcement conducted a compliance check at The Hideaway using an 18 years old
6 investigative aide. This minor investigative aide entered the tavern first and alone, taking a seat
7 at the bar at the far side of the premises from the door. After he had been sitting at the bar for a
8 few minutes, an Enforcement officer entered the bar and stood next to the minor investigative
9 aide. The minor investigative aide ordered and was served a beer by the bartender, Darla Peck.
10 After paying for the beer, the minor investigative aide left. The Enforcement officer remained
11 in the bar and was later joined there by another Enforcement officer, both of whom then met
12 with Ms. Peck at length.

13 As a result of this compliance check, Ms. Peck was issued a criminal citation and The
14 Hideaway was given an administrative citation for selling liquor to a person under the age of 21
15 contrary to RCW 66.4 4.270 and/or WAC 314-11-020(1). In light of Judge Johnson's
16 Memorandum Opinion, the criminal charges against Ms. Peck were dismissed.

17 The minor investigative aide used in the October 2009 compliance check of The
18 Hideaway is clearly shown in the video surveillance. The video surveillance establishes that the
19 minor investigative aide, who was only 18 years old at the time of the compliance check, was
20 deceptively mature in appearance.

21 POINTS AND AUTHORITIES

22 A. The Compliance Check Was Unlawful, Because It Was Not Conducted Pursuant to
23 Any Rule Adopted by the Board as Required by Both RCW 66.08.030(1) and
24 RCW 66.44.290.

25 Enforcement's compliance check of The Hideaway was unlawful, because it was not
26 authorized by and directly violated the regulatory scheme applicable to Licensee.

Under RCW 66.44.010(4), the Board is authorized to appoint enforcement officers with

1 the power to enforce the penal provisions of Title 66, the alcoholic beverage control regulatory
2 scheme in Washington. But this statute also specifically requires that enforcement officers
3 exercise this power “under the supervision of the board”. RCW 66.08.030(2) gives the Board
4 broad powers with regard to the regulation of the sale of liquor in Washington. RCW
5 66.08.030(2)(b) specifically authorizes the Board to prescribe and regulate the conduct of its
6 employees. But all of the Board’s powers are subject to RCW 66.08.030(1), which requires the
7 Board to exercise its powers through public regulations:

8 “(1) For the purpose of carrying into effect the provisions of this title according to their
9 true intent or of supplying any deficiency therein, the board may make such regulations
10 not inconsistent with the spirit of this title as are deemed necessary or advisable. All
11 regulations so made shall be a public record and shall be filed in the office of the code
12 reviser, and thereupon shall have the same force and effect as if incorporated in this
13 title. Such regulations, together with a copy of this title, shall be published in pamphlets
14 and shall be distributed as directed by the board.”

15 The administrative complaints against Licensee are based on Enforcement’s use of
16 minors to enter into its bar, which is posted as off-limits to minors, and order a beer. Under
17 RCW 66.44.290(1), a minor who attempts to purchase alcohol is guilty of a criminal offense
18 unless that minor is participating in a controlled purchase program authorized under rules
19 adopted by the Liquor Control Board:

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

RCW 66.44.290(1) does not make any distinction between private controlled purchase
programs conduct by liquor licensees and those conducted by Enforcement. It only shields
licensees and their employees conducting and participating in authorized private programs from
criminal or administrative prosecution. Sections (2) and (3) or RCW 66.44.290 do impose
certain requirements on licensees conducting in-house controlled purchase programs. But these
sections in no way limit or restrict the application of RCW 66.44.290(1).

1 The first sentence of RCW 66.44.290(1) provides that any person under the age of 21
2 who attempts to purchase liquor is in violation of the title. The second sentence of this statute
3 then provides: "This section does not apply to persons between the ages of eighteen and
4 twenty-one years who are participating in a controlled purchase program authorized by the
5 liquor control board under rules adopted by the board." The statute is clear on its face. A
6 minor commits a violation by attempting to purchase alcohol unless he or she is participating in
7 a controlled purchase program authorized by the Board under rules adopted by the Board.

8 Therefore, unless Enforcement's use of a minor investigative aide in its compliance
9 check was authorized by and conducted pursuant to rules adopted by the Board, the
10 Enforcement officers were not acting under the supervision of the Board or pursuant to any
11 authority granted by the Legislature to the Board in using a minor investigative aide to conduct
12 the compliance check.

13 The only rules formerly adopted by the Board pursuant to RCW 66.44.290 are contained
14 in WAC Chapter 314-21. But while this chapter is titled "Controlled Purchase Programs," the
15 three regulations contained in this chapter, WAC 314-21-005, WAC 314-21-015, and WAC
16 314-21-025, all only address in-house programs conducted by liquor licensees themselves, not
17 Enforcement. WAC 314-21-005 explains:

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

21 "(2) The licensee's controlled purchase program must meet the requirements of
RCW 66.44.290, WAC 314-21-015, and 314-21-025.

22 (3) Per RCW 66.44.290, violations occurring under an in-house controlled purchase
23 program may not be used for criminal prosecution or administrative action by the liquor
control board."

24 These regulations very clearly only apply to in-house controlled purchase programs.
25 None of these regulations address controlled purchase compliance checks conducted by
26 Enforcement's own officers.

1 WAC Chapter 314-21 contains the only rules formerly adopted by the Board concerning
2 the use of minors in controlled purchase programs. Enforcement nevertheless argues that its
3 Enforcement officers have broad general regulatory authority to use a minor investigative aides
4 as decoys in compliance checks, even checks conducted on premises posted off-limits to
5 minors. The sale of liquor is a highly regulated industry and the WSLCB unquestionably has
6 broad powers with regard to the regulation of the sale of liquor in Washington. But as
7 explained in *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wn.2d 455, 458-59,
8 722 P.2d 808 (1986), that power must be exercised through publicly adopted regulations:

9 “Legislative functions cannot be delegated to an administrative body but the Legislature
10 may delegate administrative power. *Keeting v. PUD 1*, 49 Wn.2d 761, 767, 306 P.2d
11 762 (1957); see also 1 C. Koch, *Administrative Law & Practice* § 1.22 (1985); R.
12 Pierce, Jr., S. Shapiro & 811 P. Verkuil, *Administrative Law & Process* § 3.4.5 (1985);
13 B. Schwartz, *Administrative Law* § 2.12 (2d ed. 1984). Regarding the standards
14 required for a proper delegation of administrative power *Barry & Barry, Inc. v.*
15 *Department of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), *appeal*
16 *dismissed*, 410 U.S. 977, 93 S.Ct. 1503, 36 L.Ed.2d 173 (1973), states:

17 “[T]he delegation of legislative power is justified and constitutional, and the
18 requirements of the standards doctrine are satisfied, when it can be shown (1)
19 that the legislature has provided standards or guidelines which define in general
20 terms what is to be done and the instrumentality or administrative body which is
21 to accomplish it; and (2) that procedural safeguards exist to control arbitrary
22 administrative action and any administrative abuse of discretionary power.”

23 “The dominion of the Board is broad and extensive. *Quan v. State Liquor Control Bd.*,
24 69 Wn.2d 373, 379, 418 P.2d 424 (1966). The broad powers of the Board are, in part,
25 enumerated under RCW 66.08.050. The Board has the authority to make necessary and
26 advisable regulations consistent with the spirit of RCW 66. RCW 66.08.030(1); see
State ex rel. Thornbury v. Gregory, 191 Wash. 70, 78, 70 P.2d 788 (1937). However,
the broad and extensive powers given the Board are not all inclusive. Numerous
statutory guidelines have been provided which broadly define the authority and duty of
the Board and which insure procedural safeguards against arbitrary administrative action
and abuse of discretionary power. See in particular RCW 66.08.010; .030; .050; .150;
RCW 66.24.010; .400-.450; RCW 66.98.070; see also RCW 34.04.”

Licensee does not contend that Enforcement lacks the authority to use minors in
controlled purchase compliance checks, only that any such compliance checks must be
authorized by and conducted according to rules adopted by the Board. The compliance check
involving Licensee was not conducted according to any statutes contained in Title 66 or rules

1 adopted by the Board thereunder and were, therefore, unlawful.

2 **B. The Compliance Check Was Unlawful Because Enforcement Officers Conducted**
3 **the Compliance Check Using a Minor Investigative Aide to Enter into Licensee's**
4 **Premises Which Were Designated and Posted Off-limits to Minors.**

5 RCW 66.44.290 appears in Chapter 66.44 RCW, the enforcement regulations for RCW
6 Title 66, the alcoholic beverage control regulatory scheme in Washington. Reading RCW
7 66.44.290 together with other statutes in Chapter 66.44 makes clear that controlled purchase
8 programs utilizing minors can only be conducted on premises onto which a minor may lawfully
9 enter, such as grocery stores and restaurants, not premises posted as off-limits to minors, such
10 as taverns and bars.

11 RCW 66.44.290(1) only allows a minor participating in an authorized and properly
12 conducted controlled purchase program to attempt to purchase alcohol without criminal penalty.
13 This statute does not authorize a minor to enter onto premises classified and posted as off-limits
14 to minors in connection with a controlled purchase program.

15 Washington State Liquor Control Board Enforcement Policy #287 does specifically
16 authorize Enforcement officers to use minor investigative aides in compliance checks under
17 certain conditions. (A copy of Enforcement Policy #287 is attached as Exhibit C.) But Board
18 Enforcement Policy #287 is not a rule formerly adopted by the WSLCB and, therefore, does not
19 provide legal authority for Enforcement to use minor investigative aides in compliance checks.
20 And even by its own terms Policy # 287 does not grant Enforcement officers the authority to
21 use minor investigative aides in compliance checks on premises classified and posted as off-
22 limits to minors. In policy statement 5, Policy #287 specifically states that:

23 **“5. Investigative aide's safety is paramount. Enforcement officers shall not**
24 **allow investigative aides to engage in arguing or other actions with sales**
25 **clerks.”**

26 (Ex. C.)

