

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 1L0058B

LCB NO. 23,654
OAH NO. 2010-LCB-0029

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 May 12, 2010, alleging that on or about February 27, 2010, 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 February 27, 2010, 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 July 1, 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. Enforcement's Response to Licensee's Petition for Review was filed on September 6, 2011.

7. 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.

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 LCB 23,654, entered by the Administrative Law Judge on August 11, 2011 is adopted, except 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.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case 23,654 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 seven days. Suspension will take place from 10:00 a.m. on November 15, 2011 until 10:00 a.m. on November 22, 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:

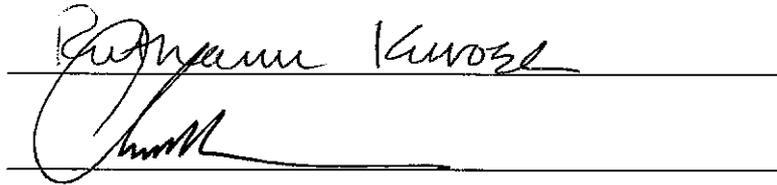
Washington State Liquor Control Board

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 20TH day of SEPTEMBER, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD



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**

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: 1L0058B
LCB HEARING NO. 23,654
OAH NO. 2010-LCB-0029
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.

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

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

4 IN THE MATTER OF:

5 NORTHWEST INC
6 d/b/a THE HIDEAWAY
7 4909 NE HAZEL DELL AVE
8 VANCOUVER, WA 98663-1235

9 LICENSEE

10 LICENSE NO. 356307-1L
11 AVN NO. 1L0058B

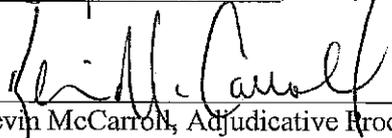
LCB NO. 23,654
OAH NO. 2010-LCB-0029

DECLARATION OF SERVICE BY MAIL

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

16 WILLIAM BAUMGARTNER, ATTORNEY FOR LICENSEE 112 W 11 TH STREET STE 150 17 VANCOUVER, WA 98660-3359	BRIAN CONIDINE, ASSISTANT ATTORNEY GENERAL, GCE DIVISION OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100
18 ENT. NORTHWEST INC, LICENSEE d/b/a THE HIDEAWAY 1819 NW 94 TH ST 19 VANCOUVER, WA 98665-6306	NORTHWEST INC d/b/a THE HIDEAWAY 4909 NE HAZEL DELL AVE 20 VANCOUVER, WA 98663-1235

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

22 
23 Kevin McCarron, Adjudicative Proceedings Coordinator
24
25
26

DECLARATION OF SERVICE BY
MAIL

1

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

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-00299

LCB No.: 23,654

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

STATEMENT OF THE CASE

On March 2, 2010, 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 February 27, 2010, 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 seven (7)-day suspension for the alleged second time violation.

On May 12, 2010, the Board issued a formal written Complaint alleging that:

(1) "on or about February 27, 2010, 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 February 27, 2010, 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 July 1, 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. Dolores Dragovich appeared and presented testimony on behalf of the Licensee.

The Liquor Control Board - Enforcement Division was represented by Brian Considine, Assistant Attorney General. Liquor Enforcement Officer John Kana, Liquor Enforcement Officer Almir Karic, [REDACTED] Investigative Aide, and Liquor Enforcement Officer Kendra Treco 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 February 27, 2010.
- 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 as part of the compliance check program.
- 5. February 27, 2010, Compliance Check** - On February 27, 2010, the Enforcement Division conducted a compliance check with the assistance of minor Investigative Aide [REDACTED]. On February 27, 2010, [REDACTED] was age 19.
- 6.** Prior to entering the Licensee's premises, [REDACTED] was checked by the Liquor Control Board Officers to be sure that she only had a valid Washington ID on her person. We find that [REDACTED] was carrying her vertical identification card which indicate that she turned age 21 on July 22, 2011.

7. February 27, 2010, was a Saturday and the Licensee had a bouncer working the door. One other employee, the bartender, was seen on the premises.

8. We find that the bar was not crowded or overly busy when the compliance check was done.

9. When [REDACTED] entered the premises, the bouncer was not at the door, but further inside the premises near the bar talking on his cell phone.

10. [REDACTED] and Enforcement Officer Kendra Treco entered together. The bouncer asked [REDACTED] for her identification which she presented. It was a vertical license.

11. The bouncer looked at the vertical license and then at [REDACTED]. He hesitated, but ultimately allowed her to remain on the premises as noted by a stamp on the back of her hand. Officer Treco also received a stamp on her hand.

12. The bartender, Dolores Dragovich, was behind the bar and close the bouncer. She saw that the bouncer had allowed [REDACTED] to remain and that she displayed the stamp on her hand.

13. The bartender saw the bouncer check the identification. However, it is unclear whether she saw him hesitate and look at [REDACTED].

14. At the bar, [REDACTED] sat near Officer Treco, who was able to observe the following events.

15. The bartender asked [REDACTED] for her order, but did not ask for any identification. [REDACTED] ordered two Corona beers, one for herself and one for Officer Treco, which she paid for. The bartender served her both beers and received her payment.

16. Once [REDACTED] and Officer Treco were served, they moved to another part of the premises and sent a text message to Enforcement Officer Almir Karic, who was waiting outside.

17. [REDACTED] then left the drink with Officer Treco and went outside to complete her report.

18. Officer Karic entered the premises to serve the AVN, and Officer Treco made a positive identification of the bartender. Officer Karic made himself known to the bartender and attempted to take a statement from her. She was argumentative and refused. The Licensee, who was on the premises in the DJ booth, left the booth and joined the discussion. The Licensee instructed the bartender not to talk with Officer Karic without a lawyer being present and she followed that directive.

19. The bouncer was interviewed and he questioned whether the identification was authentic. Officer Karic had [REDACTED] vertical license brought back into the premises for him to review.

20. Officer Karic issued citations to the bouncer, as well as the Licensee.

21. **Licensee's Policy on Checking Identification** - The bartender indicated that she did not know of any specific policy the Licensee had regarding the service of minor other than a general policy that they are not to be served. The bartender believed [REDACTED] was approximately 24 years old based, in part, on the way she carried herself.

22. We find that the Licensee has a policy to check the identification of any patron who looks to be under the age of 40. We find that this policy was not uniformly practiced, nor was it a written policy.

