

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF

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

LICENSEE

LICENSE NO. 365465
AVN 1L8137D

OAH NO. 2008-LCB-0051
LCB NO. 22,849

FINAL ORDER OF THE BOARD

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

1. The Liquor Control Board's Complaint, dated October 10, 2008, alleged that on or about May 16, 2008, the Licensee or employee(s) thereof allowed a person under the age of twenty-one to remain in a licensed premise off-limits to persons under the age of twenty-one, contrary to RCW 66.44.310(1)(a) and WAC 314-11-020(2).
2. A formal hearing was held on May 14 and 15, 2009 at Licensee Ray Kutch's timely request.
3. At the hearing the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg and the Licensee was represented by Ben Shafton, Attorney at Law.
4. On October 9, 2009, Senior Administrative Law Judge Gina L. Hale (ALJ) entered Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the Complaint.
5. The Licensee filed a petition for review signed by the Licensee's attorney on October 21, 2009, but was not received by the Board until November 3, 2009. The Licensee asserts that: (a)

the ALJ erred in not granting the Licensee's motion to suppress the evidence; (b) that the conduct of the Board's officers was outrageous because they instigated the offense, in asking [REDACTED] to attempt to enter the premises; (c) entrapment; (d) that the ALJ erred in applying the "preponderance of the evidence" standard to the alleged violations; (e) that "some of the witnesses" were not sworn at the time of the hearing, but does not identify any particular witness, or the testimony offered by that witness, as prejudicial to the Licensee; and (f) that the ALJ erred in denying a continuance of the hearing date to allow the criminal charges against Mr. Hilker to be adjudicated.

6. The Education and Enforcement Division of the Board responded to the Petition for Review, but the response was not received by the Board in a timely manner. WAC 314-42-095(2)(b) provides a period of 10 days after service of a petition for review for a response from the other party, but the Board did not receive the Education and Enforcement Division's response until November 17, 2009. However, the points raised in Licensee's Petition for Review were all previously briefed by the parties, and the Board relies on the briefing submitted prior to the entry of the Initial Order, in rejecting the Licensee's Petition for Review.

7. The Board affirms and adopts the ALJ's Initial Order, including the rulings on Prehearing Motions, Statement of the Case, and Findings of Fact Nos. 1 through 14, but corrects the statement that the Licensee was represented by William D Robinson to reflect that the Licensee was represented by Ben Shafton, Attorney at Law. The Board adopts the Conclusions of Law contained in the Initial Order, but corrects the word "older" in the second line of Conclusion No. 2 to read "holder", and corrects the word "licensee" in Conclusion No. 3 to read "license".

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

NOW THEREFORE; IT IS HEREBY ORDERED that that the Administrative Law Judge's Findings and Fact and Conclusions of Law and Initial Order, with the corrections noted in paragraph 7 above are hereby AFFIRMED AND ADOPTED as the final decision of the Board, and that the liquor license privileges granted to Dodge City Saloon, Inc. d/b/a Dodge City Bar & Grill located at 7201 NE 18th Street, Vancouver, WA 98661, License Number 365465 are hereby suspended for a term of seven (7) days to take place from 10:00 AM on Tuesday February 16, 2010 until 10:00 AM on Tuesday February 23, 2010. Failure to comply with the terms of this order will result in further disciplinary action.

DATED at Olympia, Washington this 29 day of December, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster
Ruthann Kurose

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, Sr. Assistant Attorney General, 1125 Washington St. SE, P.O. Box 40110, Olympia, WA 98504-0110. A timely petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the agency does not (a) dispose of the petition or (b)

serve the parties with a written notice specifying the date by which it will act on the petition. An order denying reconsideration is not subject to judicial review. RCW 34.05.470(5). The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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

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

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



Washington State
Liquor Control Board

January 8, 2010

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

Dodge City Saloon, Inc
d/b/a Dodge City Bar & Grill
7201 NE 18th Street
Vancouver, WA 98661-7325

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

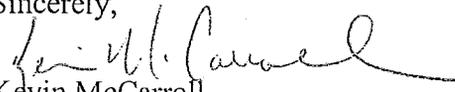
**RE: FINAL ORDER OF THE BOARD
ADMINISTRATIVE VIOLATION NOTICE NO. 1L8137D
LICENSEE: Dodge City Saloon, Inc
TRADE NAME: Dodge City Bar & Grill
LOCATION: 4250 E Fourth Plain Blvd, Vancouver, WA 98661-5650 (formerly located
at 7201 NE 18th Street, Vancouver, WA 98661)
LICENSE NO. 403213 (formerly 365465)
LCB HEARING NO. 22,849
OAH NO. 2008-LCB-0051**

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Final Order in the above referenced matter.

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

Sincerely,


Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tacoma and Vancouver Enforcement and Education Divisions, WSLCB
PO Box 43076, 3000 Pacific Ave. SE, Olympia WA 98504-3076, (360) 664-1602
www.liq.wa.gov

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WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

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

LICENSEE

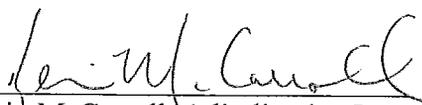
LICENSE NO. 403213 (formerly
365465)

LCB NO. 22,849
OAH NO. 2008-LCB-0051

DECLARATION OF SERVICE BY
MAIL

I declare under penalty of perjury under the laws of the state of Washington that on January 8, 2010, I served a true and correct copy of the FINAL ORDER OF THE BOARD in the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage prepaid, to all parties or their counsel of record.

DATED this 8th day of January, 2010, at Olympia, Washington.


Kevin McCarroll, Adjudicative Proceedings Coordinator

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

GORDON KARG, ASSISTANT ATTORNEY
GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
1125 WASHINGTON STREET SE
PO BOX 40100
OLYMPIA, WA 98504-0100

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

DODGE CITY SALOON, INC
d/b/a DODGE CITY BAR & GRILL
4250 E FOURTH PLAIN BLVD
VANCOUVER, WA 98661-5650

RECEIVED

OCT 13 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

MAILED

OCT 09 2009

VANCOUVER OFFICE OF
ADMINISTRATIVE HEARINGS

In the Matter of:

Dodge City Bar & Grill

Licensee

License No. 365465

OAH No.: 2008-LCB-0051

LCB No.: 22,849

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

TO: Dodge City Bar & Grill, Licensee;
Gordon Karg, Assistant Attorney General

Gina L. Hale, Administrative Law Judge (ALJ), conducted a hearing on May 14 and 15, 2009. The Licensee, Ray Kutch, d.b.a., Dodge City Bar & Grill; Dodge City Saloon, Inc., appeared and was represented by William D. Robison, Attorney at Law. Gordon Karg, Assistant Attorney General, appeared and represented the Liquor Control Board (Board). Present as witnesses were: Lt. Marc Edmonds, Officer Jeremy Free, Officer Spencer Harris, Officer Almir Karic, R. Anthony Kutch, and



PREHEARING MOTIONS

Prior to the start of the proceedings several motions were addressed:

1. The Licensee's Motion to Suppress all evidence and testimony by the Board was **DENIED**.
2. The Licensee's Motion to Dismiss the Board's entire case was **DENIED**.
3. The Board's Motion in Limine was **WITHDRAWN**.
4. The Licensee's Motion for Continuance because witness Jeffrey Hilker had invoked his 5th Amendment right against self-incrimination was **DENIED**.

STATEMENT OF THE CASE

At issue is the whether the Licensee allowed a minor to remain in an area off limits to a person under the age of twenty-one in violation of RCW 66.44.310(1)(a) and WAC 314-11-020(2). The Licensee holds license number 365465.

Based upon the record presented, the undersigned Administrative Law Judge makes the following Findings of Fact:

FINDINGS OF FACT

1. Dodge City, Inc, d.b.a. Dodge City Bar & Grill is the holder of license number 365465. This license was issued by the Washington State Liquor Control Board under the provisions of the Revised Code of Washington (RCW) 66.24. The establishment is located at 7201 NE 18th Street, Vancouver, Washington.
2. The Liquor Control Board (Board) monitors licensees through a continuing program of compliance checks wherein investigative aides under the age of twenty-one years are selected to attempt to enter a licensed establishment and to make controlled purchases of liquor from bar owners holding liquor licenses. Each of these operations is supervised by a commissioned officer of the Liquor Control Board. If a licensee allows a minor to enter their establishment in an area that is off limits to persons under the age of twenty-one, the licensee is cited and the Board is notified of the results. The money to purchase the liquor is provided by the Liquor Control Board.
3. On or about May 16, 2008, the Board, with the assistance of its investigative aides, began a series of compliance checks. The Licensee was one of several establishments checked during the course of the evening.

4. The investigative aide assigned to attempt to enter the Licensee's establishment was [REDACTED]. As of the date of the compliance check [REDACTED] was age seventeen. His date of birth is October 9, 1990.

5. It is the Board's practice to allow their investigative aides to carry one piece of identification during the compliance check. [REDACTED] had two forms of photographic identification on him at the time of the compliance check. He carried his Washington State identification card, Exhibit 1, and his vertical drivers license, Exhibit 9. A vertical license is issued to individuals under the age of twenty-one.

6. Lieutenant Marc Edmonds, Liquor Control Board officer, searched [REDACTED] before allowing him to proceed as part of the compliance check. Both the state identification card and the license were in [REDACTED] wallet. However, Lt. Edmonds only saw the identification card. It was his believe that [REDACTED] had only one piece of identification on him.

7. We find that [REDACTED] had two pieces of identification on his person at the time he participated in the compliance check. Both documents were his own and they were accurate.

8. Both the Washington State identification card and the vertical license indicate the individual's date of birth and when they will turn age 18. Across from [REDACTED] photo both documents contain the same information:

"DOB
10-09-1990"

"AGE 18 ON
10-09-2008"

9. On or about May 16, 2008, as part of the compliance check and under the supervision of several Liquor Control Board officers, [REDACTED], the investigative aide, went to the Licensee's

establishment and presented his Washington State identification card to the bouncer, Jeffrey Hilker, at the front door in an attempt to gain entry into the establishment.

10. Mr. Hilker looked at the card for approximately 15 to 25 seconds. He then put it under a black light which was designed to help read official forms of identification. After Mr. Hilker inspected the identification card, he told ██████████ to pay his \$5 cover fee. He received a stamp on his hand and he was allowed into the establishment.

11. We find that once inside, ██████████ was not asked for his identification a second time and he was never asked to leave the premises. He remained inside for approximately three (3) minutes.

12. After ██████████ left the establishment, Officer Almir Karic, Liquor Control Board Enforcement Officer, went into the establishment to serve the Administrative Violation Notice (AVN). Officer Karic served the AVN on the bartender, Erick Gill.

