

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CHARLIE'S BAR & GRILL, INC
d/b/a CHARLIE'S BAR & GRILL
3315 NE 112TH ST
VANCOUVER, WA 98662

LICENSEE

LICENSE NO. 076348-1J
AVN NO. 1J0351C

LCB NO. 23,806
OAH NO. 2011-LCB-0007

FINAL ORDER OF THE BOARD

1. The Liquor Control Board issued a complaint dated February 9, 2011, alleging that on December 17, 2010 the above-named Licensee, or employee(s) thereof, gave, sold and/or supplied liquor to a person under the age of twenty-one (21), contrary to RCW 66.44.270 and WAC 314-11-020(1).
2. The Licensee made a timely request for a hearing.
3. An administrative hearing was held on July 28, 2011 before Administrative Law Judge Katherine A. Lewis with the Office of Administrative Hearings in Vancouver, Washington.
4. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine. Attorney at Law Curt Wyrick represented the Licensee.
5. On September 23, 2011, Administrative Law Judge Katherine A. Lewis entered her Findings of Fact, Conclusions of Law and Initial Order in this matter, which affirmed the Complaint.
6. The Licensee's Petition for Review was received on October 10, 2011.
7. Enforcement Division's Motion to Extend the Time for Filing Petition for Review was received on October 13, 2011.
8. The Board issued its Order Granting Enforcement Division's Motion to Extend the Time for Filing a Petition for Review on October 18, 2011.

9. Enforcement's Petition for Review and Reply to Licensee's Petition for Review was received on November 1, 2011.
10. Licensee's Response to Enforcement's Petition for Review was received on November 9, 2011.
11. 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 that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order heretofore made and entered in this matter be, and the same hereby are, AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board, with the following changes and corrections:

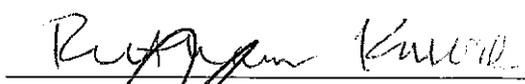
Conclusions of Law 10, 11, and 12 of the Findings of Fact, Conclusions of Law and Initial Order are STRICKEN in their entirety.

Having affirmed the Initial Order, with corrections, IT IS HEREBY ORDERED that the liquor license privileges granted to Charlie's Bar and Grill, Inc. d/b/a Charlie's Bar & Grill, License No. 076348, are hereby suspended for a term of thirty (30) days. Suspension will begin at 6:00 p.m. on January 25, 2012 until 6:00 p.m. on February 24, 2012. Failure to comply with the terms of this order will result in further disciplinary action.

DATED at Olympia, Washington this 01 day of December, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD







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

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

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

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

34.05.010(19).

FINAL ORDER
LCB NO. 23,806
CHARLIE'S BAR & GRILL
LICENSE NO.076348-1J

4

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



Washington State
Liquor Control Board

December 22, 2011

Curt Wyrick, Attorney for Licensee
12602 NW 46th Ave
Vancouver, WA 98685-3329

Charlies Bar & Grill Inc, Licensee
d/b/a Charlies Bar & Grill
3315 NE 112th Ave
Vancouver, WA 98682-8733

Stephanie Happold, 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: Charlies Bar & Grill, Inc
TRADE NAME: Charlies Bar & Grill
LOCATION: 3315 NE 112th St, Vancouver, WA 98662
LICENSE NO. 076348
ADMINISTRATIVE VIOLATION NOTICE NO: 1J0351C
LCB HEARING NO. 23,806
OAH NO. 2011-LCB-0007
UBI: 6012471640010001

Dear Parties:

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

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

Sincerely,

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

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
Teresa Young, WSLCB

WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

LCB NO. 23,806
OAH NO. 2011-LCB-0007

CHARLIES BAR & GRILL INC
d/b/a CHARLIES BAR & GRILL
3315 NE 112TH ST
VANCOUVER, WA 98662
LICENSEE

DECLARATION OF SERVICE BY MAIL

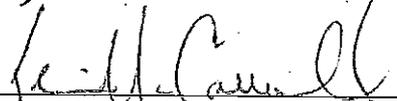
LICENSE NO. 076348
AVN NO. 1J0351C

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

CURT WYRICK, ATTORNEY FOR LICENSEE 12602 NW 46TH AVE VANCOUVER, WA 98685-3329	OFFICE OF THE ATTORNEY GENERAL MAIL STOP 40100 STEPHANIE HAPPOLD, ASSISTANT ATTORNEY GENERAL, GCE DIVISION
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CHARLIES BAR & GRILL INC, LICENSEE d/b/a CHARLIES BAR & GRILL 3315 NE 112 TH AVE VANCOUVER, WA 98682-8733	
---	--

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


Keyin McCarrall, Adjudicative Proceedings Coordinator

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

MAILED
SEP 23 2011
VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of:

Charlie's Bar & Grill, Inc.
dba Charlie's Bar & Grill

Licensee

License No. 076348

OAH No.: 2011-LCB-0007

LCB No.: 23,806

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

TO: Charlie's Bar & Grill, Inc., dba Charlie's Bar & Grill, Licensee
Curt Wyrick, Attorney for Licensee
Brian Considine, Assistant Attorney General

RECEIVED

OCT 03 2011

Liquor Control Board
Board Administration

PREHEARING MOTIONS

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

Prior to the hearing, the Licensee submitted a Motion to Suppress the Board's evidence and a Motion to Dismiss the Board's case. The Licensee argued:

1. The Board is required to promulgate a rule allowing its officers to engage in compliance checks. No such rule has been promulgated. Therefore, the check was unlawful and the case should be dismissed.
2. The use of a minor investigative aides in the compliance check is also not provided for by rule and therefore the evidence obtained should be suppressed and the case should be dismissed.
3. The minor investigative aide committed the crime of trespass by entering the establishment a second time during the compliance check. The evidence obtained should therefore be suppressed and the case dismissed.
4. The compliance check amounted to entrapment by the Board's agents and the case should be dismissed.

DISCUSSION

1. *Can the Liquor Control Board engage in controlled buys?*

The licensee argues that without a rule promulgated by the agency, the officers do not have the authority to engage in compliance checks (controlled buys).

The licensee at partly bases this argument on the fact that there is a rule promulgated which gives licensed premises the authority to conduct their own compliance checks. RCW 66.44.290. If there is a rule for this, then there must be rule allowing the officers to do the same seems to be the reasoning.

The Liquor Act of 1933, in its entirety, is "an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose." Laws of 1933, ex. sess., ch. 62, Section 2, RCW 66.08.010.

The dominion of the Liquor Control Board over the regulation, supervision and licensing of the retail sale of intoxicating liquors is, by legislative enactment, broad and extensive. Jow Sin Quan, et al, Appellants, v. Washington State Liquor Control Board, 69 Wn.2d 373 (1966), citing State ex rel. Shannon v. Sponburgh, 66 Wn.2d 135, 401 P.2d 635 (1965).

The Legislature has authorized the Liquor Control Board to employ liquor enforcement officers. RCW 66.44.010(4).

The police power found as the basis for the Liquor Act itself and the further definition of that power as "broad and extensive" by case law, warrants a conclusion that liquor control officers engaging in controlled buys, without a rule specifically stating they can do so, is within the power and objectives of the Board and its employees.

2. *Can the Liquor Control officers use minors in these controlled buys?*

This is a separate question than the first, although it is recognized that for enforcement of the age limit on the selling of liquor, the use of minors is inherent in the whole concept of a controlled buy. Nevertheless, the use of minors presents a separate issue.

Law enforcement has used decoys and informers for many years to present the opportunity for commission of a crime. State v. Gray, 69 Wn.2d 432, 418 P.2d 725 (1966).

These agents of law enforcement, at the direction of officers, and law enforcement officers themselves, have sometimes engaged in crimes to detect crimes. When this is part of a scheme of detection by law enforcement, such practices have not ordinarily been held illegal. State v. Emerson, 10 Wn. App. 235, 517 P.2d 245 (1973), citing United States v. Wray, 8 F.2d 429 (N.D. Ga 1925); and other cases.

An exception to this allowance of illegal activities occurs when the action of the law enforcement officer or his/her agent violates "fundamental fairness, shocking to the universal sense of justice" mandated by the Due Process Clause of the Fifth Amendment. Emerson, supra.

In Emerson, a police agent had sex on several occasions with alleged prostitutes, at law enforcement direction and using public funds, in order to demonstrate his sex partners were indeed prostitutes. The court noted that the agent committed acts which, if performed by one not engaged in crime detection duties, would have been in violation of the law. Nevertheless, this agent's conduct was not found to be shocking to the "universal sense of justice".

The acts committed by the agent in Emerson are far less "shocking" than a minor buying beer.

Minors used as "decoys" in the controlled buys by licensees are specifically exempted from prosecution due to their ages, as part of a larger scheme allowing the programs in these specific

cases. RCW 66.44.290(2).

Although there is no exemption for the use of minors in controlled buys by law enforcement, there is also no rule, and none is required as noted above, allowing such controlled buys at all.

Minors are apparently not allowed to purchase and consume alcohol because public policy and human experience teaches us that minors do not have the judgment to use alcohol wisely and could cause themselves and others harm were they allowed to consume alcohol. (The fact that adults also often cause themselves and others harm when they have consumed alcohol is best left for another case.)

Public policy is that licensed premises abide by the law. Public policy is also that minors need to be protected and prevented from using alcohol. Where there are competing public policies, they need to be reconciled without unnecessarily impairing the vigor of each. Emerson, supra.

Minors used by the Liquor Control Officers are not allowed to consume the alcohol they purchase. The public policy protecting minors from consuming alcohol is thus satisfied and does not unnecessarily compete with the public policy that licensees abide by the law that they not serve minors.

The controlled buys engaged in by liquor enforcement officers are part of a scheme of detection by law enforcement, and are not unlawful, especially considering how difficult enforcing the age limit on sales of alcohol could be without using minors.

The issue of potential prosecution of these minors for breaking the law at the behest of liquor control officers is not addressed in the law, as is nothing else about such a "sting". There is therefore nothing to legally bar such prosecution. However, as a practical matter the officers will not and have not done so. Not only would this be completely unfair to the minors, the officers would have difficult finding minors to help them should they do this.

Further, minors put in such a situation would have the complete defense of entrapment.

The use of minors by liquor enforcement officers is not unlawful.

3. *Was it lawful to send the minor into the licensed premises a second time?*

The minor in this case was sent back into the premises after being refused service the first time. Although there is the appearance the officers were going to keep sending him in until he was eventually served, there is some confusion regarding what was said to the minor after he was refused service. The undersigned believes the officer understood that the minor had been told by the bartender to "get a wristband" proving his age and so the officer sent the minor back into the premises to do just that.

The undersigned also believes the bartender meant the minor to understand he was to leave the bar unless he could prove his age to a doorman.

Regardless, there is no rule against sending the minor in a second time. It is true that at this point, he may well have been committing the crime of trespass, but realistically, he was doing so the minute he went into the bar the first time, given his age. This second pass does not convert the controlled buy, already ruled a lawful activity, into an unlawful activity.

4. *Do the controlled buys entrap licensees?*

Liquor Control Board action, directed toward the suspension or cancellation of a retail liquor license is not a criminal proceeding. Essentially, it is an administrative regulatory proceeding-civil and disciplinary in nature-the purpose of which is protect the public health, safety and morals from imprudent, improper, and/or unlawful actions of the board's licensees. Jow Sin Quan, supra, citing State v. Meyers, 85 Idaho 129, 376 P.2d 710 (1962); Kearns v. Aragon, 65 .M. 119, 333 P2d 607 (1958).

Entrapment is a defense only in a criminal proceeding. RCW 9A.16.070.

The controlled buy at issue did not entrap the licensee.

DECISION SUMMARY
Licensee's Motion to Suppress And Motion to Dismiss

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

STATEMENT OF THE CASE

On December 22, 2010, the Washington State Liquor Control Board (Board) issued an Administrative Violation Notice to Charlie's Bar & Grill, 3315 NE 112th St, Vancouver, Washington, 98662. In its notice, the Board alleged that on December 17, 2010, the Licensee, or an employee thereof, had violated the provisions of Revised Code of Washington (RCW) 66.44.270(1) by furnishing alcohol to a person under twenty-one (21) years of age. The Licensee made a timely request for hearing.

On February 9, 2011, the Board issued a Complaint in which it alleged that on or about December 17, 2010, the Licensee and/or employees thereof sold, gave or otherwise supplied liquor to a person under twenty-one (21) years of age in violation of RCW 66.44.270.

The hearing was held before Katherine A. Lewis, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on July 28, 2011, in Vancouver, Washington. At hearing, the Board was represented by Brian Considine, Assistant Attorney General. The Licensee, Charlie's Bar & Grill, appeared in the person of Bruce Richardson, owner, and was represented by Curt Wyrick, Attorney at Law. Almir Karic, Paul Magerl and [REDACTED] appeared as witnesses for the Board. Joshua Hood, Misty Winders, Tracy Wild, Franklin Day, Deni Liufau, Brian O'Neill and Tara Bartell appeared as witnesses for the Licensee.

Joshua Hood, an employee of the Licensee, was also cited in this matter. The hearing

regarding his citation was held jointly with the present hearing for judicial economy reasons: all the witnesses were the same for both matters. Mr. Hood was represented by Tresa Cavanaugh, Attorney at Law. There is a separate Order regarding Mr. Hood, Docket No. 2011-LCB-0011.

Based on the record presented, the ALJ makes the following Findings of Fact:

FINDINGS OF FACT

1. The Licensee, Charlie's Bar & Grill, Inc., dba Charlie's Bar and Grill (Charlie's), is a restaurant and lounge located at 3315 NE 112th Street, Vancouver, Washington. The premises has been licensed by the Board for the sale of spirits, beer and wine pursuant to License Number 076348 since November 26, 1990.
2. Prior to August 5, 2009, Charlie's had not received any citation for violation of the statutes or rules of the Board.
3. On August 5, 2009, and again on October 1, 2009, Charlie's received its first and second citations for serving alcohol to a minor. Both these citations were the result of compliance checks done by liquor control officers, agents of the Board, using minors (investigative aides), who enter premises that sell alcohol and attempt to purchase it.
4. The same bartender served the minors on both occasions and, despite being an employee of Charlie's for 13 years, was discharged as result.
5. Following these citations, and after consulting with liquor control officers for help in preventing future such problems, Charlie's instituted a "bracelet" or "wristband" policy. Doormen (bouncers) were placed at each door and were responsible for checking the identifications of entering patrons who looked younger than 30 years of age. If the patron was of legal age, he or she was issued a wristband which he/she was to wear. Bartenders were to check for these wristbands and anyone without a band was not to be served alcohol. Further, such a person was supposed to be told to either

get a wristband or leave the premises.

6. Friday, December 17, 2010, was a busy, noisy night at Charlie's. There was a live band and over 100 patrons.

7. Liquor control officers Almir Karic and Paul Magerl did a compliance check at Charlie's on this night.

8. [REDACTED] was the minor investigative aide used for the check.

9. Pictures of [REDACTED] were taken prior to the check (Exhibit 5) and he was searched by the officers to make certain he had nothing on his person other than his driver's license and money provided by the officers for any alcohol purchase.

10. [REDACTED] was 19 years old on December 17, 2010 and his "vertical" driver's license showed this. (Exhibit 5).

11. [REDACTED] was instructed by the officers that he was to enter Charlie's ahead of them, but that he was not to try and purchase alcohol until he saw one or both of the officers enter the establishment.

12. [REDACTED] approached the north door, the main entrance to Charlie's, shortly before midnight. According to [REDACTED] he stood at or near the door for one to two minutes and was ignored by the bouncer who was talking to someone.

13. The bouncer assigned to that door, Deni Liufau, denied anyone could have loitered near the door for a minute or two without him being aware and asking for identification. He also denied he was talking to anyone, but was busy checking the identifications of entering patrons. He did not recall seeing [REDACTED] but did not deny it was possible he could have "slipped by" and entered the bar.

14. Once he was inside, [REDACTED] waited for Officers Karic and Magerl to enter. When he saw them, he went to the bar and was approached by a bartender from whom he requested a bottle of

Coors Light, a beer. The bartender, Misty Winders, asked to see the required wrist band. [REDACTED] told her he did not have one.

15. [REDACTED] states Ms. Winders simply told him "to go get one".

16. Ms. Winders contends she told him that he could not be in the bar without a wristband and he was to go to one of the bouncers and get one or get out.

17. This testimony was supported by fellow bartender Tracy Wild, who said she heard Ms. Winders tell [REDACTED] that he had to get a wristband or leave.

18. Liquor enforcement officer Paul Magerl stated he was close behind [REDACTED] when he ordered the beer and heard Ms. Winders tell [REDACTED] something like, "no wristband, no liquor".

19. According to [REDACTED] he then went in search of a bouncer in an attempt to obtain a bracelet. He went to the south door of Charlie's and no bouncer was in sight. He then left the establishment through that door.