23. The Licensee has used a machine for checking identification since sometime in 2011.

24. We find that, as of the day of the hearing, [REDACTED] had never been on the Licensee's premises prior to February 27, 2010, or since.

25. **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."

26. 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.

27. 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 bouncer followed the Licensee's stated policy of checking the identification of patrons who appear to be younger than the age 40. However, the bouncer seemed to question the identification, but he allowed [REDACTED] to remain on the premises in spite of any concerns he had. The bouncer was presented with a valid vertical license, which by its vertical shape and the information on the face of the card indicated that [REDACTED] might not be over the age of 21. The bouncer either did not read it or chose not to follow the information that it contained.

8. The bartender put at risk herself Licensee by accepting the bouncer's approval of [REDACTED]. It is unclear whether the Licensee's policy requires more than one employee to check and the identification of patrons who appear to be under the age of 40. The practice seems to be if a patron displays a hand-stamp, somehow other employees need not independently check the identification. The bar was not crowded and the few extra minutes to double check [REDACTED] identification would have been worth the time. It might have avoided the issuance of the AVN if the second person reviewing the identification had noticed that it was a vertical license and had read the date on which [REDACTED] turned age 21.

9. The Licensee has argued that [REDACTED] was deceptively mature. The undersigned concludes that, that is a defense to an internal compliance check and not a compliance check conducted by Liquor Control Board officers. Additionally, here the Licensee's staff had the actual information to determine [REDACTED] age, but did not act on it; there was no deception on her part.

10. Regarding the Licensee's argument that no alcohol was actually served, the Licensee's representative conceded that alcohol was served as part of his closing argument and therefore the argument need not be addressed.

11. 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

////
////
////
////
////
////

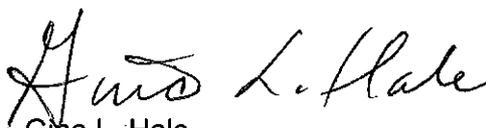
Initial Decision and Order

IT IS HEREBY ORDERED, that the Board's Complaint dated May 12, 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 seven (7) days to commence on a date to be set 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

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

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-0029

LCB Nos.: 23,654

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 February 27, 2010, 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 May 12, 2010, Enforcement issued a formal complaint against the Hideaway. On or
3 about July 1, 2010, Licensee filed a motion to suppress and dismiss this Complaint, on the
4 grounds that the compliance check was unlawful, because it utilized a minor investigative aide
5 but was not conducted pursuant to any rule adopted by the WSLCB as required by both RCW
6 66.08.030(1) and RCW 66.44.290. Licensee moved to suppress all evidence gained through the
7 unlawful compliance check and to dismiss the complaint on the grounds that there was no
8 admissible evidence to support it. Enforcement opposed this motion.

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

11 An administrative hearing was then conducted by ALJ Hale on July 1, 2011. By
12 Findings of Fact, Conclusions of Law and Initial Order dated August 11, 2011, ALJ Hale
13 sustained the Board's Complaint.

14 **STATEMENT OF EXCEPTIONS**

15 Licensee takes exception to the following portions of the Initial Order entered on March
16 3, 2011 (Ex. B):

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

21 2. Licensee also takes exception to the conclusion in Section IV of the Initial Order
22 that the WSLCB has the authority to use minor investigative aides to enter onto premises posted
23 off limits to minors without promulgating additional rules allowing its officers to do so. (Ex. B,
24 pg. 4.) The statutes in RCW Title 66 and regulations in WAC Title 314 prohibit minors from
25 entering onto premises restricted to adults, and the WSLCB has not adopted any rule according
26 to the requirements of RCW 66.08.030, or pursuant to any other statute, allowing liquor control

1 officers to utilize minors to purchase liquor on premises posted off limits to minors.
2 Therefore, the compliance check of Licensee's premises, which are restricted to adults, was
3 unlawful and all evidence obtained from the compliance check must be suppressed.

4 **EVIDENCE OF RECORD RELIED ON**

5 Licensee relies on findings of fact numbers 1 through 20 of the August 11, 2011 Initial
6 Order (Ex. A, pgs. 2-3) and the undisputed facts set out in Section II of the March 3, 2011
7 Initial Order. (Ex. B, pgs. 2-3.) In addition, Licensee relies on the Declaration of Laurence R.
8 Wagner in Support of Licensee's Motion to Suppress and Dismiss and the exhibits attached to
9 it: Exhibit A, a copy of the Clark County Superior Court's Memorandum Opinion in Case Nos.
10 09-1-00725-0, 09-1-00724-1, and 09-1-00723-3; Exhibit B, a copy of the WSLCB
11 Property/Narrative Report for the compliance check at The Hideaway on February 27, 2010;
12 and Exhibit C, a copy of the State's Motion to Dismiss and Clark County District Court Judge
13 Eiesland's Order dated May 2, 2010, dismissing the criminal action against the involved
14 Licensee employee.

15 The Hideaway holds a liquor license and operates a facility located in Vancouver,
16 Washington. These premises are restricted to people over 21 years of age.

17 On February 27, 2010, Enforcement conducted a compliance check at The Hideaway
18 using a 19 years old investigative aide. This minor investigative aide entered the tavern along
19 with an Enforcement Officer in an undercover capacity. They walked up to the bar, where they
20 were contacted by a male employee, Kenan Nero, who asked for their identifications. The
21 minor investigative aide presented her Washington Drivers License showing her date of birth.
22 Mr. Nero checked her identification, checked the identification of the Enforcement officer, and
23 then stamped both of their hands. A female bartender, Dolores Dragovich, then asked them
24 what they wanted to drink and they ordered two beers. Ms. Dragovich served them and took
25 cash from the minor investigative aide for the sale. Two other Enforcement officers entered the
26 tavern a short while later, confirmed the identity of the bartender who had served alcohol to the

1 minor investigative aide, and then cited both the bartender and the Licensee for furnishing
2 liquor to a minor.

3 A criminal citation was also issued to Ms. Dragovich. On the State's motion to dismiss
4 on the grounds that insufficient evidence existed to obtain a conviction, Judge Eiesland of the
5 Clark County District Court dismissed the criminal action against Ms. Dragovich by an Order
6 dated May 3, 2010.