13. Officer Karic also spoke with Mr. Hilker, as the bouncer having allowed ██████████ entry onto the premises, and charged him with violation of RCW 66.44.310(1)(a), allowing a person under the age of twenty-one into an area that is considered off limits. Officer Karic stated in the AVN summary that Mr. Hilker claimed the identification had a different date of birth on it and that it was a horizontal license.

14. It is the Licensee's argument that ██████████ was deceptively mature looking at the time he participated in the compliance check, and that the Board was essentially attempting to entrap the Licensee.

From the foregoing Findings of Fact, the Administrative Law Judge now enters the following
Conclusions of Law:

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction in this matter pursuant to Revised Code of Washington (RCW) 34.12, Chapter 34.05 and Washington Administrative Code (WAC) 10-08 and WAC 314-42.
2. The Washington State Liquor Control Board has jurisdiction over the Licensee Ray Kutch, d.b.a., Dodge City Bar & Grill; Dodge City Saloon, Inc., who is the holder of license number 365465, which was issued under the provisions of RCW 66.24.
3. A licensee is a privilege and not a vested right. WAC 314-12-010.
4. Under the provisions of WAC 314-11-015(1)(a), liquor licensees are responsible for operation of the licensed premises in compliance with the liquor laws and rules of the board. If the licensee chooses to employ others in the operation of the business, any violations committed, or permitted, by those employees shall be treated by the board as violations committed, or permitted, by the licensee.
5. It is the duty and responsibility of the licensees to control the conduct of employees and patrons on the premises at all times. WAC 314-11-015(3).
6. It is a violation of both RCW 66.44.310(1)(a) and WAC 314-11-020(2) for a Licensee to allow persons under the age of twenty-one to enter or remain in a portion of the establishment that is off limits.
7. In order for the AVN to be affirmed and the complaint sustained, the Board must establish by a preponderance of the evidence that: a) the Licensee or an employee, b) allowed, c) a person under the age of twenty-one, d) to remain, e) in an off-limits section of the premises.

8. The undersigned concludes that all the required elements have been met by a preponderance of the evidence presented. An employee of the Licensee allowed the then 17 year old [REDACTED] to enter and remain in an off-limits section of the premises.

9. In the present case, the Licensee violated both the statute and the regulation when its staff member allow a minor to enter and remain on the premises. The Licensee argued that [REDACTED] was deceptively mature looking and therefore, the Licensee was some how entrapped by the compliance check. That argument fails because [REDACTED] firsthand testimony was that Mr. Hilker not only looked at his valid identification card, but also placed it under the black light of a machine especially designed to read such identification. The fulcrum point upon which the Board's key argument rests is that card itself stated clearly when [REDACTED] would turn 18, which also clearly meant that at the time he was not 21 either. Irrespective of how [REDACTED] looked, his valid identification card indicated that he was too young to be granted admittance.

10. A preponderance of the credible evidence presented has established that the Licensee did violate the provisions of RCW 66.44.310(1)(a) and WAC 314-11-020(2).

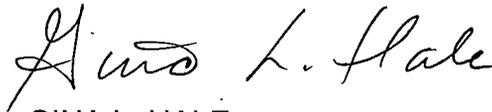
From the foregoing conclusions of law, NOW THEREFORE,

ORDER

IT IS HEREBY ORDERED That the Board's AVN is **AFFIRMED** and the Complaint is **SUSTAINED** and that the liquor license privileges granted to Licensee, Ray Kutch, d.b.a., Dodge City Bar & Grill; Dodge City Saloon, Inc., located at 7201 NE 18th Street, Vancouver, Washington, license 365465, shall be suspended for a term of seven (7) days.

DATED and mailed at Olympia, Washington, this 9th day of October, 2009.

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS



GINA L. HALE
Assistant Deputy Chief
Administrative Law Judge
5300 MacArthur Blvd, Suite 100
Vancouver, WA 98661
Telephone: (360) 690-7189 or 1-800-243-3451
FAX: (360)

NOTICE TO THE PARTIES

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

The petition for review must:

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

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

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

Following this review, the board will enter a final order WAC 314-29-010(4)(d). Within ten days of the service of a final order, any party may file a petition for reconsideration, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

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

Mailed to:

Licensee:

Dodge City Saloon, Inc.
Dodge City Bar & Grill
7201 NE 18th Street
Vancouver, WA 98661

Licensee's Representative:

William Robison, Attorney at Law
900 Washington Street, Suite 1000
Vancouver, WA 98660-3455

Assistant Attorney General:

Gordon Karg
Office of the Attorney General
1125 Washington St SE
PO Box 40100
Olympia, WA 98504-0100

Barb Cleveland, OAH
Mail Stop - 42488

On 10/21/09 I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff(s)-defendant(s) containing a copy of the document to which this affidavit is affixed. *Karg*

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

L. Vaughn
DATE: 10/21/09
PLACE: Vancouver, WA

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Enforcement & Education
Vancouver, WA

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

In the Matter of:

OAH No. 2008-LCB-0051
LCB No. 22,849

DODGE CITY SALOON, INC.
DODGE CITY BAR & GRILL
7201 NE 18th STREET
VANCOUVER, WA 98661

PETITION FOR REVIEW

Licensee

License No.: 365465

COMES NOW Dodge City Bar & Grill (Dodge City) and petitions for review of the Findings of Fact and Conclusions of Law and Initial Order dated October 9, 2009. This Petition is made pursuant to WAC 314-42-095 and WAC 10-08-211. The following points are made in connection the Petition for Review.

I. All Evidence Must Be Suppressed.

a. Ruling In The Initial Order.

Dodge City moved to suppress all evidence because it was acquired in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington State Constitution. The Administrative Law Judge denied this motion. This denial was improper. The motion should have been granted.

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LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

1 b. Factual Statement.

2 The facts are based on the evidence solicited at the hearing of this matter, which is
3 briefly summarized here.

4 On May 16, 2008, the date of the alleged violation, Dodge City held a license to sell
5 alcoholic beverage. There were signs posted at the door at the place of business to the effect that
6 persons under the age of twenty-one years were not allowed to enter the premises. In point of fact,
7 Dodge City did not knowingly allow underage persons to come into its establishment.
8

9 On May 16, 2008, the Board, employed [REDACTED] under the title of
10 "investigative aid." [REDACTED] claims to have been born on October 9, 1990. If that is true, he
11 would have been seventeen years of age on May 16, 2008.
12

13 At approximately 11:00 p.m. on May 16, 2008, Board Officer Almir Karic directed
14 [REDACTED] to try to gain entrance to Dodge City's premises to purchase alcoholic beverage.
15 Jeffrey Hilker, a member of Dodge City's security team, greeted [REDACTED] at the front door and
16 asked [REDACTED] to produce identification. [REDACTED] produced something. Mr. Hilker
17 examined it. He concluded that the item given to him was a valid identification card and that it
18 showed that [REDACTED] was over the age of twenty-one years. He then admitted [REDACTED] to
19 Dodge City's premises.
20

21 c. Argument.

22 i. Admissibility Standard.

23 Washington's Administrative Procedure Act allows the admission of
24 evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
25

1 However, evidence excludable on constitutional or statutory grounds cannot be admitted in
2 administrative proceedings. As the relevant statute states:

3 The presiding officer shall exclude evidence that is excludable on
4 constitutional or statutory grounds or on the basis of evidentiary
5 privilege recognized in the courts of this state.

6 RCW 34.05.452(1). All of the Board's evidence was obtained in violation of the Fourth
7 Amendment to the United States Constitution and of Article 1, Section 7 of the Washington State
8 Constitution. The evidence should therefore have been excluded.

9 ii. The Test for Validity of the Search.

10 Fourth Amendment to the United States Constitution prohibits unreasonable
11 searches and seizures. Article 1, Section of the Washington State Constitution precludes
12 governmental interference in a person's private affairs. These two provisions apply co-extensively
13 to administrative searches. *Centimark Corp v. Department of Labor & Industries*, 129 Wn.App.
14 368, 375 (2005). They apply when the government forced to enter upon private property to
15 ascertain whether there is compliance with governmental regulations. *City of Seattle v. McCready*,
16 123 Wn.2d.260 (1994).

17
18 Intrusion onto private property to conduct an administrative inspection can
19 be sanctioned by a properly issued warrant supported by probable cause. *Camara v. Municipal*
20 *Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *City of Seattle v. McCready*,
21 *supra*, 123 Wn.2d at 273. The Board did not obtain a warrant authorizing the action that it took on
22 May 16, 2008.
23
24
25

1 Nonetheless, the Board can justify its actions if they fall within one of the
2 .jealously guarded exceptions to the warrant requirement. The Board bears the burden of proof that
3 its conduct falls into one of those exceptions. *State v. Manthe*, 102 Wn.2d 537 (1984).

4 Searches of regulated industries can be conducted without a warrant if three
5 (3) requirements are met:

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

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

18 The first of these requirements is the existence of a regulatory system. As
19 noted above, the regulatory scheme must provide an adequate substitute for a warrant. As the Court
20 of Appeals recently indicated in *Seymour v. Washington State Department of Health*, 2009 W.L.
21 2857185 (September 8, 2009):

22 Reining in the power of the executive branch in conducting
23 administrative searches is a primary concern of courts reviewing
24 such statutory schemes. Where a statutory scheme is properly
25 formulated and followed, Fourth Amendment concerns are
addressed by the elimination of unreasonable searches. In such
cases, "it is difficult to see what additional protection a warrant

1 requirement would provide The discretion of Government
2 officials to determine what facilities to search and what
3 violations to search for is thus directly curtailed by the regulatory
4 scheme. . .” A proper regulatory scheme, “rather than leaving
5 the frequency and purpose of inspections to the unchecked
6 discretion of Government officers . . . establishes a predictable
7 and guided . . . regulatory presence . . .” Hence, the person
8 subject to the inspection “is not left to wonder about the purposes
9 of the inspector or the limits of his task. . .” The “regulatory
10 statute must perform the two basic functions of a warrant: it must
11 advise the owner of the commercial premises that the search is
12 being made pursuant to the law and has a properly defined scope,
13 and it must limit the discretion of the inspecting officers. . .”

14 In this case, it is clear that the regulatory scheme is not sufficient to pass constitutional muster. It is
15 also clear that the Board violated the statutory scheme.

16 iii. The Statute Allowing Inspections Is Infirm.

17 The Board purports to take its authority to enter licensed premises from
18 RCW 66.28.090(1). That statute provides as follows:

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

25 The Supreme Court of Washington held a similarly worded statute to be unconstitutional in
Washington Massage Foundation v. Nelson, 87 Wn.2d 948 (1976). In that case, the Court was
required to the constitutionality of former RCW 18.108.180 and RCW 18.108.190. The former
statute provided as follows:

The director or any of his authorized representatives may at any
time visit and inspect the premises of each massage business

1 establishment in order to ascertain whether it is conducted in
2 compliance with the law, including the provisions of this
3 chapter, and the rules and regulations or the director. The
4 operator of such massage business shall furnish such reports
5 and information as may be required.

