

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In The Matter Of the Hearing Of:

JOHN F. KLINKERT

14316 11TH PLACE W
LYNNWOOD, WA 98087-6085

AN INDIVIDUAL

TVN: 2A1075A

OAH NO. 2011-LCB-0027

LCB NO. T-537

FINAL ORDER OF THE BOARD

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

1. On May 16, 2011, the Board issued a Complaint alleging that on March 16, 2011, the above-named Individual sold/supplied tobacco to a person under the age of eighteen (18), contrary to RCW 26.28.080 and is subject to the penalties set out in RCW 70.155.100(3) and (4).
2. A formal hearing was held on August 25, 2011 at the Individual's timely request.
3. At the hearing, the Individual John F. Klinkert appeared and represented himself. Assistant Attorney General Brian Considine represented the Education and Enforcement Division of the Board.
4. On October 24, 2011, Administrative Law Judge Steven C. Smith entered his Findings of Fact, Conclusions of Law and Initial Order in this matter, which affirmed the violation.

5. A Petition for Review of Initial Order was filed by Mr. Klinkert on November 14, 2011.

6. Enforcement's Reply to Individual's Petition for Review was filed by Assistant Attorney General Stephanie Happold on November 23, 2011.

7. The entire record in this proceeding having been reviewed by the Board, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE,

IT IS HEREBY ORDERED that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order for case T-537 is adopted.

IT IS HEREBY FURTHER ORDERED that the Complaint filed in case T-537 is sustained and that the above-named Individual, John F. Klinkert, shall be subject to a monetary penalty of one hundred dollars (\$100.00) due within 30 days of this order. Failure to comply with the terms of this Order will subject the Individual to further disciplinary action.

Payment should be sent to:

**Washington State Liquor Control Board
PO Box 43085
Olympia, WA 98504-3085**

DATED at Olympia, Washington this 27 day of December, 2011.

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster
Ruthanne Kurose Linda Carroll
per telephonic approval
Chun

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

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

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

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

RCW 34.05.010(19).



Washington State
Liquor Control Board

December 28, 2011

John F. Klinkert, An Individual
14316 11th Place W
Lynnwood, WA 98087-6085

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

RE: Final Order of the Board
LCB No. T-537
OAH No. 2011-LCB-0027
Tobacco Violation Notice No. 3A1075A/ 31195

Dear Parties:

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

The applicable monetary penalty is due by **January 27, 2012**. The address for payments is WSLCB, P.O. Box 43085, Olympia, WA 98504-3085. Please label the check with your License Number and Administrative Violation Notice Number listed above

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

Sincerely,

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Tukwila and Seattle Enforcement and Education Divisions, WSLCB
Teresa Young, Tobacco Violations Coordinator, WSLCB

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3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 JOHN F. KLINKERT
6 14316 11TH PLACE W
7 LYNNWOOD, WA 98087-6085

8 AN INDIVIDUAL

9 TVN NO. 3A1075A / 31195

LCB NO. T-537
OAH NO. 2011-LCB-0027

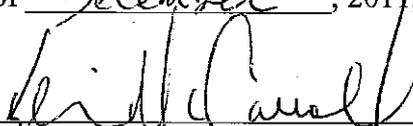
DECLARATION OF SERVICE BY
MAIL

10
11 I certify that I caused a copy of the FINAL ORDER OF THE BOARD in the above-
12 referenced matter to be served on all parties or their counsel of record by US Mail Postage
13 Prepaid via Consolidated Mail Service for Licensees; by Campus Mail for the Office of
14 Attorney General, on the date below to:

15
16 JOHN F. KLINKERT, AN INDIVIDUAL
17 14316 11TH PLACE W
18 LYNNWOOD, WA 98087-6085

STEPHANIE HAPPOLD, ASSISTANT
ATTORNEY GENERAL, GCE DIVISION
OFFICE OF THE ATTORNEY GENERAL
MAIL STOP 40100

19
20 DATED this 28th day of December, 2011, at Olympia, Washington.

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22 
23 Kevin McCarroll, Adjudicative Proceedings Coordinator

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DECLARATION OF SERVICE BY
MAIL

1

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

OCT 28 2011

**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD
(Licensing and Regulation Division)**

Liquor Control Board
Board Administration

In The Matter Of:

JOHN F. KLINKERT, AN INDIVIDUAL,

RESPONDENT.

OAH Docket No. 2011-LCB -0027
LCB No. T-537

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND INITIAL ORDER

1. STATEMENT OF THE CASE:

Hearing

1.1 On March 24, 2011, the Washington State Liquor Control Board (Agency or LCB) issued a written Notice of Board Action on Tobacco Violation (citation) to Respondent John F. Klinkert (Respondent or Mr. Klinkert) for alleged violation of RCW 26.28.080 (sale or supply of tobacco product to a person under the age of 18 years). Respondent requested an administrative hearing to contest the citation.

1.2 On May 16, 2011, LCB issued a written complaint against Respondent also alleging violation of RCW 26.28.080 (sale or supply of tobacco product to a person under the age of 18 years), in furtherance of enforcement of the citation.

1.3 On August 25, 2011, in response to Mr. Klinkert's request for hearing, and pursuant to RCW 70.155.100(3)(4) and (8), 34.05 RCW, and 10-08 WAC, Administrative Law Judge (ALJ) Steven C. Smith conducted an electronically recorded telephone hearing in this matter from the Office of Administrative Hearings (OAH), 949 Market St., Suite 500, Tacoma, WA 98402. The hearing record was closed August 25, 2011.

Issues for Hearing

1.4 Issue One: Did John F. Klinkert violate Washington law as alleged in the May 16, 2011 Complaint of the Washington Liquor Control Board; specifically, that on or about March 16, 2011, Mr. Klinkert sold/supplied tobacco to a person under the age of 18 years, contrary to RCW 26.28.080, and is therefore subject to the penalties set out in RCW 70.155.100(3) and (4)?

1.5 Issue Two: If Issue One were determined against the interests of Mr. Klinkert, what would be the appropriate penalty under Washington law?

Initial Order Summary

1.6 Issue One: Respondent John F. Klinkert violated Washington law as alleged in the complaint in that, on or about March 16, 2011, Mr. Klinkert sold tobacco to a person under the age of 18 years, contrary to RCW 26.28.080. This was Mr. Klinkert's second violation of RCW 26.28.080.

1.7 Issue Two: Because this was Mr. Klinkert's second violation of RCW 26.28.080, he is liable for and shall pay a penalty of \$100 to the Liquor Control Board pursuant to RCW 70.155 .100 (3) and (4)(a).

Appearances and Representation

1.8 The Liquor Control Board appeared through and was represented by Assistant Attorney General Brian Considine. Respondent John F. Klinkert appeared *pro se* and thereby exercised his right of self-representation (Note: At the time of hearing, Mr. Klinkert was an inactive attorney from another state.)

Witnesses

1.9 The following witnesses appeared for testimony, but, due to stipulations reached by the parties on the record, only Respondent testified (Respondent was sworn prior to giving testimony); the testimony of Respondent was considered by the ALJ:

Sergeant Dee Johnson, Seattle LCB Enforcement Officer; Fel Pajimula, [REDACTED] (Minor); Amy Tomtam; and, Respondent John F. Klinkert.

