

NO. 41454-6-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DODGE CITY SALOON,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT A. LEWIS

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Assignment of Error No. 1: The trial court erred by entering the Memorandum of Opinion and Order Affirming Board's Decision.

Issue Presented No. 1: Did the Washington State Liquor Control Board's (the Board) actions on May 16, 2008, violate the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington State Constitution?

Issue Presented No. 2: Should all evidence and testimony from State actors have been suppressed?

Issue Presented No. 3: Should the Board's complaint have been dismissed under the doctrine of entrapment?

Issue Presented No. 4: Should the Board's complaint have been dismissed due to outrageous conduct?

Issue Presented No. 5: Should the Board have been required to prove the allegations of its complaint by clear and convincing evidence?

Issue Presented No. 6: Did the Administrative Law Judge err by failing to grant a requested continuance?

Issue Presented No. 7: Did the trial court err by failing to award Dodge City its attorney's fees pursuant to RCW 4.84.350?

STATEMENT OF THE CASE¹

I. Dodge City's Operation.

On May 16, 2008, Dodge City Saloon, Inc. (Dodge City) held a retail liquor license to operate a nightclub and bar located at 7201 E 18th Street, Vancouver, Washington. (AR 501; FF 1)

At that time, Dodge City took steps to ensure that persons under the age of twenty-one (21) years did not enter its establishment. First of all, there was a sign on the exterior of the building indicating that no minors were allowed on the premises. (AR 152) Secondly, it maintained policies and practices designed to keep under-aged persons out of its establishment. Its employees were familiar with those policies and the consequences for violation of the policy. (AR 171) On weekends, such as the night in question here, Dodge City required its security personnel to check the identification of every patron. (AR 148) It put its best security people at the entrance to check for identification. (AR 141) These employees were schooled on how to check the identification and how to spot a fake identification card. Dodge City employed a "black light."

¹ The administrative record in this case contains a verbatim transcript of the administrative hearings together with other papers including pleadings and exhibits. Each page of the transcript is numbered beginning at 1 and ending at 243. The balance of the record begins at page 244 and ends at page 556. Citations to the administrative record will be designated as "AR" along with the page number. Certain of the Findings of Fact made in this matter are not disputed. These will be designated by "FF" with a reference to the page in the Administrative Record where the findings are contained.

Placing identification up to this device would show if the card is legitimate. (AR 146)

Dodge City had experienced success with its measures to keep persons under the age of twenty-one (21) years from gaining entrance. Every weekend, Dodge City personnel would confiscate fake identification cards presented by minors. It would turn these over to the Washington State Liquor Control Board (the Board). (AR 149, 170)

On May 16, 2008, Jeffrey Hilker was one of Dodge City's security persons. He was experienced in this type of work and was known to be quite meticulous. Dodge City considered him to be one of its best people. No one had ever identified Mr. Hilker to Board personnel as a person who had allowed a minor to frequent any premises off limits to persons under the age of twenty-one years. (AR 171, 227)

II. Board Practices.

The Board sends persons under the age of twenty-one years into establishments and directs them to attempt to purchase alcoholic beverage. The Board refers to these activities as "compliance checks." It refers to the youngsters as "investigative aides." (AR 50)

The Board supplies the "investigative aide" with money to make their purchases. (AR 52) The "investigative aide" is supposed to carry only one piece of identification, an item issued by the State of Washington.

(AR 51, 79, 81, 211) The “investigative aide” is typically searched before attempting to make a purchase to make sure that he or she is only carrying one piece of identification and no other money except that supplied by the Board. (AR 469)

The “investigative aide” is directed to present the piece of identification he or she is carrying if requested by the establishment. (AR 80) The “investigative aide” is also allowed to engage in deception. For example, an “investigative aide” may represent himself or herself to be over the age of twenty-one years. (AR 52) There is one limitation, however — an “investigative aide” is not allowed to bribe any person to sell alcoholic beverage to him or her. (AR 79)