20. Franklin Day, the south door bouncer, was required on this night to let no one in through the south door. Consequently, he had no wristbands to give.

21. He asserted he was at his posted spot and was not aware of [REDACTED]. However, since his concern was people trying to come in not people leaving, Mr. Day could not be certain if [REDACTED] left through the south door. In any case, there is no evidence there was any communication between the two.

22. Officer Magerl followed [REDACTED] out the south door. (He also states there was no bouncer at that door.) The two discussed the wristband requirement.

23. Officer Magerl told [REDACTED] to go back to the north door and "try again".

24. Officer Magerl contended that if the claimant had flatly been denied the service of alcohol, he would not have sent him back in. However, he argued [REDACTED] had not been denied alcohol, but

had been told to "get a wristband". This may be a distinction without a difference.

25. In any case, [REDACTED] again went to the north door and says he again stood "just inside the doorway" for a minute or two and was not asked for any identification from the bouncer, Mr. Liufau. He thereupon walked into the bar area and up to the bar.

26. Mr. Liufau again denied anyone could have loitered where [REDACTED] says he was without being asked for identification.

27. According to [REDACTED], a bartender later identified to him as Joshua Hood, asked what he wanted to which [REDACTED] responded "a Coors Light". Without asking to see a wristband, Mr. Hood brought the beer to [REDACTED] took payment for it, and made change.

28. Mr. Hood, who has never been cited for service to a minor in a ten-year career as a bartender, argued he is very consistent in checking for wristbands and/or identification and has no memory of [REDACTED] nor of serving him alcohol on the night in question.

29. Upon receiving the beer, [REDACTED] took it to a table whereupon Officers Magerl and Karic came to the table, took the beer and excused [REDACTED] from the establishment.

30. The officers then located management personnel and informed them of the illegal service and of the fact that the establishment would be cited.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter pursuant to RCW 66.44, RCW 34.12, RCW 34.05, and WAC 10-08, WAC 314-11, WAC 314-16 and WAC 314.29.

2. As a licensed retail seller of liquor, 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 and 314-11, 314-16 and 314-29 WAC. Proceedings involving agency action are

adjudicative proceedings under RCW 34.05. The Board has the authority to assign such proceedings to an administrative law judge pursuant to RCW 34.12. A proper hearing was provided in this case.

3. RCW 66.44.270 prohibits the sale of liquor to any person under the age of twenty-one years. The definition of liquor includes beer. RCW 44.04.010(20).

4. Chapter 314-11 WAC sets forth general requirements for liquor licenses and outlines the responsibilities of a liquor licensee. (WAC 314-005)

5. The Board, through its Liquor Enforcement Officers, conduct compliance checks to ensure individuals and establishments are complying with liquor regulations. These compliance checks involve sending a minor into a restricted premises, such as a bar, and having the minor attempt to buy or buy alcohol.

6. These minors are paid for their work and receive training from the officers. They engage in the compliance checks under the supervision of the officers. As ruled above, these compliance checks and the use of minors is not unlawful.

7. Charlie's violated RCW 66.44.270 on December 17, 2010, by serving alcohol to the minor investigative aide, [REDACTED]

8. The Board has the authority to establish an appropriate penalty as a matter of its discretion. Pursuant to RCW 66.24.010, the Board has the authority to suspend or cancel a Licensee's liquor license. Effective May 5, 2002, the Board has adopted as rules a set of "standard penalties" which may applied to certain offenses. WAC 314-29-015.

9. Because the violation by Charlie's is its third within a two-year period, the mandatory penalty is a 30-day suspension of Charlie's liquor license. WAC 314-29-020.

10. Mitigation of the standard suspension period or fine in lieu of suspension may be granted at

the discretion of the Board. A monetary option in lieu of suspension may be offered by the Board during a settlement conference where there are mitigating circumstances. WAC 314-29-015(4).

11. The undersigned does not know if there was any settlement conference. However, it does appear that settlement conferences can occur after an appeal is filed. Given that, the undersigned believes that Charlie's has shown real efforts to prevent the kind of violation at issue, including discharging a bartender who was careless about checking identification and engendered the first two violations, and asking for help from liquor control officers in setting up preventative measures, including the wristband program involved in this case. The owner and his employees were all sincere in a desire to prevent these occurrences.

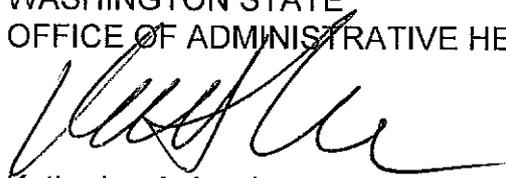
12. Thus, while the undersigned does not have the authority to order mitigation, it is to be hoped consideration will be given to the efforts taken by the licensee should the matter be appealed.

ORDER

IT IS HEREBY ORDERED THAT the Board's Complaint dated February 9, 2011, alleging a violation of RCW 66.44.270 on December 17, 2010 is **AFFIRMED**. The license privileges issued to Charlie's Bar & Grill, Inc., dba Charlie's Bar & Grill at 3315 NE 112th St, Vancouver, in Clark County, Washington, License No. 076348, shall be suspended for 30 days on a date to be set by the Board in its final order.

DATED and mailed at Vancouver, Washington, this 23 day of Sept, 2011.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS


Katherine A. Lewis
Administrative Law Judge
5300 MacArthur Blvd, Suite 100
Vancouver, WA 98661

Telephone: (360) 690-7189 or 1-800-243-3451
FAX: (360)

Mailed to:

Licensee:

Charlie's Bar and Grill, Inc.
dba Charlie's Bar and Grill
3315 NE 112th Avenue
Vancouver, WA 98682

Licensee Representative:

Curt Wyrick, Attorney At Law
12602 NW 46th Avenue
Vancouver, WA 98685

Assistant Attorney General:

Brian Considine, AAG
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

Department Contact:

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

Petition for Review of Initial Order: 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, WAC 10-08-211 and WAC 314-42-095.

The petition for review must:

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

(ii) Refer to the evidence of record which is relied upon to support the petition; and

(iii) Be filed with the liquor control board within twenty (20) days of the date of service of the initial order.

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

Address for filing a petition for review with the board:

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

RECEIVED

OCT 10 2011

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

Liquor Control Board
Board Administration

In Re:

Charlie's Bar & Grill, Inc.
D/b/a Charlie's Bar & Grill

Licensee

License No. 076348

Docket No. 2011-LCB-0007

LCB No. 23,806

LICENSEE'S PETITION FOR REVIEW

Charlie's Bar & Grill Inc. d/b/a Charlie's (Licensee) by and through its attorney, Curt Wyrick submits this petition for review of the Office of Administrative Hearings Initial Order and Pre Hearing Order issued by Administrative Law Judge Katherine Lewis on September 23, 2011. A copy of the Findings of Fact, Conclusions of Law and rulings on Licensee's Prehearing Motions is attached as Exhibit A.

STATEMENT OF EXCEPTIONS

Licensee takes exception to the following portions of the Initial Order and the Prehearing Motion Rulings contained in the Initial Order:

1. Licensee takes exception to the Rulings on Licensee's Motion to Suppress/Dismiss that;
(1) Liquor Control Officers are may engage in controlled buys without the Board adopting rule pursuant to RCW 66.44.290; (2) The use of minors to enter bars and purchase alcohol is permissible despite the failure of the Board to adopt rules authorizing minors to used by Liquor Control Officers; (3) Because it was lawful for the minor to enter Charlie's the first time, even if told to leave by the bartender, it was lawful for the officer to send him in the bar the second time; (4) Entrapment is a defense only in criminal proceedings and the controlled by did not entrap the licensee.
2. Findings of Fact No. 10, "that [REDACTED] stood at or near the door for one to two minutes and was ignored by the bouncer who was talking to someone." While it is true [REDACTED]

██████████ testified that's what he did, such testimony was directly contradicted by Deni Liufau and other bar employees that he could have stood by the door for that period of time.

3. Findings of Fact No. 13. "██████████ states Ms. Winders simply told him to go get one". While it is true that is what he testified to, such testimony was directly contradicted by other witnesses, the policy of Charlie's that without ID you must leave the bar and the subsequent actions of ██████████ when directed by Misty Winders that he had to leave the bar unless he had a wrist band. He left the bar.
4. Findings of Fact No.16. Liquor enforcement officer Paul Magerl stated he was close behind ██████████ when he ordered the beer and heard Ms. Winders tell ██████████ something like, "no wristband, no liquor". At the hearing the liquor agents testified that entered the bar and were met by the night manager Tara Bartell and Brian O'Neill and it was while this encounter was ongoing that officer Magerl left the group and overheard the conversation between Winders and ██████████ Bartell and O'Neill testified that their first contact with liquor enforcement agents happened after Josh Hood had sold ██████████ a bottle of Coors Light and that the officers were not in the bar until that contact and could not have overheard the conversation.
5. Findings of Fact No.17. According to ██████████ he then went in search of a bouncer in an attempt to obtain a bracelet. He went to the south door of Charlie's and no bouncer was in sight. He then left the establishment through that door. This testimony defies common sense. First, witness's Day and Bartell testified that Day didn't leave his post at the south door. Second, ██████████ knew there was a bouncer at the north door but instead chose to leave the bar. The only logical explanation is that he was doing what he was told, no bracelet leave the bar. Third, it was December 17 no one would go outside to obtain a bracelet or look for a doorman when all he had to do was walk thru the bar to the north door where he knew a bouncer was checking ID.
6. Findings of Fact No.23. Officer Magerl told ██████████ to go back to the north door and "try again". Officer Magerl's report, Exhibit 3. "I instructed the IA to go to the north

entrance and get a wristband.” [REDACTED] went to the north door but did not attempt to get a wristband. Instead he once again slipped in.

7. Findings of Fact No.24. Officer Magerl contended that if the claimant had flatly been denied the service of alcohol he would not have sent him back in. However, he argued [REDACTED] had not been denied the service of alcohol, but had been told to “get a wristband”. This may be a distinction without a difference. The ALJ failed to recognize the legal implication of being told to leave the bar. Findings of Fact Nos. 16 and 17 set forth the testimony of Misty Winders and Traci Wild that [REDACTED] had to get a wristband or leave the bar.

The ALJ makes no attempt to reconcile conflicting testimony because she mistakenly believed that the minor could be sent into the bar despite being told to leave.

8. Findings of Fact Nos. 24 and 25 [REDACTED] testified that he stood just inside the door for a minute or two and was not asked for identification. Liufau denies this could have happened.
9. Conclusion of Law Nos. 5 and 6. liquor control enforcement officers may use minor investigative aides to enter premises posted off limits to minors without adopting rules allowing its officer to do so.

EVIDENCE IN THE RECORD RELIED ON

1. Licensee relies upon the testimony of: Bruce Richardson, owner of Charlie’s testimony about Charlie’s policies that prohibit anyone who appears under 30 from remaining in the bar without identification verifying age. He further testified as to the extensive training of staff regarding alcohol enforcement laws ; Misty Winders, the bartender who refused the IA service and directed that he leave the bar unless he had a wrist band; Traci Wild, a server at Charlie’s who was present and overheard Misty tell the IA he had to leave the bar if he didn’t have a wrist band; Tara Bartell, the night manager, testimony that her first contact the liquor control officers Karic and Magerl was after the

IA was served by Josh Hood. There was no conversation in the middle of the bar prior to that time; Brian O'Neill, who heads security testimony supports Bartel that the only conversation with the officers happened after the IA had been served by Josh Hood. The significance of this testimony is that the officers were not in the bar talking to Bartel and O'Neil when they claim to overheard the conversation between the IA and Misty Winders; Deni Liufau's testimony that he worked as a bouncer at the north door and that the IA did not loiter by the north door one or two minutes either time he entered the bar but may have slipped in when he was checking other ID; Franklin Day's testimony that he was stationed at the south door and was never approached by the IA and that he had not left his post; Joshua Hood's testimony that he had been a bartender for many years and never had been cited for any violations until a system was in place where the bouncer checked ID not the bartenders. The testimony of all Charlie's witnesses of the extensive and continuous training they had received, including a owner initiated controlled purchase program approved by the Liquor Board.

2. Statement's written by Misty Winders and Tara Bartel about what happened on 12/17/2010 while the incident was still fresh in their minds. Liscensee exhibits.
3. Officers Magerl report where he direct the IA not to slip past the bouncer but to get a wrist band from the north bouncer. States exhibit.
4. RCW 66.44.290 which exempts minors from criminal penalties when participation in controlled purchase programs which have been authorized by the liquor control board under rules authorized by the board.

POINTS AND AUTHORITIES

On 12/17/2010 Charlie's Bar was posted at each entrance that minors were prohibited from entering the bar. At the suggestion of liquor control officer Amir Karic, Charlie's started a system of ID checks in which bracelets were issued and ID was checked at the door instead of

by the bartenders or servers. In order to enter the bar on busy nights patrons were required to show ID at the door and to obtain a wrist band prior to entering and being served alcohol.

On December 17, 2010, with this system in place, Washington State Liquor Control Agents brought a minor to Charlie's and instructed him to enter the bar and buy alcohol. It was a busy night and doormen were stationed at both the north and south entrances. While the doorman was checking other IDs and collecting the \$5 cover charge, the minor slipped into Charlie's and made his way to the bar. At the bar he ordered a beer from bartender Misty Winders.

She saw that he had no bracelet and told him that he had to get the bracelet at the door or leave the premises as he was directed. This conversation was overheard by Traci Wild who was standing next to Winders. Instead of going back to the doorman at the north door and showing his ID he chose to leave the bar through the south entrance. The bar is only 100 feet long and the bartenders are stationed in the middle area of the bar. Walking to the north door thru the bar would be the route one would take if they thought they were allowed to stay in the bar. In addition, it was winter, so why would [REDACTED] go outside when all he had to do was walk thru the bar to the north entrance. The only logical inference is that he was doing what he was told. He knew he could not get a wrist band so he left the bar. One thing is not in dispute. When he was told to leave the bar the system had worked and Charlie's had passed the compliance check. However, once outside the minor was directed by liquor control officer Magerl to go back thru the north entrance and get a wristband. Instead of approaching the doorman, paying the cover charge and showing his ID as he was instructed by officer Magerl, he once again he slipped through claiming again to have stood by the door for 1 or 2 minutes. This time he went to a different bartender Josh Hood. Josh failed to notice he did not have a wrist band and served him a beer.

THE WASHINGTON STATE LIQUOR CONTROL BOARD

THE POWERS OF STATE AGENCIES

An agency has only those powers conferred on it by the legislature, either expressly or by necessary implication. *Washington Independent Telephone Association, Et Al., Plaintiffs, GTE Northwest, Inc., Respondent, v. Washington Utilities AND Transportation Commission, Petitioner* 148 Wn.2d 887, 901, 64 P.3d 606 (2003); *Human Rights Commission (Spangenberg) v. Cheney School District No. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982). An agency may not promulgate rules that conflict with the underlying statute, but it may “fill in gaps” if rules are necessary to effect the statute. *Washington Public Ports Association v. The Department of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 642 (2003); *Green River Community College v. Higher Education Personnel Board*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980), adhered to and modified, 95 Wn.2d 962, 633 P.2d 1324 (1981). Therefore, before adopting rules, an agency must have the requisite authority from the legislature to do so and must go through a public process when adopting rules.

Administrative agencies are creatures of the legislature without inherent or common-law powers. If an enabling statute does not authorize a particular agency regulation, either expressly or by necessary implication that regulation must be declared invalid. In re Consol. Cases Concerning the Registration of *Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-40, 869 P.2d 1045 (1994), (“We do not defer to an agency the power to determine the scope of its own authority.”)

RCW 66.44.290 (1) exempts from criminal prosecution minors participating controlled purchase programs authorized by the liquor control board under rules adopted by the board. The Legislature has allowed controlled purchase programs only when the liquor board adopts rules.

STATUTORY INTERPRETATION

Statutory interpretation is a question of law that courts review de novo. *Western Telepage, Inc. v. The City of Tacoma*, 140 Wn.2d 607, 998 P.2d 884 (2000) the court’s primary goal in

interpreting statutes is “to ascertain and give effect to the legislative intent,” *State v. Pac. Health CTR., Inc.* 135 Wn. App. 149, 158-59, 143 P.3d 618 (2006). If the statute’s meaning is plain on its face courts give effect to that plain meaning. *Department of Ecology v. Campbell and Qwin, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d (2002). In other words when a statute is clear on its face you do not look outside clear statutory language. If the statute is ambiguous you may resort to legislative history, but only if the statute is ambiguous.