Exhibits

1.10 Unless otherwise indicated, the following exhibits were offered and admitted into evidence on behalf of LCB, without objection from Respondent; each was considered by the ALJ:

1. Administrative Violation Notice No. 2A1075A/31195 (redacted to omit personal information) (2 pages);
2. Department of Health/Clark County Public Health Youth Tobacco Prevention Program Compliance Check Data Reporting (redacted to omit personal information) (1 page);

3. Photographs of Minor Investigative Aide; Receipt; and Pack of Camel Cigarettes taken on March 16 2011 (1 page);
4. Redacted Certified Copy of Intermediate License for [REDACTED] (DOB: 02/22/1994) (2 pages);
5. Video Surveillance of Walgreens Store Number 4157 from March 16, 2011 (Video initially identified in Agency's exhibit list, apparently in anticipation of its production by Respondent's former employer; at hearing, AAG Considine advised ALJ, not produced to Agency, despite requests for same. Accordingly, video deemed withdrawn as an Agency exhibit.);
6. Certified Copy of Tobacco Violation History for John Klinkert (redacted to omit personal information) (9 pages); and,
7. Copy of Electronic Journal Report from March 16, 2011 and from January 26, 2011 (2 pages: page 1 admitted without objection; page 2 withdrawn by LCB on record).

1.11 Unless otherwise indicated, the following exhibits were offered and admitted into evidence on behalf of Respondent John F. Klinkert, without objection from the Agency; each was considered by the ALJ:

- A. Audio Cassette Labeled June 9, 2011 ESD OAH Hearing for John F. Klinkert (unemployment) 30-11-14358 (1 cassette). (Withdrawn By Respondent on Record);
- B. Washington State Department of Health Form "Youth Tobacco Prevention Program Compliance Check Data Reporting" (1 page);
- C. Electronic Journal Report (1 page); and,
- D. Blank Page-Place Holder (No Exhibit).

Non-Evidentiary Documents Received And Considered By The ALJ

1.12 The following non-evidentiary documents were received and considered:

1. Education Enforcement Division's [Agency's] Hearing Brief and Witness and Exhibit List;

2. Education Enforcement Division's [Agency's] Hearing Brief and Amended Witness and Exhibit List;
3. John F. Klinkert's Hearing Brief;
4. [Respondent] John F. Klinkert's Motion to Deny Jurisdiction and Motion to Construe RCW 70.155.090 Reasonably;
5. Enforcement's [Agency's] Response to Individual's [John F. Klinkert's] Motions; and,
6. Letter, August 22, 2011 from Respondent Klinkert objecting to Agency's August 19, 2011 Amended Witness and Exhibit List as to prospective witness Amy Tomtam and above-described Agency Exhibit No. 7 (Copy of Electronic Journal Report, etc.).

2. PREHEARING MOTIONS:

Motion to Deny Jurisdiction

2.1 At a prehearing conference, Respondent requested that the Administrative Law Judge declare RCW 70.155.100 unconstitutional. The request was denied with the ALJ explaining to Respondent administrative law judges in Washington do not have jurisdiction to declare statutes unconstitutional. As candidly acknowledged by Respondent, his Motion to Deny Jurisdiction was an attempt to overcome his unsuccessful constitutional attack on the statute by having the ALJ re-characterize the civil penalty statute (RCW 70.155.100) as a criminal statute and, accordingly, determine that OAH had no jurisdiction. In support of his Motion to Deny Jurisdiction, Respondent argued that because the applicable penalties set out in RCW 70.155.100 are based upon violation of RCW 26.28.080 which declares such violation to be a "gross misdemeanor", this case is a criminal matter for which he is constitutionally entitled to a jury trial in the proper court.

2.2 The Agency opposed the motion by contending that, "Title 70.155 RCW is clear that the Liquor Control Board is the agency responsible for the civil enforcement of Washington's tobacco laws. RCW 70.155.110. The legislature also is clear that the Administrative Procedures Act (APA) controls all civil proceedings held under Title 70.155 RCW. RCW 70.15 5.100 (8). The Office of Administrative Hearings is the agency responsible for conducting administrative hearings for the Liquor Control Board. See RCW 34.05.425; RCW 34.12.040; WAC 314-42." (Enforcement's [Agency's] Response to Individual's [John F. Klinkert's] Motions)

2.3 After consideration of the authorities and arguments presented by the parties, it was determined that this is a civil enforcement matter properly before the Office of Administrative Hearings; not a criminal matter. OAH jurisdiction is clear from the foregoing authorities. Therefore, Respondent's Motion to Deny Jurisdiction was **DENIED**.

Motion to Construe RCW 70.155.090 Reasonably

2.4 By this Motion, Respondent requested the ALJ to "... Interpret... RCW 70.155.090 reasonably, so as to rule that a cashier's inadvertent one-digit mis-keying of a minor's eight-digit birthdate as shown on her driver's license, which was requested and used by the cashier, does not amount to a violation of RCW 26.2 8.080."

2.5 After consideration of the authorities and arguments presented by the parties, it was determined that Respondent's motion sought the ALJ's order that the ALJ act reasonably in the construction of the applicable statute, and that the ALJ determine in advance of the evidence how the statute should be construed in the event then as yet unheard evidence were to be produced. Insofar as the motion sought an order that the ALJ properly undertake the obligations of his office, the motion was inappropriate. In the event the Respondent were to determine that the ALJ erred, then Respondent's remedy would be further appeal; therefore, this portion of the motion was **DENIED**.

2.6 As to the construction of the statute based on a supposition of what evidence might be presented, the motion was premature. Therefore, Respondent's Motion to Construe RCW 70.155.090 Reasonably was **DENIED**, **without prejudice** as to Respondent's renewal of the motion at the conclusion of the evidentiary portion of the hearing.

Respondent Klinkert's Objection to Agency's August 19, 2011 Amended Witness and Exhibit List Re Prospective Witness Amy Tomtam and Addition of Agency Exhibit No. 7 (Copy of Electronic Journal Report, etc.)

2.7 This motion by Respondent was ambiguous; accordingly, the ALJ engaged Mr. Klinkert in a discussion to determine the intent of this motion. That discussion revealed he believed Ms. Tomtam to be biased against him for which circumstance he sought either to preclude her testimony or to engage her in general *voir dire* (questioning) prior to her anticipated testimony on behalf of the Agency. Respondent also stated that he had no objection to the admission of the Agency's Exhibit No. 7 which had been added to the exhibit list by way of the subject amendment

2.8 After consideration of Respondent's statements regarding the Agency's Exhibit No. 7, Respondent's objection to said exhibit was deemed withdrawn. As regarded Respondent's contention he should be allowed to *voir dire* the Agency's witness generally as to her alleged bias, in advance of the direct questioning by the Agency, or to preclude her testimony altogether, it was explained to the Respondent that he would have an opportunity to question the witness by way of cross-examination. Further, should he believe such was warranted, he would have the opportunity in his closing argument to seek discount of her credibility.

2.9 Therefore, insofar as the objection sought the preclusion of testimony by Ms. Tomtam, it was **OVERRULED**; insofar as it was actually a motion to *voir dire* the witness, it was **DENIED**.

3. **FINDINGS OF FACT:**

Based on a preponderance of evidence, I make the following Findings of Fact:

Jurisdictional Facts

3.1 On March 24, 2011, LCB issued a written Notice of Board Action on Tobacco Violation (citation) to Respondent John F. Klinkert for violation of RCW 26.28.080 (sale or supply of tobacco product to a person under the age of 18 years). Respondent timely requested an administrative hearing to contest the citation. (Ex. 1.)

3.2 On May 16, 2011, in furtherance of enforcement of the citation, LCB issued a written complaint against Respondent also alleging violation of RCW 26.28.080 (sale or supply of tobacco product to a person under the age of 18 years). (Complaint.)