Allowing minor aides to enter into bars posted off limits to minors is not conducive to
their safety. Bartenders and other bar employees are not commonly referred to as “sales

1 clerks.”

2 RCW 66.44.310 provides that, except as otherwise provided by RCW 66.44.316, RCW
3 66.44.350, and RCW 66.24.590, it is a misdemeanor for any person under 21 years of age to
4 enter or remain in any area classified as off-limits to such a person. There is no exception in
5 RCW 66.44.310 for a minor participating in a controlled purchase program. None of the
6 exceptions provided for by RCW 66.44.316, 6.44.350, or 66.24.590, apply. RCW 66.44.316
7 only creates an exception for professional musicians and band members, janitors, amusement
8 device company employees, security and law enforcement officers, and firefighters. RCW
9 66.44.350 only creates an exception for restaurant employees, who are permitted to serve
10 alcohol. RCW 66.24.590 only creates an exception for hotel employees, who are permitted in
11 areas of a hotel where alcohol may be consumed but is incidental to the primary use of the area.
12 Therefore, Mr. Uren committed a crime and the Enforcement officers contributed to his
13 delinquency when he entered into The Hideaway without the authority of any rule adopted by
14 the WSLCB.

15 The issue presented by this case is not whether the WSLCB has the authority to pass a
16 rule pursuant to RCW 66.08.030 allowing Enforcement to use minors in compliance checks at
17 facilities that are restricted to adults. The issue is whether, in the absence of a such a rule,
18 Enforcement may do so. Washington law is clear that, without the authority of a rule formerly
19 adopted by the WSLCB, Enforcement officers do not have the legal authority to use minor
20 investigative aides in compliance checks posted off limits to minors.

21 **C. The Compliance Check Was Unlawful for the Additional Reason that the Minor**
22 **Investigative Aide Enforcement Officers Used to Conduct this Compliance Check**
23 **Was Deceptively Mature in Appearance.**

24 WAC 314-21-025 sets out the Board’s rules for in-house controlled purchase programs
25 conducted by liquor licensees. One of these rules is that:

26 “(4) the persons participating in the in-house controlled purchase program may
not use fraudulent identification and should not be deceptively mature in
appearance.”

1 Policy #287 similarly provides that: "Investigative aides must not be deceptively
2 mature in appearance." (Ex. C.)

3 The video surveillance attached as Exhibit C to the declaration of William V.
4 Baumgartner clearly shows an individual who was deceptively mature in appearance.

5 RCW 9A.16.070 provides:

6 "(1) In any prosecution for a crime, it is a defense that:

7 "(a) The criminal design originated in the mind of law enforcement officials, or
8 any person acting under their direction, and

9 "(b) The actor was lured or induced to commit a crime which the actor had not
otherwise intended to commit.

10 "(2) The defense of entrapment is not established by a showing only that law
11 enforcement officials merely afforded the actor an opportunity to commit a crime."

12 This administrative proceeding involves prosecutions of Licensee for furnishing liquor
13 to a minor in violation of RCW 66.44.270. Violation of this statute is a gross misdemeanor.

14 This action does involve prosecution for a crime.

15 A explained in *Fine and Ende*, 13B Wash. Prac., Criminal Law § 3003 (2008-09):

16 "Establishing the defense of entrapment requires proof of two elements: (1) That the
17 defendant was tricked or induced into committing the crime by acts of trickery by law
18 enforcement agents; (2) that the defendant would not otherwise have committed the
19 crime. Washington's entrapment defense has been described as 'subjective.' This
20 means that the primary focus of the test is on whether an unwary defendant was
21 entrapped into committing a crime that would not otherwise have been committed.
22 Even though a criminal design originates in a police officer's mind, if the defendant
23 willingly participates in a developing transaction, this will not constitute entrapment.
24 Thus, although the defense requires inducement by law enforcement officials or a
25 person acting on behalf of such officials, unethical police conduct does not, by itself,
26 constitute entrapment.

"This does not mean that the propriety of the police conduct is irrelevant to a defense of
entrapment. To the contrary, entrapment requires not mere solicitation, but undue
solicitation. Inducement in this context has been described as government conduct
which creates a substantial risk that an undisposed person or otherwise law-abiding
citizen would commit the offense. The use of a normal amount of persuasion to
overcome a defendant's reluctance does not constitute entrapment."

Licensee's bartender was tricked by Enforcement into furnishing alcohol to a minor by

1 Enforcement's use of a deceptively mature minor investigative aide in its compliance check.
2 Whether the investigative aide was deceptively mature in appearance is directly relevant on the
3 issue of whether Enforcement acted lawfully in conducting the compliance check. If as
4 Enforcement contends it is not bound by any statute, rule, regulation, or internal Board policy
5 concerning its use of minor investigative aides in conducting controlled purchase programs,
6 Enforcement would be free to use minor investigative aides in any fashion it chooses with
7 impunity. In addition to prohibiting the use of deceptively mature investigative aides, Policy
8 #287 also prohibits Enforcement from the use of a disguise to make the aide look older. If an
9 investigative aide's appearance is not relevant in determining the lawfulness of compliance
10 checks resulting in administrative sanctions under RCW 66.44.270 and WAC 314-11-020 for
11 furnishing liquor to a minor, nothing would prevent Enforcement from charging a violation of
12 this statute and regulation based on a licensee selling liquor to an investigative aide who is an
13 aspiring actor, who is already deceptively mature in appearance, and who is then professionally
14 made up to look and told to act 60 years old.

15 A compliance check using a deceptively mature appearing minor is unlawful regardless
16 of whether the Hideaway may have had an internal policy of checking anyone who appeared
17 under the age of 40. A minor may be deceptively mature in appearance and still appear under
18 the age of 40. The issue is whether Enforcement can lawfully use in a compliance check a
19 minor investigative aide who deceptively looks so mature that a licensee's employees could
20 reasonably believe the aide was over the age of 21. The issue is not whether the aide
21 deceptively appears over the age of 40 or some other age that a licensee may set in an internal
22 rule in an effort to ensure compliance with the law. If the minor aide is deceptively mature in
23 appearance, the compliance check should be held unlawful, regardless of whether the aide may
24 deceptively appear over the age of 30, 35, 40, or 45.

25 Without the guidelines of a regulation adopted pursuant to RCW 66.08.030,
26 Enforcement is free to use minors in compliance checks without any safeguards for the

1 protection of either the minor or the licensee, who is engaged in a legitimate business that
2 generates substantial revenue for the State. Nothing prevents Enforcement from using minors
3 under the age of 18 in compliance checks, even though they might be might be exposed to
4 activities such as nudity and gambling. Allowing Enforcement to use a deceptively mature
5 appearing minor in compliance checks at facilities restricted to adults without the authority of a
6 regulation adopted by the WSLCB invites arbitrary administrative action by Enforcement and
7 abuse of Enforcement's discretionary power.

8 **D. All Evidence Gained from the Unlawful Compliance Check Is Inadmissible and**
9 **the Administrative Complaint Against Licensee Should Therefore Be Dismissed.**

10 Law enforcement violations of statutes in other contexts have led to suppression of
11 evidence. For example, if a vehicle impound is not authorized by statute, evidence seized
12 pursuant to an impound search must be suppressed. *State v. Singleton*, 9 Wn.App. 327, 511
13 P.2d 1396 (1973).

14 In Washington, the Fourth Amendment exclusionary rule applies in civil proceedings
15 that are quasi-criminal in nature:

16 "Evidence obtained by means of an illegal search and seizure conducted in violation of
17 the Fourth Amendment is not admissible in a civil proceeding that is quasi-criminal in
18 nature. *E.g.*, *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S.
19 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (forfeiture action). Such evidence has also
20 been held inadmissible in cases in which the government is seeking to exact a penalty
21 from, or in some way punish, the person against whom the evidence is sought to be
22 admitted. *E.g.*, *Pizzarello v. United States*, 408 F.2d 579 (2nd Cir.), *cert. denied*, 396
23 U.S. 986, 90 S.Ct. 481, 24 L.Ed.2d 450 (1969) (tax assessment on money illegally
24 seized by the government); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir.1966) (discharge
25 proceeding against an air force civilian employee); *contra Governing Board of*
26 *Mountain View Sch. Dist. of Los Angeles Cy. v. Metcalf*, 36 Cal.App.3d 546, 111
Cal.Rptr. 724 (1974) (proceeding to dismiss probationary public school teacher)." *McDaniel v. City of Seattle*, 65 Wn.App. 360, 363-64, 828 P.2d 81 (1992).

There is an exception to this rule of exclusion that applies if in the civil action the
defendant is attempting to use the exclusionary rule in support of an affirmative claim against
the Government. While the exclusionary rule will be applied to prevent the Government from
making affirmative use of unlawfully obtained evidence in quasi-criminal civil actions, it will

1 not be applied where the defendant affirmatively asserts claims in the quasi-criminal action,
2 such as assault, false arrest, false imprisonment, or malicious prosecution, and then attempts to
3 “turn the illegal method by which evidence in the Government’s possession was obtained to his
4 own advantage, and provide himself with a shield against contradiction of his untruths.”
5 *McDaniel*, 65 Wn.App. at 365 (citing to *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354,
6 98 L.Ed. 503 (1954)).

7 The present administrative case is quasi-criminal in nature. Licensee’s business license
8 is subject to suspension as a result of an alleged criminal violation by its employee. Licensee is
9 not asserting any affirmative claims against the Board and is not attempting to use the illegal
10 method by which Enforcement obtained the evidence against them to their own advantage.

11 Washington’s Administrative Procedure Act governs this administrative proceeding.
12 The rule for admissibility of evidence in these proceedings is set out in RCW 34.05.452(1), as
13 follows:

14 “Evidence, including hearsay evidence, is admissible if in the judgment of the presiding
15 officer it is the kind of evidence on which reasonably prudent persons are accustomed to
16 rely in the conduct of their affairs. The presiding officer shall exclude evidence that is
17 excludable on constitutional or statutory grounds or on the basis of evidentiary privilege
18 recognized in the courts of this state. The presiding officer may exclude evidence that is
19 irrelevant, immaterial, or unduly repetitious.”