6 The second reads as follows:

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

10 The Court ruled that these two statutes did not sufficiently delineate the purpose, scope, time, and
11 place of inspection and were therefore unconstitutional.

12 There is no greater specificity in RCW 66.28.090(1) than in former RCW
13 18.108.180 and RCW 18.108.190. In fact, there is less. The language of former RCW 18.108.180
14 allowed inspections to determine whether the business was being conducted in compliance with the
15 law. There is no such limitation in RCW 66.28.090(1). It allows Board officers to come onto
16 licensed premises for any reason or for no reason at all. It is therefore infirm.

17 Since RCW 66.28:090(1) is not sufficient to satisfy constitutional
18 requirements, it cannot authorize [REDACTED] entrance into Dodge City's premises. The Board
19 may argue that only a small amount of evidence was gained after coming onto the premises. The
20 Board forgets that none of its employees — [REDACTED] included — had any right to be on Dodge
21 City's premises for any investigative purpose. In other words, [REDACTED] mere entry onto the
22 premises—the violation with which Dodge City is charged—violated the Fourth Amendment to the
23 United States Constitution and Article I, Section 7 of the Washington Constitution.
24
25

1 iv. If the "Controlled Purchase" Statutes Apply, They Were Violated.

2 In 2001, the legislature rewrote RCW 66.44.290 to authorize the Board to --
3 conduct "controlled purchase programs." Laws of Washington 2001, Chapter 295, Section 1. The
4 language directed the Board to promulgate rules for such programs. The statute also immunized
5 persons between the ages of eighteen (18) and twenty-one (21) years from prosecution for
6 attempting to purchase liquor as part of such programs. The statute provides as follows:
7

8 Every person under the age of twenty-one years who purchases
9 or attempts to purchase liquor shall be guilty of a violation of this
10 title. This section does not apply to persons between the ages of
11 eighteen and twenty-one years who are participating in a
12 controlled purchase program authorized by the liquor control
13 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 or criminal or
administrative prosecution.

14 This statute applies to "controlled purchase" programs. By its terms, it does not apply to
15 "controlled entry" programs — underage persons attempting to gain entry to licensed premises. It
16 also requires the Board to promulgate rules to govern these programs. The Board has not done so.
17 The statute clearly indicates that the legislature wanted participants in such a program to have
18 reached their eighteenth birthday. [REDACTED] claims to have been seventeen (17) years of age on
19 May 16, 2008. Therefore, he could not participate. For these reasons, RCW 66.44.290 cannot be
20 interpreted to allow the Board's action here.
21

22 In briefing before the Administrative Law Judge, the Board conceded this
23 point. It stated in no uncertain terms that its actions were not justified by RCW 66.44.290.
24

25 ///

1 v. The Board Cannot Rely on RCW 66.44.010(4).

2 The Board is expected to rely on RCW 66.44.010(4) to justify its activities.

3 That statute provides as follows:

4 The board may appoint and employ, assign to duty and fix the
5 compensation of, officers to be designated as liquor
6 enforcement officers. Such liquor enforcement officers shall
7 have the power, under the supervision of the board, to enforce
8 the penal provisions of this title and the penal laws of this state
9 relating to the manufacture, importation, transportation,
10 possession, distribution and sale of liquor. They shall have the
11 power and authority to serve and execute all warrants and
12 process of law issued by the courts in enforcing the penal
13 provisions of this title or of any penal law of this state relating
14 to the manufacture, importation, transportation, possession,
15 distribution and sale of liquor, and the provisions of chapters
16 82.24 and 82.26 RCW. They shall have the power to arrest
17 without a warrant any person or persons found in the act of
18 violating any of the penal provisions of this title or of any penal
19 law of this state relating to the manufacture, importation,
20 transportation, possession, distribution and sale of liquor, and
21 the provisions of chapters 82.24 and 82.26 RCW.

22 All statutes must be construed in such a way as to render them
23 constitutional. *State ex rel. Faulk v. CSG Job Center*, 117 Wn.2d 493 (1991). A statute that
24 allows governmental authorities to come onto to private property without a warrant must comply
25 with the three-part test stated above. Clearly, RCW 66.44.010(4) does not pass muster under the
holding of *Washington Massage Foundation v. Nelson, supra*. It contains even less specificity
than the statutes the Court struck down in that case. Parenthetically, if RCW 66.44.010(4) was
sufficient, then RCW 66.28.090(1) would be superfluous. The Board's argument must therefore
fail.

1 vi. The Board's Policies Are of No Assistance.

2 The Board cannot rely on its internal policies to justify its actions. The
3 Constitution requires a regulatory scheme to be adopted by the legislature. Moreover, the
4 Board's policy does not even rise to the level of rule making. An administrative agency's
5 reliance on internal policy is no sufficient to comply with statutory and constitutional
6 requirements where administrative inspections are concerned. If the Board wants to base its
7 action on rules, it should comply with statutorily required procedures to adopt those rules. *Client*
8 *A v. Yoshinaka*, 128 Wn.App. 833, 844 (2005). In any event, there is nothing in the Board's
9 policies that allow it to direct its underage investigative aides to attempt to secure admission to
10 licensed premises. The only policy the Board has begins with the following statement:
11

12
13 Compliance check investigations are conducted to determine if
14 retail liquor and tobacco licensees, including state liquor
15 store/state contract stores, are in compliance regarding sales of
16 liquor and/or tobacco to underage persons. Enforcement officers
shall obtain the approval of their lieutenant before conducting
compliance check investigations.

17 (Emphasis added.) In other words, the policy allows a "compliance check" to determine
18 compliance with laws regarding presence of underage persons on restricted premises. The policy
19 suggests that Board limits its investigation to places where underage persons can otherwise be and
20 where liquor is sold — such as grocery stores and convenience stores. Therefore, the Board
21 breached its own policy in this case.
22

23
24 ///

1 vii. There Is No Adequate Substitute for a Warrant.

2 Before an administrative inspection can be conducted, there must be some
3 sort of determination that some illicit activity will be unearthed by the inspection. That
4 conclusion follows from *Seymour v. Washington State Department of Health, supra*. In that case,
5 the Court held that the Dental Quality Assurance Commission was required to make a
6 determination that a complaint had merit before it could lawfully require a dentist to furnish records
7 in response to the complaint. Since there had been no such prior determination, the Court ruled that
8 the evidence the dentist had provided in response to a demand for records must be suppressed.
9

10 There is no evidence in this case to any prior determination that, on May 16,
11 2008, it was likely that an underage person would be admitted to Dodge City premises. In fact, the
12 evidence in this case clearly indicates that the contrary is true.
13

14 II. This Matter Should Be Dismissed on the Basis of Outrageous Conduct.

15 The legislature has made it clear that an entity facing suspension of a liquor license is
16 entitled to due process of law. This conclusion follows from RCW 66.08.150 that allows an
17 adjudicative proceeding on any attempt to suspend a license. Due process of law is violated when
18 governmental conduct is sufficiently outrageous. Outrageousness can be found when law
19 enforcement personnel instigate the violation at issue. *State v. Lively*, 130 Wn.2d 1 (1996). Several
20 factors must be evaluated to determine whether the governmental conduct is sufficiently
21 outrageous. These are:
22

- 23 (1) Whether the police conduct instigated a crime or merely infiltrated ongoing
24 criminal activity.
25

1 (2) Whether the defendants' reluctance was overcome by pleas, sympathy,
2 promises of excessive profits, or persistent solicitation.

3 (3) Whether the government controls the criminal activity or simply allows the
4 criminal activity to occur.

5 (4) Whether the police motive was to prevent crime or protect the public.

6 (5) Whether the government conduct itself amounted to criminal activity or
7 conduct "repugnant to a sense of justice."

8 *State v. Lively, supra*, 131 Wn.2d at 22. When these factors are considered, it is clear that the
9 Board's conduct was outrageous.

10 First of all, the Board obviously instigated the offense. Prior to this time, Mr. Hilker had
11 never been charged with any violation involving allowing underage persons on the premises. It is
12 apparent that no violation would have occurred had not the Board asked [REDACTED] to attempt to
13 gain entrance to Dodge City's premises. Secondly, it is clear that the Board controlled the activity.
14 It directed [REDACTED] to obtain admission to Dodge City. Nothing would have happened had the
15 Board not made this direction. It was also clear that the Board was not trying to prevent crime or
16 protect the public. It simply was trying to create violations of law that it could then prosecute.

17
18 Finally, and most important, the government conduct itself amounted to criminal activity
19 and conduct "repugnant to a sense of justice." The Board directed [REDACTED] to commit a
20 number of violations of the criminal law. It directed him to go onto premises where he was not
21 welcome. There was sign on Dodge City's premises indicating that it was off limits to persons
22 under the age of twenty-one years. [REDACTED] coming onto the property amounted to a
23 violation of RCW 9A.52.070 — first degree trespass. It was also a violation of RCW
24
25

1 66.44.310(1)(b) — entering restricted premises. The Board also directed [REDACTED] to purchase
2 alcoholic beverage while on the premises. This would violate RCW 66.44.270(2)(a). It is
3 significant in this regard that [REDACTED] would not be exempted from prosecution by participating
4 in a “controlled purchase” program pursuant to RCW 66.44.290. That section exempts persons
5 between the ages of eighteen and twenty-one years who are participating in a controlled purchase
6 program the Board authorizes. [REDACTED] was not protected by this statute because he was not
7 eighteen years of age at the time of the incident. In other words, the legislature has made it clear
8 that it does not want persons under the age of eighteen years participating in a “controlled purchase”
9 program of alcohol. The Board has obviously disregarded the legislature’s direction.
10

11
12 It should also be noted that Mr. Hilker requested a piece of identification from [REDACTED].
13 It is undisputed that he put it under a black light and gave it more than a mere glance. The worst
14 that can be said is that Mr. Hilker simply misread the identification he was given.