Alleged Sale of Tobacco to Person Under Age 18 Years

3.3 At all herein relevant times, Respondent John F. Klinkert was a service clerk who performed the duties of cashier at Walgreens Pharmacy, store number 4751. (On-the-Record Stipulation of the Parties; hereinafter, "Stipulation.")

3.4 On March 16, 2011, at approximately 4:15 PM, the Washington Department of Health conducted a tobacco compliance check at Walgreens Pharmacy, store number 4751. (Stipulation.)

3.5 On March 16, 2011, while acting in his capacity as a Walgreens' cashier,

Respondent Klinkert sold tobacco products (specifically, a package of Camel cigarettes for \$6.67) to a minor child, then below the age of 18 years. The minor child has been identified as [REDACTED] (Stipulation and Ex's. 3 & 4.)

3.6 Immediately prior to the sale of tobacco products to the minor child, Respondent requested, and the minor child presented Respondent with, a true and correct Washington [Driver] Intermediate License that belonged to the minor child. The driver license presented a clear, color photograph of the minor child next to which was the statement "Age 18 On 02-22-2012." Respondent viewed the License, noted the minor's date of birth of 02-22-1994, then erroneously keyed the minor's date of birth into his assigned cash register as "02-22-1984", rather than using the correct year of 1994. (Stipulation and Ex's. 3, 4 & 5.)

3.7 As a result of Respondent having keyed the wrong birth year into his cash register, the cash register approved the tobacco sale, notwithstanding that the purchaser was a minor child. (Stipulation and Ex's. 3, 4 & 5.) Respondent contended that because he mistakenly keyed the birth year as 1984, rather than 1994, his inadvertence was excusable.

3.8 Respondent's contention was not credible because, without regard to the mistaken keying, the date of the tobacco sale was earlier than the date stated on the Washington [Driver] Intermediate License by which the minor child would have reached the age of 18 years. Therefore, Respondent Klinkert knew, or should have known, that the tobacco purchaser was under the age of 18 years at the time of the sale. (Stipulation and Ex's. 3 & 4.)

Prior Violation of RCW 26.28.080 (Sale of Tobacco to Minor)By Respondent

3.9 On January 26, 2011, Respondent was cited for sale of a tobacco product to a different minor child. Respondent did not oppose the citation; rather, he paid the assessed sanction of \$50.00. (Stipulation and Ex. 6.)

4. CONCLUSIONS OF LAW

Based on the above Findings of Fact, I make the following Conclusions of Law:

Jurisdiction

4.1 Respondent was issued a citation for violation of RCW 70.155.100 from which he appealed by requesting a formal administrative hearing. Accordingly, OAH has jurisdiction under RCW 70.155.100(3)(4) and (8), 34.05 RCW, and 10-08 WAC.

Sale of Tobacco to Person Under Age 18 Years

4.2 A person who is found to have violated RCW 26.28.080 can be penalized for selling tobacco to a minor under Chapter 70.155 RCW. RCW 26.28.080 provides that every person who sells or gives, or permits to be sold or given to any person under the age of 18 years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of gross misdemeanor.

4.3 RCW 70.15 5.100 states:

“(3) The liquor control board may impose a monetary penalty upon any person other than a licensed cigarette retailer if the liquor control board finds that the person has violated RCW 26.28.080 ... and

(4) The monetary penalty that the liquor control board may impose based upon one or more findings under subsection (3) of this section may not exceed the following:

(1) For a violation of RCW 26.28.080 or 70.155.020, fifty dollars for the first violation and one hundred dollars for each subsequent violation.”

4.4 On or about March 16, 2011, in his capacity as a cashier for Walgreens Pharmacy, Respondent was provided with the true and correct Washington [Driver] Intermediate License that belonged to the minor child who presented it to him in connection with her anticipated purchase of a package of cigarettes. The driver license displayed a clear, color photograph of the minor child next to which was the statement “Age 18 On 02-22-2012.” Respondent viewed the License and thereby knew, or should have known, that inasmuch as March 16, 2011 was almost a year in advance of the stated age 18 years date, the prospective purchaser was in fact a minor child. Respondent's actual, or attributed, knowledge was independent of his contended reliance on the computation of his assigned cash register in which he entered the erroneous birth year.

4.5 Despite his knowledge that his prospective purchaser was a minor below the age of 18 years, Respondent sold the minor a package of Camel cigarettes. Accordingly, respondent violated Washington law as set out in the foregoing authorities and is subject to monetary penalty. Because this was Respondent's second violation, the appropriate penalty is \$100.00.

5. INITIAL ORDER

Based on the foregoing Conclusions of Law, IT IS ORDERED:

5.1 Respondent John F. Klinkert violated Washington law as alleged in the complaint in that, on or about March 16, 2011, Mr. Klinkert sold tobacco to a person under the age of 18 years, contrary to RCW 26.28.080.

5.2 This was Respondent Klinkert's second violation of RCW 26.28.080; therefore, he is liable for, and shall pay, a penalty of \$100 to the Liquor Control Board pursuant to RCW 70.155 .100 (3) and (4)(a).

5.3 The Liquor Control Board's March 16, 2011 Notice of Board Action on Tobacco Violation and subsequent Complaint issued against Respondent Klinkert are **AFFIRMED**.

Signed and Issued at Tacoma, Washington on October 24, 2011.



Steven C. Smith
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO PARTIES OF FURTHER APPEAL RIGHTS - READ CAREFULLY

Petition for Review of Initial Order

Either the licensee or permit holder, individual or the assistant attorney general may **file a petition for the review of the initial order with the Liquor Control Board within twenty (20) days of the date of service of the initial order.** RCW 34.05.464. WAC 10-08-211 and WAC 314-42-095.

The petition for review must:

- (i) Specify the portions of the initial order to which exception is taken;
- (ii) Refer to the evidence of record which is relied upon to support the petition; and

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

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

Address for filing a petition for review with the Board:

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

Final Order and Additional Appeal Rights

The administrative record, the initial order, any petitions for review, and any replies filed by the parties will be circulated to the board members for review. WAC 314-42-095(3).

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten days of the service of a final order, any party may file a petition for reconsideration with the board, 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 (Washington Administrative Procedure Act).

Certificate of Service – OAH Docket No. 2011-LCB-0027

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Address: John F. Klinkert 14316 - 11th Place W. Lynnwood, WA 98087-6085	
Address: Brian Considine Ruth Ammons Assistant Attorneys General Office of the Attorney General PO Box 40100 Olympia, WA 98504-0100	
Address: Washington State Liquor Control Board Attention: Kevin McCarroll, 3000 Pacific Avenue, PO Box 43076 Olympia, Washington 98504-3076	
Address:	
Address:	
Address:	

Date: October 24, 2011



SC Smith
Office of Administrative Hearings

RECEIVED

NOV 14 2011

November 10, 2011

Liquor Control Board
Board Administration

Washington State Liquor Control Board
Attention: Kevin McCarroll
300 Pacific Avenue, PO Box 43076
Olympia, WA 98504-3076

Re: Petition for Review of Initial Order:
In the matter of JOHN F. KLINKERT,
an individual, Respondent

OAH Docket No. 2011-LCB-0027
LCB No. T-537

Dear Review Board:

This is my petition for review of Administrative Law Judge Steven C. Smith's "Findings of Fact, Conclusions of Law, and Initial Order" (the "Initial Order") issued on October 24, 2011 after an August 25, 2011 telephone hearing.