7 **POINTS AND AUTHORITIES**

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

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

13 Under RCW 66.44.010(4), the Board is authorized to appoint enforcement officers with
14 the power to enforce the penal provisions of Title 66, the alcoholic beverage control regulatory
15 scheme in Washington. But this statute also specifically requires that enforcement officers
16 exercise this power "under the supervision of the board". RCW 66.08.030(2) gives the Board
17 broad powers with regard to the regulation of the sale of liquor in Washington. RCW
18 66.08.030(2)(b) specifically authorizes the Board to prescribe and regulate the conduct of its
19 employees. But all of the Board's powers are subject to RCW 66.08.030(1), which requires the
20 Board to exercise its powers through public regulations:

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

27 The administrative complaints against Licensee are based on Enforcement's use of
28 minors to enter into its bar, which is posted as off-limits to minors, and order a beer. Under
29 RCW 66.44.290(1), a minor who attempts to purchase alcohol is guilty of a criminal offense

1 unless that minor is participating in a controlled purchase program authorized under rules
2 adopted by the Liquor Control Board:

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

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

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

23 Therefore, unless Enforcement’s use of a minor investigative aide in its compliance
24 check was authorized by and conducted pursuant to rules adopted by the Board, the
25 Enforcement officers were not acting under the supervision of the Board or pursuant to any
26 authority granted by the Legislature to the Board in using a minor investigative aide to conduct
27 the compliance check.

28 The only rules formerly adopted by the Board pursuant to RCW 66.44.290 are contained
29 in WAC Chapter 314-21. But while this chapter is titled “Controlled Purchase Programs,” the

1 three regulations contained in this chapter, WAC 314-21-005, WAC 314-21-015, and WAC
2 314-21-025, all only address in-house programs conducted by liquor licensees themselves, not
3 Enforcement. WAC 314-21-005 explains:

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

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

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

13 These regulations very clearly only apply to in-house controlled purchase programs.

14 None of these regulations address controlled purchase compliance checks conducted by
15 Enforcement's own officers.

16 WAC Chapter 314-21 contains the only rules formerly adopted by the Board concerning
17 the use of minors in controlled purchase programs. Enforcement nevertheless argues that its
18 Enforcement officers have broad general regulatory authority to use a minor investigative aides
19 as decoys in compliance checks, even checks conducted on premises posted off-limits to
20 minors. The sale of liquor is a highly regulated industry and the WSLCB unquestionably has
21 broad powers with regard to the regulation of the sale of liquor in Washington. But as
22 explained in *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wn.2d 455, 458-59,
23 722 P.2d 808 (1986), that power must be exercised through publicly adopted regulations:

24 “Legislative functions cannot be delegated to an administrative body but the Legislature
25 may delegate administrative power. *Keeting v. PUD 1*, 49 Wn.2d 761, 767, 306 P.2d
26 762 (1957); *see also* 1 C. Koch, *Administrative Law & Practice* § 1.22 (1985); R.
Pierce, Jr., S. Shapiro & 811 P. Verkuil, *Administrative Law & Process* § 3.4.5 (1985);
B. Schwartz, *Administrative Law* § 2.12 (2d ed. 1984). Regarding the standards
required for a proper delegation of administrative power *Barry & Barry, Inc. v.*
Department of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), *appeal*
dismissed, 410 U.S. 977, 93 S.Ct. 1503, 36 L.Ed.2d 173 (1973), states:

“[T]he delegation of legislative power is justified and constitutional, and the
requirements of the standards doctrine are satisfied, when it can be shown (1)

1 that the legislature has provided standards or guidelines which define in general
2 terms what is to be done and the instrumentality or administrative body which is
3 to accomplish it; and (2) that procedural safeguards exist to control arbitrary
4 administrative action and any administrative abuse of discretionary power.'

5 "The dominion of the Board is broad and extensive. *Quan v. State Liquor Control Bd.*,
6 69 Wn.2d 373, 379, 418 P.2d 424 (1966). The broad powers of the Board are, in part,
7 enumerated under RCW 66.08.050. The Board has the authority to make necessary and
8 advisable regulations consistent with the spirit of RCW 66. RCW 66.08.030(1); *see*
9 *State ex rel. Thornbury v. Gregory*, 191 Wash. 70, 78, 70 P.2d 788 (1937). However,
10 the broad and extensive powers given the Board are not all inclusive. Numerous
11 statutory guidelines have been provided which broadly define the authority and duty of
12 the Board and which insure procedural safeguards against arbitrary administrative action
13 and abuse of discretionary power. *See in particular* RCW 66.08.010; .030; .050; .150;
14 RCW 66.24.010; .400-.450; RCW 66.98.070; *see also* RCW 34.04."

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

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

23 RCW 66.44.290 appears in Chapter 66.44 RCW, the enforcement regulations for RCW
24 Title 66, the alcoholic beverage control regulatory scheme in Washington. Reading RCW
25 66.44.290 together with other statutes in Chapter 66.44 makes clear that controlled purchase
26 programs utilizing minors can only be conducted on premises onto which a minor may lawfully
enter, such as grocery stores and restaurants, not premises posted as off-limits to minors, such
as taverns and bars.

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

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

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

12 (Ex. C.)

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

16 RCW 66.44.310 provides that, except as otherwise provided by RCW 66.44.316, RCW
17 66.44.350, and RCW 66.24.590, it is a misdemeanor for any person under 21 years of age to
18 enter or remain in any area classified as off-limits to such a person. There is no exception in
19 RCW 66.44.310 for a minor participating in a controlled purchase program. None of the
20 exceptions provided for by RCW 66.44.316, 6.44.350, or 66.24.590, apply. RCW 66.44.316
21 only creates an exception for professional musicians and band members, janitors, amusement
22 device company employees, security and law enforcement officers, and firefighters. RCW
23 66.44.350 only creates an exception for restaurant employees, who are permitted to serve
24 alcohol. RCW 66.24.590 only creates an exception for hotel employees, who are permitted in
25 areas of a hotel where alcohol may be consumed but is incidental to the primary use of the area.
26 Therefore, Mr. Uren committed a crime and the Enforcement officers contributed to his
delinquency when he entered into The Hideaway without the authority of any rule adopted by

1 the WSLCB.

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

8 **C. 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).

27 There is an exception to this rule of exclusion that applies if in the civil action the
28 defendant is attempting to use the exclusionary rule in support of an affirmative claim against
29 the Government. While the exclusionary rule will be applied to prevent the Government from
30 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 License'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.

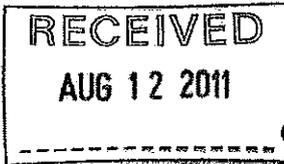
3 DATED this 25th day of August, 2011.