Where statutory language is “plain, free from ambiguity and devoid of uncertainty”, there is no room for construction because the legislative intention derived solely from the language of the statute. *Bravo v. Dolsen CLS.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995) (quoting *Krystad v. Lau*, 64 Wn.2d 827, 844, 400 P.2d 72 (1965)); see also *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). In undertaking a plain language analysis the Court must remain careful to avoid “unlikely, absurd or strained “results.” *Burton v. Layman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005) [quoting *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)] “Only where the legislative intent is not clear from the words of the statute the court resort to intrinsic aids.” *Berrocal*, 155 Wn.2d at 590.

RCW 66.44.290 exempts minors who are participating in controlled buy programs under rules adopted by the liquor control board. The language of the statute is clear that the liquor control board must adopt a rule authorizing the program. Judge Lewis found that a rule was not necessary because the liquor officers had sufficient police power authority to bring minors into bars. This might be true except : (1) the legislature adopted RCW 66.44.290 authorizing the use of minors only if the liquor control board adopts a rule allowing controlled buy programs. (2) RCW 66.44.290 is clear on its face that it applies to all controlled buy programs. (3) Because the legislature adopted RCW 66.44.290, the inherent police power authority to use minors in compliance checks has been limited because a rule must first be adopted.

PENAL STATUTES

Courts interpreting penal statutes apply a more stringent standard. The Washington State Supreme Court in *State v. Coucil* 170 Wn.2d 704; 245 P.3d 223 (2010) stated:

We review questions of statutory interpretation de novo. *State v. Eaton*, 168 Wn.2d 7476, 480, 229 P.3d 704 (2010). Where the plain words of the statute are ambiguous, our inquiry is at an end. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.2d 131 (2010). If the statute is susceptible to one or more reasonable interpretation, it is ambiguous and, absent legislative intent to the contrary, the rule of lenity requires us to interpret the statute in favor of the defendant. *State v. Jacobs* 154, Wn.2d 596, 600-01, 115 P.3d 281 (2005). Our purpose in interpreting this statute is to determine and carry out the intent of the legislature, and we must presume that it did not intend absurd results. *Eaton*, 168 Wn.2d at 480.

The rule of lenity is based upon the concept of the fundamental fairness, requires a penal statute to be literally and strictly construed in favor of the accused although, a possible, but strained, interpretation in favor of the State might be found. *State v. Hornaday*, 105 Wn.2d 120; 713 P.2d 71 (1986).

Charlie's Bar and Grill has been charged with a violation of RCW 66.44.270(1) which makes it unlawful for any person to sell liquor to any person under the age of twenty-one. WAC 314-29-020 imposes a 30-day license suspension for a third violation in a two year window. The employee or owner who serves a minor may be criminally charged. The fact that officers elected charge administratively does not alter the fact that the cited violations have criminal penalties.

POWER TO INVESTIGATE

There is no express constitutional power for agencies to conduct on premises investigations. The United States or Washington Constitution do not contain any explicit grant of power to State government agencies to gather information. This is an essential point because a given agencies power to investigate is limited to the power specifically granted to it by the legislature. The

power to physically inspect property subject to administrative regulations is an important part of an agencies investigative authority. In some cases agency investigations may employ both subpoenas and inspections; in others (e.g., enforcement of buildings and fire codes), a physical inspection may be the only practical means of deterring compliance with regulations.

The development of the law and inspections in the United States is consisted primarily of the courts effort to balance the government's preference for ready access to private property (with minimal inconvenience to the inspector) against the Fourth Amendments requirement that privacy be protected from arbitrary invasion.

RCW 66.28.090 grants the authority to liquor enforcement officers to inspect license premises:

66.28.090(1) All licensed premises used in the manufacturer, storage, or sale of liquor, or any premise or part 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. [Emphasis added]

This statute makes it a violation of RCW Title 66 to, in any way, interfere with the inspection. From the plain language of the statute the authority to enter and inspect license premises has been specifically granted by the legislature to liquor enforcement officers. Liquor enforcement officer has been defined by WAC 314-01-005(4) to be only those individual designated as a liquor enforcement officer Liquor Control Board.

It is clear that the legislature has specifically granted the authority for liquor enforcement officers to enter licensed premises to ensure that liquor laws are complied with. However, the statute granting this authority is equally clear that such power to inspect does not extend to those employees of the State who are not liquor enforcement officers, such as minors employed as investigative aides. By using minors, liquor control officers have exceeded their authority to inspect the premises and converted the action into an illegal search of the premises.

Evidence obtained by means of an illegal search and seizure conducted in violation of the Fourth Amendment is not admissible in a civil proceeding that is quasi-criminal in nature. Such

evidence is also inadmissible in cases in which the government is seeking to exact a penalty from, or in some way punish, the person against whom the evidence is sought to be admitted. *McDaniel v. The City of Seattle*, 65 Wn.App. 360 (1992). Generally, search warrants are required for administrative searches of both private and commercial premises. *Thurston County v. Sager*, 2004 Wash. App. LEXIS 1580.

The minor and liquor control officers were well aware that minors were not allowed in Charlie's the night of 12/17/2010. Officers believed that they had the authority to bring a minor into Charlie's and conduct an investigative search. Assume for the sake of argument that the initial entry into the bar was lawful, that changed when the IA was told to leave the bar. At that point reentry constituted criminal trespass but more importantly, because the minor was directed by officer Magerl to reenter it became an illegal search conducted without a warrant by state authorities. Liquor control officers themselves had every right to enter the premises but had no right to instigate an illegal search. RCW 66.32.020 grants authority for the issuance of search warrants if there is probable cause that alcohol is sold or furnished in violation of Title 66. The ALJ wrongly concluded that the minor could be ordered into the bar as many times as it took to create a violation and that a search warrant was not needed.

MINORS

Minors (those under twenty-one) are prohibited by the state from consuming, possessing alcohol or entering restricted areas. The following statutes apply to minors who enter establishments and attempt or purchase alcohol:

1. RCW 66.44.270(2)(a) it is unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor, a violation of this subsection is a gross misdemeanor punishable as provided in chapter 9A.20 RCW.

2. RCW 66.44.290(1) every person under the age of twenty-one who purchases or attempts to purchase liquor shall be guilty of a violation of this Title. Every person between the ages of

eighteen and twenty, inclusively, who is convicted of a violation of this section is guilty of a misdemeanor punishable as provided by RCW 9A.20.021 except that a minimum fine of \$250 shall be imposed in any sentence requiring community restitution shall require not fewer than 25 hours of community restitution.

3. RCW 66.44.310(b) it is a misdemeanor for any person under the age of twenty-one years to enter or remain in any area classified as off-limits to such person, but persons under twenty-one years of age may pass through restricted area in a facility holding spirits, beer and wine in private club license.

4. RCW 9A.52.080 Criminal Trespass (1) a person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully or upon the premises of another under circumstances not constituting criminal trespass in the first degree. A gross misdemeanor. RCW 9A.52.090 set forth defenses to Criminal Trespass. In a prosecution under 9A.52.070 and 9A.52.080, is it a defense that: (2) the premises at times were open to members of the public and that the actor complied with all lawful conditions imposed on access to or remaining in the premises.

On December 17, 2010 a minor entered Charlie's which had posted signs notifying minors that they were prohibited from entering the facilities. The minor slipped by security but was refused service by the bartender. He was told to either leave the premises or obtain a bracelet. Because obtaining a bracelet would require the showing of ID, he left the premises. He was then directed to reenter the premises despite knowing he was not permitted in Charlie's. He was unlawfully on the premises, the public place defense does not apply and he was guilty of criminal trespass as well as violating RCW 66.44.270, RCW 66.44.290, and RCW 66.44.310.

How many crimes is a state agency willing to commit in order to suspend a license or fine a bartender? On 12/17 liquor officers and their IA committed two misdemeanors entering Charlie's the first time. They committed two misdemeanors and one gross misdemeanor by the second entry. Five separate crimes in order to fine a bartender \$200 and to shut down a business

and to put twenty seven people out of work for thirty days. The record is clear the Charlie's only violations in 19 years resulted from minors inserted in the bar by liquor control officers. Josh Hood had no violations in over ten years of bartending until this incident. Liquor officers have the right and duty to enforce liquor law violations. They have the right to enter bars to make sure laws are complied with. The Board needs to draw the line when its employees are committing crimes to create violations.

EXCEPTIONS

The legislature recognized that the use of controlled purchase programs were a valuable tool in the enforcement of liquor laws but that it was illegal for minors to enter places such as Charlie's and attempt to purchase alcohol. To legalize the use of minors RCW 66.44.290(1) was adopted:

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

The legislature has specifically authorized the use of minors between eighteen and twenty-one to participate in controlled purchase programs which are authorized by the Liquor Board under rules adopted by the Board. When the Board fails to adopt a rule it remains unlawful for minors, including investigative aides, to purchase alcohol or enter restricted places.

The Board did adopted WAC 314-21 which allows in-house controlled purchase programs. One of the requirements of the WAC is that the person participating in the in-house controlled purchase program should not be deceptively mature in appearance. This program was formally adopted pursuant to RCW 66.08.0501 which authorized the Liquor Control Board to adopt

appropriate rules pursuant to RCW 34.05. However the Board has never adopted a rule relating to the use of minors by a liquor control officers.

On the night of December 17, 2010 the minor in question entered Charlie's Bar and Grill on two occasions, both entries were misdemeanors. The aide attempted to purchase alcohol and was turned down, another misdemeanor. He then reentered the bar and purchased alcohol which is a gross misdemeanor and a misdemeanor.

This criminal activity was unlawful and was directed by the State of Washington agents. Such activity was not done pursuant to a controlled purchase program adopted by the Liquor Control Board. It was, therefore, illegal and all information obtained by this unlawful activity should have been suppressed and the case against Charlie's dismissed by Judge Lewis and it was error not to do so.

WHY MUST THERE BE A RULE

The question of whether or not a given agency action is a "rule" or something else has significant legal consequences, both for the agency taking the action and for those whom the agencies action is intended to apply to. If an agency takes action, meeting the definition of "a rule", but fails to employ the requisite rule-making process, the agencies action may be invalidated. *Simpson Tacoma Craft Company v. Department of Ecology*, 119 Wn.2d 640, 835 P.2d 1030 (1992); *State v. Carrie*, 34 Wn.App. 674, 663 P.2d 500 (1983).

The legislature adopted 66.44.290(1) which specifically allows controlled purchase programs to be authorized by the Liquor Control Board if the Board adopts a rule. The Board has not adopted a rule allowing controlled purchases by liquor control officers. When the legislature delegates the authority to adopt rules to an administrative agency, in this case the Liquor Control Board, the Board may not sub-delegate it further without express authorization. Op. Att'y Gen. No. 7 (1987); see *Ledgering v. State*, 63 Wn.2d 94, 100, 385 P.2d 522 (1963)

Any in-house policies or other directive originating within the agency purporting to authorize the use of minors which are not a properly adopted rule are invalid.

The agency argued that they do not need a rule, that they themselves, as a limited authority law enforcement agency, have the implied authority to conduct a controlled purchase using investigative aides and, therefore, may violate the statutes that they themselves are sworn to enforce. Had the legislature not directed the Board to adopt rules this argument might have merit. But the legislature has eliminated any implied authority when it adopted RCW 66.44.290.

But what is the definition of a rule? The Administrative Procedures Act (RCW 34.05) defines rule in part as “any agency order, directive, or regulation of general applicability”

Five statutory categories of rules are set out in the definition of RCW 34.05.010(16):

“Rule” means any agency order, directive, or regulation of general applicability (1) the violation of which subjects a person to a penalty or administrative sanction; (2) which establishes, alters or revokes any procedure, practice or requirement relating to agency hearings; (3) which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law; (4) which establishes, alters or revokes any qualifications or standard for the issuance, suspension, or revocation of licenses to pursue any commercial activity, trade, or profession; or (5) which establishes, alters or revokes any mandatory standards for any product or material which must be met before distribution or sale.

The action by a state agency, in bringing minors into a prohibited establishment directing them to attempt to purchase alcohol, directly subjects a server and owner to criminal and administrative penalties.

These unauthorized and illegal controlled purchase buys are being conducted throughout the county and impact a wide variety of restaurants, taverns, and bars and should be prohibited unless the Board formally adopts a rule authorizing the use of minors by liquor control officers.

The legislature has expressed concern about agencies adopting rules, or in this case the failure to adopt required rules. This allows the agency to exceed the scope of the authority envisioned by the legislature. In this case, agency employees are bypassing the statute which requires the Liquor Control Board to adopt rules which allow controlled purchases.

Accordingly, as part of the regulatory reform effort, the legislature attempted to clarify that agencies needed more specific authority than some had been using as authority for adopting rules or in this case not adopting rules RCW 34.05.322 states:

For rules implementing statutes enacted after July 23, 1995, an agency may not rely solely on the section of law stating a statute's intent or purpose, or on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for its statutory authority to adopt the rule. An agency may use a statement of intent or purpose or the agency enabling provisions to interpret ambiguities in a statute's other provisions.

Agencies have the authority to adopt interpretive rules pursuant to RCW 42.17.250(1)(d), however this requires agencies to publish in the Washington Administrative Code "statements of general policy or interpretations of general applicability formulated and adopted by the agency" See *Association of Washington Business*, 155 Wn.2d 430 at 443. 120 P.2d 46(2005)

There no question that the Washington Liquor Control Board has never adopted a rule or even an interpretive policy regarding the use of minors in controlled purchase programs except for the in house purchase program that employers may conduct. Instead liquor control officers have chosen to violate the law by aiding and abetting persons under the age of twenty-one to enter, remain in restricted bars and to purchase alcohol in violation of State statutes. Because this activity is conducted without authority and in direct violation of the RCW 66.44.290 which requires the Liquor Control Board to adopt a rule pursuant to the Administrative Procedures Act, the violation against Charlie's Bar and Grill should be dismissed. Any evidence obtained illegally by the use of an unauthorized minor should be suppressed and the initial order be reversed.

The rules governing the admissibility of evidence in administrative proceeding are set out in RCW 34.05.452(1):

Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege

recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial or unduly repetitious. [Emphasis added]

Evidence that is excludable, on constitutional or statutory grounds, cannot be admitted in these administrative proceedings. The evidence gathered by the investigative aide was obtained illegally and is not admissible.

ENTRAPMENT

As previously pointed out evidence obtained by means of an illegal search and seizure conducted in violation of the Fourth Amendment is not admissible in a civil proceeding that is quasi-criminal in nature. Such evidence is also inadmissible in cases in which the government is seeking to exact a penalty from, or in some way punish, the person against whom the evidence is sought to be admitted. *McDaniel v. The City of Seattle*, 65 Wn.App. 360 (1992).

The penalty in this case is a 30 day license suspension for Charlie's. This will not only shut down the business but will put 27 employees out of work. In addition the bartender Josh Hood will pay a \$200 fine.

The Administrative Violation Notice charged a violation of RCW 66.44.270(1) which make it a gross misdemeanor to "sell, give, or otherwise to supply liquor to any person under the age of twenty-one years". Electing to extract substantial civil penalties instead of criminal does not convert RCW 66.44.270 into a noncriminal statute and thereby eliminating statutory and constitutional defenses.

In 1975, the Washington legislature adopted a statutory definition of entrapment RCW 9A.16.070 provides:

1. In any prosecution for a crime, it is a defense that (a) the criminal design originated in the mind of the law enforcement official or any person acting under their direction, and (b) the actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

2. That defense of entrapment is not established by showing only the law enforcement merely afforded the actor an opportunity to commit a crime.

The Supreme Court of Washington in *State v. Lively* 130 Wn.2d 1; 921 P.2d 1035 (1996) examined RCW 9A.16.070 as follows:

The statute codified the common law definition of entrapment. Under RCW 9A.16.070 and common law, entrapment occurs when the crime originates in the mind of the police or an informant and the defendant is induced to committing a crime which he was not predisposed to commit. *State v. Smith*, 101 Wn.2d 36, 42, 677 P.2d 100 (1984). The statute thus constitutes a restatement of the subjective test of entrapment as applies by both the Federal and Washington State Courts. See *Sorrels v. United States*, 287 U.S. 435, 451, 53 S.Ct. 210, 72 L.Ed.2d 413, 86 ALR 249 (1932). *State v. Waggeoner*, 80 Wn.2d 7, 10, 490 P.2d 1308 (1971). See also *21 Am. Jur.* 2d Criminal Law Section 202, at 365 (1981). The defendant must "demonstrate he was tricked or induced in committing a crime by acts of trickery by law enforcement agents. Second, he must demonstrate that he would not have otherwise committed the crime". *Smith*, 101 Wn.2d at 43.

In this case the evidence is clear. The Richardson's have owned Charlie's Bar and Grill since November 26, 1990. They had no violations until August 5, 2009 when liquor control officers used, without properly adopted rules, under age investigative aides to trick and induce bartenders to serve them alcohol. This was accomplished by using minors who appear deceptively older than 21. Charlie's and Josh Hoods only violations have occurred when minors are brought to the bar by liquor control officers.