I object to the following portions of the Initial Order:

Paragraphs 1.6 and 5.1, Paragraph 2.3, Paragraph 2.5, Paragraph 2.6,
Paragraph 3.8, Paragraph 4.2, Paragraph 4.4, Paragraph 4.5,
Paragraphs 1.7 and 5.2

Although I present my objections sequentially according to the numbered paragraphs in ALJ Smith's Initial Order, you could probably group all my objections into two categories: (1) my objections to ALJ Smith's finding on the merits, and (2) my objection to the jurisdiction claimed by the Washington State Liquor Control Board or the Office Of Administrative Hearings to decide this case. That is, I argue that (1) I am not guilty beyond a reasonable doubt (which is the proper quantum of proof) and (2) neither ALJ Smith nor the LCB has jurisdiction to decide this case.

FACTUAL BACKGROUND

About 4:15 p.m. on March 16, 2011 the King County Health Department ran a tobacco sting (called a “compliance check”) at Walgreens drugstore No. 4157 where I was working as a cashier. A minor woman, a decoy for the sting, came to my cash register and asked to buy a pack of Camels. Because she looked young, I asked for her ID. She presented her driver’s license and I keyed her birth date into my cash register. Because I inadvertently punched in “02-22-1984” as her birth date instead of “02-22-1994”, the correct birth date on the license, my cash register allowed the sale. On March 24, 2011 the Washington State Liquor Control Board issued me a written citation for having violated RCW 26.28.080 (selling tobacco to a minor). I requested a hearing, which was held by telephone on August 25, 2011 and was conducted by ALJ Steven C. Smith of the Office of Administrative Hearings. ALJ Smith issued his decision, the Initial Order, on October 24, 2011. (I base this factual summary mostly on paragraphs 1.3 and 3.1 – 3.7 of the Initial Order.)

ARGUMENTS

1. As to Paragraphs 1.6 and 5.1, I will make my broadest legal arguments here. Later when I object to other paragraphs of the Initial Order, I might repeat some of these arguments.

Both paragraphs 1.6 and 5.1 actually state the conclusion, final decision, or the verdict, of the Initial Order without providing reasoning for the conclusion. The ALJ’s conclusion in Paragraph 1.6 is that I “violated Washington law” contrary to RCW 26.28.080 by selling tobacco to a minor under the age of 18, and Paragraph 5.1 states the same.

Sections a. through l., and section o. below deal with the ALJ’s (and thus the OAH’s and LCB’s) lack of jurisdiction to decide this case

a. According to RCW 9A.20.010, Washington State has five types of crime: Class A felony, Class B felony, Class C felony, misdemeanor, and gross misdemeanor.

“RCW 9A.20.010 Classification and designation of crimes.

- (1) Classified felonies: (a) The particular classification of each felony defined in Title 9A RCW is expressly designated in the section defining it.
(b) For purposes of sentencing, classified felonies are designated as one of three classes, as follows:
 - (i) Class A felony; or
 - (ii) Class B felony; or
 - (iii) Class C felony.

- (2) Misdemeanors and Gross Misdemeanors. (a) Any crime punishable by a fine of not more than one thousand dollars, or by imprisonment in a county jail for not more than ninety days, or by both such fine and imprisonment is a misdemeanor. Whenever the performance of any act is prohibited by any statute, and no penalty

for the violation of such statute is imposed, the committing of such act shall be a misdemeanor.

(b) All crimes other than felonies and misdemeanors are gross misdemeanors.”

b. Violation of RCW 26.28.080, the crime with which I am charged, is expressly made a gross misdemeanor.

“RCW 26.28.080 Selling or giving tobacco to minor – Belief of representative capacity, no defense – Penalty.

Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor....

c. Washington’s Administrative Procedures Act, RCW 34.05 -- from which the Office of Administrative Hearings (OAH) actually derives its authority to hear cases by virtue of the definitions in RCW 34.12 (in the definition section, RCW 34.12.020) -- contains no authorization for the OAH or LCB to conduct jury trials in criminal cases. At least I have not been able to find any such authorization.

d. Article I, Section 22 of the Washington Constitution states that all persons charged with a crime are entitled to a jury trial:

“SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.....” [Emphasis added.]

e. The Washington Supreme Court case interpreting this section of the state constitution says that jury trials are required even for misdemeanors, City of Pasco v. Mace, 98 Wash.2d 87, 653 P.2d 618 (1982), which in Washington state impose a maximum potential imprisonment of only 90 days, according to RCW 9A.20.021

f. RCW 9.92.020 makes gross misdemeanors like RCW 26.28.080, where no punishment is prescribed in the statute, punishable by a maximum potential imprisonment of 364 days.

g. The Washington state constitution outranks any other Washington legal authority; in particular it outranks any statute such as RCW 70.155.100 that purports to grant jurisdiction over tobacco crimes to the Administrative Procedures Act.

h. Not only Article I, Section 22 of the Washington Constitution, but also the Sixth Amendment to the U. S. Constitution requires a jury trial in criminal cases.

I quote the relevant portion of the Sixth Amendment:

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....”

i. The Sixth Amendment’s requirement of a jury trial in criminal cases where the maximum potential imprisonment is at least six months, has been made applicable to the states by the U. S. Supreme Court. Duncan v. Louisiana, 391 U. S. 145 (1968). Thus, the Sixth Amendment of the U. S. Constitution requires a jury trial in Washington state for gross misdemeanors.

j. The U. S. Constitution (and therefore the Sixth Amendment) is the supreme law of the land, i.e., its authority outranks any other legal authority, McCulloch v. Maryland, 4 Wheat. 316, 17 U.S. 9, 4 L.Ed. 579 (1819). This principle is acknowledged in the Washington state constitution, Article I, section 2: “The Constitution of the United States is the supreme law of the land.”

k. Thus the rights granted to persons by the Washington state constitution and the U. S. Constitution outrank any purported infringements on those rights by Washington statutes, in particular by any statute such as RCW 70.155.100 that purports to grant jurisdiction over some crimes to the Administrative Procedures Act without explicitly saying so.

l. Therefore neither the OAH nor the LCB has jurisdiction to decide any cases, including this one, which charge a violation of RCW 26.28.080, because a violation is a crime, a gross misdemeanor, and requires a jury trial. Either the Liquor Control Board, or the King County Department of Health (who ran the sting) should have referred the alleged violation to the Seattle City Attorney or the King County Prosecuting Attorney for prosecution.

m. I was charged with violating RCW 26.28.080, which violation is classified as a gross misdemeanor, a crime. RCW 9A.04.100 states in part:

“RCW 9A.04.100 Proof beyond a reasonable doubt.

(1) Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt....”

Therefore, even though the Administrative Law Judge ruled incorrectly that he had jurisdiction to hear this case, the quantum of proof for which the LCB bore the burden at the hearing should have been “beyond a reasonable doubt.”

n. When ALJ Smith construed RCW 70.155.090, he should have used a “reasonable person” standard, but he did not do so. He never stated what standard he used.

RCW 70.155.090 provides a defense to sellers of tobacco to minors:

“RCW 70.155.090 Age identification requirement.

.....