4 BAUMGARTNER, NELSON & PRICE, PLLC

5
6 
7 William V. Baumgartner, WSBA #3727
8 Laurence R. Wagner, WSBA #17605
9 Attorneys for Licensee

10 Baumgartner, Nelson & Price, PLLC
11 112 West 11th Street, Suite 150
12 Vancouver, WA 98660

TAB A



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-00299
LCB No.: 23,654

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND INITIAL ORDER

STATEMENT OF THE CASE

On March 2, 2010, 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 February 27, 2010, 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 seven (7)-day suspension for the alleged second time violation.

On May 12, 2010, the Board issued a formal written Complaint alleging that:

(1) "on or about February 27, 2010, 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 February 27, 2010, 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 July 1, 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. Dolores Dragovich appeared and presented testimony on behalf of the Licensee.

The Liquor Control Board - Enforcement Division was represented by Brian Considine, Assistant Attorney General, Liquor Enforcement Officer John Kana, Liquor Enforcement Officer Almir Karic, [REDACTED] Investigative Aide, and Liquor Enforcement Officer Kendra Treco 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 February 27, 2010.

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 as part of the compliance check program.

5. **February 27, 2010, Compliance Check** - On February 27, 2010, the Enforcement Division conducted a compliance check with the assistance of minor Investigative Aide, [REDACTED]. On February 27, 2010, [REDACTED] was age 19.

6. Prior to entering the Licensee's premises, [REDACTED] was checked by the Liquor Control Board Officers to be sure that she only had a valid Washington ID on her person. We find that [REDACTED] was carrying her vertical identification card which indicate that she turned age 21 on July 22, 2011.

7. February 27, 2010, was a Saturday and the Licensee had a bouncer working the door. One other employee, the bartender, was seen on the premises.

8. We find that the bar was not crowded or overly busy when the compliance check was done.

9. When [REDACTED] entered the premises, the bouncer was not at the door, but further inside the premises near the bar talking on his cell phone.

10. [REDACTED] and Enforcement Officer Kendra Treco entered together. The bouncer asked [REDACTED] for her identification which she presented. It was a vertical license.

11. The bouncer looked at the vertical license and then at [REDACTED]. He hesitated, but ultimately allowed her to remain on the premises as noted by a stamp on the back of her hand. Officer Treco also received a stamp on her hand.

12. The bartender, Dolores Dragovich, was behind the bar and close the bouncer. She saw that the bouncer had allowed [REDACTED] to remain and that she displayed the stamp on her hand.

13. The bartender saw the bouncer check the identification. However, it is unclear whether she saw him hesitate and look at [REDACTED].

14. At the bar, [REDACTED] sat near Officer Treco, who was able to observe the following events.

15. The bartender asked [REDACTED] for her order, but did not ask for any identification. [REDACTED] ordered two Corona beers, one for herself and one for Officer Treco, which she paid for. The bartender served her both beers and received her payment.

16. Once [REDACTED] and Officer Treco were served, they moved to another part of the premises and sent a text message to Enforcement Officer Almir Karic, who was waiting outside.

17. [REDACTED] then left the drink with Officer Treco and went outside to complete her report.

18. Officer Karic entered the premises to serve the AVN, and Officer Treco made a positive identification of the bartender. Officer Karic made himself known to the bartender and attempted to take a statement from her. She was argumentative and refused. The Licensee, who was on the premises in the DJ booth, left the booth and joined the discussion. The Licensee instructed the bartender not to talk with Officer Karic without a lawyer being present and she followed that directive.

19. The bouncer was interviewed and he questioned whether the identification was authentic. Officer Karic had [REDACTED] vertical license brought back into the premises for him to review.

20. Officer Karic issued citations to the bouncer, as well as the Licensee.
21. **Licensee's Policy on Checking Identification** - The bartender indicated that she did not know of any specific policy the Licensee had regarding the service of minor other than a general policy that they are not to be served. The bartender believed [REDACTED] was approximately 24 years old based, in part, on the way she carried herself.
22. We find that the Licensee has a policy to check the identification of any patron who looks to be under the age of 40. We find that this policy was not uniformly practiced, nor was it a written policy.
23. The Licensee has used a machine for checking identification since sometime in 2011.
24. We find that, as of the day of the hearing, [REDACTED] had never been on the Licensee's premises prior to February 27, 2010, or since.
25. **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."
26. 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.
27. 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 bouncer followed the Licensee's stated policy of checking the identification of patrons who appear to be younger than the age 40. However, the bouncer seemed to question the identification, but he allowed [REDACTED] to remain on the premises in spite of any concerns he had. The bouncer was presented with a valid vertical license, which by its vertical shape and the information on the face of the card indicated that [REDACTED] might not be over the age of 21. The bouncer either did not read it or chose not to follow the information that it contained.

8. The bartender put at risk herself Licensee by accepting the bouncer's approval of [REDACTED]. It is unclear whether the Licensee's policy requires more than one employee to check and the identification of patrons who appear to be under the age of 40. The practice seems to be if a patron displays a hand-stamp, somehow other employees need not independently check the identification. The bar was not crowded and the few extra minutes to double check [REDACTED] identification would have been worth the time. It might have avoided the issuance of the AVN if the second person reviewing the identification had noticed that it was a vertical license and had read the date on which [REDACTED] turned age 21.

9. The Licensee has argued that [REDACTED] was deceptively mature. The undersigned concludes that, that is a defense to an internal compliance check and not a compliance check conducted by Liquor Control Board officers. Additionally, here the Licensee's staff had the actual information to determine [REDACTED] age, but did not act on it; there was no deception on her part.

10. Regarding the Licensee's argument that no alcohol was actually served, the Licensee's representative conceded that alcohol was served as part of his closing argument and therefore the argument need not be addressed.

11. 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

////
////
////
////
////
////
////

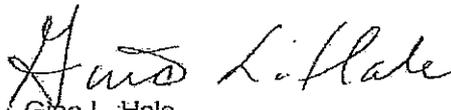
Initial Decision and Order

IT IS HEREBY ORDERED, that the Board's Complaint dated May 12, 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 seven (7) days to commence on a date to be set 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

INITIAL ORDER

G:\WPDOCS\SPECIALS\LCB\Minors\ENT NW29- Initial-Aug2011

Docket: 2010-LCB-0029

Page 7

OFFICE OF ADMINISTRATIVE HEARINGS
5300 MacArthur Boulevard, Suite 100
Vancouver, Washington 98661
(360) 690-7189 or 1-800-243-3451

NOTICE TO PARTIES

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

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

A copy of the petition for review must be mailed to all of the other parties and their representatives at the time the petition is filed. Within (10) ten days after service of the petition for review, any of the other parties may file a response to that petition with the liquor control board. WAC 314-42-080(3). Copies of the reply must be mailed to all other parties and their representatives at the time the reply is filed.