15 The Clark County District Court has dismissed charges against employees of retail licensees
16 who provided alcohol to minors who were participating in “compliance checks” initiated by the
17 Board. *State v. Anthony Colavecchio*, Clark County District Court No. 12453; *State v. Shawn*
18 *Cavanaugh*, Clark County District Court No. 12454; *State v. Cody Jones*, Clark County District
19 Court No. 12455. The District Court’s ruling provides reasoned guidance. No one should be
20 penalized based on something that occurs in the Board’s “compliance checks.”
21

22 The Board could use proceedings of this type for educational purposes — to demonstrate to
23 licensees inefficiencies in their processes. When it seeks enforcement remedies, it oversteps all
24 notions of reasonableness and offends due process. For that reason, the charges must be dismissed.
25

1 III. Dodge City was Entrapped.

2 Dodge City claimed it was entrapped. The Administrative Law Judge appears not to have
3 considered this issue and did not make a finding of fact one way or another. She should have
4 addressed this issue; found that Dodge City had indeed been entrapped; and dismissed the charges.
5

6 The Board charged Dodge City with the violation of RCW 66.44.310(1)(a) and WAC 314-
7 11-020(2). Both preclude any licensee from allowing an underage person on the premises.

8 Entrapment is a defense to any prosecution of a crime. RCW 9A.16.070(1). No
9 Washington case has decided whether entrapment is also available as a defense in licensing
10 proceedings. Other jurisdictions have concluded that the defense is in fact available. *Fumusa v.*
11 *Arizona State Board of Pharmacy*, 25 Ariz.App. 584, 545 P.2d 432 (1976), disproved on other
12 grounds *Sarwark v. Thorneycroft*, 123 Ariz. 23, 597 P.2d 9 (1979); *Patty v. Board of Medical*
13 *Examiners*, 9 Cal.3d 356, 508 P.2d 1121, 107 Cal.Rptr. 473 (1973); *One Way Fare v. State,*
14 *Department of Consumer Protection*, 2005 W.L. 701695 (Conn.Super. 2005) — applying the rule
15 to liquor license proceedings; *Smith v. Pennsylvania State Horse Racing Commission*, 517 Pa. 233,
16 535 A.2d 596 (1988). These decisions are based on the fact that no societal interest is served by
17 any governmental agency committing a crime in pursuit of enforcing licensing statutes. Entrapping
18 people into violations also does not serve the dignity with which administrative proceedings should
19 be clothed. *Patty v. Board of Medical Examiners, supra*, 9 Cal.3d at 363-67.
20
21

22 There are two elements of the defense of entrapment. These are the following:

- 23 1. The criminal design originated in the mind of law enforcement officials, or
24 any person acting under their direction; and
25

1 2. The actor was lured or induced to commit a crime which the actor had not
2 otherwise intended to commit.

3 RCW 9A.16.070(1). In this context, inducement is governmental conduct that creates a substantial
4 risk that an undisposed or otherwise law-abiding citizen would commit the offense. Predisposition
5 or lack thereof may be inferred from a defendant's history of involvement of the type of criminal
6 activity for which he has been charged combined with his ready response to the inducement. *State*
7 *v. Hansen*, 69 Wn.2d 750, 764 fn. 9 (1993).
8

9 Under this test, it is obvious that both elements are satisfied. Clearly, the criminal design
10 originated in the mind of law enforcement officials. Board personnel selected [REDACTED] and
11 directed him to secure entry to the Dodge City premises at one of its busiest times. It should be
12 noted that [REDACTED] looked older than his stated age on May 16, 2008. He was tall, possessed of
13 a deep voice, and growing facial hair. His appearance contributed to the entrapment. It is also
14 obvious that Mr. Hilker had absolutely no predisposition to commit the offense. He is experienced
15 in these matters. He understands that underage persons are not to be admitted on premises where
16 alcohol is served. He knows that Dodge City will fire him if he admits a minor. He asked [REDACTED]
17 [REDACTED] to produce identification. He checked the identification with a blue light to make sure it
18 was valid. In other words, Mr. Hilker took all necessary steps to make sure that he would not admit
19 an underage person to the premises. If we assume that [REDACTED] produced a piece of
20 identification that correctly stated his age, the worst that can be said of Mr. Hilker is that he misread
21 that identification.
22
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1 A clearer case of entrapment is hard to imagine. For that reason alone, the charges should
2 be dismissed.

3 IV. There Must Be Clear and Convincing Evidence of a Violation.
4

5 The Administrative Law Judge made her ruling on the basis of the preponderance of
6 evidence statute. Her decision appears to have been based on WAC 314-12-010, which states in
7 effect that the issuance of any license shall not be construed as granting a vested right in any of the
8 privileges conferred by the license. That decision was error.

9 In *Ongom v. Department of Health*, 159 Wn.2d 132 (2006), the Supreme Court held that
10 due process of law requires that the burden of proof be clear and convincing evidence in all
11 professional disciplinary proceedings. Relying on *Ongom v. Department of Health, supra*, the
12 Court of Appeals acknowledged as much in *Chandler v. Office of Insurance Commissioner*, 141
13 Wn.App. 639, 644 (2007), a case involving an insurance agent's license.

14 The Administrative Law Judge apparently concluded that due process of law did not require
15 application of the clear and convincing evidence standard because of her view that the license was a
16 privilege as opposed to a vested right. That reasoning is flawed. The Supreme Court of the United
17 States long ago stated that due process considerations would not be governed by any distinction
18 between "rights" and "privileges." *Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S.Ct. 2701, 33
19 L.Ed.2d 548 (1972).

20 There can be no distinction between Dodge City's license and a professional license. The
21 significance of both is governed by a three (3) part test:

- 22 1. The private interest that may be affected by official action;
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2. The risk of erroneous deprivation of such interest through the procedures used; and
3. The government interest in the added fiscal and administrative burden that additional practice would entail.

Nguyen v. State, 144 Wn.2d 516, 526 (2001). Each of these will be addressed in turn.

If Dodge City's license is suspended, it will lose the revenue from the conduct of its business and will risk damage to its reputation as a law abiding entity. A professional has the same interest. In *Nguyen v. State, supra*, and *Ongom v. Department of Health, supra*, the Court concluded that these risks were required application of the clear and convincing standard.

The second standard is whether the risk of an erroneous result requires a heightened burden of proof. The Court found that that risk required application of the clear and convincing standard. There is no reason why anyone should come to a different conclusion for this proceeding.

The final consideration is the governmental interest that the burden would entail. The Court concluded that imposition of the clear and convincing standard would not put any added burden on the State. That is the case here as well.

In short, the clear and convincing standard must apply in this case as well.

V. Failure to Swear Witnesses.

The record of the hearing will show that no oath was administered to some of the witnesses at the time of the hearing. Nonetheless, these witnesses were allowed to testify, and the Administrative Law Judge considered their testimony. This error requires, at very least, a new hearing.

1 The Liquor Control Board (the Board) is purporting to suspend Dodge City's retail license
2 for a period of seven (7) days. Dodge City is therefore entitled to an adjudicative proceeding under
3 the provisions of RCW 34.05.410 *et seq.* RCW 66.08.150. Formal adjudicative proceedings
4 allowed by RCW 34.05 allow Dodge City a number of "significant procedural safeguards." These
5 include the requirement that testimony be taken under oath. RCW 34.05.452(3); *Seattle Building*
6 *and Construction Trades Council v. The Apprenticeship and Training Council*, 129 Wn.2d 787,
7 804 (1996). As the record will show, not all witnesses were sworn prior to their giving testimony.
8 Therefore, Dodge City was deprived of the proceeding guaranteed to it by statute if not by due
9 process of law.
10

11
12 On this basis alone, the initial order should be deemed a nullity, and a new hearing should
13 be required.

14 VI. Denial of Motion for Continuance.

15 The Board chose to prosecute Mr. Hilker for allowing [REDACTED] onto the premises. The
16 criminal matter had not been concluded by the time of the hearing. Mr. Hilker understandably
17 chose not testify so as to preserve his right against self-incrimination. Dodge City moved for a
18 continuance on that basis. The Administrative Law Judge denied that continuance. This was error.
19

20 In an adjudicative hearing, the presiding officer shall afford to all parties the opportunity to
21 respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence.
22 RCW 34.05.449(2). Dodge City wished to present Mr. Hilker but was prohibited from doing so
23 because the Board chose to institute prosecution against him. The failure to grant a continuance
24 deprived Dodge City of Mr. Hilker's testimony and therefore violated RCW 34.05.449(2).
25

1 Mr. Hilker's testimony was important. Dodge City claims that Mr. Hilker was entrapped.
2 His testimony was obviously necessary to make out this defense. Mr. Hilker would also have
3 testified that the identification card that [REDACTED] presented to him showed that [REDACTED] was
4 over the age of twenty-one (21) years. He would have also testified that he asked to have [REDACTED].
5 [REDACTED] searched to find the real identification card when Board officers represented that [REDACTED].
6 [REDACTED] was underage. The Board officers would not allow this search.
7

8 The Board's tactic in prosecuting Mr. Hilker is troubling. In this case, the prosecution of
9 the employee had the effect of denying his testimony to Dodge City. That is repugnant to any sense
10 of basic justice. All parties should have the opportunity to present whatever evidence is necessary
11 at the time of hearing. On that basis, the initial order should be reversed and the matter remanded
12 for a new hearing.
13

14 VII. If the Administrative Law Judge's Decision Is Not Reversed and if the Matter Is Not
15 Dismissed, the Suspension Should Be Stayed Pending Judicial Review.

16 Dodge City believes that all charges against it should be dismissed. At worst, it believes
17 that the matter should be remanded for a new hearing based on the fact that witnesses were not
18 sworn and that a continuance was denied. If the relief Dodge City requests is not granted, any
19 suspension should be stayed.
20

21 An agency has the power to stay an order it makes. RCW 34.05.550(1). This case presents
22 a prime example of when a stay should be granted. Dodge City has raised significant constitutional
23 questions concerning the Board's activities. It has also argued that the case should be dismissed
24 based on the Board's conduct. As noted above, at least one District Court judge has seen fit to
25

1 grant just that relief. Finally, it has persuasively argued that Mr. Hilker was entrapped. These
2 matters should be judicially reviewed before any suspension is imposed.

3 Both the Board and the public have an interest in ascertaining the propriety of the Board's
4 practices. Presumably, neither the Board nor the public has any interest in interfering with Dodge
5 City's business pursuits if the Board has violated the law and the federal and state constitutions in
6 its enforcement activities. Therefore, a stay will benefit all and should be granted.
7

8 VIII. The Evidence Must be Suppressed.

9 Evidence obtained in violation of constitutional requirements cannot be admitted in
10 administrative proceedings: *Seymour v. Washington State Department of Health, supra.* [REDACTED]

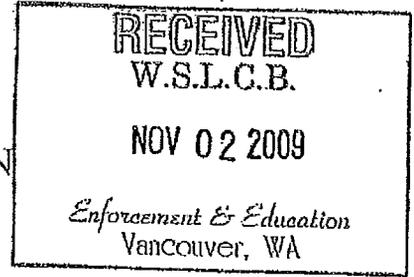
11 [REDACTED] entry onto Dodge City's premises must be suppressed for the reasons stated. Without
12 that evidence, there is no evidence of any violation, and this case must be dismissed.
13

14 CONCLUSION

15 For the reasons set out above, all charges against Dodge City should be dismissed. At
16 worst, the matter should be remanded for a new hearing. If Dodge City is not allowed any relief,
17 any suspension should be stayed pending judicial review.
18

19 DATED this 21 day of Oct., 2009.

20
21 
22 _____
23 BEN SHAFTON, WSB #6280
24 Of Attorneys for Dodge City
25



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RECEIVED

NOV 03 2009

LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

October 21, 2009

Washington State Liquor Control Board
Vancouver Enforcement and Education Division
12501 NE 99th Street, Suite A-100
Vancouver, WA 98682

RE: Dodge City Saloon, Inc.,
License/Permit No.: 365465

To Whom It May Concern:

Enclosed is Dodge City's Petition for Review.