20 The mandate of this statute is clear. Evidence that is excludable on constitutional or
21 statutory grounds cannot be admitted in administrative proceedings. All of the evidence
22 gathered by Enforcement in its compliance check of Licensees’ operations is excludable on
23 statutory grounds. Without this evidence, Enforcement cannot show any administrative
24 violations by Licensee.

25 CONCLUSION

26 The Administrative Law Judge erroneously concluded that Enforcement could, without
the authority of a rule adopted by the WSLCB pursuant to RCW 66.08.030, use a minor in its
compliance check at Licensee’s premises posted off-limits to minors. Licensee therefore

1 respectfully requests that the WSLCB reverse the Administrative Law Judge and enter an Order
2 dismissing the administrative complaint against Licensee.

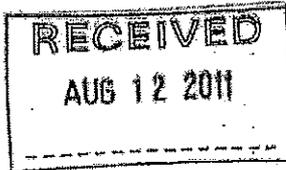
3 DATED this 25th day of August, 2011.

4 BAUMGARTNER, NELSON & PRICE, PLLC

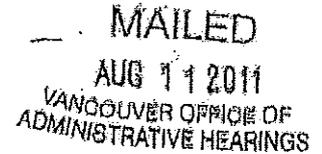
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6 
7 William V. Baumgartner, WSBA #3727
8 Laurence R. Wagner, WSBA #17605
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Tab A



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



In the Matter of:

ENT. Northwest, Inc.
dba The Hideaway

Licensee

License No. 356307

OAH No.: 2010-LCB-0019
LCB No.: 23,596

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND INITIAL ORDER

STATEMENT OF THE CASE

On October 6, 2009, the Washington State Liquor Control Board - Education and Enforcement Division (Enforcement or Board) issued an Administrative Violation Notice (AVN) to ENT Northwest, Inc., dba The Hideaway located at 1819 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington.

In the AVN, it was alleged that on October 1, 2009, the Licensee or an employee allowed a person under the age of 21 years to be served alcohol in violation of RCW 66.44.270(1), and that the Licensee or an employee allowed a person under the age of 21 years to frequent an off-limits area of the premises in violation of RCW 66.44.310.

The assessed penalty was a five (5)-day suspension or \$500 in lieu of suspension for the alleged first time violation.

On April 20, 2010, the Board issued a formal written Complaint alleging that:

(1) "on or about October 1, 2009, the above-named Licensee, or an employee(s) thereof, gave, sold and/or supplied liquor to a person (s) under the age of twenty-one (21), contrary to RCW 66.44.270 and/or WAC 314-11-020(1).

(2) on or about October 1, 2009, the above-named Licensee, or an employee(s) thereof, allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits to person (sic) under the age of twenty-one (21), contrary to RCW 66.44.310 and/or WAC 314-11-020(2)."

The Licensee filed a timely request for an administrative hearing.

The matter came on for hearing pursuant to due and proper notice at Vancouver, Washington, on June 30, 2011, before Gina L. Hale, Assistant Deputy Chief - Administrative Law Judge (ALJ).

The Licensee, ENT. Northwest, Inc. dba The Hideaway and owner Mark Otrumba, appeared and were represented by William Baumgartner, Attorney at Law.

The Liquor Control Board - Enforcement Division, was represented by Brian Considine, Assistant Attorney General. Liquor Enforcement Officer Almir Karic, Liquor Enforcement Officer Paul Magerl, and [REDACTED] Investigative Aide, 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, License Number, and Location** - The Licensee, ENT. Northwest, Inc., dba The Hideaway, is the holder of license number 356307. This license was issued by the Washington State Liquor Control Board under the provisions of Revised Code of Washington (RCW) 66.24. The license was for an establishment located at 4909 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington.

2. **Open to the Public and Conducting Business** - The Licensee was open to the public and conducting business at 4909 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington on October 1, 2009.

3. **Patrons Under Age 21 Years** - The Licensee's premises are restricted to persons age 21 years or older. Signs are posted which say "No Minors."

4. **Premises Checks, Compliance Checks, and Investigative Aides** - The Washington State Liquor Control Board - Enforcement Division monitors and regulates the conduct of licensees and their patrons to ensure compliance with applicable laws and administrative rules through a continuing program of premises checks and compliance checks. Enforcement also uses minors as Investigative Aides to assist in the compliance check program.

5. **October 1, 2009, Compliance Check** - On October 1, 2009, the Enforcement Division conducted a compliance check with the assistance of minor Investigative Aide, [REDACTED]. On October 1, 2009, [REDACTED] was age 18.

6. Prior to entering the Licensee's premises, [REDACTED] was checked by the Liquor Control Board Officers to be sure that he only had a valid Washington ID on his person. We find that [REDACTED] was carrying his vertical identification card which indicate that he turned age 18 on September 26, 2009.

7. When [REDACTED] entered the premises, no one was on duty checking identification at the door.

8. [REDACTED] was working on the inside with Enforcement Officer Paul Magerl. They made contact at the bar. As the two sat together, they were approached by the bartender.

9. The bartender asked [REDACTED] for his order, but did not ask his age or for any identification. The bartender served [REDACTED] a Bud Light which he paid for.

10. Once [REDACTED] was served, he left the drink on the bar with Officer Magerl, and went outside to complete his report.

11. Once [REDACTED] had exited the premises, Officer Almir Karic, the lead officer, entered the premises to serve the AVN.

12. Officer Karic made himself known to the bartender and took a statement from her in which she indicated that [REDACTED] was a regular and that is why she had not asked for his identification.

13. **Other Compliance Checks on October 1, 2009** - [REDACTED] participated in approximately 10 compliance checks that on the evening of October 1, 2009. He was served three to four times by the various other establishments. Some requested his identification and some did not.

14. We find that, as of the day of the hearing, [REDACTED] had never been on the Licensee's premises prior to October 1, 2009, or since.

15. **Licensee's Policy on Checking Identification** - The Licensee indicated that, prior to October 2009, the policy was to check the identification of anyone who appeared to be under the age of 40. We find that this policy was not uniformly practiced, nor was it a written policy.

16. The Licensee confirmed that no one was working the door that evening because they normally do not have a bouncer working at the door unless it is the weekend. October 1, 2009, was a Thursday.

17. **Identification Machine** - When the Licensee is using bouncers to check identification, they are to use an identification machine. The patron's identification is scanned by the machine and helps the employee know whether to admit or serve them.

18. When the bouncers are not working, bartenders use the machine and are to check the identification of the patrons.

19. **Licensee's Arguments** - The Licensee has argued that [REDACTED] was on the premises in violation of the law because of the signs which were posted saying "No Minors."

20. Additionally, the Licensee has argued that Mr. Starkel was "deceptively mature" and that Enforcement used "entrapment" to find violations for issuing the AVNs against the Licensee.

21. The Licensee has made a third argument that there was no adequate chain of custody and that it is not clear that [REDACTED] was actually served alcohol.

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. 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.

7. In the present case, the Licensee has violated its one stated policy of not checking the identification of patrons who appear to be younger than the age 40. In the case at hand, there was no attempt to check the identification or the age of [REDACTED] at all, either by electronic or manual means.

8. The bartender believed [REDACTED] to be a regular. However, [REDACTED] credible testimony was that this was the first and only time he had entered the premises.

9. The Licensee has argued that [REDACTED] was deceptively mature. The undersigned concludes that this argument fails in that the Licensee had an internal policy to check all patrons who appeared to be under the age of 40, and that was not done here.

10. The undersigned takes Administrative Notice that [REDACTED] does not appear to be over the age of 40.

11. Regarding the Licensee's argument that no alcohol was actually served, the undersigned gives credence to the voluntary statement, provided contemporaneously to the incident, by the bartender that she did in fact serve alcohol. This statement was taken shortly after the incident when the bartender's memory would have been clear and her recollection good. The Licensee's argument fails because there has been no showing that the Licensee has a habit of advertising sales of alcohol but actually selling something other than alcohol.

12. In the present case, no one used any method to confirm [REDACTED] age and the result was that an 18 year old was allowed to enter the premises and to purchase and be served alcohol.

13. The undersigned concludes that the Liquor Control Board has met its burden by a preponderance of the evidence that the Licensee served a minor in violation of the regulations and statutes.

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

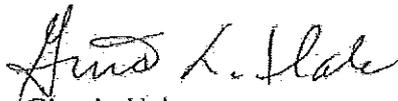
Initial Decision and Order

IT IS HEREBY ORDERED, that the Board's Complaint dated April 20, 2010, is **SUSTAINED**.

The license privileges issued to the Licensee, ENT. Northwest, Inc., dba The Hideaway, located at 4909 NE Hazel Dell Avenue, Vancouver, in Clark County, Washington, license number 356307, 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 five hundred dollars (\$500) in lieu of suspension on a date to be determined by the Board in its final order.

DATED and mailed at Vancouver, Washington, this 11th day of August, 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:

ENT. Northwest, Inc.
dba The Hideaway
1819 NE Hazel Dell Avenue
Vancouver, WA 98663

Licensee's Representative:

William Baumgartner
112 West 11th Street, Suite 150
Vancouver, WA 98660

Assistant Attorney General:

Brian Considine, AAG
Office of the Attorney General
1125 Washington Street SE
PO Box 40100 (MailStop 40100)
Olympia, WA 98504-0100

Department Contact:

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

Barb Cleveland, OAH
Mail Stop: 42488

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

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BY: _____

Tab B

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

MAILED
MAR 3 - 2011
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of:

ENT Northwest, Inc.
dba The Hideaway,

Licensee

License No.: 356307

OAH No.: 2010-LCB-0019 and
2010-LCB-0029
LCB No.: 23,596 and 23,654

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND INITIAL ORDER

STATEMENT OF THE CASE

Docket No 2010-LCB-0019. On October 6, 2009, the Washington State Liquor Control Board (Enforcement or Board) issued an Administrative Violation Notice to ENT Northwest, Inc., dba The Hideaway located at 1819 NE Hazel Dell Avenue, Vancouver, Washington. In the Notice, the Board alleged that on October 1, 2009, the Licensee or an employee allowed a person under the age of 21 years to frequent an off-limits area of the premises and that a person under the age of 21 years was served alcohol in violation of RCW 66.44.310 and RCW66.44.270(1) respectively.