- (2) It is a defense to a prosecution under RCW 26.28.080 that the person making a sale reasonably relied on any of the officially issued identification as defined in subsection (1) of this section.....”
[Emphasis added]

It seems obvious to me that a cashier’s inadvertent one-digit mis-keying of a minor’s eight-digit birth date as shown on her driver’s license, which was requested and used by the cashier, does not amount to a violation of RCW 26.28.080. I “reasonably relied on” the “officially issued identification” because I used the minor’s driver’s license to type in her birth date but I made a one-digit inadvertent error in my keypunching, and my inadvertent error was also reasonable. The reasonability defense contained in RCW 70.155.090 means that RCW 26.28.080 is no longer a strict criminal liability statute, that is, RCW 70.155.090 permits sellers to make inadvertent errors such as mine, if the error was not intentional and not overly negligent. The evidence at the hearing showed that no rational person could find beyond a reasonable doubt that my error was intentional; it was inadvertent. Thus, even if the OAH and LCB were to have jurisdiction to decide this case (which they don’t), I would not be guilty of violating RCW 26.28.080.

o. During our preliminary telephone conference on June 29, 2011, when I told Administrative Law Judge Steven C. Smith that I thought he should declare RCW 70.155.100 unconstitutional, he said that administrative law judges in Washington don’t have the authority to declare state statutes unconstitutional. So instead of asking for a declaration of unconstitutionality, I requested the Administrative Law Judge who hears this case simply to declare that the Office of Administrative Hearings has no jurisdiction to adjudicate any claim or charge by the Washington State Liquor Control Board that I (or anyone else, for that matter) violated RCW 26.28.080. Stated another way, the Administrative Law Judge should simply have denied, as you the Review Board must deny, that neither the Office of Administrative Hearings nor the Liquor Control Board has jurisdiction to hear this case, thereby avoiding the need to declare RCW 70.155.100 unconstitutional. (Also see 2. immediately below.)

2. As to Paragraph 2.3, ALJ Smith is wrong in calling this a civil enforcement matter. RCW 26.28.080 says in part “Every person who sells or gives, or permits to be sold or given to any person under the age of eighteen years any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form is guilty of a gross misdemeanor.” [Emphasis added] No Washington statute modifies in any way the classification of the violation of the statute as a crime, a gross misdemeanor. Yet ALJ Smith says in Paragraph 2.3, using the passive voice, that “it was determined that this is a civil enforcement matter [Emphasis added],” which means that he, ALJ Smith, determined that this action by the LCB against me is a civil enforcement matter. But he doesn’t say how he determined it, i.e., what reasoning he used to change the alleged violation

from a crime into a “civil enforcement matter.” Maybe in some magical way a statute like RCW 70.155.100 that purports to invoke the Administrative Procedures Act can transform a crime into a civil enforcement matter, but if so, ALJ Smith never explained how. And his failure to explain must have been deliberate; he knew he would be unable to explain, and that’s why he used the passive voice.

Therefore, violation of RCW 26.28.080 is still a crime and I am entitled to a jury trial pursuant to Article I, sections 21 and 22 of the Washington state constitution and the Sixth Amendment of the U. S. Constitution. Neither the Office of Administrative Hearings nor the Liquor Control Board has jurisdiction to decide this case or, so far as I know, any criminal case.

3. As to Paragraph 2.5, ALJ Smith pointed out that because one of my prehearing motions “sought [his] order that [he] act reasonably in the construction of the applicable statute, and [that I] sought an order that [he] properly undertake the obligations of the office....”, he denied “this portion of the motion...” I have only myself to blame for really sloppy wording. I was in too much of a hurry to finish writing the motion; I have no excuse for my carelessness. What I meant was that the ALJ should use a “reasonable person” standard in interpreting the defense offered by RCW 70.155.090 to persons who inadvertently sell tobacco to minors even after they have requested official ID from the minor.

4. As to Paragraph 2.6, ALJ Smith’s calling my motion “premature” because I requested him to construe RCW 70.155.090 ahead of time “based on a supposition of what evidence might be presented” puzzles me, because my request necessarily had to be made in advance, but I was not asking him to render an interpretation of the statute immediately, i.e., before any evidence was presented. But as I said above in 3., I worded my motion carelessly.

5. As to Paragraph 3.8, ALJ Smith says that my contention (which is that “because [I] mistakenly keyed the birth year as 1984, rather than 1994, [my] inadvertence was excusable”) was not credible “because, without regard to the mistaken keying, the date of the tobacco sale was earlier than the date stated on the Washington [Driver] (sic) Intermediate License by which the minor would have reached the age of 18 years.” He adds that “[t]herefore Respondent Klinkert knew, or should have known, that the tobacco purchaser was under the age of 18 years at the time of the sale.”

First, because this is a criminal violation, the quantum of proof for which the LCB bears the burden of proof and which ALJ Smith as the trier of fact should have used and which you the Review Board should use now, is “beyond a reasonable doubt.” ALJ Smith does not state in his Initial Order what quantum he is using, “beyond a reasonable doubt” (the quantum in criminal cases) or “by a preponderance of the evidence” (the quantum in civil cases – anything greater than 50% of the weight of the evidence). Nor does he ever in his Initial Order even discuss the quantum of proof issue, except perhaps in Paragraph 2.3 by implication when he calls this case a “civil enforcement matter” which would invoke a “preponderance of the evidence” quantum. However, as I have shown, ALJ Smith is required to use the “beyond a reasonable doubt” quantum.

Second, no rational person could find beyond a reasonable doubt that I “should have known that the tobacco purchaser was under the age of 18 years at the time of the sale. Because there was no testimony at the hearing about this tobacco sale except from me, my testimony was uncontradicted except perhaps silently by the Exhibit 4, the driver’s license. However, you, the Review Board, would need to speculate or make some assumptions about what I knew or should have known, based on Exhibit 4, as ALJ Smith seems to have done here. I never really noticed the phrase on the driver’s license that said “Age 18 On 02-22-2012” which would require me to stop and ask myself what date today is and what year this is (and therefore I didn’t testify about that phrase). Instead I simply typed the birth date into the cash register computer, as I always do, because that is a much more reliable check on birth date than the combination of (1) my memory or anyone’s memory of the current date and year with (2) the phrase “Age 18 On 02-22-2012”, assuming that you key in the birth date correctly. Also, notice when you examine Exhibit 4 (the driver’s license) that the birth date comes at the top of the license, before the phrase “Age 18 On 02-22-2012” and is thus the first relevant item to catch your eye; and also: part of the phrase “Age 18 On 02-22-2012” is slightly difficult to see because it blends in with the minor’s photograph. Therefore, for ALJ Smith to say that I should have known that the tobacco purchaser was under 18 is not rational. It should be obvious, upon reflection, to any rational person that I took the most accurate option of verifying the minor’s birth date. Therefore, no rational person could find me guilty beyond a reasonable doubt.

6. As to Paragraph 4.2, ALJ Smith is wrong in saying that “A person who is found to have violated RCW 26.28.080 can be penalized for selling tobacco to a minor under Chapter RCW 70.155.

As ALJ Smith correctly points out in 4.2, violation of RCW 26.28.080 is a gross misdemeanor. As I explained above in my objection to Paragraph 2.3, violation of RCW 26.28.080 is a crime and I am entitled to a jury trial pursuant to Article I, sections 21 and 22 of the Washington state constitution and the Sixth Amendment of the U. S. Constitution. Neither the Office of Administrative Hearings nor the Liquor Control Board has jurisdiction to decide this case or, so far as I know, any criminal case. Therefore, I can not be “penalized for selling tobacco to a minor under Chapter RCW 70.155.”

7. As to Paragraph 4.4, ALJ Smith says, “Respondent viewed the License and thereby knew, or should have known, that inasmuch as March 16, 2011 was almost a year in advance of the stated age 18 years date, the prospective purchaser was in fact a minor child. Respondent’s actual, or attributed, knowledge was independent of his contended reliance on the computation of his assigned cash register in which he entered the erroneous birth year.”

First, in my objection above to Paragraph 3.8, I have already replied to the “knew, or should have known” issue, and I repeat that objection here. Second, as to my actual knowledge, ALJ Smith can’t know what I knew (and certainly not beyond a reasonable doubt), and what little testimony I gave at the hearing only supports my contention that I did not know the purchaser was a minor.