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

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

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

AUG 12 2011

BY: _____

TAB B

RECEIVED
MAR 04 2011

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

MAILED
MAR 9 - 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, [REDACTED] was age 19 years on February 27, 2010. She was accompanied by an undercover Enforcement Division law enforcement officer, [REDACTED] 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. [REDACTED] 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.

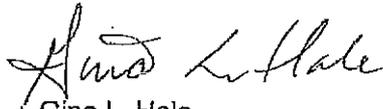
Inadmissible Evidence and Dismissal. The Licensee's arguments fail regarding the necessity for the Board to promulgate rules for the use of investigative aides as part of the compliance check program. Therefore, the evidence gathered by the Board is admissible and the Motion to Dismiss is Denied.

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.
dba The Hideaway
1819 NE Hazel Dell Avenue
Vancouver, WA 98665

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

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

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.

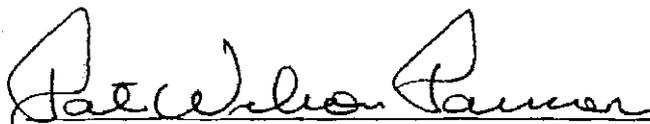
Replaces Policy Manual Chapter 8 Compliance Checks Created June 26, 1997

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**

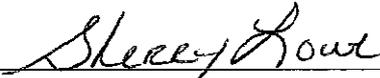
2 I hereby certify that on the 25^h day of August, 2011, I served the foregoing

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.

16
17 
18 _____
19 SHERRY LOWE
20
21
22
23
24
25
26

RECEIVED

SEP 06 2011

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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 NO. 1L0058B

OAH NO. 2010-LCB-0029

LCB NO. 23,654

ENFORCEMENT'S RESPONSE TO
LICENSEE'S PETITION FOR
REVIEW

I. INTRODUCTION

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.

II. PROCEDURAL HISTORY

On February 27, 2010, Enforcement issued AVN No. 1L0058B to the Licensee for a violation of RCW 66.44.270(1) and RCW 66.44.310(1)(a). After the Licensee requested a formal hearing in each matter, the Board issued a Complaint to the Licensee on May 12, 2010,

1 for violations of RCW 66.44.270(1) and RCW 66.44.310(1)(a). A prehearing conference was
2 held on June 8, 2010, and a briefing schedule for the Licensee's Motions to Suppress and
3 Dismiss (Motions) was set.

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

10 I. FINDINGS OF FACT

11 The Licensee does not take exception to the ALJ's Findings of Fact. *See* Licensee
12 Petition for Review at 3. Enforcement submits that the ALJ's Findings of Fact are fully
13 supported by the record.¹ Therefore, the ALJ's Findings of Fact remain unchallenged by the
14 Licensee, Enforcement will not address these unchallenged findings, and the Board should
15 adopt the Administrative Law Judge's Findings of Fact.

16 Additionally, the Licensee attempts to rely on exhibits not admitted at the
17 administrative hearing in this matter. The Licensee cites to counsel's declaration and exhibits
18 offered in support of its motions for suppression and dismissal. *See* Licensee's Motion to
19 Suppress and Dismiss, Exhibits; Petition for Review at 3. These exhibits were not offered by
20 the Licensee at the administrative hearing and are not part of the factual record established at
21 the administrative hearing. Therefore, the Board should disregard them as facts and, if
22 necessary, only refer to them for the Licensee's legal arguments.

23 Lastly, any reliance by the Licensee on Superior Court Case Numbers 09-1-00725-9,
24 09-1-00724-1, and 09-1-00723-3, and District Court Case Number 13671 is misplaced.

25 ¹ The only change Enforcement recommends is correction of a scrivener's error. The first name of the minor
investigative aide is "Desiree" and not "Denise" as is stated on page 2 of the Initial Order.

1 Superior Court and District Court decisions have no precedential value and should not be cited
2 or relied upon in this administrative action. *See Yousoufian v Office of Ron Sims*, 168 Wn.2d
3 444, 470, 229 P.3d 735 (2010). Therefore, the Board should disregard any reference to these
4 orders.

5 II. CONCLUSIONS OF LAW

6 1. The administrative law judge's determination that "the alcohol industry is 7 disfavored and highly regulated" is immaterial to the Licensee's motion.

8 The Licensee takes exception to the administrative law judge's determination that "the
9 alcohol industry is disfavored and highly regulated." Petition for Review at 2; *See* March 3,
10 2011, Order at 4. The administrative law judge's determination that "the alcohol industry is
11 disfavored and highly regulated" is immaterial to the Licensee's motion. The Licensee does not
12 cite to any statute or case law that contradicts this legal conclusion. Additionally, the Licensee
13 does not indicate how this conclusion in the Tribunal's "Discussion" section affects its
14 Motions to Suppress and Dismiss. *See* Petition for Review at 2.

15 Nevertheless, the sale of alcohol is historically a highly regulated industry, not only in
16 Washington State, but throughout the nation. *See Colonnade Catering Corp. v. United States*,
17 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *see also Jow Sin Quan v. Washington State*
18 *Liquor Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966). The dominion of the Board
19 in regulating, supervising, and licensing the retail sale of alcohol is "broad and extensive," and
20 a liquor license does not constitute a vested property right, but rather "a temporary permit, in
21 the nature of a privilege, to engage in a business that would otherwise be unlawful." *Jow Sin*
22 *Quan*, 69 Wn.2d at 382; WAC 314-07-015; *see also Anderson, Leech, & Morse, Inc. v.*
23 *Washington State Liquor Control Bd.*, 89 Wn.2d 688, 694-95, 575 P.2d 808 (1978); *Scottsdale*
24 *Insurance Co. v. Intl. Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058 (2001)
25 (noting that a liquor license is "merely representative of a privilege granted by the state").

1 Therefore, the Licensee's exception is immaterial to the Licensee's motion and the
2 Board should disregard the Licensee's exception. Additionally, even if the conclusion were
3 material, the alcohol industry is highly regulated and unfettered sale, distribution, and use of
4 alcohol in Washington State is disfavored. Consequently, the Licensee's exception fails.