The assessed penalty was \$500 for service to a minor for the alleged violation of RCW 66.44.270(1) and a five (5)-day suspension or \$500 for the alleged violation of RCW 66.44.310.

Docket No 2010-LCB-0029. On March 2, 2010, the Board issued an Administrative Violation Notice to ENT Northwest, Inc., dba The Hideaway located at 1819 NE Hazel Dell Avenue, Vancouver, Washington. In the Notice, the Board alleged that on February 27, 2010, the Licensee or an employee allowed a person under the age of 21 years to frequent an off-limits area of the premises and that a person under the age of 21 years was served alcohol in violation of RCW 66.44.310 and RCW66.44.270(1) respectively.

The assessed penalty was a seven (7)-day suspension for service to a minor for the alleged violation of RCW 66.44.270(1) and a seven (7)-day suspension for the alleged violation of RCW 66.44.310.

The Licensee made a timely request for hearing in both cases.

On July 30, 2010, Gina L. Hale, Assistant Deputy Chief - Administrative Law Judge (ALJ), heard oral arguments on the Licensee's Motion to Suppress and Dismiss.

The Licensee was represented by William Baumgartner, Attorney at Law. The Liquor Control Board was represented by Brian Considine, Assistant Attorney General.

DECISION SUMMARY

1. The Licensee's Motion to Suppress and Dismiss is **Denied**.
2. The case will be re-set for a hearing on the merits.

This decision is based on the written submissions and oral arguments of the parties.

I. Legal Briefing and Evidence

The following briefs and materials were submitted by the parties:

Filed July 6, 2010

- Licensee's Motion to Suppress and Dismiss
- Declaration of Laurence R. Wagner in Support of Licensee's Motion to Suppress and Dismiss.

Filed July 9, 2010

- Enforcement's Reply to Licensee's Motion to Suppress and Dismiss.

All Exhibits and Declarations included with all of the above briefs.

II. Undisputed Facts

Licensee, License Number, and Location - The Licensee, ENT. Northwest, Inc., dba The Hideaway, is the holder of license number 356307. This license was issued by the Washington State Liquor Control Board under the provisions of Revised Code of Washington (RCW) 66.24. The establishment is located at 1819 NE Hazel Dell Avenue, Vancouver, Washington.

Compliance Checks and Investigative Aides - The Washington State Liquor Control Board - Enforcement Division (Enforcement or Board) monitors and regulates the conduct of licensees and their patrons to ensure compliance with applicable laws and administrative rules through a continuing program of premises checks. Enforcement also uses minors as Investigative Aides as part of the compliance check program.

Open to the Public and Conducting Business - The Licensee was open to the public and conducting business in its current location as of February 27, 2010.

Patrons Under Age 21 Years - The Licensee's premises are restricted to persons age 21 years or older.

February 27, 2010, Compliance Check - On February 27, 2010, the Enforcement Division conducted a compliance check with the assistance of Investigative Aide, Denise Muñoz. Ms. Muñoz was age 19 years on February 27, 2010. She was accompanied by an undercover Enforcement Division law enforcement officer. Ms. Muñoz presented her Washington State identification to a male employee; the identification showed her date of birth. The employee

checked her identification and that of the officer and stamped their hands which allowed them to be on the premises. A female bartender asked them what they wanted. The aide and the officer ordered and were served two beers. Ms. Muñoz paid for the purchase of the drinks. Two other Enforcement officers entered the premises. After confirming the identity of the bartender, the officers cited the bartender and the Licensee for service to a minor.

Criminal Charges: Clark County District Court - Criminal charges against the bartender were dismissed by an Order entered in Clark County District Court on May 3, 2010, on the basis of insufficient evidence.

Prior Clark County District Court Orders - In December 2008, the Enforcement Division conducted compliance checks in three other cases. The criminal charges in all three cases were dismissed by the Clark County District Court. In those cases, the Court: a) held that the use of minors in such compliance checks was unlawful; b) suppressed all evidence obtained through the use of the minors; and c) dismissed all criminal charges.

Appeal to Clark County Superior Court - The Enforcement Division appealed those dismissals to the Clark County Superior Court which affirmed the District Court. The Superior Court held that the undercover program used by the Enforcement Division was not authorized in the absence of a specific statute or rule as required by RCW 66.08.030.

Based on the rulings in the December 2008, criminal cases, the Licensee argues that the Board's evidence, obtained with the help of the minor Investigative Aide in the present cases for Docket No. 2010-LCB-0019 and 2010-LCB-0029, should be suppressed and that the cases should be dismissed.

III. Licensee's Motion to Suppress and Dismiss

The Licensee has submitted a Motion to Suppress and Dismiss citing two bases for its position:

1. The Compliance Check Was Unlawful Because It Was not Conducted Pursuant to Any Rule Adopted by the WSLCB as Required by both RCW 66.08.030(1) and RCW 66.44.290.
2. All Evidence Gained Through the Compliance Check is Inadmissible and this Action Must Be Dismissed.

IV. Discussion

The rulings in the criminal cases by both the District and Superior Courts are instructive, but not as precedential as a ruling by the Court of Appeals or state Supreme Court. The undersigned is therefore not bound by the rulings of the District and Superior Courts.

Agency Rule. The legislature delegated, to the Washington State Liquor Control Board, the authority to regulate, educate, and penalize licensees engaged in the business of selling alcohol to the public as part of the police power of the state. The Board acts to protect the health, safety, and

welfare of the public. The alcohol industry is a disfavored and highly regulated industry. The license to operate in that industry is a privilege and not a right. WAC 314-12-010.

Under the provisions of RCW 66.44.010(4), the Board has the authority to "appoint and employ" liquor enforcement officers. These officers have the authority to enforce the penal provisions of the statute including RCW 66.44.270 which prohibits sale and distribution of alcohol to a person under the age of 21 years on the Licensee's premises. This statute grants the authority to the Board and does not require that any particular rule be promulgated in conjunction with the grant of authority.

As part of its efforts to enforce statute, the Board also has the authority to conduct compliance checks by using minors as investigative aides. The Licensee has cited RCW 66.44.290 to support its argument that the Board needs to promulgate rules. However, RCW 66.44.290 refers to the Licensee and not the Board. The Board has promulgated rules in order to allow Licensee's to develop and conduct their own internal compliance check or "controlled purchase program." This is not a requirement for the Board when conducting compliance checks on the Licensee or other license holders.

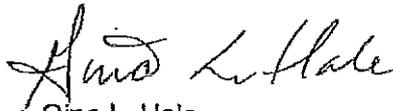
Inadmissible Evidence and Dismissal. The Licensee's arguments fail regarding the necessity for the Board to promulgate rules for the use of investigative aides as part of the compliance check program. Therefore, the evidence gathered by the Board is admissible and the Motion to Dismiss is Denied.

V. Initial Decision and Order

1. The Motion to Suppress and Dismiss submitted by the Licensee is DENIED.
2. The case will be set for a hearing on the merits.

DATED and mailed at Vancouver, Washington, this 3rd day of March, 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:

ENT. Northwest, Inc.
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1819 NE Hazel Dell Avenue
Vancouver, WA 98665

Licensee's Representative:

William Baumgartner
112 West 11th Street Suite 150
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Assistant Attorney General:

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1125 Washington Street SE
PO Box 40100 (MailStop 40100)
Olympia, WA 98504-0100

Department Contact:

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

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- (i) Specify the portions of the initial order to which exception is taken;
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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

Tab C



ENFORCEMENT DIVISION POLICY # 287 Investigative Aides

Policy #: 287	Effective Date: 3/5/07
Category: Officer Accountability	See Also: RCW 66.44.290
Purpose: Authority to use investigative aides in conducting liquor and tobacco compliance checks	RCW 70.155.080
Applies to: Enforcement Captains, Lieutenants and Officers	Enforcement Division Policy #280 Duty Expectations Enforcement Division Policy #285 Compliance Check Investigations

POLICY STATEMENT

The use of investigative aides is authorized to assist enforcement officers in conducting liquor and tobacco compliance check investigations. Investigative aides may volunteer or be paid as a part-time state employee.

- 1. Enforcement officers may recruit and utilize investigative aides to conduct compliance check investigations under the following conditions:**
 - Tobacco investigative aides must be 14 to 17 years of age.
 - Liquor investigative aides must be 17 to 20 years of age.
 - Investigative aides must not be deceptively mature in appearance.
 - Investigative aides shall not use a disguise or alter their appearance to look older.
 - The investigative aide may not be related to the enforcement officer.
 - All persons who wish to become investigative aides, either paid or voluntary must complete the investigative aide employment packet.
 - Investigative aides shall not be used until approved by the Chief's office.
- 2. The identity of investigative aides is not confidential. However, enforcement officers shall discuss the use of investigative aides or their names only in the course of their duties. Personal information on an investigative aide shall not be released unless required by public disclosure laws.**
- 3. Enforcement officers shall ensure that all investigative aides are briefed on the following compliance check procedures prior to each set of compliance check investigations.**

-
- If identification is carried or shown during the controlled purchase, it shall be the investigative aide's true identification.
 - If the investigative aide is not carrying any identification, they shall use one of the following excuses for failing to have identification:
 - a. "I left it at home."
 - b. "It's in the car."
 - c. "I lost it."
 - d. "I don't have any."
 - Note: If an investigative aide is asked their age they shall respond with the appropriate legal age for the product they are purchasing.
 - Investigative aides should avoid talking to anyone except the employees at the location. A receipt of the sale should be taken if offered.
 - Enforcement officers shall advise the investigative aide on what the procedure will be for collection of evidence, completion of the investigative aide's statement of sale and where to go when enforcement action is taken.
 - Investigative aides shall be informed that their employment is not dependant upon being successful in making liquor or tobacco purchases.
 - If the investigative aide is of the opposite sex from the enforcement officer conducting the compliance check investigation, two or more enforcement officers shall be involved in the operation.
- 4. Investigative aides shall not carry their own money. All money for the controlled purchase shall be provided by the officer from the investigative fund.**
- Enforcement officers shall check the investigative aide's wallets, purse, pockets, etc. to ensure the Investigative aide is not carrying any personal money prior to conducting compliance check investigations.
- 5. Investigative aide's safety is paramount. Enforcement officers shall not allow investigative aides to engage in arguing or other actions with sales clerks.**
- Enforcement Officers shall not allow investigative aides to speak with anyone other than the officer after the sale. Enforcement officers shall provide a safe area for the investigative aide to wait after a sale is made that is out of any inclement weather.
- 6. Two photos (Polaroid or Digital) of the investigative aide will be taken on the day of the compliance check investigation.**

-
- One photo shall be full face and one photo shall show the investigative aide from head to toe. The photos or copies shall be forwarded with the enforcement officer's case report.