Thank you for your attention to this matter.

Very truly yours,

Ben Shafton

Enclosure
BCS:lv

cc: Ray Kutch -- Dodge City Saloon, Inc.
Gordon Karg
Duplicate original to Office of Administrative Hearings

RECEIVED

NOV 17 2009

**LIQUOR CONTROL BOARD
BOARD ADMINISTRATION**

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

10 IN THE MATTER OF:

11 DODGE CITY SALOON, INC.
12 DODGE CITY BAR & GRILL
13 7201 NE 18TH STREET
14 VANCOUVER, WA 98661

15 LICENSEE

16 LICENSE NO. 365465

OAH No. 2008-LCB-0051
LCB No. 22,849

RESPONSE TO LICENSEE'S
PETITION FOR REVIEW

17 The Washington State Liquor Control Board, Enforcement and Education Division
18 (Enforcement) by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and
19 GORDON KARG, Assistant Attorney General, now responds to the Petition for Review filed
20 by Dodge City Saloon, Inc. d/b/a Dodge City Bar and Grill (Licensee) in the above-captioned
21 matter.

22 **I. INTRODUCTION**

23 On October 10, 2008 the Washington State Liquor Control Board issued a Complaint
24 alleging the Licensee allowed a person under the age of twenty-one to enter and remain on
25 their licensed premise which is off-limits to such persons. The Complaint arose from a
26 compliance check conducted at the establishment on May 16, 2008 in which a minor
investigative aide attempted to enter the Licensee's restricted establishment and was allowed to

1 do so by the Licensee's employees. *See* Exhibit (Ex.) 2; Ex. 4. A formal administrative
2 hearing was set for this matter to be held on March 12-13, 2009. The Licensee moved for
3 continuance on February 4, 2009, but was not filed with OAH until February 11, 2009. The
4 motion was granted and the hearing was rescheduled for May 14-15, 2009. On April 13, 2009
5 the Licensee then filed a motion to suppress and dismiss which Enforcement responded to on
6 April 24, 2009¹. On May 4, 2009 the Licensee moved for another continuance of the hearing
7 date. Enforcement objected. The Licensee also filed a document entitled "Brief" on May 6,
8 2009, less than a week prior to hearing it posited additionally arguments for dismissal and
9 other substantive issues. On May 13, 2009 Enforcement responded to the "Brief".

10 The hearing was held on May 14-15, 2009. The presiding Administrative Law Judge
11 (ALJ) denied the motions to suppress, dismiss, and for continuance. After the record was
12 closed the ALJ issued an Initial Order with finding of facts (FOF) and a conclusion of law
13 (COL) on October 9, 2009. The Licensee filed a timely petition for review and Enforcement
14 now responds.

15 II. ARGUMENT

16 A. Licensee's Petition Challenges Only Specific Conclusions Of Law

17 The Licensee provides no objection to any portion of the FOF in the Initial Order, nor
18 does it support any part of its argument with any citation to the record. *See generally*
19 Licensee's Petition for Review (Petition). The Licensee provides a four paragraph recitation of
20 the facts, which appears in actuality to be a combination of facts as found at hearing, opinion
21 and conjecture. Petition at 2. Because the Licensee has failed to formally object to the FOF,
22 this portion of the Petition should be ignored.

23 Similarly, the Licensee does not object to, or raise argument regarding, most of the
24 Licensee's COL. *See generally* Petition. Instead, the Licensee confines itself to arguing that
25 the ALJ erred in dismissing the Licensee's original motion to suppress; erred in concluding the

26 ¹ There was also a motion in limine filed by the Enforcement, which was withdrawn and is not relevant to the Licensee's petition.

1 Licensee was not entrapped; erred in finding the standard of proof is by a preponderance of the
2 evidence; and erred in denying the Licensee's second motion for continuance. Additionally, the
3 Licensee now argues that some unidentified witnesses were not properly sworn before giving
4 testimony and also argues that any penalty arising from a final order of the Board should be
5 held in abeyance during the pendency of judicial review proceedings. The Licensee does not
6 deny that all elements of the violation have been met by the facts as found, or the ALJ's
7 conclusion that the violation did, as a matter of fact and law, occur.

8 **B. Challenge To The ALJ's Ruling To Dismiss Licensee's Motion To Suppress**

9 The Licensee argues the ALJ was erred in dismissing its motions to suppress evidence,
10 arguing that the evidence presented by Enforcement was obtained in violation of the Forth
11 Amendment to the United States Constitution and Article 1, Section 7 of the Washington State
12 Constitution. Petition at 2-3. This argument is based on the assumption that the evidence
13 sought to be suppressed² was obtained through a warrantless search and the statute which
14 allows Enforcement officers to enter and inspect a licensed premise is facially unconstitutional.
15 *Id.* at 3-6. The Licensee also argues that Enforcement's use of an investigative aide (IA), in
16 this case [REDACTED] a minor employed by the Board, was impermissible. The
17 Licensee's arguments fail on multiple grounds. *Id.* at 7.

18 **1. Warrantless searches and statutory authority to inspect.**

19 The Licensee's arguments are not particularly clear. The Licensee's Petition speaks in
20 generalities and sweeping proclamations. It fails to identify exactly what activity took place
21 that constitutes a search, what specific testimony or exhibits would be the fruit of that search,
22 or how any particular action crossed or invoked the Licensee constitutional rights. The
23 Licensee fails to set forth the legal mechanism or even any case law demonstrating that
24
25

26 ² The Licensee's motion had sought to broadly suppress the testimony of [REDACTED] testimony and the
testimony of any other Board officer or police officer that observed him." Licensee's Motion to Suppress at 13.

1 suppression is the appropriate remedy even if they could demonstrate a violation of their
2 Fourth Amendment rights³.

3 However, in essence, the Licensee appears to argue that the testimony of the officers
4 should have been suppressed because either Enforcement officers or the IA engaged in an
5 unconstitutional search of the licensed premises. Enforcement has already responded to the
6 Licensee's arguments in its Response to Licensee's Motion to Suppress and Dismiss and
7 incorporates all those arguments by reference herein and only adds the following further
8 response.

9 **a. Licensee fails to demonstrate a search took place in the instant case.**

10 Warrantless inspections of liquor licensed premises are authorized by statute. RCW
11 66.28.090.⁴ Because no warrant was sought or acquired in this matter, the Licensee's
12 argument for suppression rests largely on its assertion that RCW 66.28.090 is constitutionally
13 inadequate to authorize a warrantless search of its premise. Petition at 3-6.

14 However, before the Licensee can reach the issue of whether RCW 66.28.090 meets
15 constitutional "muster" they must first establish, as a factual matter, that the conduct engaged
16 in by Enforcement was a search subject to constitutional protection or scrutiny. The Licensee
17 cannot establish such a search took place in the instant case.

18
19
20 ³ Undoubtedly many individuals not trained in the law assume that a Fourth Amendment violation automatically
21 leads to suppression. This is not always the case, though, and setting fourth authority establishing that
22 suppression is the proper remedy in any given factual situation is not a perfunctory step in a motion to suppress.
23 In *Hudson v. Michigan*, 547 U.S. 586, 591-92, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006) the United States Supreme
24 Court reaffirmed the longstanding conclusion that "whether the exclusionary sanction is appropriately imposed in
25 a particular case ... is 'an issue separate from the question whether the Fourth Amendment rights of the party
26 seeking to invoke the rule were violated by police conduct.' "

⁴ RCW 66.28.090 Provides that: "(1) All licensed premises used in the manufacture, storage, or sale of liquor, or
any premises or parts of premises used or in any way connected, physically or otherwise, with the licensed
business, and/or any premises where a banquet permit has been granted, shall at all times be open to inspection by
any liquor enforcement officer, inspector or peace officer. (2) Every person, being on any such premises and
having charge thereof, who refuses or fails to admit a liquor enforcement officer, inspector or peace officer
demanding to enter therein in pursuance of this section in the execution of his/her duty, or who obstructs or
attempts to obstruct the entry of such liquor enforcement officer, inspector or officer of the peace, or who refuses
to allow a liquor enforcement officer, and/or an inspector to examine the books of the licensee, or who refuses or
neglects to make any return required by this title or the regulations, shall be guilty of a violation of this title."

1 “[A] search occurs under the Fourth Amendment if the government intrudes upon a
2 reasonable expectation of privacy.” *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610 (2000);
3 *State v. Lakotiy*, 151 Wn. App. 699, 711, 214 P.3d 181 (2009). While the Licensee also
4 invokes Article 1, Section 7 of the Washington State Constitution as well, federal analysis
5 frequently guides Washington courts because both court systems recognize “similar
6 constitutional principles.” *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007).

7 No search occurs “when a law enforcement officer is able to detect something by
8 utilization of one or more of his senses while lawfully present at the vantage point where those
9 senses are used.” *Bobic*, 140 Wn.2d 250 at 259. Here, the record demonstrates that all of the
10 officer’s who testified at hearing who observed ██████████ enter the Licensee’s premise from
11 the outside did so while parked across the street, a vantage point they had a lawful right to be
12 within. *See Ex. 4, Pg. 4; see also* Audio Recording of May 14, 2009 Hearing.

13 Furthermore, in regards to entering private residential property, “a police officer has the
14 same license to intrude as a reasonably respectful citizen.” *State v. Seagull* 95 Wn.2d 898,
15 902, 632 P.2d 44 (1981). “If a law enforcement officer or agent does not go beyond the area of
16 the residence that is impliedly open to the public, such as the driveway, the walkway, or an
17 access route leading to the residence, no privacy interest is invaded.” *State v. Gave*, 77 Wn.
18 App. 333, 337, 890 P.2d 1088 (1995).