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

7 The Licensee argues that Part IV of the ALJ's March 3, 2011, order is incorrect
8 because the Board must promulgate a rule allowing Enforcement to conduct compliance
9 checks. Petition for Review at 2. The administrative law judge properly found that the
10 Board's Enforcement Division has the authority to conduct compliance checks. *See* March 3,
11 2011, Order at 3-4. The Licensee's argument is unsupported and erroneous, and the Board
12 should adopt the ALJ's Initial Order.

13 The Washington State Legislature granted the Board the power to "enforce the penal
14 provisions of this title and the penal laws of this state relating to the manufacture, importation,
15 transportation, possession, distribution, and *sale of liquor.*" RCW 66.44.010(2) (emphasis
16 added). The Legislature also has authorized the Board to "appoint and employ...liquor
17 enforcement officers" who "shall have the power, under the supervision of the board, to
18 enforce the penal provisions of this title and the penal laws of this state relating to the
19 manufacture, importation, transportation, possession, distribution, and *sale of liquor.*"
20 RCW 66.44.010(4) (emphasis added). The Legislature also ensured that licensees would
21 comply with the conditions of their license by allowing the Board to conduct, through its liquor
22 enforcement officers, warrantless inspections of their licensed premises. *See* RCW 66.28.090.
23 RCW 66.28.090, states, in part, that:

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

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

4 In keeping with these responsibilities, liquor enforcement officers, similar to state,
5 county, and city law enforcement officers, utilize "compliance checks" to help them inspect
6 and regulate licensees in their interactions with minors². Enforcement conducts its compliance
7 checks by employing minor investigative aides to act as decoys. The minor investigative aides
8 help Enforcement simulate a typical scenario where a minor may try and enter an
9 establishment off limits to them and purchase alcohol. Any minor investigative aide that is
10 utilized in a compliance check is employed as an agent of the Enforcement Division, and only
11 enters liquor establishments at the direction of a liquor enforcement officer. Furthermore, the
12 Board published WAC 314-29-005(1) that expanded its liquor officers' authority to enforce the
13 Board's administrative rules codified in Title 314 WAC. *See* WAC 314-29-005(1). Thus, a
14 liquor enforcement officer can cite a licensee with an administrative violation if he or she
15 believes a violation occurred.

16 Here, the Licensee was cited for violations of RCW 66.44.270(1) and
17 RCW 66.44.310(1)(a) after Enforcement conducted a compliance check at the Licensee's
18 premises and observed its minor investigative aide enter into the licensed premises, remain,
19 and be sold liquor by the Licensee's bartender. The statutes in Title 66 RCW are clear in that
20 the Board has the authority to enforce these provisions, and has the authority to employ liquor
21 enforcement officers to enforce the liquor laws. The Board's authority, through the use of its
22 Enforcement Division, to utilize compliance checks is derived through the Board's broad
23

24 ² Law enforcement may use a decoy or informer when affording a person with an opportunity to violate the law.
25 *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 regulatory authority along with the Legislature’s authorization allowing the Board to employ
2 and use liquor enforcement officers. The Board, through its Enforcement Division, was well
3 within its authority to inspect the licensed premises and provide an opportunity for the
4 Licensee, through its employees, to either comply or not comply with the law. Therefore,
5 Enforcement has the authority to use compliance checks and the ALJ properly denied the
6 Licensee’s motions.

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

9 The Licensee also argues that RCW 66.08.030(1) requires the Board to promulgate
10 rules authorizing Enforcement to utilize compliance checks. Petition for Review at 4.
11 RCW 66.08.030 does not require the Board to promulgate rules authorizing Enforcement to
12 utilize compliance checks. Additionally, the statutory language found in Title 66 RCW must
13 be analyzed in the context of the entire statute, including the statute’s purpose. *State v. Manro*,
14 125 Wn. App 165, 173, 104 P.3d 708 (2005). When looking at statutory language, courts
15 should derive the statute’s purpose from its plain and unambiguous meaning. *Id.* The “plain
16 meaning” of a statute is determined by the ordinary meaning of its language, the general
17 context of the statute in which that provision is found, related provisions, and the statutory
18 scheme as a whole. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *See also, State*
19 *v. Thorne*, 129 Wn.2d 736, 761, 921 P.2d 514 (1996); *State v. Nam*, 136 Wn. App. 698, 704,
20 150 P.3d 617 (2007). When looking at a statute, “the fundamental objective is to ascertain and
21 carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court
22 must give effect to that plain meaning as an expression of legislative intent. *Dep’t of Ecology*
23 *v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Also, the court should
24 look at related statutes when analyzing the purpose of a statute or regulatory structure. *See*
25 *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *Washington Public Ports Ass’n v.*
Dept of Revenue, 148 Wn.2d 637, 645-46, 62 P.3d 462 (2003). Lastly, a court should construe

1 agency rules in a rational, sensible manner, giving meaning to the underlying policy and intent
2 and avoid interpretations that are unlikely or absurd. *See Odyssey Healthcare Operating BLP*
3 *v. Washington State Dept. of Health*, 145 Wn. App. 131, 185 P.3d 652 (2008) quoting *Mader v.*
4 *Health Care Auth.*, 149 Wn.2d 458, 70 P.3d 931 (2003).

5 The Licensee argues that RCW 66.08.030(1) requires that the Board publish rules
6 authorizing Enforcement to conduct premises checks, but the plain meaning of
7 RCW 66.08.030(1) does not create this requirement. Petition for Review at 4-6.
8 RCW 66.08.030(1) asserts that: “[f]or the *purpose of carrying into effect the provisions of this*
9 *title according to their true intent or of supplying any deficiency therein*, the board *may* make
10 such regulations not inconsistent with the spirit of this title as are deemed necessary or
11 advisable....” (Emphasis added). This provision’s plain meaning does not require the Board
12 to publish rules for any specific statute, and listing of areas the Board can specifically regulate
13 in RCW 66.08.030(2) does not limit the broad discretionary authority given to the Board in
14 RCW 66.08.030(1). *Compare* RCW 66.08.030(2) with RCW 66.08.030(1).

15 The context of the statute is also clear. RCW 66.08.030(1) is meant to be the general
16 mechanism that allows the Board to publish rules it deems necessary or advisable to administer
17 the sections of Title 66 RCW. It is not a mandate that the Board publish any particular rule,
18 but it is the authority allowing it to do so. Therefore, the Licensee is incorrect when it argues
19 that RCW 66.08.030(1) requires the Board to publish a rule on Enforcement’s use of
20 compliance checks.