Charlie's on 12/17/2010 had notices posted that minors were prohibited from entering the premises. Despite these signs liquor control officers instructed a minor to enter the bar on two occasions. On the first occasion, the minor was refused service by a bartender because he did not have a bracelet showing his ID had been checked. He was directed by the bartender to obtain a bracelet from the person checking ID at the door or leave the premises. He followed the instructions and left the bar, but was instructed by liquor control officers to reenter through a different door and according to officer's Magerl report obtain a wristband from the doorman he. Instead of approaching the doorman once again slipping past security and attempted to purchase alcohol.

Bartenders and servers have no incentive to serve minors. First, they are subject to criminal penalties and fines and second, it places their jobs at risk. Owners of establishments have no incentive to serve minors because it results in substantial fines and potential loss of liquor license. In many cases means losing their business. Charlie's cooperated with liquor control officials in establishing a bracelet system designed to prevent minors from entering the premises. The owners continually trained their employees and even implemented an employer control buy training exercise pursuant to the Washington Administrative Code to test and train their employees. The owners posted at their establishment to ensure minors do not enter. They have hired security personnel to sit at doors and night manager to ensure liquor laws are being enforced. In addition to criminal penalties they subject themselves to tort liability for negligently serving minors. There is no incentive or desire to serve minors and until the State brought minors, who appeared deceptively older, into the premises there were no violations of liquor laws.

The government has crossed the line between legitimate enforcement when it employs criminal means to entrap business owners. When they cross that line, they engage in what can only be called outrageous conduct. When the State engages in such conduct it violates due process and the courts will focus on the States' behavior not the defendants' previous position *United States v. Luttrell*, 889 F.2d 806, 811 (9th Cir.) (1989).

There are several factors which Courts consider when determining whether police conduct offends due process:

Whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity (*Harris*, 997 F.2d at 816); whether the defendants reluctance to commit a crime was overcome by police sympathy, promises or access profits, or persistent solicitation *Isaacson*, 373 NE 2d at 83; whether the government controls the criminal activity or simply allows for the criminal activity to occur *United States v. Corcione*, 592 F.2d 11 115 (2nd Cir.), *cert denied* 440 U.S. 975, 99 S.Ct. 1545, 59 L.Ed.2d 794, and whether the government's conduct amounted to criminal

activity or conduct repugnant to a since of justice “*Isaacson*, 387 NE 2d at 83.” *State v. Lively* 130 Wn.2d 1, 921 P.2d 1035(1996)

In this case it is clear that the criminal violation would not have occurred but for the actions of the liquor control officers. Liquor control officers have the right to inspect premises and do so on a regular basis. They have the right to check ID and determine whether violations are occurring. From November 26, 1990 to August, 2009 they have issued no citations to Charlie’s or Josh Hood despite inspecting Charlie’s Bar and Grill countless times. It is only through the states own action, when they brought in an illegal minor into the bar, who did not look under the age of 21, were able to create a violation.

In this case the liquor control officers controlled the criminal activities from start to finish. Relevant in finding whether the state engaged in outrageous conduct is whether the police motive was to prevent further crime and protect the populous or was it just simply to get a conviction. What better evidence that the officers were out to obtain convictions than when they decided to send the minor back into the bar after being refused service. In this instance the governments conduct demonstrates a greater interest in creating the crime to prosecute than protecting the public from criminal behavior. *Bogart*, 783 F.2d at 1438, *United States v. Larrod* 734 F.2d 1290, (8th Cir.) (1984). In *State v.*

Lively 130 Wn.2d 1, 921 P.2d 1035 (1996) the court stated the following:

Finally, and perhaps most importantly, is whether the government conduct amounted to criminal activity or other improper conduct repugnant to the since of justice *Isaacson*, 378 NE 2d at 83.

The Court went on to reverse the defendants’ conviction because of the government conduct violated the principles of due process.

When the state agency violates the law by bringing a minor into a prohibited establishment, provides them with money and directs them to purchase alcohol knowing they are

not legally authorized to do so and in the process commits five separate crimes, that is entrapment and that is outrageous conduct.

The ALJ ruled that the entrapment defense was only available in criminal cases and was not available in this case. The violation charged is a criminal statute. In addition no Washington case has ruled that entrapment is not a defense in an administrative proceedings to sanction a licensee, especially in light of the severity of the sanctions. Other jurisdictions have concluded that the defense is available. *Fumusa v. Arizona State Board of Pharmacy*, 25 Ariz.App. 584, 545 P.2d 432 (1976), disapproved on other grounds, *Sarwik v. Thorneycroft*, 123 Ariz. 23, 597 P.2d 9 (1979); *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal.Rptr. 473(1973); *Smith v. Pennsylvania State Horse Racing Commission*, 517 Pa. 233, 535 A.2d 596 (1988). See also *One Way Fare v, State Department of Consumer Protection*, 2005 W.L. 701695 (Conn.Super. 2005). These decision are base on public policy- no societal interest is served by any government agency committing a crime in pursuit of the enforcement of licensing statutes. Luring people into violations also does not serve the dignity with which administrative proceedings should be clothed. *Patty v. Board of Medical Examiners*, supra, 9 Cal.3d at 363-67.

The Initial Order's Conclusion of Law Nos. 10 and 11 support the fact that the Licensee was not predisposed to commit a crime or merely afforded an opportunity to commit a crime. Just the opposite these Conclusions of Law make it clear that the ALJ found that the Licensee went to great lengths not to violate the law.

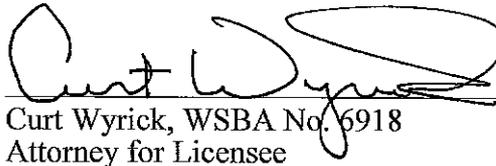
In addition to the grounds set forth previously, the Initial Order should be reversed, this case should be dismissed because the evidence should have been suppressed.

CONCLUSION

Restaurant and bar owners are businessmen. They conduct a business which pays significant taxes and payrolls. Charlie's Bar and Grill operated for eighteen years without a violation of liquor laws. For twenty years the owners have worked cooperatively with liquor

enforcement officers to comply with the law and train their employees. It was not until August 2009 when the local liquor control officers decided to use minors that Charlie's committed its first violation. The use of minors by the liquor control officers is not authorized by law. The Liquor Control Board has the authority granted by the legislature to adopt rules which would legalize the use of minors in a controlled purchase program. They have not done so. Until they do so, all citations issues and all violations found through the use of a controlled purchase program are invalid and illegal. The Liquor Board exists to enforce liquor laws. Officers have the right to enter licensed establishment to ensure compliance. These checks were done countless times at Charlie's and no violations were found. When officers decide that creating violations by inserting minors into bars where they found no minors they have crossed the line from enforcing the law to creating violations and entrapping honest business owners and bartenders. Such citations should be dismissed and any of the evidence obtained through these programs should be suppressed.

DATED this 5 day of OCTOBER, 2011


Curt Wyrick, WSBA No. 6918
Attorney for Licensee

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CHARLIE'S BAR AND GRILL, INC.
d/b/a CHARLIE'S BAR AND GRILL

3315 NE 112TH AVENUE
VANCOUVER, WA 98682

LICENSEE

LICENSE NO. 076348
AVN NO. 1J0351C

OAH NO. 2011-LCB-0007
LCB NO. 23,806

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

The Washington State Liquor Control Board's (Board) Education & Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and BRIAN J. CONSIDINE, Assistant Attorney General, and pursuant to WAC 314-42-095, respectfully move the Board for an Order extending the time for filing Enforcement's Petition for Review and Response to the Licensee's Petition for Review.

Once an Administrative Law Judge (ALJ) has prepared an initial order in a liquor matter, the ALJ will send the order to the parties of record and to the Board. WAC 314-42-095(1). Upon receipt of the order, either party may submit exceptions to the initial order within twenty (20) days from service¹ of the order. WAC 314-42-095(2)(a). Parties may also petition the Board for an extension of the filing time for its petition for review and/or its response to a petition for review. WAC 314-42-095(2)(a). The Board may extend or shorten the filing time

¹ Service is defined as personal service or by United States mail. Service by mail is achieved upon deposit in the United States mail. RCW 34.05.010(19)

1 based on a party's motion demonstrating a clear and convincing showing of exigent
2 circumstances. *Id.*

3 On October 10, 2011, Enforcement received the Licensee's Petition for Review (Petition)
4 in the above-reference matter. *See* Attachment 1, Declaration of Brian J. Considine. The
5 Licensee mailed its Petition on October 6, 2011, and Enforcement currently has until October 17,
6 2011 to respond to the Licensee's Petition. *See* Attachment 1, Declaration. After receiving the
7 Licensee's Petition, my office requested a copy of the audio record from the Board, and my
8 office is waiting for its copy and I have not had a chance to review the audio record. *See*
9 Attachment 1, Declaration. Enforcement must be able to review the audio record before it can
10 respond to the Licensee's Petition. *See* Attachment 1, Declaration. Additionally, the parties
11 presented nearly a full day of testimony, and Enforcement's counsel will need several days to
12 review the record before Enforcement can respond to the Licensee's Petition. *See* Attachment 1,
13 Declaration. Therefore, the exigent circumstances in this matter warrant an extension for a
14 response to the Licensee's Petition, and Enforcement requests twenty (20) days to review the
15 record and file Enforcement's Response to the Licensee's Petition for Review. *See* Attachment
16 1, Declaration.

17 Furthermore, Enforcement received ALJ Katherine Lewis' Proposed Findings of Fact,
18 Conclusions of Law and Initial Order in the above-reference matter. *See* Attachment 1,
19 Declaration. Based on the ALJ's initial ruling, Enforcement will likely submit exceptions to the
20 ALJ's initial order. *See* Attachment 1, Declaration. Since the Licensee has filed a Petition for
21 Review, Enforcement believes the most efficient practice would be for it to file its Petition for
22 Review with its Response to the Licensee's Petition. *See* Attachment 1, Declaration. Therefore,
23 the exigent circumstances in this matter warrant an extension for filing a petition for review, and
24 Enforcement requests that it be allowed to file its Petition for Review² in conjunction with its
25

26 ² Enforcement recognizes the Licensee would have ten (10) days to respond to its Petition for Review and it would not oppose a longer timeframe if the Licensee requests an extension under WAC 314-42-095.

1 Response to the Licensee's Petition, which would be twenty (20) days from the date the Board
2 would grant Enforcement's requests.

3 DATED this 12th day of October, 2011.

4 ROBERT M. MCKENNA
5 Attorney General

6 
7 _____
8 BRIAN J. CONSIDINE, WSBA #39517
9 Assistant Attorney General
10 Attorneys for the Washington State Liquor
11 Control Board Enforcement Division
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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CHARLIE'S BAR AND GRILL, INC.
d/b/a CHARLIES BAR AND GRILL

3315 NE 112TH AVENUE
VANCOUVER, WA 98682

LICENSEE

LICENSE NO. 076348
AVN NO. 1J0351C

OAH NO. 2011-LCB-0007
LCB NO. 23,806

DECLARATION OF BRIAN J.
CONSIDINE IN SUPPORT OF
ENFORCEMENT'S MOTION TO
EXTEND THE TIME FOR FILING
PETITION FOR REVIEW

I, BRIAN J. CONSIDINE, hereby declare as follows:

1. I am currently the attorney of record for the Washington State Liquor Control Board (Board), Education and Enforcement Division (Enforcement) in this matter.

2. I am over the age of eighteen, and am competent to testify hereto, and make this Declaration upon personal knowledge of its contents.

3. On September 27, 2011, my office received Administrative Law Judge (ALJ) Katherine Lewis' Proposed Findings of Fact, Conclusions of Law and Initial Order in Liquor Control Board Number (LCB No.) 23,806.

4. Based on the ALJ's initial ruling, Enforcement will likely submit exceptions in the above-referenced case.

5. On October 10, 2011, Enforcement received the Licensee's Petition for Review (Petition) in the above-reference matter.

DECLARATION OF BRIAN J.
CONSIDINE IN SUPPORT OF
ENFORCEMENT'S MOTION TO
EXTEND THE TIME FOR FILING
PETITION FOR REVIEW

ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
(360) 664-9006

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CHARLIE'S BAR & GRILL, INC
d/b/a CHARLIE'S BAR & GRILL
3315 NE 112TH ST
VANCOUVER, WA 98662

LICENSEE

LICENSE NO. 076348-1J

LCB NO. 23,806
OAH NO. 2011-LCB-0007

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

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

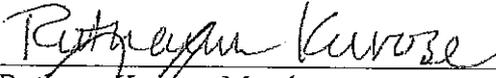
1. On September 23, 2011, Administrative Law Judge Katherine A. Lewis issued her Findings of Fact, Conclusions of Law and Initial Order in this matter.
2. On October 10, 2011, the Licensee's Petition for Review was received.
3. On October 11, 2011, staff for the Attorney's General's Office representing the Enforcement Division in this case contacted the Board's Adjudicative Proceedings Coordinator to request a copy of the recording of the July 28, 2011 hearing. A copy of the recording was sent via campus mail on October 11, 2011 to the Office of the Attorney General and it was received on October 12, 2011.
4. On October 13, 2011, the Enforcement Division of the Board, through Assistant Attorney General Brian J. Considine, filed a Motion to Extend the Time for Filing a Petition for Review in this matter. The Motion was supported by the Declaration of Brian J. Considine.
5. The Board finds that the Enforcement Division has made a clear and convincing showing of good cause to extend the date for filing a Petition for Review, due to exigent circumstances.

The Board hereby ORDERS that the Enforcement Division's Motion is granted. Enforcement may file a Petition for Review within twenty (20) days from October 12, 2011. The Licensee will have ten (10) days to respond or request an extension under WAC 314-42-095.

IT IS HEREBY FURTHER ORDERED that the Enforcement Division's request to file its Reply to Licensee's Petition for Review in conjunction with its own Petition for Review is granted.

DATED this 18th day of October 2011.

Sharon Foster, Chair



Ruthann Kurose, Member



Chris Marr, Member

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Liquor Control Board
Board Administration

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

CHARLIE'S BAR AND GRILL, INC.
d/b/a CHARLIES BAR AND GRILL

3315 NE 112TH AVENUE
VANCOUVER, WA 98682

LICENSEE

LICENSE NO. 076348
AVN NO. 1J0351C

OAH NO. 2011-LCB-0007
LCB NO. 23,806

ENFORCEMENT'S PETITION FOR
REVIEW AND REPLY 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, and pursuant to RCW 34.05.464 and WAC 314-42-095(2), submits the following exceptions to the Initial Order issued by Administrative Law Judge (ALJ) Katherine Lewis, on September 23, 2011, and responds to the Licensee CHARLIE'S BAR AND GRILL, INC. d/b/a CHARLIES BAR AND GRILL's (Licensee) Petition for Review (Petition) in the above-referenced case.

Enforcement respectfully takes exception to some of the Findings of Fact, and Conclusions of Law, but it does not take exception to ALJ Lewis' Initial Order. Additionally, the Licensee's Petition lacks the force and merit necessary to overcome the ALJ Lewis' Initial

1 Order, and the Initial Order (Order) issued by the ALJ is supported by the evidence in the
2 record and its result should be adopted by the Board.

3 I. STANDARD OF REVIEW

4 Any party in an administrative action may file a petition for review of the initial order
5 pursuant to RCW 34.05.464 and WAC 314-29-010(4). A party filing a petition for review
6 must specify the portions of the initial order to which exception is taken and refer to evidence
7 in the record on which the party relies to support the petition. WAC 314-29-010(4). The
8 reviewing officer (including the agency head reviewing an initial order) “shall exercise all the
9 decision-making power that the reviewing officer would have had to decide and enter the final
10 order had the reviewing officer presided over the hearing[.]” RCW 34.05.464(4). Therefore,
11 the Washington State Liquor Control Board is not bound by the ALJ’s Findings of Facts or
12 Conclusions of Law in the Initial Order. However, reviewing officers “shall give due regard to
13 the presiding officer’s opportunity to observe the witnesses.” RCW 34.05.464(4).

14 II. PROCEDURAL HISTORY

15 On December 22, 2010, Enforcement issued an Administrative Violation Notice (AVN)
16 to the Licensee for a violation of RCW 66.44.270(1). *See* Exhibit 1, AVN. After the Licensee
17 requested a formal hearing, the Board issued a Complaint to the Licensee on February 9, 2011.
18 *See* Complaint. The Complaint charged that “on or about December 17, 2010, the Licensee, or
19 an employee thereof, gave, sold, and/or supplied liquor to a person under the age of twenty-
20 one.” *See* Complaint.