“Investigative aides” will typically have a vertical identification card issued to him or her because Washington identification cards and driver licenses are vertical if they are issued prior to a person’s twenty-first birthday. The fact that a card is vertical, however, does not mean that the person to whom the card is issued is actually under the age of twenty-one years. A person may continue to use a vertical identification card after his or her twenty-first birthday. (AR 147, 239, 502; FF 5)

III. Events of May 16, 2008.

On May 16, 2008, the Board engaged Christopher Mangan as an “investigative aide” to perform “compliance checks” at various locations

in Clark County including Dodge City's establishment. His date of birth is October 9, 1990. He was seventeen (17) years of age on May 16, 2008. (AR 502; FF 4) On that date, Mr. Mangan was 6'1" tall, weighed approximately 180 pounds, and had some facial hair. (AR 59, 90)

The Board had received no particular complaint that caused it to target Dodge City for a "compliance check" on May 16, 2008. (AR 70-71) There is also no evidence that it obtained any sort of warrant before directing Mr. Mangan to attempt to gain entry.

Board personnel gave contradictory testimony about whether Mr. Mangan was searched prior to the "compliance check" at Dodge City's premises. Marc Edmonds was at the scene. He testified that he did not search Mr. Mangan and really did not know who did. (AR 54-60) A report submitted by Diana Peters stated that Almir Karic conducted the search. (AR 469) According to Mr. Karic and Mr. Mangan, Mr. Edmonds conducted the search. (AR 99, 195)

Board personnel also disagree about exactly what identification Mr. Mangan was carrying. Ms. Peters' report states that Mr. Mangan was carrying his Washington driver license. (AR 69) Mr. Mangan testified that he was carrying both his driver license and a Washington identification card. (AR 81) This would have been improper because, as indicated, an "investigative aide" is only allowed to carry one piece of

identification. For his part, Mr. Karic did not know that Mr. Mangan had two pieces of identification on his person. (AR 196)

Mr. Mangan approached Dodge City's establishment. Mr. Hilker met him near the entrance and asked him for identification. Tony Kutch, Dodge City's manager, was standing near Mr. Hilker at the time. (AR 172) Mr. Mangan produced a vertical identification card. According to Mr. Hilker, the card showed a date of birth that would have made Mr. Mangan over the age of twenty-one years. (AR 450) Mr. Hilker examined it and put it under the black light to check its validity. When the black light test showed that the identification was valid, Mr. Hilker allowed Mr. Mangan onto the premises. Mr. Mangan stayed for about three minutes. (AR 87, 502-3; FF 9-11)

According to both Mr. Hilker and Mr. Kutch, Mr. Mangan offered to pay money to get into the premises. Mr. Mangan denies doing so. (AR 172-73, 450)

Mr. Mangan claims that he purchased a bottle of Bud Light when he was inside the establishment. (AR 468) According to Ms. Peters, however, he purchased a Coors Light. Dodge City personnel photographed a bottle of Coors light and produced a copy of the photograph with the notation "Dodge City, date of violation 5/16-08 2300 hours." (AR 356, 468, 470)

After Mr. Mangan left the premises, Mr. Karic approached Mr. Hilker and accused him of allowing an under-aged person onto the premises. Mr. Hilker immediately and passionately told Mr. Karic that Mr. Mangan had displayed an identification card that showed him to be over the age of twenty-one years. (AR 175, 202) Dodge City personnel wanted to search Mr. Mangan to determine exactly what identification the young man was carrying. Mr. Karic would not allow the search because he feared a lawsuit by Mr. Mangan's parents. (AR 174-205)

IV. Charges against Mr. Hilker.

Mr. Karic cited Mr. Hilker for violation of RCW 66.44.310(1)(a), a misdemeanor offense prohibiting a person under the age of twenty-one years to remain in any area off limits to that person. At the time of the administrative hearing, that matter had not been resolved. (AR 412)

V. Course of Administrative Proceedings.

The Board issued a complaint against Dodge City for allowing a person under the age of twenty-one years to remain on premises off limits to that person in violation of RCW 66.44.310(1)(a) and WAC 314-11-020(2). (AR 246) Dodge City sought a hearing.