7. The investigative aide's file shall be kept according to the Enforcement Division's records retention schedule.

- An investigative aide's files shall become inactive when the age of the investigative aide is older than policy requirements. Information contained in the investigative aide files shall only be used for division business.

RESPONSIBILITIES

Enforcement Captains/Lieutenants

- Ensure that enforcement officers follow the policy for using investigative aides.
- Maintain a confidential file on investigative aides used within their region by Enforcement officers. Each investigative aides file shall contain:
 - a. Legal name, nickname, address, and phone number
 - b. DOB/sex/race/height/weight/hair and eye color/scars, marks, or tattoos
 - c. Division identification number
 - d. Current photographs
 - e. Current occupation or school attending
 - f. Copies of legal identification issued to the person
 - g. Permission/Acknowledgement letters signed by a parent/guardian
 - h. Parent/School Authorizations
 - i. Labor and Industry files
 - j. Copies of each investigative aides report completed
 - k. Training and past experience
 - l. Copy of the debriefing information signed by the investigative aide
 - m. Enforcement officer's remarks on the cooperation and abilities of the investigative aide

Enforcement Officers

- Ensure investigative aides under 18 years of age have a current permission and acknowledgement letter signed by a parent/guardian. Enforcement officers should meet with one of the parents, if at all possible.
- Assure all appropriate Labor and Industries and school paperwork such as the Parent/School Authorization is completed. The Department of Labor and Industries may be contacted at www.wa.gov/lni/workstandards.
- Ensure investigative aide completes report of hours worked correctly.

DEFINITIONS

None

RELEVANT LAWS AND OTHER RESOURCES

RCW 66.20.190-Identification

WAC 314-21-Controlled Purchase Program

RCW 70.155.080 Tobacco Compliance Checks

REVISION HISTORY

Revised in March 5, 2007.

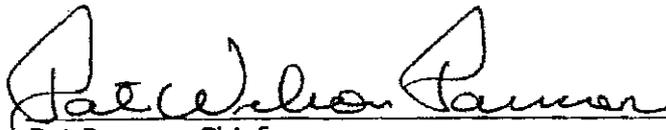
Replaces Policy Manual Chapter 8 Compliance Checks Created June 26, 1997

Replaces Policy Manual Chapter 28 Compliance Checks Created June 26, 1997

CONTACT

For additional information about this policy, contact the Deputy Chief of the Enforcement Division.

APPROVING AUTHORITY



Pat Parmer, Chief
Enforcement Division

3/5/07
Date

1 **CERTIFICATE OF SERVICE**

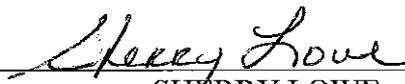
2 I hereby certify that on the 25th day of August, 2011, I served the foregoing

3 LICENSEE'S PETITION FOR REVIEW on the following parties at the following address:
4

5 Washington State Liquor Control Board
6 3000 Pacific Avenue SE
7 Olympia, WA 98501

8 Brian Considine, AAG
9 Office of Attorney General
10 1125 Washington Street SE
11 PO Box 40100 (MailStop 40100)
12 Olympia, WA 98504-0100

13 by mailing to them a true and correct copy thereof, certified by me as such, placed in a sealed
14 envelope addressed to them at the addresses set forth above, and deposited in the U.S. Post
15 Office at Vancouver, Washington on said day with postage prepaid.

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19 SHERRY LOWE
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**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

ENT. NORTHWEST, INC. d/b/a THE
HIDEAWAY

4909 NE HAZEL DELL AVE
VANCOUVER, WA 98663

LICENSEE

LICENSE NO. 356307
AVN NOS. 1L9274B

OAH NO. 2010-LCB-0019

LCB NO. 23,596

ENFORCEMENT'S RESPONSE TO
LICENSEE'S PETITION FOR
REVIEW

The Washington State Liquor Control Board (Board), Enforcement and Education Division (Enforcement) by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, hereby responds to the ENT. NORTHWEST, INC. d/b/a THE HIDEAWAY's (Licensee) Petition for Review in the above-captioned matter.

Enforcement asserts that the Licensee's Petition lacks the force and merit necessary to overcome the reasoned opinion of the administrative law judge. The Initial Order issued by the administrative law judge is fully supported by the evidence in the record and the law and should be affirmed by the Board.

I. STANDARD OF REVIEW

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

1 reviewing officer (including the agency head reviewing an initial order) “shall exercise all the
2 decision-making power that the reviewing officer would have had to decide and enter the final
3 order had the reviewing officer presided over the hearing[.]” RCW 34.05.464(4).

4 **II. PROCEDURAL HISTORY**

5 On October 1, 2009, Enforcement issued Administrative Violation Notice (AVN)
6 No. 1L9274B to the Licensee for a violation of RCW 66.44.270(1) and RCW 66.44.310(1)(a).
7 After the Licensee requested a formal hearing in each matter, the Board issued a Complaint to
8 the Licensee on April 20, 2010, in LCB No. 23,596 for violations of
9 RCW 66.44.270(1) and RCW 66.44.310(1)(a). A prehearing conference was held on June 8,
10 2010, and a briefing schedule for the Licensee’s Motions to Suppress and Dismiss (Motions)
11 was set.

12 The Licensee submitted its Motions and Enforcement Responded. Administrative Law
13 Judge (ALJ) Gina Hale heard oral arguments on the Licensee’s motions on July 30, 2010, and
14 issued a decision on March 3, 2011, denying the Licensee’s Motions and set the matter for a
15 hearing on the merits. A hearing was held on June 30, 2011, and ALJ Hale issued her Initial
16 Order on August 11, 2011. The Licensee submitted a Petition for Review of ALJ Hale’s ruling
17 on or about August 25, 2011, and Enforcement now responds.

18 **III. FINDINGS OF FACT**

19 The Licensee does not take exception to the ALJ’s Findings of Fact. *See* Petition for
20 Review at 2-4. Enforcement submits that the ALJ’s Findings of Fact are fully supported by the
21 record. Therefore, the ALJ’s Findings of Fact remain unchallenged by the Licensee,
22 Enforcement will not address these unchallenged findings, and the Board should adopt the
23 Tribunal’s Findings of Fact.

24 Additionally, the Licensee attempts to rely on exhibits not admitted at the
25 administrative hearing in this matter. The Licensee cites to counsel’s declaration and exhibits

1 offered in support of its motions for suppression and dismissal. *See* Licensee’s Motion to
2 Suppress and Dismiss, Exhibits; Petition for Review at 3, 10. These exhibits were not offered
3 by the Licensee at the administrative hearing and are not part of the factual record established
4 at the administrative hearing. Therefore, the Board should disregard them as facts and, if
5 necessary, only refer to them for the Licensee’s legal arguments.

6 Lastly, any reliance by the Licensee on Superior Court Case Numbers 09-1-00725-9,
7 09-1-00724-1, and 09-1-00723-3, misplaced. Superior court decisions have no precedential
8 value and should not be cited or relied upon in this administrative action. *See Yousoufian v.*
9 *Office of Ron Sims*, 168 Wn.2d 444, 470, 229 P.3d 735 (2010). Therefore, the Board should
10 disregard any reference to these Superior Court cases.

11 IV. CONCLUSIONS OF LAW

12 A. Exceptions to Conclusions of Law – March 3, 2011, Order

13 1. The administrative law judge’s determination that “the alcohol industry is 14 disfavored and highly regulated” is immaterial to the Licensee’s motion.

15 The Licensee takes exception to the administrative law judge’s determination that “the
16 alcohol industry is disfavored and highly regulated.” Petition for Review at 2; *See* March 3,
17 2011, Order at 4. The administrative law judge’s determination that “the alcohol industry is
18 disfavored and highly regulated” is immaterial to the Licensee’s motion. The Licensee does not
19 cite to any statute or case law that contradicts this legal conclusion. Additionally, the Licensee
20 does not indicate how this conclusion in the Tribunal’s “Discussion” section affects its
21 Motions to Suppress and Dismiss. *See* Petition for Review at 2.

22 Nevertheless, the sale of alcohol is historically a highly regulated industry, not only in
23 Washington State, but throughout the nation. *See Colonnade Catering Corp. v. United States*,
24 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *see also Jow Sin Quan v. Washington State*
25 *Liquor Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966). The dominion of the Board
in regulating, supervising, and licensing the retail sale of alcohol is “broad and extensive,” and

1 a liquor license does not constitute a vested property right, but rather “a temporary permit, in
2 the nature of a privilege, to engage in a business that would otherwise be unlawful.” *Jow Sin*
3 *Quan*, 69 Wn.2d at 382; WAC 314-07-015; *see also Anderson, Leech, & Morse, Inc. v.*
4 *Washington State Liquor Control Bd.*, 89 Wn.2d 688, 694-95, 575 P.2d 808 (1978); *Scottsdale*
5 *Insurance Co. v. Intl. Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001)
6 (noting that a liquor license is “merely representative of a privilege granted by the state”).