21 A prehearing conference was held on April 19, 2011, and a briefing schedule for the
22 Licensee’s Motions was set. The Licensee submitted its Motions and Enforcement submitted
23 its Reply. Administrative Law Judge (ALJ) Katherine Lewis heard oral arguments on the
24 Licensee’s motions. An administrative hearing was held on July 28, 2011.¹ Enforcement

25 ¹ Two administrative cases were consolidated for the hearing—Charlie’s Bar and Grill, LCB No. 23,806 and Joshua Hood, LCB No. 23,810. Joshua Hood did not file a Petition for Review.

1 presented three witnesses: Officer Paul Magerl, 17:58-1:30:00; Investigative Aide [REDACTED]
2 [REDACTED] 1:31:00-2:19:00; and Officer Almir Karic, 2:19:45-3:32:00. *See* Audio Recording,
3 Disc 1, from July 28, 2011, Charlie's Bar and Grill, No. 23,806, Administrative Hearing
4 (Audio Record, Disc 1). The Licensee presented eight witnesses²: Bruce Richardson, 00:00-
5 14:00; Misty Winders, 14:00-36:00; Traci Wilde, 36:00-48:37; Frank Day, 48:38-1:04:15,
6 Denny Liufau, 1:04:16-1:24:30; Brian O'Neil, 1:24:34-1:36:58; Tara Bartel, 1:37:00-2:03:00;
7 and Jason Hood, 2:03:12-2:14:20. *See* Audio Recording, Disc 2.

8 ALJ Lewis issued her Initial Order on September 23, 2011. In her Initial Order, ALJ
9 Lewis denied the Licensee's Motions and sustained the Board's Complaint. The Licensee
10 submitted its Petition for Review of ALJ Lewis's Initial Order on or about October 6, 2011,
11 and Enforcement received an extension from the Board to file its Petition for Review and
12 Reply to Licensee's Petition on or before November 1, 2011.

13 III. PETITION FOR REVIEW

14 A. Exceptions to Prehearing Motions – Discussion³

15 1. Exception to Conclusion Number 2

16 Conclusion Number 2 states that there is nothing in the law to bar prosecution of an
17 investigative aide when he or she assists with a compliance check. Discussion at 4. This
18 statement is not supported by law. A minor investigative aide is an employee of the Liquor
19 Control Board working on behalf of its Enforcement Division. Neither the Licensee nor the
20 court has cited to any authority that supports prosecution for an Enforcement employee's
21 actions when the employee is engaged in his employment under Title 66 RCW. Additionally,
22 as stated by the court, the investigative aide would have the affirmative defense of entrapment
23
24

25 ² All eight witnesses were called for both LCB Case Nos. 23,806 and 23,810.

³ Enforcement is not contesting the ALJ's ultimate ruling that the Licensee's Motions are unsupported and should be denied.

1 to bar prosecution. *See* Discussion at 5; RCW 9A.16.070. Therefore, this assertion should not
2 be adopted by the Board.

3 **2. Exception to Conclusion Number 3**

4 Conclusion Number 3's statement that "there is the appearance the officers were going
5 to keep sending [the investigative aide] in until he was eventually served, there is some
6 confusion regarding what was said to the minor after he was refused service" is not supported
7 by the record. Discussion at 5. The record clearly contradicts this assertion. *See* Finding of
8 Fact Number 24. The record is clear that the Licensee failed to check the investigative aide's
9 identification. Officer Magerl and Officer Karic testified that the purpose of the compliance
10 checks was to see if the Licensee would check the investigative aide's identification and/or
11 sell/serve liquor to a minor. *See* Officer Paul Magerl, 17:58-1:30:00; Officer Almir Karic,
12 2:19:45-3:32:00. The officers testified that the purpose was not to see if the Licensee could
13 implement its wristband procedure, but to see if a minor could gain access to liquor at its
14 establishment. *Id.* The record is clear that the investigative aide was not refused service by
15 Ms. Winders and he was served liquor by Mr. Hood. Therefore, this assertion is not supported
16 by the record and should not be adopted by the Board.

17 Additionally, Conclusion Number 3's statement that the minor investigative aide "may
18 well have been committing the crime of trespass, but realistically, he was doing so the minute
19 he went into the bar the first time given his age" is not supported by the record or law. As
20 previously stated, a minor investigative aide is an employee of the Liquor Control Board
21 working on behalf of its Enforcement Division. Enforcement has the statutory authority to
22 regulate liquor licensees. *See* RCW 66.44.010(4). Inherent in that regulatory authority is its
23 authority to enter the businesses it regulates.⁴ *Id.*; *See also*, WAC 314-11-090. Additionally,
24 the court has not provided any legal authority to support its assertion that a trespass was
25

⁴ Especially a licensee, like Charlie's Bar and Grill, that is required to be open to the public.

1 committed. Therefore, this assertion is not supported by the record and should not be adopted
2 by the Board.

3
4 **B. Exceptions to Findings of Fact**

5 **1. Exception to Findings of Fact Number 16 and 17**

6 Enforcement objects to Finding of Fact Number 16 because Ms. Winders never told the
7 investigative aide that “he could not be in the bar without a wristband and he was to go to one
8 of the bouncers and get one or get out.” The record is clear that she told the investigative aide
9 that he needed a wristband. See Officer Paul Magerl, 17:58-1:30:00; Investigative Aide
10 [REDACTED] 1:31:00-2:19:00; Misty Winders, 14:00-36:00; Traci Wilde, 36:00-48:37.
11 Ms. Winder’s testimony is clear that she did not inform any other employee that the
12 investigative aide did not have a wristband. See Misty Winders, 14:00-36:00. She did not tell
13 the investigative aide that he was not allowed to be on the premises. *Id.* She did not ask the
14 investigative aide to leave. *Id.* She simply asked the investigative aide, and an earlier
15 customer that night, to get a wristband and expected that he would leave if he did not get a
16 wristband. The Licensee’s policy asking someone to leave if they did not have a wristband
17 was not implemented until after December 22, 2010. See Tara Bartel, 1:37:00-2:03:00; Jason
18 Hood, 2:03:12-2:14:20. Therefore, Findings of Fact Numbers 16 and 17 are not supported by
19 the record and should not be adopted.

20 **2. Exception to Finding of Fact Number 24**

21 Enforcement objects to Finding of Fact Number 24 because the record is clear that
22 there is a distinction between being asked to get a wristband and refusing to serve/sell liquor to
23 a person. See Officer Paul Magerl, 17:58-1:30:00; Investigative Aide [REDACTED]
24 1:31:00-2:19:00; and Officer Almir Karic, 2:19:45-3:32:00. The fact that the Licensee sold
25 liquor to the investigative aide is a clear indication that the investigative aide was permitted to
be in the establishment and not denied alcohol. Additionally, the Licensee’s subsequent

1 implementation of a policy asking someone to leave if they did not have a wristband is a clear
2 indication that the investigative aide was not refused service. *See* Tara Bartel, 1:37:00-
3 2:03:00; Jason Hood, 2:03:12-2:14:20. Therefore, Finding of Fact Number 24 is not supported
4 by the record and it should not be adopted.

5 **3. Exception to Findings of Fact Numbers 13 and 26**

6 Enforcement objects to Findings of Fact Numbers 13 and 26 because the record is clear
7 that Mr. Liufau could not monitor everyone around the north entrance and his contention that
8 [REDACTED] could not have stood around the entrance is contradicted by Mr. Liufau's own
9 testimony. *See* Denny Liufau, 1:04:16-1:24:30. Mr. Liufau admitted on several different
10 occasions that he can become too busy and is unable to monitor everyone entering the
11 establishment when he is assigned to check identifications, collect money, check coats, and
12 distribute wristbands at the North entrance. *Id.* Therefore, Finding of Fact Numbers 13 and 26
13 are not supported by the record and should not be adopted.

14 **C. Conclusions of Law**

15 **1. Exception to Conclusions of Law Numbers 11 and 12**

16 Enforcement objects to Conclusions of Law Numbers 11 and 12 because the record
17 does not support the ALJ's contention that mitigation is appropriate in this matter. The
18 Licensee did not present evidence that mitigation is appropriate under WAC 314-29-015(4).
19 Additionally, the Licensee had the ability to present evidence for mitigation. It failed to make
20 a record for mitigation and chose to contest the Board's ability to regulate its liquor license.
21 The Licensee failed to submit any written policies and its employees failed to take basic steps
22 to ask for the investigative aide's identification and sold/service the investigative aide liquor.
23 Therefore, Conclusions of Law Number 11 and 12 are not supported by the record and should
24 not be adopted.
25

IV. REPLY TO LICENSEE'S PETITION

A. Licensee's Exceptions to Findings of Fact⁵

The Licensee's exceptions to the ALJ's decision are not supported by the record. "Findings of fact by an administrative agency are subject to the same requirement as are findings of fact drawn by a trial court." *Weyerhaeuser v. Pierce Licensee*, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) (quoting *State ex rel. Bohon v. Department of Pub. Serv.*, 6 Wn.2d 676, 694, 108 P.2d 663 (1940); *State ex rel. Duvall v. City Coun.*, 64 Wn.2d 598, 602, 392 P.2d 1003 (1964)). An administrative law judge is afforded discretion in weighing the evidence. *See Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 605 n.19, 13 P.3d 1076 (2000).

Formal findings of fact serve multiple purposes. They inform the parties of those portions of the record on which the trier of fact relied in reaching the decision, and the basis for that decision. *Weyerhaeuser*, 124 Wn.2d at 35-36. Factual findings also help to ensure that the trier of fact fully and properly dealt with all of the issues of the case before rendering a decision. *Id.* Finally, they aid in meaningful judicial review of the decision. *Id.*; *Boeing Company v. Gelman*, 102 Wn. App. 862, 871, 10 P.3d 475 (2000) (citations omitted). The purpose of factual findings is not to restate every fact elicited during the hearing – the transcript of proceedings serves that purpose. "Findings must be made on matters 'which establish the existence or nonexistence of determinative factual matters ...'." *Weyerhaeuser*, 124 Wn.2d at 35-36.

Additionally, the Licensee appears to only rely upon a small portion of the administrative record to support its arguments. *See* Petition at 3-4. It is the role of the trier of fact, rather than the attorneys, to determine which facts have been established by the evidence. *Hering v. State, Dept. of Motor Vehicles*, 13 Wn. App. 190, 192, 534 P.2d 143 (1975).

⁵ Exceptions were only filed for some of the ALJ's Findings of Fact. The Findings not being challenged by the Licensee will not generally be addressed any further. Therefore, the findings of fact not challenged by the Licensee or Enforcement should be adopted by the Board.

1 **1. Exception to Finding of Fact Number 10**

2 The Licensee objects to Finding of Fact Number 10 by arguing [REDACTED] testimony
3 is contradicted by the testimony of Mr. Liufau. Petition at 1-2, ¶2. The Licensee fails to
4 indicate how Mr. Liufau's testimony contradicts this finding and why this finding is not
5 supported by the record. See Petition at 1-2, ¶2. [REDACTED] testimony supports this finding
6 of fact. Investigative Aide [REDACTED] 1:31:00-2:19:00. Additionally, Mr. Liufau
7 admitted that he cannot observe everything because he has many job duties and he is not able
8 to watch the door when he is busy. See Denny Liufau, 1:04:16-1:24:30. Therefore, Finding of
9 Fact Number 10 is fully supported by the record and should be adopted by the Board.

10 **2. Exception to Finding of Fact Number 13**

11 The Licensee objects to Finding of Fact Number 13 by agreeing with the Finding of
12 Fact. Petition at 2, ¶3. [REDACTED] testified that he was told to get a wristband. Investigative
13 Aide [REDACTED] 1:31:00-2:19:00. The Licensee fails to show where the record
14 contradicts this statement. Therefore, Finding of Fact Number 13 is fully supported by the
15 record and should be adopted by the Board.

16 **3. Exception to Finding of Fact Number 16**

17 The Licensee objects to Finding of Fact Number 16. Petition at 2, ¶4. It is unclear
18 what the Licensee is contesting in this finding, and it conflates Officer Magerl and Officer
19 Karic's testimonies. However, Officer Magerl testified that he heard the bartender tell
20 [REDACTED] to get a wristband, [REDACTED] testified that he was told to get a wristband, and the
21 bartender, Ms. Winders, testified she told him to get a wristband. See Investigative Aide
22 [REDACTED] 1:31:00-2:19:00. Therefore, the Licensee's attempt to discredit
23 Enforcement's witnesses by paraphrasing its own witnesses' testimonies without citing to the
24 record is unsupported by the record. See Petition at 2, ¶3. Consequently, Finding of Fact
25 Number 16 is fully supported by the record and it should be adopted by the Board.

1 **4. Exception to Finding of Fact Number 19⁶**

2 The Licensee objects to Finding of Fact Number 19 by dramatically asserting that
3 ██████████ attempt to get a wristband at the south door “defies common sense.” Petition at
4 2, ¶5. However, ██████████ testified he went to the south door to try and get a wristband
5 because that is what he was told to do. Investigative Aide ██████████ 1:31:00-
6 2:19:00. Nothing in the record contradicts ██████████ testimony. The Licensee’s assertion
7 that Mr. Day “didn’t leave his post” is incorrect. Mr. Day, while being hostile to
8 Enforcement’s questions at hearing, admitted that he left the door one time and sometimes
9 moves his seat away from the door so he can see the bar. Frank Day, 48:38-1:04:15. The
10 Licensee does not cite to any portion of the record to support its “logical explanation” and this
11 finding is fully supported by the record. Therefore, Finding of Fact Number 19 should be
12 adopted by the Board.⁷

13 **5. Exception to Finding of Fact Number 23**

14 The Licensee objects to Finding of Fact Number 23 because it does not reiterate Officer
15 Magerl’s statement in his report. Petition at 2-3, ¶6. The Licensee fails to cite to a place in the
16 record that contradicts this finding. Officer Magerl testified that he instructed the investigative
17 aide to re-enter the premises to see if he would be asked for his identification at the door and/or
18 be sold liquor by a bartender. Officer Paul Magerl, 17:58-1:30:00. This finding is consistent
19 with Officer Magerl’s testimony. Therefore, Finding of Fact Number 23 is fully supported by
20 the record and it should be adopted by the Board.

21 **6. Exception to Finding of Fact Number 24**

22 The Licensee objects to Finding of Fact Number 24 as not being supported by the
23 record. Officer Magerl and ██████████ testimony clearly show that ██████████ was told he

24 _____
25 ⁶ The Licensee objects to Finding of Fact Number 17, but this Finding does not address the facts referenced in the Licensee’s objection. Finding of Fact Number 19 appears to be the relevant Finding of Fact.

⁷ Enforcement asks for an addition of this finding in its Petition for Review, but it does not have issue with the statement in this finding of fact.

1 needed a wristband. [REDACTED] was not asked to leave by Ms. Winders or any other employee
2 of the Licensee. See Officer Paul Magerl, 17:58-1:30:00; Investigative Aide [REDACTED]
3 [REDACTED] 1:31:00-2:19:00; Officer Almir Karic, 2:19:45-3:32:00; Misty Winders, 14:00-36:00.
4 Additionally, Ms. Winders testified that she had to ask another patron earlier in the night to get
5 a wristband and that she didn't know what happened to that patron. Misty Winders, 14:00-
6 36:00. Therefore, Finding of Fact Number 24 is fully supported by the record and it should be
7 adopted by the Board.

8 **7. Exception to Findings of Fact Number 25**

9 The Licensee objects to Finding of Fact Number 25 because its witness, Mr. Liufau,
10 denied the investigative aide could have stood near the entrance for a minute or two.
11 [REDACTED] testified that he stood inside the entrance for a minute or two. Although
12 Mr. Liufau denies this happened, he could not remember seeing the investigative aide and
13 admitted that people could get past him because he has many job duties and it is hard to keep
14 track of people when he is busy. Denny Liufau, 1:04:16-1:24:30. Therefore, Finding of Fact
15 Number 25 is fully supported by the record and it should be adopted by the Board.

16 **B. Licensee's exceptions to Conclusions of Law⁸**

17 The Licensee objects to the ALJ's denial of its Motions to Suppress and Dismiss and
18 Conclusions of Law Numbers 5 and 6. Petition at 1, ¶1; Petition at 3, ¶9. However, the
19 Licensee's arguments are unsupported by fact and law and the Board should uphold the ALJ's
20 determination that the Licensee's Motions are baseless and find the violation occurred.

21 **1. The ALJ properly found that Enforcement has statutory, regulatory and case law 22 authority to enforce all liquor laws and rules and engage in compliance checks.**

23 The Licensee argues that ALJ Lewis erred by concluding that Enforcement's use of
24 compliance checks are lawful. Petition at 5-12. The Licensee incorrectly argues that the

25 ⁸ Exceptions were only filed for some of the ALJ's Conclusions of Law. The Conclusions not being challenged
by the Licensee will not generally be addressed any further. Therefore, the conclusions of law not challenged by
the Licensee or Enforcement should be adopted by the Board.