19 By contrast, while the owner and operator of a business has some reasonable
20 expectation of privacy in a commercial property, that expectation is different and far less
21 significant than a similar interest held by an individual in their home. *New York v. Burger*, 482
22 U.S. 691, 699-700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987); *Centimark Corp. v. Dept. of*
23 *Labor and Industries*, 129 Wn. App. 368, 376, 119 P.3d 865 (2005). This difference is even
24 more pronounced when the business engaged in is “subject to extensive governmental
25 regulation and frequent unannounced inspections are necessary to insure compliance.”
26 *Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 953, 558 P.2d 231 (1976).

1 The record indicates that [REDACTED] walked through the parking lot and up onto a
2 porch that was open to the public. Initial Order FOF ¶9; Ex. 4, Pg. 4; Ex. 7. Pg. 3; Ex. 2.
3 Indeed the public was impliedly invited to enter this property as the Licensee's business was
4 the sale of food and alcohol, to the public. The Licensee's privacy interest is significantly less
5 than that of a person in their private home, and even more so that they voluntarily chose to
6 engage in a highly regulated industry. The Licensee has no reasonable expectation of privacy
7 in any of these entrance areas impliedly open to the public and [REDACTED] entry onto these
8 areas, even as an agent of law enforcement, cannot constitute a search.⁵

9 Moreover, even if the Licensee could convincingly argue that any observations [REDACTED]
10 [REDACTED] made once inside the establishment could be suppressed, his very entry into the
11 premise satisfied that element of the violation. His entry was observed by others from a public
12 place, so any such suppression would have no effect on the outcome of the case.

13 **b. The Board lacks jurisdiction to review the constitutionality of RCW**
14 **66.28.090.**

15 The Licensee's original motion to suppress and its petition for review now before the
16 Board, posits a facial constitutional challenge to RCW 66.28.090. Petition at 5-6. As
17 Enforcement argued previously in its response to the Licensee's motion to suppress, an ALJ
18 does not have jurisdiction or authority to review the constitutionality of a state statute. *Enf.*
19 *Resp.* at 8. This is because administrative tribunals are a creature of statute and lack the authority
20 to resolve the type of constitutional challenge at issue here. *See* Washington State Constitution
21 Art. IV, § 6 (granting superior courts original jurisdiction to hear constitutional issues); RCW
22 34.05.570(3)(a) (determination by a superior court that an agency order based on a statute or rule
23 which is unconstitutional on its face or as applied is a basis to overturn agency order on judicial
24 review); *Standing v. Dept. of Labor and Industries*, 92 Wn.2d 463, 466-467, 598 P.2d 725

25 ⁵ Additionally, even if the Licensee could convincingly argue that any testimony based on observations made by
26 [REDACTED] once he entered the premise could be suppressed, his very entry into the premise satisfied an element
of the violation. His entry was observed by others from a public place, so any such suppression would have no
effect on the outcome in this matter.

1 (1979) (because an administrative agency declined to rule on the constitutionality of a statute,
2 due to lack of jurisdiction, it became the sole issue before the Court on appeal). Like the ALJ,
3 the Board also lacks jurisdiction to resolve constitutional arguments, it should decline
4 consideration of Licensee's facial challenge to the constitutionality of RCW 66.28.090.

5 **2. Compliance checks and RCW 66.44.290.**

6 Licensee also argues that "RCW 66.28.290 cannot be interpreted to allow the Board's
7 action here." Petition at 7. Presumably, the Licensee is suggesting that this too is grounds for
8 suppression of evidence or dismissal of the action. The Licensee's petition fails to set forth
9 any legal authority or argument as to how its assertions about RCW 66.28.290 leads to the
10 remedy it seeks as it is not posed as a violation of any constitutional right. *See Id.*

11 Even setting the issue of remedy aside, the Licensee's interpretation of RCW 66.44.290
12 is totally unsupported by the plain language of the statute, relevant authority, or logic.
13 Enforcement has already responded to this argument in previous briefing and incorporates
14 those arguments herein by reference and only adds the following further response.

15 **a. The plain language of RCW 66.44.290 defeats the Licensee's
16 assertions.**

17 "If a statute is clear on its face, its meaning is to be derived from the plain language of
18 the statute alone." *State v. M.C.*, 148 Wn. App. 968, 971, 201 P.3d 413 (2009). The plain
19 meaning of a statute should be "discerned from all that the Legislature has said in the statute
20 and related statutes which disclose legislative intent about the provision in question." *Thurston*
21 *County v. Cooper Point Association*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002), *quoting Dep't of*
22 *Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). Under this
23 approach, an act is to be construed as a whole, giving effect to all of the language used.
24 *Cooper Point Association*, 148 Wn.2d at 12. The Washington State Supreme Court has held
25 that this "formulation of the plain meaning rule provides the better approach because it is more
26 likely to carry out legislative intent." *Id.*

1 Considering the statute as a whole, those provisions of the statute that refer to
2 “controlled purchase programs” clearly only refer to such programs authorized by the Board to
3 be conducted by licensee’s themselves. RCW 66.44.290. The statute’s provisions speak
4 almost exclusively of “private” or “in-house” controlled purchase programs. *Id.* Only in a
5 single sentence in the entire statute is the term “controlled purchase program” used without an
6 adjective specifying it as a private program. RCW 66.44.290(1). From this alone, the
7 Licensee has asked the ALJ, and now the Board, to infer that the entire statute is intended to
8 apply to and limit how Enforcement, not a private entity, engages in their authority and duty to
9 enforce the law. The language of the statute cannot support such an interpretation.

10 Additionally, the Licensee singles out the following language in RCW 66.44.290(1) in
11 an attempt to support its argument:

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

19 The Licensee asserts this language prohibits Enforcement from conducting compliance checks
20 with an investigative aide that is younger than eighteen years of age. The plain language of the
21 statute refutes this assertion as well.

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

1 The facts in the instant case demonstrate that [REDACTED] being allowed to enter the
2 Licensee's premise was not the result of a "private controlled purchase program", nor has the
3 Licensee ever argued as such. See FOF 2-4. Thus, the second immunity is not applicable here.

4 If this statute was intended to apply to Enforcement activities, which it was not, the
5 only result under the facts in this case is that [REDACTED] would not be subject to the first
6 immunity outlined in this section of the statute for a purchase of alcohol. RCW 66.44.290(1).
7 Therefore, if this section of the statute was applied to the facts here in a total legal vacuum, as
8 the Licensee seems to suggest is appropriate, the only result would be that [REDACTED] could
9 be subject to criminal prosecution for a violation of RCW 66.44.290. Fortunately, other laws
10 exist that relate to this matter. Because [REDACTED] activities were at the direction of law
11 enforcement officers, he would have a complete defense from criminal conviction under the
12 entrapment defense statute at RCW 9A.16.070(1)(a).

13 Moreover, here, while there was some evidence of a purchase of alcohol by [REDACTED]
14 [REDACTED] in the record, that violation was not charged against the Licensee or decided by the
15 ALJ. See *Generally*, Initial Order; Ex. 10. The Licensee was charged with allowing a minor to
16 enter a restricted premise. See Complaint. As RCW 66.44.290 is silent as to the issue of a
17 minor being allowed to enter restricted premises, the law appears completely inapplicable or
18 even relevant to the facts in this case.

19 Nothing about this statute dictates the methods by which Enforcement may, as a law
20 enforcement agency, go about enforcing the laws and rules it has been authorized to enforce by
21 the Legislature and the Board. Consequently, the statute is not an avenue by which the
22 Licensee may now avoid its responsibility to follow the law and rules it voluntarily agreed to
23 abide by when it chose to apply for an accept a liquor license.

1 **b. Enforcement has statutory authority to enforce all liquor laws and**
2 **rules and may do so with under cover operations and compliance**
3 **checks.**

4 The authority to enforce the law, or specific categories of law, is provided to law
5 enforcement agencies by statute. *See* RCW 66.44.010(4); *See e.g.* RCW 36.28 (powers and
6 duties of County Sheriff's and deputies). How a law enforcement agency goes about actually
7 enforcing the law is dictated by case law and both state and federal constitutions. *See e.g. State v.*
8 *Lively*, 130 Wn.2d 1, 20, 921 P.2d 1035 (1996) ("Public policy allows for some deceitful
9 conduct and violation of criminal laws by the police in order to detect and eliminate criminal
10 activity"). The Licensee's argument confuses this basic distinction.

11 There is no doubt that Enforcement officers have statutory authority to enforce the liquor
12 laws of the state, and also have authority granted by the Board to enforce all promulgated liquor
13 rules. RCW 66.44.010(4); WAC 314-29-005(1).

14 It is well established by Washington case law that law enforcement agencies may
15 utilize undercover operations, deceitful conduct, decoys, informers and some violation of
16 criminal laws to enforce the law and, specifically, to afford a person with an opportunity to
17 violate the law. *See State v. Athan*, 160 Wn.2d 354, 371, 377, 158 P.3d 27 (2007); *State v.*
18 *Lively*, 130 Wn.2d at 20; *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *City of Seattle v.*
19 *Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948); *State v. Littooy*, 52 Wash. 87, 100 Pac. 170
20 (1909); *State v. Enriquez*, 45 Wn. App. 580, 585, 725 P.2d 1384 (1986); *State v. Smith*, 101
21 Wn.2d 36, 43, 677 P.2d 100 (1984); *State v. Swain*, 10 Wn. App. 885, 889, 520 P.2d 950
22 (1974); *State v. Emerson*, 10 Wn. App. 235, 242, 517 P.2d 245 (1973).

23 Furthermore, in reviewing the law enforcement activities of undercover liquor
24 enforcement officers specifically, Division One of the Washington State Court of Appeals
25 noted that "deceitful practices . . . including the use of undercover agents and limited police
26 participation in unlawful enterprises, are not constitutionally prohibited." *Playhouse Inc. v.*
Liquor Control Board, 35 Wn. App. 539, 667 P.2d 1136 (1983).

1 The Licensee has failed to set out any authority to the contrary. The Licensee has
2 failed to provide any authority or case law demonstrating Enforcement is prohibited from using
3 undercover operations, decoys, deceit and the like in enforcing the law. In this case,
4 Enforcement engaged in an undercover operation and utilized a decoy to afford the Licensee's
5 employee an opportunity to violate the law. Initial Order, FOF at ¶2-4. Enforcement had
6 authority enforce the law via statute, and its enforcement methods have been long upheld in
7 Washington as lawful and appropriate.

8 **3. Policy is not law.**

9 Licensee's petition also argues that "the Board cannot rely on its internal policies."
10 Petition at 9. It is elementary that internal agency policies cannot act as law. *See Mills v.*
11 *Western Washington University*, 150 Wn. App. 260, 276-77, 208 P.3d 13 (2009) (Where an
12 internal policy was not a "rule" as that term is used in the Administrative Procedures Act and
13 could not be relied upon as authority by an adjudicative body). Enforcement never relied on
14 such policies at hearing or in briefing, but rather relied on statutes, rules and case authority.