8. As to Paragraph 4.5, first, ALJ Smith's statement that "Accordingly, respondent violated Washington law as set out in the foregoing authorities and is subject to monetary penalty" [emphasis added] depends on the truth of the antecedent clause "Despite his knowledge that his prospective purchaser as a minor below the age of 18 years..." I have shown above that I did not know the "prospective purchaser was a minor". Let me put this another way: There was no evidence at the hearing that justified ALJ Smith, or any rational person, to find beyond a reasonable doubt that I knew the "prospective purchaser was a minor."

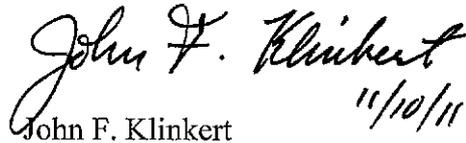
Second, ALJ Smith did not cite any "authorities," i.e., cases; he only cited or quoted from statutes. In his Initial Order he cited no case law at all in opposition to the cases I cited in my briefs and motions.

Third, I did not "violate Washington law" because (1) RCW 70.155.090 provides me a possible defense for my inadvertent sale of tobacco to a minor, and (2) the only valid determination that I violated Washington law must result from a jury trial to which I am entitled by Article I, sections 21 and 22 of the Washington state constitution and the Sixth Amendment of the U. S. Constitution.

I have already addressed (2) in my arguments above in section 1. And I have addressed (1) in my arguments above in sections 5 and 7.

9. As to Paragraphs 1.7 and 5.2, ALJ Smith states that this is my second violation of RCW 26.28.080. This statement is incorrect, because as I have shown above in sections 5, 7 and 8, my actions as a cashier on March 16, 2011 were not a violation at all, so this cannot be a second violation.

Respectfully submitted,


John F. Klinkert 11/10/11

cc: Brian Considine
Ruth Ammons
Assistant Attorneys General
Office of the Attorney General
PO Box 40100
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NOV 23 2011

Liquor Control Board
Board Administration

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

JOHN F. KLINKERT
14316 11th PLACE W
LYNNWOOD, WA 98087-6085,

INDIVIDUAL

NO. LCB NO. T-537
OAH No. 2011-LCB-0027

ENFORCEMENT'S REPLY TO
INDIVIDUAL'S PETITION FOR
REVIEW

The Washington State Liquor Control Board's (Board) Education and Enforcement Division (Enforcement), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and STEPHANIE U. HAPPOLD, Assistant Attorney General, hereby responds (Enforcement's Reply) to JOHN KLINKERT's (Individual) of Lynnwood, Washington, Petition for Review (Petition).

Enforcement asserts that Mr. Klinkert's Petition lacks the force and merit necessary to overcome the reasoned opinion of the Administrative Law Judge (ALJ). The Initial Order (Order) issued by the ALJ is fully supported by the evidence in the record and it should be adopted by the Board.

I. STANDARD OF REVIEW

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

1 reviewing findings of fact, reviewing officers “shall give due regard to the presiding officer’s
2 opportunity to observe the witnesses.” RCW 34.05.464(4).

3 **II. BACKGROUND**

4 On March 24, 2011, Enforcement issued a written Notice of Board Action on Tobacco
5 Violation (“AVN”) to the above-identified Individual alleging that the above-identified
6 individual furnished tobacco to a minor, on or about March 16, 2011. The one hundred dollar
7 penalty reflected in the AVN was based on the Individual’s violation history comprising of one
8 previous violation for selling tobacco to a minor. *See* AVN. On May 16, 2011, the Liquor
9 Control Board issued an administrative complaint based on the above-referenced AVN. The
10 Complaint charged that “on or about March 16, 2011, the above-named Individual,
11 sold/supplied tobacco to a person under the age of eighteen (18), contrary to RCW 26.28.080
12 and is subject to the penalties set out in RCW 70.155.100(3) and (4).” *See* Complaint.

13 The case was heard telephonically by ALJ Steven C. Smith on August 25, 2011. The
14 Parties stipulated to most of the facts at the time of the hearing. Audio Recording, Disc 1,
15 August 25, 2011, John Klinkert, No. T-537, Administrative Hearing (Audio Record, Disc 1), at
16 35:12 – 1:04:26. After a full hearing on the merits, the ALJ entered his Findings of Fact,
17 Conclusions of Law, and Initial Order on October 24, 2011. The ALJ sustained the Board’s
18 complaint and found that the Individual sold/supplied tobacco to a minor. The Individual
19 timely filed exceptions to the ALJ’s Initial Order, and Enforcement now responds to its
20 Petition.

21 **III. INDIVIDUAL’S EXCEPTIONS TO ALJ’S INITIAL ORDER**

22 The Individual takes exception to the Order’s Paragraphs 1.6 and 5.1 and bases his
23 objections on:

- 24 1. The ALJ not providing reasoning for the conclusions made in Paragraphs 1.6 &
25 5.1¹; and

26 ¹ Petition at 2, ¶1.1.

1 2. The ALJ, the Board, and the Office of Administrative Hearings (OAH) lacking
2 jurisdiction to decide the case because it is a crime and ALJ Smith should have
3 used a “reasonable person” standard when construing RCW 70.155.090.²

4 As Paragraphs 1.6 and 5.1 are the Tribunal’s rulings, the ALJ was correct in stating the
5 conclusions and then providing the reasoning for the rulings in the Order’s Finding of Facts
6 and Conclusions of Law. Enforcement will not address this exception any further and will
7 respond to the Individual’s exception based on his claim that the ALJ, the Board, and the OAH
8 lack jurisdiction to decide the case because it is a crime and the ALJ should have used a
9 “reasonable person” standard when construing RCW 70.155.090.

10 **A. The ALJ, the Board, and OAH, have jurisdiction in Liquor Control Board**
11 **cases**

12 Mr. Klinkert incorrectly asserts that the ALJ, the Board, and OAH do not have
13 jurisdiction in this matter. Petition at 2-5. Chapter 70.155 RCW uses unambiguous language
14 in providing the Liquor Control Board responsibility for the civil enforcement of Washington’s
15 tobacco laws. RCW 70.155.110. Specifically, the Liquor Control Board may cite an
16 individual for a civil administrative violation if he/she sells tobacco products to a minor.
17 RCW 70.155.100(3). The Liquor Control Board may also impose a one hundred dollar (\$100)
18 monetary penalty for a second violation of selling tobacco products to a minor.
19 RCW 70.155.100(4)(a).

20 The Legislature is also clear that the Administrative Procedure Act (APA) controls all
21 civil proceedings held under chapter 70.155 RCW. RCW 70.155.100(8). The Office of
22 Administrative Hearings is the agency responsible for conducting administrative hearings for
23 the Liquor Control Board under the APA. *See* RCW 34.05.425; RCW 34.12.040; WAC 314-
24 42. Therefore, the Office of Administrative Hearings and its ALJs have the statutory authority
25 to conduct a civil administrative hearing in this matter. The Individual’s Petition is without
26 merit and the Administrative Law Judge’s Order should be adopted by the Board.

² Petition at 2-5.

1 **B. Mr. Klinkert is not entitled to a defense under RCW 70.155.090**

2 Mr. Klinkert incorrectly asserts that he is entitled to a defense under
3 RCW 70.155.090(2).³ During the August 25, 2011, hearing, both parties stipulated that a
4 minor investigative aide for the Department of Health purchased cigarettes from Mr. Klinkert
5 on March 16, 2011. Audio Record, Disc 1 at 36:06 – 57:30. Additionally, when the minor
6 investigative aide showed Mr. Klinkert her officially issued identification, the aide’s
7 identification specifically indicated that she was “age 18 on 02-22-2012” and her date of birth
8 was “02-22-1994.” *Id.* Therefore, Mr. Klinkert could not have reasonably relied upon the
9 minor investigative aide’s officially issued identification because it clearly indicated that she
10 was seventeen years old when she purchased cigarettes on March 16, 2011. Additionally, Mr.
11 Klinkert failed in exercising due diligence under RCW 70.155.090(2) because he had the
12 minor’s identification, yet he still incorrectly entered her date of birth. Petition at 5; Audio
13 Record, Disc 1 at 36:30 – 57:30.