1 Board's Enforcement Division does not have the authority to conduct compliance checks⁹
2 against the Licensee. See Petition at 5-12. Each provision found in Title 66 RCW should not
3 be read in a vacuum and the court should look at related statutes when analyzing the purpose of
4 one particular statute or regulatory structure in Title 66 RCW. See *State v. Jacobs*, 154 Wn.2d
5 596, 600, 115 P.3d 281 (2005); *Washington Public Ports Ass'n v. Dept of Revenue*, 148 Wn.2d
6 637, 645-46, 62 P.3d 462 (2003). When reviewing the meaning of a statute to determine an
7 agency's authority, the first step is to look to the plain meaning of the statute's terms. See
8 *Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002). A
9 statute's plain meaning should be "discerned from all that the Legislature has said in the statute
10 and related statutes which disclose legislative intent about the provision in question." *Cooper*
11 *Point Association*, 148 Wn.2d at 12, quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*,
12 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

13 Additionally, a court should also construe agency rules in a rational, sensible manner,
14 giving meaning to the underlying policy and intent and avoid interpretations that are unlikely
15 or absurd. *Odyssey Healthcare Operating BLP v. Washington State Dept. of Health*, 145 Wn.
16 App. 131, 185 P.3d 652 (2008) quoting *Mader v. Health Care Auth.*, 149 Wn.2d 458, 70 P.3d
17 931 (2003). "Administrative agencies have the powers expressly granted to them and those
18 necessarily implied from their statutory delegation of authority." *Tuerk v. Dept. of Licensing*,
19 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). "When a power is granted to an agency,
20 'everything lawful and necessary to the effectual execution of the power' is also granted by
21 implication of law." *Id.* at 125 citing *State ex. Rel Puget Sound Nav. Co. v. Dept. of*
22 *Transportation*, 33 Wn.2d 448, 481, 206 P.2d 456 (1949). However, an agency's power to
23

24 _____
25 ⁹ A Compliance check is a term of art used when the Liquor Control Board's Enforcement and Education
Division—its law enforcement arm—uses a minor investigative aide under the age of twenty-one (21), who is an
agent of the Board, to test whether or not a Licensee will allow a minor in a restricted area and/or sell or supply
liquor to the minor.

1 interpret its regulations is limited by the condition that its interpretations be consistent in its
2 enacting statutes. *Id.* at 126.

3 The Washington State Legislature set forth the power and expectations of the Board in
4 Title 66 RCW. When the Legislature enacted the Liquor Act in 1933, it declared that the
5 “entire act shall be deemed an exercise of the *police power* of the state, for the *protection of the*
6 *welfare, health, peace, moral and safety of the people* of the state, and all its provisions shall
7 be *liberally construed* for the accomplishment of that purpose.” Laws of 1933, ex. sess., ch. 62
8 § 2; RCW 66.08.010. (Emphasis added). RCW 66.08.020 charges the Board with the
9 administration of Title 66 RCW. *See* RCW 66.08.020.

10 Likewise, the Board has the authority to “enforce the penal provisions of this title and
11 the penal laws of this state relating to the manufacture, importation, transportation, possession,
12 distribution, and *sale of liquor*.” RCW 66.44.010(2) (emphasis added). The Legislature also
13 authorized the Board to “appoint and employ...liquor enforcement officers” who “shall have
14 the power, under the supervision of the board, to enforce the penal provisions of this title and
15 the penal laws of this state relating to the manufacture, importation, transportation, possession,
16 distribution, and *sale of liquor*.”¹⁰ RCW 66.44.010(4) (emphasis added). To assist the Board’s
17 officers in enforcing the provisions of Title 66 RCW, the Legislature expressly allowed the
18 Board to conduct, through its liquor enforcement officers, warrantless inspections of licensed
19 premises. *See* RCW 66.28.090. The Legislature also ensured that licensees would comply
20 with the conditions of their license because it has stated a licensee’s privileges are subject to
21 the Board being able to have access to the licensed premises through its Enforcement officers.
22 *See* RCW 66.28.090(2). Part of that responsibility, along with county and municipal law
23 enforcement agencies, is to ensure that the Licensee is not violating the statutes at issue in this
24 matter, RCW 66.44.270(1) and RCW 66.44.310(1)(a). *See* RCW 66.44.010.

25 ¹⁰ The Board published WAC 314-29-005. WAC 314-19-005(1) expanded its liquor officers’ authority to enforce the Board’s administrative rules codified in Title 314 WAC. *See* WAC 314-29-005(1).

1 In keeping with these responsibilities, liquor enforcement officers, similar to state,
2 county, and city law enforcement officers, utilize compliance checks to help them inspect and
3 regulate licensees in their interactions with minors.¹¹ Enforcement conducts its compliance
4 checks by employing minor investigative aides to act as decoys. The minor investigative aides
5 help officers simulate a typical scenario where a minor may try and enter an establishment to
6 purchase alcohol. Any minor investigative aide that is utilized in a compliance check is
7 employed as an agent of the Enforcement Division, and only enters liquor establishments at the
8 direction of a liquor enforcement officer. Without the assistance of a minor investigative aide,
9 it would be difficult for liquor officers to properly check if licensees are complying with
10 RCW 66.44.270.

11 **2. Enforcement, not the investigative aide, inspects a licensed premises.**

12 The Licensee argues that liquor enforcement officers are the only employees of the
13 Board who may “inspect” a licensed premises.¹² Petition at 8-10. The Licensee supports its
14 argument by stating that RCW 66.28.090 clearly indicates that liquor enforcement officers are
15 the only State employees who may “inspect” a licensed premises. *Id.* The Licensee’s argument
16 is incorrect and does not demonstrate that Enforcement cannot conduct compliance checks.

17 The Licensee’s assertion implies that a minor investigative aide, not a liquor
18 enforcement officer, is the person “inspecting” the premises. Nothing in fact or law supports
19 this proposition. The statutes in Title 66 RCW are clear in that the Board has the authority to
20 enforce these provisions, and has the authority to employ liquor enforcement officers to

21 _____
22 ¹¹ Law enforcement may use a decoy or informer when affording a person with an opportunity to violate the law.
23 *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*
24 *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.”).

25 ¹² The Licensee also asserts that RCW 66.28.090 is the only authority allowing Enforcement to enter or “inspect”
liquor licensees. *See* Petition at 6. However, the Licensee has provided no support for this argument and the
statutory framework of Title 66 RCW and case law are contrary to the Licensee’s position. *See* 66.08.010; *Jow*
Sin Quan, 69 Wn.2d at 382; *See also, State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (“Courts may
assume where no authority is cited in a brief, counsel has been unable to find any.”)

1 enforce the liquor laws. Enforcement's authority to utilize compliance checks is derived
2 through the Board's broad regulatory authority along with the Legislature's authorization of
3 the employment and use of liquor enforcement officers. It is clear that Enforcement conducted
4 the compliance check and RCW 66.28.090 does not prevent Enforcement from conducting
5 compliance checks. Therefore, the use of a compliance check was well within its authority to
6 inspect the licensed premises and provide an opportunity for the Licensee, through its
7 employees, to either comply or not comply with the law.

8 **3. RCW 66.44.290 does not relate to Enforcement's use of compliance checks and it**
9 **does not require the Board to promulgate rules authorizing Enforcement to utilize**
10 **compliance checks.**

11 The Licensee erroneously contends that RCW 66.44.290 defines the authority and duty
12 of the Board with regard to the use of minors in compliance checks. *See* Petition
13 at 10-16. The Licensee argues that RCW 66.44.290(1) establishes that the statute was meant to
14 authorize Enforcement's use of compliance checks and requires the Board to adopt rules
15 authorizing Enforcement's use of compliance checks. Petition at 14. The Licensee cites to
16 RCW 34.05.010(16) and RCW 34.05.322 as support for this conclusion. *Id.* at 14-15.
17 However, the plain meaning of RCW 66.44.290 establishes that the statute is not meant to
18 regulate the conduct of Enforcement or the Board, but, the conduct of minors and private in-
house controlled purchase programs.

19 RCW 66.44.290 should be analyzed in the context of the statutory scheme of Title 66
20 RCW, its purpose within the statutory structure of Title 66 RCW, and read as a whole while
21 harmonizing each provision to insure proper construction. *State v. Manro*, 125 Wn. App 165,
22 173, 104 P.3d 708 (2005); *State v. Nam*, 136 Wn. App. 698, 704, 150 P.3d 617 (2007);
23 *Washington Public Ports Ass'n*, 148 Wn.2d at 645-46. RCW 66.44.290 states:

24 Minor purchasing or attempting to purchase liquor – penalty.

25 (1) Every person under the age of twenty-one years who purchases or attempts to
purchase liquor shall be guilty of a violation of this title. This section does not

1 apply to persons between the ages of eighteen and twenty-one years who are
2 participating in a controlled purchase program authorized by the liquor control
3 board under rules adopted by the board. Violations occurring under a private,
4 controlled purchase program authorized by the liquor control board may not be
5 used for criminal or administrative prosecution. :

6 (2) An employer who conducts an in-house controlled purchase program
7 authorized under this section shall provide his or her employees a written
8 description of the employer's in-house controlled purchase program. The written
9 description must include notice of actions an employer may take as a consequence
10 of an employee's failure to comply with company policies regarding the sale of
11 alcohol during an in-house controlled purchase. :

12 (3) An in-house controlled purchase program authorized under this section shall
13 be for the purposes of employee training and employer self-compliance checks.
14 An employer may not terminate an employee solely for a first-time failure to
15 comply with company policies regarding the sale of alcohol during an in-house
16 controlled purchase program authorized under this section.

17 (4) Every person between the ages of eighteen and twenty, inclusive, who is
18 convicted of a violation of this section is guilty of a misdemeanor punishable as
19 provided by RCW 9A.20.021, except that a minimum fine of two hundred fifty
20 dollars shall be imposed and any sentence requiring community restitution shall
21 require not fewer than twenty-five hours of community restitution.

22 The Licensee contends that this statute clearly indicates that the Legislature required
23 the Board to adopt rules concerning compliance checks. Petition at 12. However, nothing in
24 RCW 66.44.290 indicates that the Legislature expressly required the Board to adopt rules
25 concerning compliance checks. RCW 66.44.290(1) and (4) only address the crime,
punishment and possible immunity for minors who purchase liquor, and it does not address the
conduct of licensees or the Board. The plain meaning of these subsections demonstrate that
they are to *only* apply to minors who attempt to purchase liquor, and not to the conduct of the
Licensees or the Board. Moreover, the plain intent and purpose of subsection (1) is to protect
minors participating in private in-house controlled purchase programs because a minor would
not be protected in these situations without this statutory provision.¹³

RCW 66.44.290(2) and (3) only apply to licensees wishing to conduct in-house control
purchase programs. See RCW 66.44.290 (2), (3). The plain reading of RCW 66.44.290 (2)

¹³ A minor is already protected if he/she acts under the direction of a liquor enforcement officer. See RCW 9A.16.070. See also *Emerson*, 10 Wn. App. at 238; *Playhouse Inc*, 35 Wn. App. at 667.

1 and (3) establish that the statute regulates licensees' in-house controlled purchase programs
2 and not compliance checks. These subsections supplement the penalties for minors purchasing
3 liquor and their roles within an in-house controlled purchase program. It does not seek to
4 address or constrain the Board from using compliance checks and provides a mechanism for
5 licensees to self-police the conduct of their employees.

6 Therefore, when RCW 66.44.290 is read as a whole, the statute clearly addresses: (1)
7 minors purchasing alcohol and (2) private in-house controlled purchase programs. It *does not*
8 pertain to the actions of the Board or Enforcement. If the Legislature had intended for
9 RCW 66.44.290 to pertain to Enforcement's use of compliance checks, it would have directly
10 addressed the use of compliance checks in the statute.¹⁴ Therefore, the plain meaning and
11 language of RCW 66.44.290 establishes that the statute is clearly meant to regulate the conduct
12 of minors and licensees, and not the conduct of Enforcement.

13 **4. The legislative history of RCW 66.44.290 demonstrates the statute was never**
14 **intended to apply to or control Board enforcement activities.**

15 If there is any ambiguity in RCW 66.44.290, its legislative history demonstrates that the
16 statute was not promulgated with the intent to have it apply to, or restrict, the Board's liquor
17 enforcement activities. RCW 66.44.290 was first enacted in 1933. *See* Laws of 1933, ex.
18 sess., ch. 62. §37(1). Prior to 2001, RCW 66.44.290 was amended in 1935, 1955 and 1965.
19 *See* Laws of 1935, ch. 174 §6(3); Laws of 1955, ch. 70 §4; Laws of 1965, ch. 49 §1. In
20 looking at the amendments, the purpose and language of the statute remained constant for over
21 sixty-five years. The 1935 amendment stated that "every person under the age of twenty-one
22 years who purchases any liquor shall be guilty of a violation of this act." Laws of 1935, ch.
23 174 §6(3) (*See* Attachment 1). The 1955 amendment stated that "every person under the age
24 of twenty-one years who purchases any liquor shall be guilty of a violation of this title." Laws

25 ¹⁴ The Legislature knew that the Board conducted compliance checks when it amended RCW 66.44.290 in 2001.
See infra Enforcement's discussion of the legislative history of RCW 66.44.290.

1 of 1955, ch. 70 §4 (*See* Attachment 2). The 1965 amendment stated that “every person under
2 the age of twenty-one years who purchases or attempts to purchase liquor shall be guilty of a
3 violation of this title.” Laws of 1965, ch. 49 §1 (*See* Attachment 3). The 1965 amended
4 language remained unchanged until the Legislature amended it in 2001. *See* Laws of 2001, ch.
5 49 §1 (Attachment 4).

6 In 2001, Senators Spanel and Gardner introduced amendments to RCW 66.44.290 as
7 S.B. 5604. S.B. 5604, 57th Leg., Reg. Sess. (Wash. 2001). S.B. 5604 retained the 1965
8 statutory language and added immunity to minors participating in controlled purchase
9 programs. *Id.* In addition, S.B. 5604 added two other subsections pertaining to in-house
10 controlled purchase programs. *Id.* Senator Harriet Spanel and the Senate Committee’s
11 nonpartisan staff, testifying at the Senate Committee hearing on S.B. 5604, specified that the
12 purpose of the Bill was solely to provide licensees the ability to conduct internal controlled
13 purchase programs. *See* An Act Relating to Allowing the Liquor Control Board to Authorize
14 Controlled Purchase Programs and Amending RCW 66.44.290: Hearing on S.B. 5604 Before
15 the S. Comm. on Labor, Commerce and Fin. Inst., 57th Leg. (2001) at 00:29:16 (audio
16 recording of hearing).¹⁵ Larry Mount, representing a licensee, and Jan Gee representing the
17 Washington State Food Industry also testified at the Senate Committee hearing. *Id.* at 00:30:00
18 (audio recording of hearing). Both individuals indicated that they supported the Bill, not to
19 replace liquor enforcement compliance checks, but to allow licensees to do their own internal
20 checks to increase compliance with the law and assist Enforcement’s efforts. *Id.* at 00:30:02-
21 00:33:01 (audio recording of hearing).

22 The House Committee on Commerce and Labor also held a hearing on S.B. 5604. *See*
23 An Act Relating to Allowing the Liquor Control Board to Authorize Controlled Purchase
24

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

12 In 2003, the Legislature amended RCW 66.44.290 by adding a fourth subsection to the
13 statute. *See* Laws of 2003, ch. 53 §301. The Legislature did not change the 2001 amended
14 language, and solely added a fourth section. *Id.* The 2003 amendment established that a
15 violation of the statute is a misdemeanor and a minimum fine of two hundred and fifty dollars
16 (\$250) and no less than twenty-five hours of community restitution should be imposed. The
17 statute has not been amended since 2003.

18 "The fundamental objective" in construing and interpreting statutes is to ascertain the
19 legislative intent. *Amburn v. Daly*, 81 Wn.2d 241, 501 P.2d 178 (1972); *Williams v. Pierce*
20 *County*, 13 Wn. App. 755, 758, 537 P.2d 856 (1975). Clearly, this legislative history shows

21
22 ¹⁶ 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 ¹⁷ 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 that the legislature was aware of the Board's use of compliance checks. If the Legislature had
2 intended for RCW 66.44.290 to pertain to Liquor Enforcement's use of compliance checks, it
3 would have directly addressed the use of such compliance checks in the statute when it
4 amended RCW 66.44.290 in 2001. It did not. Instead, it continued to allow the Board to rely
5 on its broad police powers when enforcing provisions of Title 66 RCW and its own rules. See
6 RCW 66.44.010.