15 Indeed, Enforcement now directs the Board to the Licensee's original Motion to
16 Suppress, wherein the *Licensee* attempted to argue that Enforcement's own internal policies
17 limited its investigative authority. Licensee's Motion to Suppress at 16. Now, the Licensee's
18 petition bizarrely appears to again argue that those same internal policies would prohibit its
19 actions in the instant case. Petition at 9. Again, as the Licensee concedes, such policies are not
20 law and do not empower or prohibit any type of action by Enforcement and any assertions by
21 the Licensee in that vein are meaningless.

22 **C. Licensee Has Failed To Demonstrate That Enforcement's Conduct Meets The
23 Stringent Standard Of "Outrageousness"**

24 The Licensee also argues now, as it did in its motion to suppress and dismiss that the
25 actions of Enforcement in this matter were sufficiently outrageous to constitute a violation of
26 its Due Process rights and as a result, the Complaint issued by the Board must be dismissed.
Petition at 10-12; Licensee's Motion to Suppress at 13-15. Enforcement has already responded

1 | to this argument in its previous Response to Licensee's Motion to Suppress and Dismissal and
2 | now incorporates those arguments herein by reference and only adds the following further
3 | response.

4 | An "outrageous conduct" argument is based upon the principle that the conduct of law
5 | enforcement officers and their agents may be "so outrageous that due process principles would
6 | absolutely bar the government from invoking judicial processes to obtain a conviction." *State*
7 | *v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035; *quoting United States v. Russell*, 411 U.S. 423,
8 | 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973); *see also Playhouse Inc.*, 35 Wn. App. at
9 | 540. In determining whether police conduct violates due process a court must conclude that
10 | the conduct is "so shocking that it violates fundamental fairness." *Lively*, 130 Wn.2d at 19,
11 | 921; *State v. Myers*, 102 Wn.2d 548, 551, 689 P.2d 38 (1984). The Supreme Court in *Lively*
12 | held that "a due process claim based on outrageous conduct requires more than a mere
13 | demonstration of flagrant police conduct." *Lively*, 130 Wn.2d at 20, 921 P.2d 1035. The Court
14 | went on to hold that "because policy allows for some deceitful conduct and violation of
15 | criminal laws by the police in order to detect and eliminate criminal activity" a dismissal based
16 | on outrageous conduct must be reserved for only the most egregious circumstances and "it is
17 | not to be invoked each time the government acts deceptively" *Id.*

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

25 | That the Licensee would seriously make such an argument in the instant case borders
26 | on the offensive. The conduct of Enforcement in this matter cannot be considered "so

1 shocking that it violates fundamental fairness”. The Licensee has failed to demonstrate that
2 Enforcement, which utilized law enforcement investigative methods continually upheld by
3 Washington Courts⁶, engaged in behavior even remotely similar to the conduct in *Lively*.

4 **D. Entrapment Does Not Apply Here, Nor Would It Provide A Defense If It Did**

5 The Licensee’s Motion to Suppress did not include a formal discussion of the defense
6 of entrapment. Indeed, this issue was raised in its prehearing brief filed less than a week
7 before hearing. It now raises the issue again in its petition for review.

8 As a preliminary note, the Licensee’s Petition accuses the ALJ in this matter of failing
9 to recognize or rule on the issue of entrapment. Petition at 13. This is untrue, the Initial Order
10 notes that the Licensee argued it was entrapped, and concluded it was not. Initial Order at FOF
11 ¶14, COL ¶9.

12 RCW 9A.16.070(1) provides that “in any prosecution for a crime” entrapment is a
13 defense. Here, the Licensee has not been charged with a crime and the instant matter is not a
14 criminal prosecution. Tacitly recognizing these procedural facts, the Licensee attempts to
15 argue that the entrapment defense may be raised in a civil administrative adjudication based
16 upon case law from extra-jurisdictional courts. Licensee’s Brief at 6-7. In short, the Licensee
17 suggests that the opinions of courts from other states, interpreting other laws, should trump the
18 plain language of the Washington state legislature which has clearly stated entrapment is a
19 defense available only for “prosecution for a crime”. Licensee’s Brief at 6-7; *See also* RCW
20 9A.16.070(1).

21 “If a statute is clear on its face, its meaning is to be derived from the plain language of
22 the statute alone.” *State v. M.C.*, 148 Wn. App. 968, 971, 201 P.3d 413 (2009). Case law
23 generated by other state courts cannot act as law or binding authority on Washington courts
24 and tribunals. *See Rickert v. State Public Disclosure Com’n*, 129 Wn. App. 450, 467, 119 P.3d
25 379 (2005) (holding that a Pennsylvania state court opinion was not binding precedent in

26 _____
⁶ See the discussion of viable investigative methods in Section III, Part B(2)(a).

1 Washington). Thus, the case law offered by Licensee here is non-binding and cannot be
2 adhered to by the Tribunal. Because of this, these opinions cannot be used to interpret
3 Washington State statutes, and most certainly cannot be used to subvert the plain language of a
4 statute. The plain language of RCW 9A.16.070(1) demonstrates the defense of entrapment is
5 only available in criminal prosecutions, and as a result, is not available to the Licensee in a
6 civil administrative proceeding in Washington.

7 Even if the affirmative defense of entrapment were available to the Licensee here, it
8 would bear the burden of proof to establish entrapment occurred. *State v. Lively*, 130 Wn.2d 1,
9 14, 921 P.2d 1035 (1996). The Licensee could not meet its burden under the facts in this case.
10 RCW 9A.16.070(2) provides that: “The defense of entrapment is not established by a showing
11 only that law enforcement officials merely afforded the actor an opportunity to commit a
12 crime.” *See also, State v. Swain*, 10 Wn. App 885, 889, 520 P.2d 950 (1974) (“mere
13 solicitation by a police officer or other state agent to commit the crime is not entrapment”).

14 Mr. Hilker, an employee of the Licensee, was merely afforded an opportunity to
15 commit a violation of the liquor laws and rules. Initial Order, FOF ¶9-11. Enforcement’s
16 investigative aide requested only to be allowed in the premises, and provided his own
17 identification, which demonstrated his true age. *Id.* at ¶8-10. At that point, it was entirely up
18 to the Licensee’s employee, not the investigative aide or the Enforcement officers on scene, as
19 to whether he was going to allow a minor to enter the licensed premise.

20 The opportunity to violate the law provided to Mr. Hilker was no different then if a
21 peace officer provides an opportunity for an individual to sell or deliver illicit drugs or engage
22 in any other illegal activity. *See e.g. State v. Trujillo*, 75 Wn. App. 913, 919, 883 P.2d 320
23 (1994) (police informant merely afforded defendant an opportunity deliver cocaine, which was
24 not entrapment despite the defendant’s reluctance to commit the crime). Mr. Hilker was
25 afforded an opportunity to violate the law and when provided that opportunity he did so by
26 allowing the investigative aide into the Licensee’s establishment. Additionally, nothing

1 establishes that Mr. Hilker was reluctant to allow [REDACTED] into the establishment.
2 Entrapment is not a defense available to the Licensee in this matter and if it was the Licensee
3 cannot meet their burden of proof necessary to establish entrapment occurred.

4 **E. The Preponderance Of The Evidence Standard Is Appropriate In Liquor
5 Enforcement Proceedings**

6 The Licensee argues, as is did in its "Brief" filed on May 6, 2009, that "there can be no
7 distinction between the Dodge City's license and a professional license." Petition at 15.
8 Therefore, the Licensee argues, the ALJ should have applied the "clear and convincing
9 evidence" standard in this matter based on the Washington State Supreme Court Decisions in
10 *Ongom and Nugyen. Id.*

11 Interestingly, as an initial response, Enforcement notes that the Licensee has never
12 argued that the outcome of these proceedings would be any different had the "clear and
13 convincing" standard been applied. Petition at 15-16. The Licensee has never denied that a
14 person under the age of twenty one was allowed onto its restricted premise, which constitutes a
15 violation of RCW 66.44.310(1)(a). Even if the clear and convincing evidence standard applied
16 here, a contention Enforcement adamantly denies, the record in this matter demonstrates
17 beyond reasonable doubt that the violation occurred. Given the facts as found, in the instant
18 case, the question of what evidentiary standard was appropriate is moot.

19 Regarding the Licensee's primary argument, it ignores the basic legal tenant that the
20 preponderance standard used in civil proceedings is applied in administrative hearings in
21 Washington unless otherwise mandated by statute or due process principles. *Thompson v.*
22 *Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *see also Steadman v.*
23 *Securities & Exchange Comm'n.*, 450 U.S. 91, 103-04, 101 S. Ct. 999, 67 L. Ed. 2d 69 (1981);
24 *Ingram v. Dept. of Licensing*, 162 Wn.2d 514, 518, 173 P.3d 259 (2007) (noting that civil
25 driver's license suspension proceedings have a lower burden of proof then the parallel criminal
26 proceeding.)

1 A specific, non-statutory, exception to the general rule, that the preponderance standard
2 is applicable in administrative proceedings involving state issued licenses, arises in
3 professional license disciplinary proceedings. *Bang Nguyen v. Dept. of Health*, 144 Wn.2d
4 516, 524, 29 P.3d 689 (2001); *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029
5 (2006). In creating this exception to the general rule, the Washington State Supreme Court
6 held that professional healthcare license revocation proceedings “instigated by the state”
7 involved “a stigma more substantial than mere loss of money”. *Nguyen*, 144 Wn.2d at 529;
8 *Ongom*, 159 Wn.2d at 139.

9 A liquor license is nothing like a professional license. Recently the Washington State
10 Court of Appeals, Division Two, held that erotic dancers were not holders of a professional
11 license and, therefore, the *Ongom* opinion would not apply in an administrative hearing
12 determining whether an erotic dancer permit should be suspended. *Brunson v. Pierce County*,
13 149 Wn. App. 855, 205 P.3d 963 (2009). The Court relied on RCW 18.118.020 to establish
14 what constituted a “professional license” in Washington State:

15 “‘Professional license’ means an individual, nontransferable authorization to
16 carry on an activity based on qualifications which include: (a) Graduation from
17 an accredited or approved program, and (b) acceptable performance on a
18 qualifying examination or series of examinations.”

19 *Brunson*, 149 Wn. App. at 865.

20 A liquor license does not convey a legal right to carry on an activity based upon
21 graduation from an accredited program and a qualifying exam; rather, it conveys only the
22 privilege to sell alcohol out of a licensed business. RCW 66.24.010. Liquor licenses are
23 issued to business entities, not individuals. RCW 66.24.010; WAC 314-07-010(4); WAC 314-
24 07-035. A liquor license is transferrable when ownership of the licensed business entity
25 changes. WAC 314-07-080. In short, a liquor license fails to meet any of the criteria
26 established by the *Brunson* court for what qualifies as a “professional license.” *Brunson*, 149
Wn. App. at 865-66. Accordingly, *Ongom* does not apply to the present matter.