7 Therefore, the Licensee’s exception is immaterial to the Licensee’s motion and the
8 Board should disregard it. Additionally, even if the conclusion were material, the alcohol
9 industry is highly regulated and unfettered sale, distribution, and use of alcohol in Washington
10 State is disfavored. Consequently, the Licensee’s exception fails and the Board should adopt
11 the Initial Order.

12 **2. Enforcement has the authority to enforce all liquor laws and rules and engage**
13 **in compliance checks.**

14 The Licensee argues that Part IV of the ALJ’s March 3, 2011, order is incorrect
15 because the Board must promulgate a rule allowing Enforcement to conduct compliance
16 checks. Petition for Review at 2. The administrative law judge properly found that the
17 Board’s Enforcement Division has the authority to conduct compliance checks. *See* March 3,
18 2011, Order at 3-4. The Licensee’s argument is unsupported and erroneous, and the Board
19 should adopt the ALJ’s Initial Order.

20 The Washington State Legislature granted the Board the power to “enforce the penal
21 provisions of this title and the penal laws of this state relating to the manufacture, importation,
22 transportation, possession, distribution, and *sale of liquor.*” RCW 66.44.010(2) (emphasis
23 added). The Legislature also has authorized the Board to “appoint and employ...liquor
24 enforcement officers” who “shall have the power, under the supervision of the board, to
25 enforce the penal provisions of this title and the penal laws of this state relating to the
manufacture, importation, transportation, possession, distribution, and *sale of liquor.*”

1 RCW 66.44.010(4) (emphasis added). The Legislature also ensured that licensees would
2 comply with the conditions of their license by allowing the Board to conduct, through its liquor
3 enforcement officers, warrantless inspections of their licensed premises. *See* RCW 66.28.090.
4 RCW 66.28.090, states, in part, that:

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

10 This statute is clear that the Board may inspect a licensed premise at any time, and a licensee's
11 privileges are subject to the Board being able to have access to the licensed premises through
12 its Enforcement officers. *See* RCW 66.28.090(2).

13 In keeping with these responsibilities, liquor enforcement officers, similar to state,
14 county, and city law enforcement officers, utilize "compliance checks" to help them inspect
15 and regulate licensees in their interactions with minors¹. Enforcement conducts its compliance
16 checks by employing minor investigative aides to act as decoys. The minor investigative aides
17 help Enforcement simulate a typical scenario where a minor may try and enter an
18 establishment off limits to them and purchase alcohol. Any minor investigative aide that is
19 utilized in a compliance check is employed as an agent of the Enforcement Division, and only
20 enters liquor establishments at the direction of a liquor enforcement officer. Furthermore, the
21 Board published WAC 314-29-005(1) that expanded its liquor officers' authority to enforce the
22 Board's administrative rules codified in Title 314 WAC. *See* WAC 314-29-005(1). Thus, a
23 liquor enforcement officer can cite a licensee with an administrative violation if he or she
24 believes a violation occurred.

25 ¹ Law enforcement may use a decoy or informer when affording a person with an opportunity to violate the law.
See State v. Gray, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245
(1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948); *See Also Playhouse Inc. v. Liquor Control
Board*, 35 Wn. App. 539, 667 P.2d 1136 (1983) ("deceitful practices . . . including the use of undercover agents
and limited police participation in unlawful enterprises, are not constitutionally prohibited.").

1 Here, the Licensee was cited for violations of RCW 66.44.270(1) and
2 RCW 66.44.310(1)(a) after Enforcement conducted a compliance check at the Licensee's
3 premises and observed its minor investigative aide enter into the licensed premises, remain,
4 and be sold liquor by the Licensee's bartender. The statutes in Title 66 RCW are clear in that
5 the Board has the authority to enforce these provisions, and has the authority to employ liquor
6 enforcement officers to enforce the liquor laws. The Board's authority, through the use of its
7 Enforcement Division, to utilize compliance checks is derived through the Board's broad
8 regulatory authority along with the Legislature's authorization allowing the Board to employ
9 and use liquor enforcement officers. The Board, through its Enforcement Division, was well
10 within its authority to inspect the licensed premises and provide an opportunity for the
11 Licensee, through its employees, to either comply or not comply with the law. Therefore,
12 Enforcement has the authority to use compliance checks and the ALJ properly denied the
13 Licensee's motions.

14 **a. RCW 66.08.030 does not require the Board to promulgate rules authorizing**
15 **Enforcement to utilize compliance checks.**

16 The Licensee also argues that RCW 66.08.030(1) requires the Board to promulgate
17 rules authorizing Enforcement to utilize compliance checks. Petition for Review at 5.
18 RCW 66.08.030 does not require the Board to promulgate rules authorizing Enforcement to
19 utilize compliance checks. Additionally, the statutory language found in Title 66 RCW must
20 be analyzed in the context of the entire statute, including the statute's purpose. *State v. Manro*,
21 125 Wn. App 165, 173, 104 P.3d 708 (2005). When looking at statutory language, courts
22 should derive the statute's purpose from its plain and unambiguous meaning. *Id.* The "plain
23 meaning" of a statute is determined by the ordinary meaning of its language, the general
24 context of the statute in which that provision is found, related provisions, and the statutory
25 scheme as a whole. *State v Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *See also, State*
v. Thorne, 129 Wn.2d 736, 761, 921 P.2d 514 (1996); *State v. Nam*, 136 Wn. App. 698, 704,

1 150 P.3d 617 (2007). When looking at a statute, “the fundamental objective is to ascertain and
2 carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court
3 must give effect to that plain meaning as an expression of legislative intent. *Dep’t of Ecology*
4 *v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Also, the court should
5 look at related statutes when analyzing the purpose of a statute or regulatory structure. *See*
6 *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *Washington Public Ports Ass’n v.*
7 *Dept of Revenue*, 148 Wn.2d 637, 645-46, 62 P.3d 462 (2003). Lastly, a court should construe
8 agency rules in a rational, sensible manner, giving meaning to the underlying policy and intent
9 and avoid interpretations that are unlikely or absurd. *See Odyssey Healthcare Operating BLP*
10 *v. Washington State Dept. of Health*, 145 Wn. App. 131, 185 P.3d 652 (2008) quoting *Mader v.*
11 *Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003).

12 The Licensee argues that RCW 66.08.030(1) requires that the Board publish rules
13 authorizing Enforcement to conduct premises checks, but the plain meaning of
14 RCW 66.08.030(1) does not create this requirement. Petition for Review at 4-7.
15 RCW 66.08.030(1) asserts that: “[f]or the *purpose of carrying into effect the provisions of this*
16 *title according to their true intent or of supplying any deficiency therein*, the board *may* make
17 such regulations not inconsistent with the spirit of this title as are deemed necessary or
18 advisable....” (Emphasis added). This provision’s plain meaning does not require the Board
19 to publish rules for any specific statute, and listing of areas the Board can specifically regulate
20 in RCW 66.08.030(2) does not limit the broad discretionary authority given to the Board in
21 RCW 66.08.030(1). *Compare* RCW 66.08.030(2) with RCW 66.08.030(1).

22 The context of the statute is also clear. RCW 66.08.030(1) is meant to be the general
23 mechanism that allows the Board to publish rules it deems necessary or advisable to administer
24 the sections of Title 66 RCW. It is not a mandate that the Board publish any particular rule,
25 but it is the authority allowing it to do so. Therefore, the Licensee is incorrect when it argues

1 that RCW 66.08.030(1) requires the Board to publish a rule on Enforcement's use of
2 compliance checks.

3 Moreover, each provision found in Title 66 RCW should not be read in isolation and
4 the court should look at related statutes when analyzing the purpose of one particular statute or
5 regulatory structure in Title 66 RCW. *See State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281
6 (2005); *Washington Public Ports Ass'n v. Dept of Revenue*, 148 Wn.2d 637, 645-46, 62 P.3d
7 462 (2003). RCW 66.08.010 asserts that "entire title shall be deemed an exercise of the police
8 power of the state, for the protection of the welfare, health, peace, morals, and safety of the
9 people of the state, and all its provisions shall be liberally construed for the accomplishment of
10 that purpose." RCW 66.08.020 charges the Board with the administration of Title 66 RCW.
11 *See* RCW 66.08.020. Likewise, RCW 66.44.010 allows the Board to enforce the penal laws of
12 Washington State and authorizes the Board to employ liquor enforcement officers to enforce
13 the provisions under Title 66 RCW. Part of that responsibility, along with county and
14 municipal law enforcement agencies, is to ensure that the Licensee is not violating the statutes
15 at issue in this matter, RCW 66.44.270(1) and RCW 66.44.310(1)(a). *See* RCW 66.44.010.
16 Looking at these provisions, it is clear that the legislature gave the Board, and its Enforcement
17 Division, broad penal and regulatory power in enforcing Title 66 RCW and did not require the
18 Board to publish rules allowing Enforcement to utilize compliance checks.

19 Additionally, the legislative history of RCW 66.44.290 provides insight into the
20 legislature's mind set when it looks at Enforcement's use of compliance checks. Though
21 RCW 66.44.290 is not applicable to Enforcement's use of compliance checks, its legislative
22 history does provide insight into the Legislature's knowledge of compliance checks.
23 RCW 66.44.290, with its current amendments, was introduced to the legislature as S.B. 5604
24 by Senators Spanel and Gardner. S.B. 5604, 57th Leg., Reg. Sess. (Wash. 2001). Senator
25 Harriet Spanel and the Senate Committee's nonpartisan staff, testifying at the Senate

1 Committee hearing on S.B. 5604, specified that the purpose of the Bill was solely to provide
2 licensees the ability to conduct internal controlled purchase programs. *See* An Act Relating to
3 Allowing the Liquor Control Board to Authorize Controlled Purchase Programs and Amending
4 RCW 66.44.290: Hearing on S.B. 5604 Before the S. Comm. on Labor, Commerce and Fin.
5 Inst., 57th Leg. (2001) at 00:29:16 (audio recording of hearing)². Larry Mount, representing a
6 licensee, and Jan Gee representing the Washington State Food Industry also testified at the
7 Senate Committee hearing. *Id.* at 00:30:00 (audio recording of hearing). Both individuals
8 indicated that they supported the Bill, not to replace liquor enforcement compliance checks,
9 but to allow licensee's to do their own internal checks to increase compliance with the law and
10 assist Enforcement's efforts. *Id.* at 00:30:02-00:33:01 (audio recording of hearing).