14 Last, RCW 26.28.080 and RCW 70.155.100 are clear—a person is prohibited from
15 selling tobacco to a person under the age of eighteen (18). The statutes do not use the words
16 “knowingly” or “intend” and the violation is the *sale* of tobacco and not the intent of the seller.
17 Therefore, the statute creates a strict liability on licensees and their employees and they have
18 committed a violation if they are found to have sold tobacco to a person under the age of
19 eighteen (18). *See State v. Moser*, 98 Wash. 481, 482, 167 P. 1101 (1917) (if a person sold
20 liquor to minors, “he is guilty of the crime charged, irrespective of his intention, knowledge, or
21 belief ...”); *State v. Catalino*, 118 Wash. 611, 612-13, 204 P. 179 (1922) *overruled on different*
22 *grounds by State v. Missetrich*, 124 Wash. 470, 215 P. 13 (1923). *See also State v. Nicolls*, 61

23
24
25 ³ RCW 70.155.090(2) states it is a defense to a prosecution under RCW 26.28.080 that the person making a sale
26 reasonably relied on any of the officially issued identification as defined in subsection (1) of this section. The liquor control
board shall waive the suspension or revocation of a license if the licensee clearly establishes that he or she acted in good faith
to prevent violations and a violation occurred despite the licensee's exercise of due diligence.

1 Wash. 142, 145, 112 P. 269 (1910); *State v. McCathern*, 211 Or. App. 171, 177-180, 154 P.3d
2 130 (2007).

3 Accordingly, the ALJ correctly interpreted the above-mentioned governing statutes
4 involving the sale of tobacco to a minor and found a violation had occurred. Therefore, the
5 ALJ's Order should be adopted by the Board.

6 **IV. INDIVIDUAL'S EXCEPTIONS TO ALJ'S DENIAL OF INDIVIDUAL'S**
7 **MOTIONS**

8 The Individual takes exception to Paragraphs 2.3, 2.5, and 2.6 of the ALJ's Initial
9 Order that denied Mr. Klinkert's various motions. Petition at 5 - 6.

10 **A. Individual's Exception to Paragraph 2.3**

11 Mr. Klinkert takes exception to the Administrative Law Judge calling this a civil
12 enforcement matter. However, chapter 70.155 RCW is clear that the Liquor Control Board is
13 the agency responsible for civil enforcement of Washington's tobacco laws⁴ and that a tobacco
14 licensee or its employee is subject to civil administrative sanctions if they sell tobacco to a
15 person under the age of eighteen⁵. The Legislature provided unambiguous language in
16 RCW 70.155.100(8) stating the Administrative Procedure Act controls all civil proceedings
17 held under chapter 70.155 RCW. The Office of Administrative Hearings is the agency
18 responsible for conducting the APA administrative hearings for the Liquor Control Board. *See*
19 RCW 34.05.425; RCW 34.12.040; WAC 314-42. Therefore, the OAH has the authority to
20 conduct a civil administrative hearing in this matter. The ALJ's Order was correct in asserting
21 OAH's, the Board's, and his jurisdiction over the matter and denying Individual's Motion to
22 Deny Jurisdiction.

23 **B. Individual's Exception to Paragraphs 2.5 and 2.6**

24 Individual takes exception to the ALJ's rulings in the Order's Paragraphs 2.5 and 2.6.
25 Mr. Klinkert bases these exceptions on his Motion containing "sloppy wording" and being

26 ⁴ RCW 70.155.110.

⁵ *See* RCW 70.155.100.

1 “worded...carelessly.” Petition at 6, ¶ 3-4. However, the ALJ ruled correctly based on the
2 record before the Tribunal. If there had been an error in the Motion’s wording, the Individual
3 should have clarified during the hearing. The record is now closed for the administrative
4 hearing and the Board must rule on what was presented in the record up to closure. The
5 Individual does not get a third chance to present a motion of which he already had two
6 opportunities: the first when he drafted the Motion and the second when he presented it at the
7 hearing. The ALJ was correct in denying the Individual’s Motion.

8 **V. INDIVIDUAL’S EXCEPTIONS TO THE ALJ’S FINDINGS OF FACT⁶**

9 The Individual objects to the Finding of Fact No. 3.8 because the ALJ determined that
10 the Individual’s contention was not credible⁷ and that the ALJ should have used the
11 ‘reasonable doubt’ standard instead of ‘by a preponderance of the evidence.’⁸ However, the
12 Individual’s exceptions to the ALJ’s Finding of Fact are not supported by the evidence or law.

13 “Findings of fact by an administrative agency are subject to the same requirement as
14 are findings of fact drawn by a trial court.” *Weyerhaeuser v. Pierce Licensee*, 124 Wn.2d 26,
15 35-36, 873 P.2d 498 (1994) (quoting *State ex rel. Bohon v. Department of Pub. Serv.*, 6 Wn.2d
16 676, 694, 108 P.2d 663 (1940); *State ex rel. Duvall v. City Coun.*, 64 Wn.2d 598, 602, 392
17 P.2d 1003 (1964)). Formal findings of fact serve multiple purposes. They inform the parties
18 of those portions of the record on which the trier of fact relied in reaching the decision, and the
19 basis for that decision. *Weyerhaeuser*, 124 Wn.2d at 35-36. Factual findings also help to
20 ensure that the trier of fact fully and properly dealt with all of the issues of the case before
21 rendering a decision. *Id.* Finally, they aid in meaningful judicial review of the decision. *Id.*;
22 *Boeing Co. v. Gelman*, 102 Wn. App. 862, 871, 10 P.3d 475 (2000) (citations omitted).

23
24
25 ⁶ Exceptions were only filed for some of the ALJ’s Findings of Fact. Therefore, the Findings not being
26 challenged by the Licensee will not generally be addressed any further and should be adopted by the Board.

⁷ Petition at 6, ¶ 5.1

⁸ Petition at 6, ¶ 5.2

1 Additionally, an administrative law judge is afforded discretion in weighing the
2 evidence. *See Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 605 n.19, 13
3 P.3d 1076 (2000). In weighing the evidence, it is within the province of the administrative law
4 judge to determine issues of witness credibility. *See State v. Carver*, 113 Wn.2d 591, 604; 781
5 P.2d 1308, 789 P.2d 306 (1989); *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*,
6 65 Wn. App. 614, 618, 829 P.2d 217. When reviewing factual findings, the courts generally
7 accept the fact-finder's views regarding the credibility of witnesses and the weight to be given
8 to reasonable but competing inferences. *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn.
9 App. 547, 556, 156 P.3d 232 (2007), *citing Freeburg v. City of Seattle*, 71 Wn. App. 367, 371–
10 72, 859 P.2d 610 (1993); *Fisher Properties, Inc. v. Arden–Mayfair, Inc.*, 115 Wn.2d 364, 369–
11 70, 798 P.2d 799 (1990). The purpose of factual findings is not to restate every fact elicited
12 during the hearing – the transcript of proceedings serves that purpose. “Findings must be made
13 on matters ‘which establish the existence or nonexistence of determinative factual matters ...’.”
14 *Weyerhaeuser*, 124 Wn.2d at 35-36. It is the role of the trier of fact to determine which facts
15 have been established by the evidence. *Hering v. State, Dept. of Motor Vehicles*, 13 Wn. App.
16 190, 192, 534 P.2d 143 (1975).