21 Moreover, each provision found in Title 66 RCW should not be read in isolation and
22 the court should look at related statutes when analyzing the purpose of one particular statute or
23 regulatory structure in Title 66 RCW. *See State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281
24 (2005); *Washington Public Ports Ass’n v. Dept of Revenue*, 148 Wn.2d 637, 645-46, 62 P.3d
25 462 (2003). RCW 66.08.010 asserts that “entire title shall be deemed an exercise of the police

1 power of the state, for the protection of the welfare, health, peace, morals, and safety of the
2 people of the state, and all its provisions shall be liberally construed for the accomplishment of
3 that purpose.” RCW 66.08.020 charges the Board with the administration of Title 66 RCW.
4 *See* RCW 66.08.020. Likewise, RCW 66.44.010 allows the Board to enforce the penal laws of
5 Washington State and authorizes the Board to employ liquor enforcement officers to enforce
6 the provisions under Title 66 RCW. Part of that responsibility, along with county and
7 municipal law enforcement agencies, is to ensure that the Licensee is not violating the statutes
8 at issue in this matter, RCW 66.44.270(1) and RCW 66.44.310(1)(a). *See* RCW 66.44.010.
9 Looking at these provisions, it is clear that the legislature gave the Board, and its Enforcement
10 Division, broad penal and regulatory power in enforcing Title 66 RCW and did not require the
11 Board to publish rules allowing Enforcement to utilize compliance checks.

12 Additionally, the legislative history of RCW 66.44.290 provides insight into the
13 legislature’s mind set when it looks at Enforcement’s use of compliance checks. Though
14 RCW 66.44.290 is not applicable to Enforcement’s use of compliance checks, its legislative
15 history does provide insight into the Legislature’s knowledge of compliance checks.
16 RCW 66.44.290, with its current amendments, was introduced to the legislature as S.B. 5604
17 by Senators Spanel and Gardner. S.B. 5604, 57th Leg., Reg. Sess. (Wash. 2001). Senator
18 Harriet Spanel and the Senate Committee’s nonpartisan staff, testifying at the Senate
19 Committee hearing on S.B. 5604, specified that the purpose of the Bill was solely to provide
20 licensees the ability to conduct internal controlled purchase programs. *See* An Act Relating to
21 Allowing the Liquor Control Board to Authorize Controlled Purchase Programs and Amending
22 RCW 66.44.290: Hearing on S.B. 5604 Before the S. Comm. on Labor, Commerce and Fin.
23 Inst., 57th Leg. (2001) at 00:29:16 (audio recording of hearing)³. Larry Mount, representing a
24

25 ³ Available at Audio Recording of Senate Com. Hearing 2/26/01, <http://www.tvw.org> (go to “media archives”; then “audio/video archives”; then to “Senate Committees, 2001”; then to Audio Recording of Public Hearing on February 26, 2001).

1 licensee, and Jan Gee representing the Washington State Food Industry also testified at the
2 Senate Committee hearing. *Id.* at 00:30:00 (audio recording of hearing). Both individuals
3 indicated that they supported the Bill, not to replace liquor enforcement compliance checks,
4 but to allow licensee's to do their own internal checks to increase compliance with the law and
5 assist Enforcement's efforts. *Id.* at 00:30:02-00:33:01 (audio recording of hearing).

6 The House Committee on Commerce and Labor also held a hearing on S.B. 5604. *See*
7 An Act Relating to Allowing the Liquor Control Board to Authorize Controlled Purchase
8 Programs and Amending RCW 66.44.290: Hearing on S.B. 5604 Before the H. Comm. on
9 Commerce and Labor, 57th Leg. (2001)⁴. The House Committee's nonpartisan staff introduced
10 the bill to the committee pointing out that the Board enforcement officers currently conduct
11 controlled purchases from Licensees as a part of its regulatory compliance program. *Id.* at
12 00:33:43-00:34:05 (audio recording of hearing)⁵. Then, Jan Gee, Larry Mount, Joe Daniels
13 representing the United Food and Commercial Workers, Michael Transue representing the
14 Washington Restaurant Association, and Larry Phillips representing the Liquor Control Board,
15 testified at the hearing. *Id.* at 00:33:43-00:45:30 (audio recording of hearing). All individuals
16 indicated that they supported the bill to allow liquor establishments to conduct their own
17 internal checks to self-regulate the sale of alcohol by their employees. *Id.* at 00:36:52-00:45:30
18 (audio recording of hearing).

19 Clearly, this legislative history shows that the legislature is aware of Enforcement's use
20 of compliance checks. If the legislature wanted to constrain law enforcement's use of

21 _____
22 ⁴ 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).

23 ⁵ The House nonpartisan staff gives a detailed description of the Board's current practice, current industry
24 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 compliance checks, it could do so, but it has chosen to allow law enforcement to use its broad
2 police powers when enforcing provisions of Title 66 RCW. This history is further evidence
3 that the Board and its Enforcement arm have the authority to conduct compliance checks.

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

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

16 Next, the Licensee argues that RCW 66.44.290, RCW 66.44.310, and/or WAC 314-21
17 prevents Enforcement from utilizing minor investigative aides in compliance checks. *See*
18 *Petition for Review* at 5-9. The Licensee supports this conclusion by asserting Enforcement
19 lacks that ability because the pertinent statutes and rules only address the crime, punishment
20 and possible immunity for minors who purchase liquor, and no statute or rule addresses the
21 conduct of Enforcement. This argument is misplaced.

22 The plain meaning of RCW 66.44.290, RCW 66.44.310, and/or WAC 314-21
23 demonstrate that they are to only apply to minors who attempt to purchase liquor, and not to
24 the conduct of Enforcement. RCW 66.44.290's plain meaning demonstrates that its provisions
25 were clearly intended to address minors purchasing alcohol and private in-house controlled
purchase programs and not Enforcement's use of compliance checks. If the legislature had

1 intended for RCW 66.44.290 to pertain to Enforcement's use of compliance checks, it would
2 have directly addressed the use of compliance checks in the statute since it knew that the Board
3 conducted compliance checks when it amended RCW 66.44.290 in 2001⁶. Therefore, the plain
4 meaning and language of RCW 66.44.290 establishes that the statute is clearly meant to
5 regulate the conduct of minors and private in-house controlled purchase programs, and not the
6 conduct of Enforcement.