11 The House Committee on Commerce and Labor also held a hearing on S.B. 5604. *See*
12 An Act Relating to Allowing the Liquor Control Board to Authorize Controlled Purchase
13 Programs and Amending RCW 66.44.290: Hearing on S.B. 5604 Before the H. Comm. on
14 Commerce and Labor, 57th Leg. (2001)³. The House Committee's nonpartisan staff introduced
15 the bill to the committee pointing out that the Board enforcement officers currently conduct
16 controlled purchases from Licensees as a part of its regulatory compliance program. *Id.* at
17 00:33:43-00:34:05 (audio recording of hearing)⁴. Then, Jan Gee, Larry Mount, Joe Daniels
18 representing the United Food and Commercial Workers, Michael Transue representing the
19

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

22 ³ Available at Audio Recording of 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
23 Recording of Public Hearing on March 28, 2001).

24 ⁴ The House nonpartisan staff gives a detailed description of the Board's current practice, current industry
practices, and a summary of how the bill will affect the current law. *See* An Act Relating to Allowing the Liquor
25 Control Board to Authorize Controlled Purchase Programs and Amending RCW 66.44.290: Hearing on S.B. 5604
Before the H. Comm. on Commerce and Labor, 57th Leg. (2001), Available at Audio Recording of 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).

1 Washington Restaurant Association, and Larry Phillips representing the Liquor Control Board,
2 testified at the hearing. *Id.* at 00:33:43-00:45:30 (audio recording of hearing). All individuals
3 indicated that they supported the bill to allow liquor establishments to conduct their own
4 internal checks to self-regulate the sale of alcohol by their employees. *Id.* at 00:36:52-00:45:30
5 (audio recording of hearing).

6 Clearly, this legislative history shows that the legislature is aware of Enforcement's use
7 of compliance checks. If the legislature wanted to constrain law enforcement's use of
8 compliance checks, it could do so, but it has chosen to allow law enforcement to use its broad
9 police powers when enforcing provisions of Title 66 RCW. This history is further evidence
10 that the Board and its Enforcement arm have the authority to conduct compliance checks.

11 Therefore, considering the plain meaning of RCW 66.08.030(1), its context, related
12 statutes, and the legislative history of RCW 66.44.290, it is clear that the Board and its
13 Enforcement Division have the authority to enforce all liquor laws through the use of a
14 compliance check against the Licensee. Consequently, the Licensee's argument that
15 the Board must publish a rule authorizing Enforcement to utilize compliance checks is
16 incorrect, and it is not an avenue by which the Licensee may now avoid its responsibility to
17 follow the law and rules it voluntarily agreed to abide by when it chose to apply for and accept
18 a liquor license. Therefore, the Licensee's motions were properly denied and the Board should
19 adopt the Initial Order in this matter.

20 **b. RCW 66.24.290, RCW 66.44.310, and WAC 314-21 do not prevent**
21 **Enforcement from utilizing a minor investigative aide in a compliance check**
22 **and its use of compliance checks is not improper.**

23 Next, the Licensee argues that RCW 66.44.290, RCW 66.44.310, and/or WAC 314-21
24 prevents Enforcement from utilizing minor investigative aides in compliance checks. *See*
25 *Petition for Review* at 5-9. The Licensee supports this conclusion by asserting Enforcement
lacks that ability because the pertinent statutes and rules only address the crime, punishment

1 and possible immunity for minors who purchase liquor, and no statute or rule addresses the
2 conduct of Enforcement. This argument is misplaced.

3 The plain meaning of RCW 66.44.290, RCW 66.44.310, and/or WAC 314-21
4 demonstrate that they are to only apply to minors who attempt to purchase liquor, and not to
5 the conduct of Enforcement. RCW 66.44.290's plain meaning demonstrates that its provisions
6 were clearly intended to address minors purchasing alcohol and private in-house controlled
7 purchase programs and not Enforcement's use of compliance checks. If the legislature had
8 intended for RCW 66.44.290 to pertain to Enforcement's use of compliance checks, it would
9 have directly addressed the use of compliance checks in the statute since it knew that the Board
10 conducted compliance checks when it amended RCW 66.44.290 in 2001⁵. Therefore, the plain
11 meaning and language of RCW 66.44.290 establishes that the statute is clearly meant to
12 regulate the conduct of minors and private in-house controlled purchase programs, and not the
13 conduct of Enforcement.

14 Similarly, RCW 66.44.310's plain meaning demonstrates that its provisions were
15 clearly intended to address situations where minors enter areas classified as off-limits to any
16 person under the age of twenty-one. If the legislature had intended for RCW 66.44.310 to
17 pertain to Enforcement's use of compliance checks, it would have directly addressed the use of
18 compliance checks. Therefore, the plain meaning and language of RCW 66.44.310 establishes
19 that the statute is clearly meant to regulate the conduct of minors, and not the conduct of
20 Enforcement.

21 Also, the intent and plain meaning of WAC 314-21 clearly indicates that it was
22 published to address in-house controlled purchase programs carried out under RCW 66.44.290
23 and how a licensee must conduct an in-house controlled purchase program. The Board did not
24 intend to exclude Enforcement from utilizing compliance checks, and the Licensee's inference

25 ⁵ See *Supra*, Enforcement's discussion of the legislative history of RCW 66.44. The legislative history clearly shows that the legislature knew that the Board conducted compliance checks when it amended this statute in 2001.

1 that it did would ask for an absurd result. WAC 314-21 is clear that it only relates to a
2 Licensee's use of an in-house controlled purchase program and not Enforcement's use of
3 compliance checks.

4 Additionally, the Licensee misguidedly suggests the use of a minor investigative aide is
5 improper because the minor investigative aide violated the law.⁶ Petition for Review at 9. The
6 Licensee also seems to infer that the minor investigative aide and the liquor enforcement
7 officers are now exposed to criminal prosecution for participating in the compliance check.
8 Petition for Review at 9. However, the Licensee has provided no authority to support these
9 careless assertions, and the Board should disregard these arguments⁷.

10 Officers of the Washington State Liquor Control Board are limited purpose law
11 enforcement officers. *See* RCW 66.44.010. As such, they have broad police powers to enforce
12 the laws in Washington relating to the sale of liquor. Liquor enforcement officers are granted
13 the authority to conduct compliance checks on liquor retailers through the Board's
14 authorization to employ and use liquor enforcement officers⁸, authority derived from general
15 police powers, and Washington case law.

16 Washington Courts are clear that law enforcement may run undercover operations and
17 use a decoy or informer when affording a person with an opportunity to violate the law. *See*
18 *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 242,
19 517 P.2d 245 (1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948).
20 Specifically, the courts have stated the use of a decoy or informer to present an opportunity for
21 commission of a crime is not improper." *Gray*, 69 Wn.2d at 432; *see also Playhouse Inc. v.*
22 *Liquor Control Board*, 35 Wn. App. 539, 542, 667 P.2d 1136 (1983) ("deceitful practices . . .

23
24 ⁶ Enforcement notes that the Licensee mentions "Mr. Uren," but the investigative aide in this matter was [REDACTED]

25 ⁷ *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) ("Courts may assume where no authority is cited in a
brief, counsel has been unable to find any.")

⁸ RCW 66.44.010(4)

1 including the use of undercover agents and limited police participation in unlawful enterprises,
2 are not constitutionally prohibited.”). The minor investigative aide or liquor enforcement
3 officers did not violate any law acting as agents of the Board. Additionally, Enforcement is
4 allowed to use compliance checks for the purpose of affording the Licensee with an
5 opportunity to violate the law in the furtherance of Enforcements well established duty to test
6 the Licensee’s compliance with liquor laws. See RCW 66.44.010(4); *Playhouse Inc.*, 35 Wn.
7 App. at 342; *State v. Athan*, 160 Wn.2d 354, 371-77, 158 P.3d 27 (2007).

8 Moreover, as an agent of Enforcement, the minor investigative aide is protected from
9 prosecution even if the liquor statutes and rules do not explicitly mention immunity for minor
10 investigative aides involved in Enforcement-run compliance checks. Law enforcement may
11 engage in limited criminal acts “in order to detect and eliminate criminal activity.” *State v.*
12 *Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996). These practices, when part of a scheme of
13 crime detection by law enforcement officers, have not ordinarily been held improper.
14 *Playhouse*, 35 Wn. App. at 542; See also, *Emerson*, 10 Wn. App. at 242, *State v. Clark*, 34
15 Wn. App. 173, 175-76, 659 P.2d 554. Even if that reasoning did not apply to the minor
16 investigative aide here, he would be absolved from any criminal liability as he could claim a
17 complete defense of entrapment. See RCW 9A.16.070(1)(a).

18 Here, the minor investigative aide used in the Licensee’s compliance check is an agent
19 of Enforcement, and is not subject to the provisions of RCW 66.44.290 or WAC 314-21.
20 Additionally, Enforcement is a law enforcement agency and has the ability to run compliance
21 checks as a part of its law enforcement duties. The Licensee fails to recognize Enforcement’s
22 limited law enforcement jurisdiction, and its exaggerated concern for the risk of prosecution
23 faced by the investigative aide and liquor enforcement officers here is not supported by law
24 and is wholly illusory. Therefore, the ALJ properly denied the Licensee’s motions.