7 Therefore, RCW 66.44.290's legislative history clearly establishes that the Legislature
8 was aware of Enforcement's use of compliance checks. If the Legislature wanted to constrain
9 law enforcement's use of compliance checks, it could do so, but it has chosen to allow law
10 enforcement to use its broad police powers when enforcing provisions of Title 66 RCW.
11 Therefore, the plain meaning of RCW 66.08.030(1), its context, related statutes, and the
12 legislative history of RCW 66.44.290, establishes that the Legislature did not intend to
13 constrain the Board or Enforcement from conducting compliance checks, and the Board and
14 Enforcement retain their inherent authority, as previously discussed, to enforce all liquor laws
15 through the use of a compliance check against the Licensee. Consequently, the Licensee has
16 failed to establish that RCW 66.44.290 requires the Board to publish a rule authorizing
17 Enforcement to utilize compliance checks and its motion should be denied.

1 **5. Enforcement is allowed to utilize a minor investigative aide in a compliance check**
2 **and its use of compliance checks is not improper.**

3 The Licensee appears to argue that RCW 66.44.270, RCW 66.44.290, RCW 66.44.310,
4 RCW 9A.52.080 and/or WAC 314-21 prevent Enforcement from utilizing minor investigative
5 aides in compliance checks. *See* Petition at 10-16. The Licensee seems to support this
6 conclusion by arguing that the aforementioned statutes and rules only address the crime,
7 punishment and possible immunity for minors who purchase liquor, and the omission of
8 Enforcement from the statutes or rules prevents Enforcement from utilizing minors in
9 compliance checks. *Id.* This argument is illusory and unsupported by the plain meaning of
10 RCW 66.44.270, RCW 66.44.290, RCW 66.44.310, and WAC 314-21.

11 The plain meaning of RCW 66.44.270 RCW 66.22.290, RCW 66.44.310, and/or
12 WAC 314-21 demonstrate that they are to only apply to minors who attempt to purchase
13 liquor, and not to the conduct of Enforcement. As previously argued, RCW 66.44.290's plain
14 meaning demonstrates that its provisions were clearly intended to address the conduct of
15 minors and licensees and not the conduct of Enforcement or its investigative aides.¹⁸

16 Similarly, RCW 66.44.310's plain meaning demonstrates that its provisions were
17 clearly intended to address situations where minors, not employed by Enforcement, enter areas
18 classified as off-limits to any person under the age of twenty-one (21).

19 RCW 66.44.310 does not address Enforcement's use of compliance checks or its
20 employment of investigative aides. Furthermore, exceptions to RCW 66.44.310(1) only relate
21 to the Licensee's employees under the age of twenty-one (21), and does not address
22 Enforcement's employment of investigative aides. *See* RCW 66.44.316, RCW 66.44.318,

23 ¹⁸ Contrary to the Licensee's assertion, RCW 66.44.290 only addressed a licensee's ability to use a minor in an in-
24 house controlled purchase program. *See Supra* Legislative History of RCW 66.44.290. It was not enacted to
25 apply to Enforcement since law enforcement officers were already allowed to use a decoy or an informer when
 affording a person with an opportunity to violate the law. *See State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966);
 State v. Emerson, 10 Wn. App. 235, 242, 517 P.2d 245 (1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d
 967 (1948); *See Also Playhouse Inc. v. Liquor Control Board*, 35 Wn. App. 539, 667 P.2d 1136 (1983) ("deceitful
 practices . . . including the use of undercover agents and limited police participation in unlawful enterprises, are
 not constitutionally prohibited.")

1 RCW 66.44.340, RCW 66.44.350, and RCW 66.24.590. Similarly, RCW 66.44.270 does not
2 address Enforcement's use of compliance checks or its employment of investigative aides.
3 Therefore, the plain meaning of RCW 66.44.310 and RCW 66.44.270 establish that the statutes
4 are clearly meant to regulate the conduct of minors and licensees, and not the conduct of
5 Enforcement.

6 Additionally, WAC 314-21 was adopted pursuant to RCW 66.44.290 and
7 RCW 66.08.030.¹⁹ See Petition at 12; WAC 314-21. WAC 314-21 does not apply to
8 Enforcement. The intent and plain meaning of WAC 314-21 clearly indicates that it was
9 published to address licensees' use of in-house controlled purchase programs carried out under
10 RCW 66.44.290. See WAC 314-21-005, "What is an in-house controlled purchase program?"
11 The plain meaning of WAC 314-21 clearly indicates that the Board promulgated these rules to
12 comply with the Legislature's requirement that the Board promulgate rules pertaining to in-
13 house controlled purchase programs under RCW 66.44.290. See WAC 314-21-015.
14 Therefore, WAC 314-21 is immaterial to this matter, and it shows that the Board adopted rules
15 pursuant to the Legislature's *expressed* requirement that the Board adopt rules for in-house
16 controlled purchase programs.

17 Additionally, the Licensee also takes the position that the minor investigative aide and
18 the liquor enforcement officers are now exposed to criminal prosecution for participating in the
19 compliance check. Petition at 7-8, 13. The Licensee also suggests that the use of a minor
20 investigative aide is improper because the minor investigative aide violated the law during the
21 compliance check. *Id.* The Licensee has provided no authority to support these claims, and
22 the court correctly disregarded these allegations.²⁰ It has also ignored the Legislature's grant
23

24 ¹⁹ RCW 66.08.0501 and RCW 34.05 indicate the *manner* in which rules are to be adopted. They do not require
25 the Board to adopt any particular rule. Compare RCW 66.08.0501 and RCW 66.08.030.

²⁰ *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) ("Courts may assume where no authority is cited in a
brief, counsel has been unable to find any.")

1 of immunity to the Board and its employees for actions taken in performance of their duties in
2 the administration of Title 66 RCW. RCW 66.08.100.

3 The minor investigative aide or liquor enforcement officers did not violate any law
4 acting as agents of the Board. The long-standing statutory framework of Title 66 RCW and
5 case law allow liquor enforcement officers to conduct compliance checks. *See State v. Gray*,
6 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245
7 (1973); *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948). Liquor enforcement
8 officers are granted the authority to conduct compliance checks on liquor retailers through the
9 Board's authorization to employ and use liquor enforcement officers²¹, authority derived from
10 general police powers, and Washington case law. Additionally, the Board has the authority to
11 hire employees. RCW 66.08.016.

12 As an employee of the Board, the minor investigative aide is protected from criminal
13 and/or civil liability. RCW 66.08.100. The minor investigative aide also is protected from
14 prosecution even if the liquor statutes and rules did not explicitly mention immunity for
15 employees involved in Enforcement-run compliance checks. Law enforcement may engage in
16 limited criminal acts "in order to detect and eliminate criminal activity." *State v. Lively*, 130
17 Wn.2d 1, 20, 921 P.2d 1035 (1996). These practices, when part of a scheme of crime detection
18 by law enforcement officers, have not ordinarily been held improper. *Playhouse*, 35 Wn. App.
19 at 542; *See also, Emerson*, 10 Wn. App. at 242, *State v. Clark*, 34 Wn. App. 173, 175-76, 659
20 P.2d 554. Even if that reasoning did not apply to the minor investigative aide here, he would
21 be absolved from any criminal or civil liability as he could claim a complete defense of
22 entrapment in a criminal case or immunity in a civil suit. *See RCW 9A.16.070(1)(a)*;
23 RCW 66.08.100.
24
25

²¹ RCW 66.44.010(4)

1 Here, the minor investigative aide used in the Licensee's compliance check is an agent
2 of Enforcement, and is not subject to the provisions of RCW 66.44.270, RCW 66.44.290,
3 RCW 66.44.310, RCW 9A.52.080 and/or WAC 314-21. Additionally, Enforcement is a law
4 enforcement agency and has the ability to run compliance checks as a part of its law
5 enforcement duties. The Licensee ignores Enforcement's limited law enforcement jurisdiction,
6 and its reckless assertion that the liquor officers and/or the investigative aide committed crimes
7 and risk prosecution is not supported by law and is wholly illusory.

8 **6. The Affirmative Defense of Entrapment is Not Applicable in This Administrative**
9 **Case.**

10 The Licensee argues that the affirmative defense of entrapment is available in a civil
11 administrative adjudication and the facts were sufficient to raise the defense of entrapment.
12 Petition at 16-20. The Licensee cites to Washington's criminal code, state and foreign case
13 law as the basis for its entrapment argument. *Id.* However, the ALJ properly denied
14 Licensee's motions because criminal law and case law are not applicable in this civil
15 administrative matter and its argument should fail.

16 RCW 9A.16.070(1) provides that entrapment is a defense "in any prosecution for a
17 crime." Here, the Petitioner has not been charged with a crime and the action taken against the
18 Petitioner in this *administrative* action is not a criminal prosecution. *See* Complaint; Initial
19 Order. Moreover, if the Licensee had been charged with a crime, these matters could not be
20 before this administrative tribunal since it has no jurisdiction in criminal matters. *See*
21 RCW 34.12. However, the Petitioner overlooks the fact that Title 9A RCW is Washington's
22 criminal code and attempts to cite to this in an administrative matter, and appears to argue that
23 the Petitioner's administrative case was a prosecution for crime. Petition at 17-18.

24 "If a statute is clear on its face, its meaning is to be derived from the plain language of
25 the statute alone." *State v. M.C.*, 148 Wn. App. 968, 971, 201 P.3d 413 (2009). The plain
language of RCW 9A.16.070(1) demonstrates the defense of entrapment under the statute is

1 only available in criminal prosecutions, and as a result, is not available to the Petitioner in a
2 civil administrative proceeding in Washington. No criminal charges were filed against the
3 Licensee, no criminal prosecution occurred, and there are no Washington decisions allowing
4 the entrapment defense in the civil administrative context. Therefore, the defense of
5 entrapment is not available to the Petitioner in this administrative matter.

6 Nevertheless, even if the defense of entrapment were available, the Licensee bears the
7 burden of establishing entrapment occurred. *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035
8 (1996). The Licensee has not met its burden under the facts in this case. The defense of
9 entrapment cannot be established if the law enforcement officials merely afforded the actor an
10 opportunity to commit a crime. *See* RCW 9A.16.070(2); *See also, State v. Swain*, 10 Wn. App
11 885, 889, 520 P.2d 950 (1974) (“mere solicitation by a police officer or other state agent to
12 commit the crime is not entrapment”). Furthermore, law enforcement may use a decoy or
13 informer to assist them in presenting a person with an opportunity to commit a crime. *See*
14 *Gray*, 69 Wn.2d 432; *See Also Playhouse Inc.*, 35 Wn. App. 539.

15 Mr. Hood, an employee of the Licensee, was merely afforded the opportunity to
16 commit a violation of the liquor laws and rules.²² The Licensee did not prevent the minor
17 investigative aide from entering the premises. While inside, the minor investigative aide was
18 not asked for his valid identification, which demonstrated his true age, and he was served a
19 beer. *See* Initial Order. At that point, it was entirely up to the Licensee’s employee, without
20 pressure from the minor investigative aide or the Enforcement officers on scene, to choose
21
22
23

24 ²² Interestingly, the Licensee claims it was entrapped. Petition at 13. The Licensee provides no support indicating
25 how a *corporation* can be entrapped in a non-criminal, regulatory inspection. Additionally, the Licensee appears
to argue the Board had no reason to suspect its employees were selling liquor to minors. However, the Licensee
has two previous violations for selling liquor to minors and this would be the third violation for selling liquor to a
minor within the past two years. *See* Exhibit 7.

1 whether he was going to sell to a person under the age of twenty-one.²³ The Licensee's
2 employee was afforded an opportunity to violate the law and when provided that opportunity,
3 he did so by selling to a minor.

4 The risk presented to the Licensee is no different than if the minor had walked into the
5 Licensee's establishment on his own and not as an agent of the Liquor Control Board.
6 Therefore, Entrapment is not a defense available to the Licensee in this matter and, even if it
7 was, the Licensee has not met its burden of proving that any entrapment occurred here.
8 Consequently, the Licensee's entrapment defense fails, all the evidence gathered by
9 Enforcement was properly admitted at the administrative hearing and the ALJ properly denied
10 the Licensee's motions.

11 **7. The Licensee Failed to Demonstrate "Outrageous Conduct" On The Part of**
12 **Enforcement.**

13 The Licensee argues that the actions of Enforcement in this matter were so outrageous
14 as to require dismissal. Petition at 18-19. To support this contention, the Licensee cites to
15 several foreign cases and a single Washington Supreme Court opinion, *State v. Lively*, 130
16 Wn.2d 1, 921 P.2d 1035 (1996). In doing so, the Licensee has failed to show Enforcement's
17 conduct was "outrageous" and has failed to properly apply *Lively* or compare the facts in that
18 case to this matter.

19 An "outrageous conduct" argument is based upon the principle that the conduct of law
20 enforcement officers and their agents may be "so outrageous that due process principles would
21 absolutely bar the government from invoking judicial processes to obtain a conviction."
22 *Lively*, 130 Wn.2d at 19, 921 P.2d 1035; quoting *United States v. Russell*, 411 U.S. 423, 431-

23 _____
24 ²³ The Licensee argues that its employees do not intend to sell to minors. Petition at 13. However, RCW
25 66.44.270 does not use the words "knowingly" or "intend" and the violation is the *sale* of liquor and not the intent
of the seller. Therefore, the statute creates a strict liability on licensees and they have committed a violation if
they are found to have sold liquor to a person under the age of twenty-one (21). See *State v. Moser*, 98 Wash.
481, 482, 167 P. 1101 (1917) (if a person sold liquor to minors, "he is guilty of the crime charged, irrespective of
his intention, knowledge, or belief...").

1 32, 93 S. Ct. 1637, 1643, 36 L.Ed.2d 366 (1973); *See also Playhouse Inc.*, 35 Wn. App. at 542.
2 In determining whether police conduct violates due process a court must conclude it was “so
3 shocking that it violates fundamental fairness.” *Lively*, 130 Wn.2d at 19; *State v. Myers*, 102
4 Wn.2d 548, 551, 689 P.2d 38 (1984). The Supreme Court in *Lively* held that “a due process
5 claim based on outrageous conduct requires more than a mere demonstration of flagrant police
6 conduct.” *Lively*, 130 Wn.2d at 20. The Court also held that a dismissal based on outrageous
7 conduct must be reserved for only the most egregious circumstances and “it is not to be
8 invoked each time the government acts deceptively.” *Id.*

9 The *Lively* case is the only instance where the Washington Supreme Court dismissed a
10 conviction based upon the “outrageous conduct” principle. In *Lively*, a police informant
11 attended an Alcoholics Anonymous (AA) meeting. *Id.* at 26. The informant befriended a
12 woman who was a recovering addict, developed a live-in relationship with her, and over time,
13 convinced her, despite her deep reluctance, to arrange drug sales. *Id.* The Washington
14 Supreme Court found that having police agents attend AA meetings to lure recovering drug-
15 addicts to commit illegal acts was repugnant to a sense of justice. *Id.*

16 The same cannot be said in the instant matter. As Enforcement has already established,
17 Enforcement may engage in certain types of conduct to assist officers in detecting and
18 eliminating violations of the law. *See Lively*, 130 Wn.2d at 20; *Playhouse Inc.*, 35 Wn. App. at
19 340. There is no evidence that any of Licensee’s employees were coerced or provoked by
20 Enforcement’s officers into allowing a minor to enter their restricted premises; or that they
21 were reluctant to allow a minor to enter without having his identification checked at the
22 entrance. Additionally, there is no evidence indicating that the Licensee’s employees were
23 coerced or provoked by Enforcement’s officers into selling liquor to the minor investigative
24 aide. On the contrary, the officers’ and minor investigative aide’s reports indicate that had the
25 minor investigative aide engaged in the exact same conduct entirely on his own, without Board

1 approval, the Licensee's employees would have still allowed that minor to enter and purchase
2 alcohol. *See* Initial Order.

3 The Enforcement officers used a decoy to create an opportunity for the Licensee's
4 employees to violate the law, a valid enforcement action which cannot be considered
5 outrageous under the standards of *Lively*. *See Lively*, 130 Wn.2d at 20; *see also Playhouse*
6 *Inc.*, 35 Wn. App. at 542. Indeed, this cannot be "outrageous conduct" when the Legislature
7 allows licensees to also conduct controlled purchase programs, using underage persons, to help
8 train and evaluate their own staff. RCW 66.44.290.

9 Here, the Board was exercising its lawful duty to test and investigate the Licensee's
10 compliance with the liquor laws and rules of the State of Washington—laws and rules it had
11 previously violated. *See* RCW 66.44.010(4); WAC 314-29-005(1); *Playhouse Inc.*, 35 Wn.
12 App. at 542. By the very standards set forth in *Lively*, this conduct does not even begin to
13 approach the level of "outrageousness," and the ALJ properly denied its motions. *See Lively*,
14 130 Wn.2d at 19-20.