17 **A. The Individual objects to the ALJ finding the Individual’s contention was not**
18 **credible.**

19 Mr. Klinker objects to Finding of Fact No. 3.8 because the ALJ found the Individual’s
20 contention not credible. Petition at 6, ¶5.1. However, the ALJ is afforded discretion in
21 weighing the evidence and witness credibility. *See Bowers v. Pollution Control Hearings Bd.*,
22 103 Wn. App. 587, 605 n.19, 13 P.3d 1076 (2000). During the August 25, 2011, hearing, both
23 parties stipulated that a minor investigative aide for the Department of Health purchased
24 cigarettes from Mr. Klinkert on March 16, 2011. Audio Record, Disc 1 at 36:06 – 57:30.
25 Additionally, when the minor investigative aide showed Mr. Klinkert her officially issued
26 identification, the aide’s identification specifically indicated that she was “age 18 on 02-22-

1 2012” and her date of birth was “02-22-1994.” *Id.* Therefore, the ALJ’s Finding of Fact No.
2 3.8 is fully supported by the record as Mr. Klinkert knew or should have known that the
3 tobacco purchaser was under the age of 18 years at the time of the sale. ALJ’s Finding of Fact
4 No. 3.8 is based on the administrative record and should be adopted by the Board.

5 **B. The Individual objects to the ALJ not using the reasonable doubt standard.**

6 Mr. Klinkert objects that the ALJ did not use the criminal burden of proof of ‘beyond a
7 reasonable doubt’ when making the factual finding. Petition at 6, ¶5.2. However, chapter
8 70.155 RCW uses unambiguous language in providing that the Liquor Control Board is the
9 agency responsible for the civil enforcement of Washington’s tobacco laws. RCW 70.155.110.
10 Specifically, the Liquor Control Board may cite an individual for a *civil* administrative
11 violation if he/she sells tobacco products to a minor. RCW 70.155.100(3) [emphasis added].
12 The Legislature is also clear that the Administrative Procedure Act (APA) controls all *civil*
13 proceedings held under chapter 70.155 RCW. RCW 70.155.100(8) [emphasis added]. The
14 ALJ does not need to use the criminal burden of proof of beyond a reasonable doubt because it
15 does not apply to the current civil proceedings. Finding of Fact No. 3.8 was within the scope
16 of a civil enforcement hearing and should be adopted by the Board.

17 **VI. LICENSEE’S EXCEPTIONS TO THE ALJ’S CONCLUSIONS OF LAW⁹**

18 **A. Exception to Conclusion of Law No. 4.2.**

19 The Individual takes exception to the ALJ’s Conclusion of Law No. 4.2 by arguing that
20 the ALJ, OAH, and the Board do not have jurisdiction to decide the case. Petition at 7, ¶6.1-
21 6.2. Enforcement previously addressed this argument in its response above. *See*
22 Enforcement’s Reply supra, Pg 3, ¶2-3; Pg 5, ¶3; Pg 8, ¶1. The OAH, its ALJs, and the Board
23 have jurisdiction over this matter. The ALJ’s Conclusion of Law No. 4.2 is fully supported by
24 the record and should be adopted by the Board.

25 _____
26 ⁹ Exceptions were only filed for some of the ALJ’s Conclusions of Law. Therefore, the Conclusions not
being challenged by the Licensee will not generally be addressed any further and should be adopted by the Board.

1 **B. Exception to Conclusion of Law No. 4.4.**

2 The Individual takes exception to Conclusion of Law No. 4.4 by objecting to the ALJ's
3 use of "knew or should have known" and use of "actual knowledge". Petition at 7, ¶7.2.
4 However, the ALJ is afforded discretion in weighing the evidence and witness credibility. *See*
5 *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 605 n.19, 13 P.3d 1076 (2000).
6 During the August 25, 2011, hearing, both parties stipulated that a minor investigative aide for
7 the Department of Health purchased cigarettes from Mr. Klinkert on March 16, 2011. Audio
8 Record, Disc 1 at 36:06 – 57:30. Additionally, when the minor investigative aide showed Mr.
9 Klinkert her officially issued identification, the aide's identification specifically indicated that
10 she was "age 18 on 02-22-2012" and her date of birth was "02-22-1994." *Id.* Mr. Klinkert had
11 actual knowledge of the minor's age because he had her identification in hand and looked at it
12 at the time of purchase. Therefore, the ALJ's Conclusion of Law No. 4.4 is fully supported by
13 the record and should be adopted by the Board, as Mr. Klinkert knew or should have known
14 that the tobacco purchaser was under the age of 18 years at the time of the sale.

15 **C. Exception to Conclusion of Law No. 4.5**

16 The Individual appears to take four exceptions to Conclusion of Law No. 4.5, which
17 are:

- 18 1. The ALJ not using the 'beyond a reasonable doubt' burden of proof¹⁰; and
- 19 2. Individual objecting to the ALJ not citing to any case law¹¹; and
- 20 3. Individual asserting an affirmative defense under RCW 70.155.090¹²; and
- 21 4. That any conclusion of violation must be brought forth under the criminal
22 procedures of Washington State¹³.

23
24
25 ¹⁰ Petition at 8, ¶ 8.1

¹¹ Petition at 8, ¶ 8.2

¹² Petition at 8, ¶ 8.3

¹³ Petition at 8, ¶ 8.3

1 Exceptions 1, 3 and 4 listed above have already been addressed in Enforcement's
2 Reply. *See* Enforcement's Reply supra, Pg 3, ¶2-3; Pg 4, ¶ 1-2; Pg 5, ¶1, 3; Pg 8, ¶1. In
3 response to Exception 2, Enforcement asserts that when issuing the Order, the ALJ cited to
4 proper statutory authority for this proceeding as found in the Revised Code of Washington.
5 There is nothing in the APA stating administrative law judges must cite to case law when
6 issuing Orders for adjudicative proceedings.

7 The ALJ correctly interpreted governing statutes involving the sale of tobacco to a
8 minor and the civil enforcement of the violation. The ALJ's Conclusion of Law No. 4.5
9 should be adopted by the Board.

10 **VII. INDIVIDUAL'S EXCEPTION TO SECOND VIOLATION OF RCW 26.28.080**

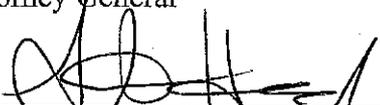
11 Mr. Klinkert takes exception to Paragraphs 1.7 and 5.2 of the ALJ's Initial Order.
12 Petition at 8, ¶ 9. However, the above-mentioned arguments in Enforcement's Reply confirm
13 the ALJ's position and that this is, in fact, a second violation of the Individual selling tobacco
14 to a minor. The ALJ's Initial Order should be adopted by the Board.

15 **VIII. CONCLUSION**

16 The ALJ's Findings of Fact and Conclusions of Law are supported by the record and
17 case law. The Individual's exceptions do not show that the ALJ made an unreasoned decision,
18 and its exceptions do not form grounds for modification of the Initial Order. Accordingly, for
19 the reasons set forth above, Enforcement respectfully requests that the Board adopts and
20 affirms the findings of fact and conclusions of law set forth in the ALJ Smith's Initial Order.

21 DATED this 22 day of November, 2011.

22 ROBERT M. MCKENNA
23 Attorney General

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25 STEPHANIE U. HAPPOLD, WSBA #38112
26 Assistant Attorney General
Attorneys for Enforcement