1 **c. The Licensee’s mention of Enforcement Policy Number 287 is immaterial and**
2 **is not controlling in this administrative matter.**

3 The Licensee cites to Enforcement’s Internal Policy No. 287 and correctly contends
4 that Enforcement’s Internal Policy Number 287 is not a rule adopted by the Board. Petition for
5 Review at 8. Then, the Licensee cites to Internal Policy Number 287 as a relevant and
6 controlling authority in this matter. Petition for Review at 8, 10. Enforcement Policy Number
7 287 is an internal policy that has not been promulgated by the Board, and it is not relevant, nor
8 controlling, in this administrative matter.

9 A “rule” is any agency order, directive, or regulation of general applicability that was
10 formally promulgated according to RCW 34.05. *See* RCW 34.05 and RCW 34.05.010(16); *See*
11 also *Pierce County v. State*, 144 Wn. App. 783, 836, 185 P.3d 594 (2008). A “rule” includes
12 the amendment or repeal of a prior rule, but “*does not include statements concerning only the*
13 *internal management of an agency and not affecting private rights or procedures available to*
14 *the public....*” RCW 34.05.010(16) (Emphasis added).

15 Unless formally promulgated by the Board, internal agency policies are not law nor do
16 they have the authority of law in an administrative hearing. *See* RCW 34.05.010(16); *Mills v.*
17 *Western Washington University*, 150 Wn. App. 260, 276-77, 208 P.3d 13 (2009) (Where an
18 internal policy was not a “rule” as that term is used in the Administrative Procedures Act and
19 could not be relied upon as authority by an adjudicative body). Furthermore, since internal
20 policies are not promulgated by the Board, they do not have the force of law. *See Joyce v.*
21 *Dept. of Corrections*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005) (“Unlike administrative rules
22 and other formally promulgated agency regulations, internal policies and directives generally
23 do not create law”). As a result, the only rules that have the authority of law in this instant
24 matter can be found in Title 314 WAC.

25 Here, Policy No. 287 was never formally promulgated by the Board according to
RCW 34.05 and RCW 66.08.030(1), and it is not a policy conceived by or even produced by

1 the members of the Board. It is an Enforcement internal policy, and it is merely a guideline for
2 employees of the Board's Enforcement Division. As such, it is not law, nor does it have the
3 authority of law in this administrative matter, and the court should not consider it when
4 deciding whether or not a licensee committed an administrative violation. See
5 RCW 34.05.010(16); *Mills*, 150 Wn. App. at 276-77. Therefore, Enforcement's internal
6 policies would not be determinative as to the admissibility or relevance of the evidence
7 gathered against the Licensee, and they have no relevancy as to whether or not the Licensee
8 furnished liquor to a minor.

9 Consequently, the Board and Enforcement have the statutory, regulatory, and case law
10 authority to conduct compliance checks on the Licensee's premises. The Licensee's reference
11 to Internal Policy Number 287 is immaterial and meant to cloud the issues in this matter, and
12 the ALJ properly denied the Licensee's motions.

13 **3. The Licensee failed to set forth viable legal grounds to dismiss the**
14 **administrative complaint.**

15 The Licensee asserts that all evidence presented against it at the administrative hearing
16 was inadmissible and the administrative complaint should be dismissed. Petition for Review at
17 12. The Licensee appears to assert that the evidence in this matter should be suppressed
18 because it was attained through an unlawful search. Petition for Review at 12. However, the
19 Licensee fails to engage in any analysis of how Enforcement engaged in an unlawful search.
20 Here, the Licensee runs a business it holds open to the public.⁹ The administrative record
21 clearly establishes that the minor investigative aide entered and remained in the public portion
22 of the Licensee's premise. See August 11, 2011, Order at 2. While inside the public portion of
23 the Licensee's premises, the minor investigative aide purchased a Bud Light beer. See August
24 11, 2011, Order at 3. The Licensee has presented no evidence and no facts are found showing
25

⁹ See WAC 314-11-072

1 the minor investigative aide or any officer ever entered a portion of the Licensee's commercial
2 property that was not open to the general public or limited only to employees.

3 Therefore, the Licensee appears to ignore WAC 314-11-072—it must be open to the
4 general public whenever liquor is sold, served, or consumed—and RCW 66.04.010(35)—
5 “public place” includes “establishments where beer may be sold. . . restaurants”—in its attempt
6 to infer that an unlawful search occurred. This oversight is fatal to the Licensee's argument
7 because expectation of privacy in commercial property does not extend to that which an owner
8 or operator of a business voluntarily exposes to the public. *See State v. Carter*, 151 Wn.2d
9 118, 126, 85 P.3d 887 (2004); *See v. City of Seattle*, 387 U.S. 541, 545, 87 S. Ct. 1737 (1967);
10 *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994) (“what is voluntarily exposed to the
11 general public and observable without the use of enhancement devices from an unprotected
12 area is not considered part of a persons private affairs”).

13 Additionally, the Licensee invokes the exclusionary rule as the mechanism through
14 which the Board should suppress evidence because it asserts that administrative proceedings
15 before the Board are “quasi-criminal” in nature. *See* Petition for Review at 12. However, the
16 Licensee fails to actually cite to any authority indicating that administrative proceedings before
17 the Board are quasi-criminal in nature.¹⁰ Additionally, the Licensee has failed to provide any
18 support for why the exclusionary rule should be a remedy in this administrative matter.
19 Although Enforcement assumes that the Licensee is attempting to invoke the exclusionary rule
20 because it feels that an unlawful “search” occurred in this matter, its reliance on the
21 exclusionary rule is based entirely on its own assumptions and it has failed to provide the
22
23

24 ¹⁰ Administrative proceedings are not quasi-criminal when the potential penalties are remedial in nature. *See State*
25 *v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997). Here, the penalties found in WAC 314-29-020 are not punitive
in nature, and are meant to protect and promote the public's health, safety, and welfare. RCW 66.08.010. Thus,
absent any indication that a criminal purpose was intended the stated civil goals of the agency are controlling.
Catlett, 133 Wn.2d at 367 (citing *In re Young*, 122 Wn.2d at 23).

1 Board with any evidence that a “search” occurred. Consequently, the Licensee’s motions were
2 properly denied and the board should adopt the Initial Order in its entirety.

3 **B. Exceptions to Conclusions of Law – August 11, 2011, Order**

4 The investigative aide’s appearance is immaterial in this matter and “deceptively
5 mature in appearance” is not a legal standard that is applicable in this matter. The Licensee
6 argues that Enforcement used a minor investigative aide who was “deceptively mature in
7 appearance.” Petition for Review at 9-12. The Licensee does not cite to anything in the
8 administrative record to support this factual assertion.¹¹ Nevertheless, its argument is
9 immaterial and unsupported by the record and the ALJ’s Order. The Licensee cites to
10 WAC 314-21-025 and Internal Policy No. 287. As previously stated, neither WAC 314-21 nor
11 Internal Policy No. 287 are relevant in this matter, and the Licensee has provided no authority
12 to the contrary¹².

13 RCW 66.44.270 is clear—a person is prohibited from selling, giving, or supplying
14 liquor to a person under the age of twenty-one (21) years. The statute does not use the words
15 “knowingly” or “intend” and the violation is the *sale* of liquor and not the intent of the seller.
16 Therefore, the statute creates a strict liability on licensees and they have committed a violation
17 if they are found to have sold liquor to a person under the age of twenty-one (21). *See State v.*
18 *Moser*, 98 Wash. 481, 482, 167 P. 1101 (1917) (if a person sold liquor to minors, “he is guilty
19 of the crime charged, irrespective of his intention, knowledge, or belief...”); *State v. Catalino*,
20 118 Wash. 611, 612-13, 204 P. 179 (1922) *overruled on different grounds by State v.*
21 *Misetrich*, 124 Wash. 470, 215 P. 13 (1923). *See also State v. Nicolls*, 61 Wash. 142, 145, 112
22 P. 269 (1910); *State v. McCathern*, 211 Or. App. 171, 177-180, 154 P.3d 130 (2007).

23
24 ¹¹ The Licensee cites to video surveillance in an exhibit, but the video surveillance was never offered at hearing,
25 was not admitted by the administrative law judge, and it is not part of the administrative record. Therefore, the
Board should exclude it from their consideration.

¹² *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (“Courts may assume where no authority is cited in a
brief, counsel has been unable to find any.”)

1 Furthermore, under the Licensee's argument, a minor's actual age would be
2 meaningless. If the Licensee's argument was controlling, it would be a complete defense for
3 any person or licensee to argue that he/she/it is not responsible for the sale to a minor because
4 the minor looked of lawful age. This would create an absurd result, and the law was not
5 intended to have this subjective element.

6 Additionally, "deceptively mature in appearance" is not a legal standard that is
7 applicable in this administrative matter. The term "deceptively mature in appearance" can only
8 be found in WAC 314-21-025 and it is a standard for a retail liquor licensee when it conducts
9 and in-house controlled purchase program. The term does not appear in any other statute or
10 rule and it is not a term defined in case law. Therefore, it only applies when a licensee utilizes
11 an in-house controlled purchase program, which is clearly not the circumstance in this matter.
12 Moreover, if the term did apply in this matter, this would be a finding of fact made by the
13 hearings officer and the administrative law judge explicitly determined that minor investigative
14 aide did not appear deceptively mature in appearance. See August 11, 2011 Order at 4-5.
15 Thus, the Licensee's argument is baseless and the Board should adopt the Initial Order in its
16 entirety.

17 IV. CONCLUSION

18 For the reasons set forth above, The ALJ's Findings of Fact and Conclusions of Law
19 are supported by the record and case law. The Licensee's exceptions do not show that the ALJ
20 made an unreasoned decision, and its exceptions do not form grounds for modification of the
21 Initial Order. Accordingly, for the reasons set forth above, Enforcement respectfully requests
22

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1 that the Board adopt and affirm the findings of fact and conclusions of law set forth in the
2 Initial Order.

3 DATED this 6th day of September, 2011

4 ROBERT M. MCKENNA
5 Attorney General

6 
7 BRIAN J. CONSIDINE, WSBA #39517
8 Assistant Attorney General
9 Attorneys for Enforcement