1 In comparison, adjudications involving the revocation of a non-professional license or
2 permit have been found to be subject to the preponderance standard just as in any other civil
3 proceeding. See e.g. *Bonneville v. Pierce County*, 148 Wn. App. 500, 202 P.3d 309 (2009). In
4 *Bonneville* the appellant held a conditional use permit, issued by Pierce County, to conduct a
5 business out of his home. *Bonneville* 148 Wn. App. at 504. County investigators alleged the
6 permit holder violated several use permit conditions. *Id.* at 505-06. After an administrative
7 hearing, the hearing examiner concluded, by a preponderance of the evidence, that the permit
8 holder had violated three conditions of the use permit and subsequently revoked the permit. *Id.*
9 at 506.

10 On appeal, the appellant contended that the County had violated his Due Process rights
11 when the hearing officer failed to apply the clear, cogent and convincing standard of proof. *Id.*
12 at 515. In doing so, the appellant relied, in part on *Nguyen*. *Id.* at 317. Division Two held that
13 the reliance was misplaced as the interest at issue in *Nguyen* was far more significant a
14 property interest, namely, a professional license. *Id.* The Court went on to note that the
15 preponderance standard satisfied due process “when the interest at stake was a 14-day
16 involuntary civil commitment.” *Id.* at 517, citing *In re Det. of LaBelle*, 107 Wn.2d 196, 220-
17 21, 728 P.2d 138 (1986). The Court held that “if the preponderance standard met due process
18 for a 14-day involuntary civil commitment . . . it surely meets due process for revoking a
19 conditional land use permit.” *Id.* The Court concluded by reasserting the general rule: that the
20 preponderance standard generally applies to all civil matters. *Id.*

21 Furthermore, In *Bang Nguyen* the Court specifically notes that Due Process requires
22 clear and convincing standard in civil adjudications “to protect particular important individual
23 interests.” *Bang Nguyen*, 144 Wn.2d at 525. The Court went on to note that the standard was
24 only appropriate when “the individual interests at stake are more substantial than mere loss of
25 money.” *Id.* at 527-28.

1 A liquor license cannot be held by an individual and does not represent an individual
2 property interest, but rather a property interest held by an entity and its “true parties in
3 interest”. WAC 314-07-010(4). Clearly, in the license application process individuals who
4 have some potential control over the business operation, the “true parties in interest”, must be
5 vetted for potentially troubling criminal history. WAC 314-07-035, 040. None of these
6 individuals, though, holds a liquor license in their name, nor does such a license convey the
7 right to practice a profession⁷. Moreover, the interest at stake in this matter, and in all liquor
8 license hearings, is always the same - “a mere loss of money”, whether it is in the form of the
9 funds paid for the fine or the loss of revenue associated with a suspension or revocation of the
10 license. *See Bang Nguyen*, 144 Wn.2d at 525-26. The Licensee here does not have an
11 individual interest and the only interest at stake is a “mere loss of money.”

12 The Licensee also suggests that “Dodge City” has an interest avoiding “damage to its
13 reputation” equivalent to a professional who faces possible discipline for violating the law in
14 the course of their professional duties. Petition at 16. The Licensee has provided no evidence
15 that “Dodge City” has a reputation in the community that would be affected by the outcome of
16 the current matter. More importantly, the Court in *Ongom* noted that both Dr. Nguyen and Ms.
17 Ongom had a liberty interest in their professional reputations and that *professional* discipline
18 was stigmatizing. *Ongom*, 159 Wn.2d at 139. The Licensee provides no authority to support
19 the contention that a corporation, holding a liquor license, is legally considered to have the
20 same liberty interests, or would face the same professional stigma if disciplined, as an
21 individual human holding a professional license. Licensee’s argument defies the law and
22 common sense.

23 Furthermore, the sale of alcohol is a highly regulated industry, not only in Washington
24 State, but throughout the nation. *See Colonnade Catering Corp. v. United States*, 397 U.S. 72,
25

26 ⁷ A liquor license may be held by a sole proprietor, but that license is still held by a business entity with a separate
license to conduct business in Washington State and the proprietor is the only true party in interest.

1 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970); *see also* *Jow Sin Quan v. Washington State Liquor*
2 *Control Board*, 69 Wn.2d 373, 382, 418 P.2d 424 (1966). A license to engage in the retail sale
3 of liquor does not constitute a vested property right, but rather “a temporary permit, in the
4 nature of a privilege, to engage in a business that would otherwise be unlawful.” *Id*; *see also*
5 *Scottsdale Insurance Co. v. Intl. Protective Agency, Inc.*, 105 Wn. App. 244, 249, 19 P.3d 1058
6 (2001) (noting that a liquor license is “merely representative of a privilege granted by the
7 state”).

8 Nothing indicates a liquor license is in any way similar to a professional license. The
9 preponderance of the evidence standard is the appropriate burden of proof in this matter, just as
10 in all other administrative hearings absent statute or other legal authority to the contrary.
11 *Thompson*, 138 Wn.2d 783 at 797.

12 **F. Alleged Failure To Swear In Witnesses**

13 The Licensee’s Petition alleges that “no oath was administered to some of the witnesses
14 at the time of hearing.” Petition at 16. The Licensee fails to cite to where in the record this
15 assertion can be demonstrated and fails to name the witnesses that were allegedly not sworn in.
16 *Id.* The Licensee fails to include declarations from any witness stating they were not sworn in
17 before testimony. *Id.*

18 The Licensee argues that its remedy should be that “the initial order should be deemed
19 a nullity and a new hearing should be required.” Petition at 17. Even if the record supports the
20 Licensee’s assertions, which is difficult to establish as the Licensee has provided no evidence
21 to support its claim, it fails to set forth any authority establishing that their remedy for the
22 complained of error is remand of the entire case. The Licensees proposed remedy makes little
23 sense. As a purely factual matter the Licensee’s own petition suggests that some witnesses
24 were sworn in and presumably that testimony would not be in error and fully admissible. The
25 Licensee’s argument in this matter is cursory, and fails to set forth authority which supports the
26 breadth of the remedy requested.

1 **G. The ALJ Did Not Err In Denying The Licensee's Second Motion For Continuance**

2 The Licensee argues that the denial of its second motion for continuance was error on
3 the part of the ALJ. Petition at 17-18. In brief, the Licensee sought continuance in this matter
4 on the basis that one of there employees, Mr. Jeffery Hilker was refusing to cooperate and
5 testify on there behalf as his criminal matter related to this incident was still pending. The
6 reasons, both factual and legal, for Enforcement's objection to a continuance is fully explicated
7 in its May 6, 2009 Response to the Licensee's Motion for Continuance. Those arguments are
8 entirely incorporated herein by reference and will not be reiterated in full, Enforcement now
9 ads only the following additional argument.

10 The Licensee asserts that "the Board's tactic in prosecuting Mr. Hilker is troubling. In
11 this case, the prosecution of the employee had the effect of denying his testimony to Dodge
12 City [sic]. That is repugnant to any sense of justice." This assertion is purely inflammatory
13 and not supported by the facts or the basic structure of the justice system. The "Board", as an
14 administrative agency, has no authority to prosecute a criminal matter. Mr. Hilker was issued a
15 criminal citation by an Enforcement officer for the same events giving rise to this
16 administrative action. Ex. 3. The decision to prosecute that criminal charge or any trial
17 scheduling surrounding that matter is not the purview of the Board.

18 The Licensee was not "prohibited" from presenting Mr. Hilker's testimony as it now
19 claims. Petition at 17. Indeed, the Licensee concedes that Mr. Hilker "chose not to testify so
20 as to preserve his right against self incrimination." *Id.* No legal mechanism or sabotage
21 prevented Mr. Hilker from testifying at the hearing. "There is no blanket Fifth Amendment
22 right to refuse to answer questions based on an assertion that any and all questions might tend
23 to be incriminatory." *Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981). The
24 privilege must be claimed as to each question and Mr. Hilker would have been free to assert
25 the claim to individual questions at hearing. *See Id.*

1 Mr. Hilker made a voluntary sworn statement at the time of the events at issue in this
2 case. Ex. 2. Knowing and voluntary statements, of any kind, made to law enforcement agents
3 are not barred by the Fifth Amendment privilege. *See Miranda v. Arizona*, 384 U.S. 436, 478,
4 86 S.Ct. 1602, 16 L.Ed.2d 694. (1966). Thus, Mr. Hilker's own sworn statement, which was
5 admitted to the hearing without objection by the Licensee, contained statements already
6 outside any Fifth Amendment protection.

7 Furthermore, the testimony which the Licensee now argues would have been elicited is
8 all information that was admitted to the record and considered by the ALJ prior to making her
9 decision. *See* Petition at 18. Mr. Hilker's sworn statement declares that he believed the ID
10 presented to him by ██████████ indicated he was over the age of twenty one (21). Ex. 2. The
11 testimony and report of Officer Karic demonstrates that employees of the Licensee wanted to
12 search ██████████ person after Officer Karic informed them the violation, and that he
13 refused that request. Ex. 4, Pg. 3.

14 The Licensee's tactic of insinuating the "Board" conspired to deprive them of the
15 testimony of Mr. Hilker is unsupported by fact or law and is, frankly, ludicrous. The ALJ's
16 decision to deny the motion for continuance should be upheld.

17 **H. Stay Of Final Order During Pendency Of Judicial Review**

18 It is entirely the discretion of the Board as to whether or not it would stay the
19 effectiveness of its final order in this matter if it chose to sustain the ALJ's initial order. RCW
20 34.05.550(1). Enforcement notes only that the Licensee has never denied the violation
21 charged actually occurred, and has demonstrated no interest in taking responsibility for this
22 violation. Additionally, if the Licensee does intend to seek judicial review of this matter, they
23 may petition the superior court for a stay at the time of that filing. RCW 34.05.550(3).

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III. CONCLUSION

For the foregoing reasons, Enforcement respectfully requests that Initial Order in this matter be sustained.

DATED this 17 day of November, 2009.

ROBERT M. MCKENNA
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**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

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

LICENSEE

LICENSE NO. 365465

OAH NO. 2008-LCB-0051

LCB NO. 22,849

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on November 17, 2009, I served a true and correct copy of the *Response to Licensee's Petition for Review* by placing same in the U.S. mail with proper postage affixed to:

Ben Shafton
Caron, Colven, Robison & Shafton, P.S.
900 Washington Street. Ste 1000
Vancouver, WA 98661

DATED this 17th day of November, 2009 at Olympia, Washington.



NICOLE TEETER, Legal Assistant