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

14 Also, the intent and plain meaning of WAC 314-21 clearly indicates that it was
15 published to address in-house controlled purchase programs carried out under RCW 66.44.290
16 and how a licensee must conduct an in-house controlled purchase program. The Board did not
17 intend to exclude Enforcement from utilizing compliance checks, and the Licensee's inference
18 that it did would ask for an absurd result. WAC 314-21 is clear that it only relates to a
19 Licensee's use of an in-house controlled purchase program and not Enforcement's use of
20 compliance checks.

21 Additionally, the Licensee misguidedly suggests the use of a minor investigative aide is
22 improper because the minor investigative aide violated the law.⁷ Licensee's Motions at 8. The
23 Licensee also seems to infer that the minor investigative aide and the liquor enforcement

24 ⁶ See *Supra*, Enforcement's discussion of the legislative history of RCW 66.44. The legislative history clearly
25 shows that the legislature knew that the Board conducted compliance checks when it amended this statute in 2001.

⁷ Enforcement notes that the Licensee mentions "Mr. Uren," but the investigative aide in this matter was [REDACTED]

1 officers are now exposed to criminal prosecution for participating in the compliance check.
2 Licensee's Motion to Suppress at 8-9. However, the Licensee has provided no authority to
3 support these careless assertions, and the Board should disregard these arguments⁸.

4 Officers of the Washington State Liquor Control Board are limited purpose law
5 enforcement officers. See RCW 66.44.010. As such, they have broad police powers to enforce
6 the laws in Washington relating to the sale of liquor. Liquor enforcement officers are granted
7 the authority to conduct compliance checks on liquor retailers through the Board's
8 authorization to employ and use liquor enforcement officers⁹, authority derived from general
9 police powers, and Washington case law.

10 Washington Courts are clear that law enforcement may run undercover operations and
11 use a decoy or informer when affording a person with an opportunity to violate the law. See
12 *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 242,
13 517 P.2d 245 (1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948).
14 Specifically, the courts have stated the use of a decoy or informer to present an opportunity for
15 commission of a crime is not improper." *Gray*, 69 Wn.2d at 432; see also *Playhouse Inc. v.*
16 *Liquor Control Board*, 35 Wn. App. 539, 542, 667 P.2d 1136 (1983) ("deceitful practices . . .
17 including the use of undercover agents and limited police participation in unlawful enterprises,
18 are not constitutionally prohibited."). The minor investigative aide or liquor enforcement
19 officers did not violate any law acting as agents of the Board. Additionally, Enforcement is
20 allowed to use compliance checks for the purpose of affording the Licensee with an
21 opportunity to violate the law in the furtherance of Enforcements well established duty to test
22 the Licensee's compliance with liquor laws. See RCW 66.44.010(4); *Playhouse Inc.*, 35 Wn.
23 App. at 342; *State v. Athan*, 160 Wn.2d 354, 371-77, 158 P.3d 27 (2007).

24
25 ⁸ *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.")

⁹ RCW 66.44.010(4)

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

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

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

20 The Licensee correctly contends that Enforcement’s Internal Policy Number 287 is not
21 a rule adopted by the Board. Licensee’s Petition at 8. Enforcement Policy Number 287 is an
22 internal policy that has not been promulgated by the Board, and it is not relevant, nor
23 controlling, in this administrative matter.

24 In administrative law, a “rule” is any agency order, directive, or regulation of general
25 applicability that was formally promulgated according to RCW 34.05. *See* RCW 34.05 and
RCW 34.05.010(16); *See also Pierce County v. State*, 144 Wn. App. 783, 836, 185 P.3d 594

1 (2008). A “rule” includes the amendment or repeal of a prior rule, but “*does not include*
2 *statements concerning only the internal management of an agency and not affecting private*
3 *rights or procedures available to the public....*” RCW 34.05.010(16) (Emphasis added).

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

14 Here, Policy No. 287 was never formally promulgated by the Board according to
15 RCW 34.05 and RCW 66.08.030(1), and it is not a policy conceived by or even produced by
16 the members of the Board. It is an Enforcement internal policy, and it is merely a guideline for
17 employees of the Board’s Enforcement Division. As such, it is not law, nor does it have the
18 authority of law in this administrative matter, and the court should not consider it when
19 deciding whether or not a licensee committed an administrative violation. *See*
20 RCW 34.05.010(16); *Mills*, 150 Wn. App. at 276-77. Therefore, Enforcement’s internal
21 policies would not be determinative as to the admissibility or relevance of the evidence
22 gathered against the Licensee, and they have no relevancy as to whether or not the Licensee
23 furnished liquor to a minor.

24 Consequently, the Board and Enforcement have the statutory, regulatory, and case law
25 authority to conduct compliance checks on the Licensee’s premises. The Licensee’s reference

1 to Internal Policy Number 287 is immaterial and meant to cloud the issues in this matter, and
2 the ALJ properly denied the Licensee's motions.

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

5 The Licensee asserts that all evidence presented against it at the administrative hearing
6 was inadmissible and the administrative complaint should be dismissed. Petition for Review at
7 12. The Licensee appears to assert that the evidence in this matter should be suppressed
8 because it was attained through an unlawful search. Petition for Review at 12. However, the
9 Licensee fails to engage in any analysis of how Enforcement engaged in an unlawful search.
10 Here, the Licensee runs a business it holds open to the public.¹⁰ August 11, 2011, Order at 2.
11 The administrative record clearly establishes that the minor investigative aide entered and
12 remained in the public portion of the Licensee's premise. *See* August 11, 2011, Order at 2-3.
13 While inside the public portion of the Licensee's premises, the minor investigative aide
14 purchased a Corona beer. *See* August 11, 2011, Order at 3. The Licensee has presented no
15 evidence and no facts are found showing the minor investigative aide or any officer ever
16 entered a portion of the Licensee's commercial property that was not open to the general public
17 or limited only to employees.

18 Therefore, the Licensee appears to ignore WAC 314-11-072—it must be open to the
19 general public whenever liquor is sold, served, or consumed—and RCW 66.04.010(35)—
20 “public place” includes “establishments where beer may be sold. . . restaurants”—in its attempt
21 to infer that an unlawful search occurred. This oversight is fatal to the Licensee's argument
22 because expectation of privacy in commercial property does not extend to that which an owner
23 or operator of a business voluntarily exposes to the public. *See State v. Carter*, 151 Wn.2d
24 118, 126, 85 P.3d 887 (2004); *See v. City of Seattle*, 387 U.S. 541, 545, 87 S. Ct. 1737 (1967);
25 *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593 (1994) (“what is voluntarily exposed to the

¹⁰ *See* WAC 314-11-072

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
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25