15 **8. "Deceptively Mature in Appearance" is not a legal standard relevant to this**
16 **administrative matter.**

17 The Licensee also appears to assert that the minor investigative aide was "deceptively
18 mature in appearance." Petition at 18. This argument is unsupported and immaterial. The
19 Licensee fails to cite to the record supporting its contention that the minor was "deceptively
20 mature in appearance." *See* Petition at 18-19. Nevertheless, the appearance of a minor is
21 immaterial in this matter. Under the Licensee's argument, a minor's actual age would be
22 meaningless. If the Licensee's argument was controlling, it would be a complete defense for
23 any person or licensee to argue that he/she/it is not responsible for the sale to a minor because
24 the minor looked of lawful age. This would create an absurd result, and the law was not
25 intended to have this subjective element, and it is contrary to the plain meaning of
RCW 66.44.270.

1 Additionally, “deceptively mature in appearance” is not a legal standard that is
2 applicable in this administrative matter. The term “deceptively mature in appearance” can only
3 be found in WAC 314-21-025 and it is a standard for a retail liquor licensee when it conducts
4 an in-house controlled purchase program. The term does not appear in any other statute or rule
5 and it is not a term defined in case law. Therefore, it only applies when a licensee utilizes an
6 in-house controlled purchase program, which is clearly not the circumstance in this matter.
7 Thus, the Licensee’s argument is baseless and the Board should adopt the Initial Order in its
8 entirety.

9 **9. The Licensee fails to set forth viable legal grounds to suppress any evidence in this**
10 **matter as a result of a “search” of its premise.**

11 The Licensee asserts that evidence resulting from the compliance check in question
12 here should be suppressed. Petition at 16, 19-20. The Licensee has correctly noted that
13 RCW 34.05.452(1) provides that a hearing officer “shall exclude evidence that is excludable
14 on constitutional or statutory grounds.” Petition at 16. The Licensee’s citation to the
15 exclusionary rule implies that the Licensee’s Constitutional Rights have been violated. The
16 Licensee states that an unlawful search and seizure occurred because Enforcement is required
17 to obtain a search warrant prior to conducting an administrative search. Petition at 10.
18 However, the Licensee fails to explain how an administrative search occurred in this matter
19 and does not explain how the exclusionary rule might apply. *Id.*

20 WAC 314-11-072 requires the Licensee to “be open to the general public whenever
21 liquor is sold, served, or consumed.” RCW 66.04.010(35) defines “public place” as
22 “establishments where beer may be sold. . . restaurants.” The Licensee’s failure to recognize
23 that it is open to the public is fatal to the Licensee’s argument. Its expectation of privacy in
24 commercial property does not extend to that which an owner or operator of a business
25 voluntarily exposes to the public. *See State v. Carter*, 151 Wn.2d 118, 126, 85 P.3d 887
(2004); *See v. City of Seattle*, 387 U.S. 541, 545, 87 S. Ct. 1737 (1967); *State v. Young*, 123

1 Wn.2d 173, 182, 867 P.2d 593 (1994) (“what is voluntarily exposed to the general public and
2 observable without the use of enhancement devices from an unprotected area is not considered
3 part of a persons private affairs”).

4 Additionally, the Licensee invokes the exclusionary rule as the mechanism through
5 which the Board should suppress evidence because it asserts that administrative proceedings
6 before the Board are “quasi-criminal” in nature. See Petition at 9-10. However, the Licensee
7 fails to cite to any authority indicating that administrative proceedings before the Board are
8 quasi-criminal in nature.²⁴ Additionally, the Licensee has failed to provide any support for
9 why the exclusionary rule should be a remedy in this administrative matter. Although
10 Enforcement assumes that the Licensee is attempting to invoke the exclusionary rule because it
11 feels that an unlawful “search” occurred in this matter, its reliance on the exclusionary rule is
12 based entirely on its own assumptions and it has failed to provide the Board with any evidence
13 that a “search” occurred.

14 The Licensee bears the burden of proving it had a reasonable expectation of privacy.
15 *State v. Evans*, 159 Wn.2d 402, 409, 150 P.3d 105 (2007) (defendant must “exhibit an actual
16 (subjective) expectation of privacy by seeking to preserve something as private”). The failure
17 by the Licensee to demonstrate any law enforcement officer or agent disturbed its private
18 affairs or conducted a search as that term is defined by law is fatal to its argument. Therefore,
19 the ALJ properly denied the Licensee’s Motions.

20 IV. CONCLUSION

21 For the reasons set forth above, The ALJ’s Findings of Fact and Conclusions of Law
22 are fully supported by the record and her rulings are supported by law. The Licensee’s
23

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

1 exceptions do not show that the ALJ made an unreasoned decision, and its exceptions do not
2 form grounds for modification of the Initial Order. Accordingly, for the reasons set forth
3 above, Enforcement respectfully requests that the Board adopt the initial order amend the
4 findings of fact and conclusions of law to incorporate Enforcement's exceptions set forth in its
5 Petition for Review.

6 DATED this 1 day of November, 2011

7 ROBERT M. MCKENNA
8 Attorney General

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10  #38112 for
11 BRIAN J. CONSIDINE, WSBA #39517
12 Assistant Attorney General
13 Attorneys for Enforcement
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PROOF OF SERVICE

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

Curt Wyrick
Attorney at Law
12602 NW 46th Ave.
Vancouver, WA 98685

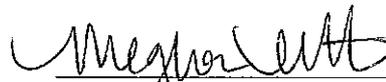
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Hand delivered by Stephanie Happold.

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

DATED this 18 day of November, 2011, at Olympia, WA.



MEGHAN LEHNHOFF, Legal Assistant

NOV 09 2011

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

Liquor Control Board
Board Administration

In Re:

Charlie's Bar & Grill, Inc.
D/b/a Charlie's Bar & Grill

Licensee

License No. 076348

Docket No. 2011-LCB-0007

LCB No. 23,806

LICENSEE'S RESPONSE TO
ENFORCEMENT'S PETITION FOR
REVIEW

Charlie's Bar & Grill Inc. d/b/a Charlie's (Licensee) by and through its attorney, Curt Wyrick submits this response to Enforcement's petition for review.

Exception to Conclusion Number 2

The record is clear that minors were prohibited from entering Charlie's on the night of 12/17/2010. When the investigative aide entered the bar he committed a crime. When he ordered a beer he committed a crime. When he reentered the bar he committed two crimes and when he purchased a beer he committed another crime. Enforcement's asserts that neither the court nor the licensee cite any authority that supports the ability to prosecute the minor for criminal violations. Enforcement has it backwards. When one is raising the issue that they are exempt from these criminal statutes it is the person claiming the exemption to prove the exemption.

The Legislature has created exceptions to minors entering premises where alcohol is sold and consumed. The first exception is found in RCW 66.44.290(1). The legislature recognized that the use of controlled purchase programs were a valuable tool in the enforcement of liquor laws but that it was illegal for minors to enter places such as Charlie's and attempt to purchase alcohol. To legalize the use of minors RCW 66.44.290(1) was adopted:

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

The legislature has specifically authorized the use of minors between eighteen and twenty-one to participate in controlled purchase programs which are authorized by the Liquor Board under rules adopted by the Board. When the Board fails to adopt a rule it continues to be unlawful for minors, including investigative aides, to purchase alcohol or enter restricted places.

The second set of exceptions that the legislature has provided is codified in RCW 66.44.316. This statute makes it lawful for minors performing four types of functions to enter and remain in bars where minors are prohibited. None of these exemptions apply in this case.

Enforcements cites no law, rule or court case which exempts minors who are employed by the liquor board from criminal penalties while engage in criminal activity. There is none. Three separate courts in Clark County have ruled that RCW 66.44.290(1) is clear that the liquor board must adopt a rule to allow the use of minors in these types of sting programs. Without the rule minors are unlawfully obtaining evidence and suppression and dismissal is the result.

Exception to Conclusion Number 3

Enforcement alleges that the record is clear that the investigative was not refused service by Ms. Winders. The record is clear that he was refused service. In addition he was told to get a wristband or leave the bar.

Enforcement admits that the investigative aide was to “see if a minor could gain access to liquor at its establishment.” The minor snuck past the doorman checking ID, made his way to the bar and ordered a beer from Misty Winders. She refused to sell him a beer and told him he had to go to the doorman and get a bracelet or leave the bar. Enforcement argues that when the minor ordered a beer and was told by the bartender Winders he could not be served because he did not have a bracelet that this did not constitute a refusal of service. What else would it be? A review of officer Magerl’s testimony answers the question. If the state admits the IA was refused service, according to officer Magerl the investigation is over and Charlie’s passed the compliance check

Officer Magerl:

“Under that situation if he was refused service we would not have sent him back in”.

Question “Well he was refused service wasn’t he?”

Answer “No sir he was told to get a bracelet.”

Question “He tried to order a beer, did he get one from Misty Winders?”

Answer “She said she couldn’t serve him without a bracelet.” CD 1 57.05 – 57.30

“I heard most of the conversation where she instructed she couldn’t serve he needed to get a wristband before she could.” CD 1 1.15.30 – 1.15.48

Question “You testified you only heard most of the conversation there may have been something you didn’t hear?”

Answer “There may have been something I didn’t hear sir.” CD 1 1.28.14 – 1.28.24

“If he would have been refused he would have been refused, we would have ended it”.
CD 1 1.27.04 – 1.27.07

The previously cited portions of the record lead to only one rational interpretation. The IA was refused service and according to the officer’s own testimony the investigation was complete. Enforcement is playing unconvincing semantics to justify their actions. The Board should do the right thing and dismiss this case.

Exception to Findings of Fact Number 16 and 17

Enforcement states the Misty Winders never told the IA “ he could not be in the bar without a wristband and he was to go to one of the bouncers and get one or get out.” They argue that the record is clear that she only told the investigative aide that he needed a wristband. Once again this makes no sense. The IA is refused service because he has not had is ID checked to prove he is 21 but is allowed to stay in the bar even though minors are prohibited from being on the premises. Once again an examination of the record contradicts Enforcement assertions.

First, officer Magerl admits that he may not have heard all of the conversation between the IA and Misty Winders and therefore his testimony does not contradict the testimony of Winders and Wild. Second, the report written by the nineteen year old IA makes no mention and contains no facts relating to his contact with Winders. The night of 12/17/2010 the IA went to eight different locations. His testimony was given in excess of eight months after the fact. Winders on the other hand did a written statement within days of the incident (exhibit A of the record) which was unequivocal that the IA was told to get a wristband or leave the bar. He was not allowed in the bar without the wristband. Traci Wild was standing next to Misty when this conversation took place.

Winders testified:

When shown exhibit 6, the picture of the IA, “Yeah he’s familiar to me.”

Question “Did you serve him?”

Answer “No”

Question “why not”

Answer “Because he didn’t have a wristband.”

Question “When he ordered a beer and you ask him to show the wristband and he didn’t have what did you tell him?”

Answer “ I told him that you can’t be in the bar without a wristband. You have to go find a bouncer at either door and get a wristband. You have to have one to be in the bar.”

Question “You made it clear to him that he was not allowed to stay in the bar without a wristband?”

Answer “I believe so, yeah.” CD2 16.54 -17.30

Question It has been suggested that you didn't tell the IA he had to leave the bar but rather simply said he had to get a wristband"

Answer "I think I was pretty clear in what I said. You can't be here unless you have a wristband. I mean I can't tell you exactly word for word what I said, it was awhile ago but I think I was pretty clear."

Question "Is that the policy of the bar?"

Answer "Yes. You have to have a wristband, especially when we have a band playing because we have a cover so you can't be in there without a wristband."

Question "Your interaction with people who come into the bar, do you consistently tell them without a wristband you have to leave."

Answer "Yes." CD 2 20.10 – 20.45

On cross examination

Question "When you say are you told him to leave the bar are you summarizing or did you actually tell him you can't be in the bar you have to leave now?"

Answer "I clearly stated, well I didn't say you have to leave now, I wasn't rude about it. I clearly stated you can not be in the bar without a wristband. I was extremely clear about that."

CD 2 20.52 – 21.30

Testimony of Tracy Wild

Question "So you were right there when he (the IA) was trying to order?"

Answer "Yeah"

Question "What did Misty, did she serve him?"

Answer "No, she ask him for a bracelet. He said he didn't have one and went like this (shrug). I didn't get one or I didn't have one, I'm not really sure what he said."

Question "What then did she direct him to do?"

Answer "She told him to go to either door and get one from the bouncier or he needed to leave because we don't serve people without bracelets."

Question "And not allowed to be in the building?"

Answer “No, not allowed to be in the bar on those nights.”

Question “Is that standard policy?”

Answer “For band nights absolutely for the bracelet, yes.”

Question “Is Misty consistent in applying that policy with people.”

Answer “Probably the most consistent for asking for the bracelet.”

Question “And telling people they can’t stay in the bar?”

Answer Absolutely, yeah. Yeah to when we started with bracelets it became our policy that if you didn’t have a bracelet you couldn’t be in the bar, nor could you drink in the bar.”

Question “Could you clearly hear her conversation with the gentleman (IA)?

Answer “Oh yeah, she was exactly as far away from me as you are.” CD 2 38.40 – 40.08

Question “Is there any doubt in your mind that it was clearly told to that individual that he had to leave the bar if he didn’t have a bracelet?

Answer “No, she absolutely told him that.” CD 2 40.51 – 41.07

Enforcement assertion that “The Licensee’s policy asking someone to leave if they did not have a wristband was not implemented until after December 22, 2010.” This is a total misstatement of the testimony in this hearing. Enforcement is trying to change the facts in this case to justify the IA’s second entry into the bar. They are trying to convince this board that there was no policy in effect that without a wristband he was told to leave the premises. Enforcement knows full well this is false.

At the time of this incident Charlie’s policy was clear, if you did not have a wristband you would not be served and you either obtained a wristband or were required to leave the bar. After this incident Charlie’s modified the policy because the person directed to leave the bar could not be trusted not to sneak back in.

Tracy Wild:

Question “The policy now is to walk people out?”

Answer "We physically walk them to a doorman now. We don't trust them to just go to the door any more. We actually, if there is someone in there that does not have a bracelet or has been in prior and has no bracelet we walk them to the door, to the doorman."

Tara Bartel being questioned by Mr. Considine

Question "It's been testified to there is now a new policy was not in place in 2010, but there is now a policy that says that if they don't have a wristband they are actually escorted out."

Answer "Uh uh they are escorted to the doorman or out of the bar."

Question "But that wasn't around in December of 2010?"

Answer "No, they were asked to" Mr. Considine finishes the sentence "go get a wristband or leave." Ms. Bartel responds "Absolutely."

Finding's 16 and 17 are clearly supported by the record.

Exception to Findings of Fact Number 24

Licensee's response in Exception to Conclusion Number 3 sets forth the testimony of officer Magerl. Licensee's response to Finding of Fact 16 and 17 sets forth the testimony of Winders and Wild as it relates to the conversation with the IA. Excerpts from the testimony of Bartel, Wild and Winders clearly show that Charlie's policy that if you did not have a wristband you had to leave the bar predated the incident of 12/17/2020.

The ALJ found that "Officer Magerl contended that if the claimant had flatly been denied the service of alcohol he would not have sent him back in." In other words the compliance check was passed successfully.

This Board can read the testimonial excerpts regarding this incident. The clear, credible evidence is that the IA was denied service. He ordered a beer and was refused. If he wanted to be served and stay in the bar he had to obtain a bracelet showing his ID had been checked and he was 21. If he did not obtain a bracelet he was told to leave.

The Board in this case should find that there is a distinction with a difference in this case. When the IA was refused service and was told to leave the bar unless he obtained a wristband, this investigation was completed.

Exception to Findings of Fact 13 and 26

The ALJ findings are what Mr. Liufau testified. He steadfastly stated that no person could have stood where the IA claimed to stand on 2 separate occasions from 1 to 2 minutes when he was a few feet away because he would have seen him and checked his ID. The only plausible explanation was the IA snuck past the person checking ID because he successfully entered the bar twice.

Exceptions to Conclusion of Law 11 and 12

The Administrative Law Judge listened to the testimony of owner and employees of Charlie's. She heard testimony regarding the amount of training that the employees had been given relating to alcohol laws. She heard testimony that the bar did an in-house sting operation to help train its employees and had terminated a long time employee who caused the first two violations. She also was provided testimony of the efforts to work with liquor control officers to set in place systems and implement operational changes to prevent violations. The bracelet system which resulted in this violation was one of those recommendations. After listening to all the testimony she felt mitigation was called for but that she was without the authority to implement mitigation.

Conclusion

The Licensee submits its response to Enforcements objections to be considered by the Board, but maintains that the evidence is overwhelming that the Initial Order should be overturned.

Dated this 7 day of November, 2011

Curt Wyrick WSBA # 6918