Several pre-trial motions were made. Dodge City moved to suppress all evidence from Board personnel and also moved to dismiss. These motions were denied. (AR 400)

Mr. Hilker had been advised by his criminal defense attorney not to testify at the administrative proceedings because of the pending charge against him. (AR 412) Dodge City moved for a continuance on that basis. (AR 409-11) In connection with the motion, Dodge City made an offer of proof to include Mr. Hilker's written statement at AR 450. Dodge City also indicated that Mr. Hilker would testify that he was a long-term Vancouver resident; that he was married with children; that both he and his wife were employed; that he had worked in security for ten years; that he had never been accused or cited for any type of violation of law; that he understands that his job requires him to keep minors and intoxicated people from entering Dodge City premises; that he believes his job is important and that he works as diligently as he can to do his job effectively; that Mr. Mangan presented him with an identification card that showed that Mr. Mangan was over the age of twenty-one years; that the piece of identification was a vertical Washington driver license not an identification card as Mr. Mangan testified; that Mr. Mangan approached him near Dodge City's entrance and offered him money to allow him onto the premises; and that Mr. Hilker took the item offered as Mr. Mangan's identification and examined it under a black light. (AR 188-89) That motion was denied. (AR 500)

The Administrative Law Judge found Dodge City in violation and assessed a penalty of a seven day license suspension. (AR 505-12) On December 29, 2009, the Board adopted the Findings of Fact and Conclusions of Law made by the Administrative Law Judge. (AR 551-54) This order was served on January 8, 2010. (AR 555)

VI. Dodge City's Appeal.

On January 20, 2010, Dodge City filed its Petition for Review. (CP 1-4)² The Superior Court affirmed the Board by order dated October 13, 2010. (CP 49-54) On November 12, 2010, Dodge City appealed.

ARGUMENT

Assignment of Error No. 1: The trial court erred by entering the Memorandum of Opinion and Order Affirming Board's Decision.

I. Standard of Review.

Relief from an administrative decision is governed by RCW 34.05.570(3). That statute provides in pertinent part as follows:

The court shall grant relief from an agency order in an adjudicated proceeding only if it determines that:

² In the Petition for Review, Dodge City sought review of two Board decisions — this matter and one based on an alleged violation occurring on December 29, 2007. The Superior Court ruled in Dodge City's favor on the December 29, 2007, incident and ordered that the complaint be dismissed. The Board has not appealed that decision.

- (a) The order . . . is in violation of constitutional provisions on its face or as applied;
- (c) The agency has engaged in an unlawful procedure or decision making process . . .;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review. . .;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (i) The order is arbitrary and capricious.

If a party is entitled to relief, the Court may “. . .set aside agency action, enjoin or stay the agency action, (or) remand for further proceedings. . .” RCW 34.05.574(1)(b).

The term “substantial evidence” in this context is that quantum of evidence that would convince an unprejudiced, thinking mind of the declared premise. *Jefferson County v. Seattle Yacht Club*, 73 Wn.App. 576, 870 P.2d 987 (1994); *May v. Robertson*, 153 Wn.App. 57, 218 P.3d 211 (2009). Conclusions of law are reviewed *de novo*, however. *Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002); *Bullseye Distributing, LLC v. Washington State Gambling Commission*, 127 Wn.App. 231, 237, 110 P.3d 1162 (2005).

On review, the Appellate Court sits in the same position as the Superior Court and applies the standards of review in RCW 34.05.570 directly to the agency record. *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 589, 957 P.2d 1241 (1998); *Bullseye Distributing, LLC v. Washington State Gambling Commission, supra*, 127 Wn.App. at 237.

II. All Evidence Should Have Been Suppressed.

a. Standard for Admissibility of Evidence.

The Administrative Procedure Act allows the admission of all evidence in which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, evidence excludable on constitutional or statutory grounds cannot be admitted. As RCW 34.05.452(1) states:

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

As will be discussed, the Board's "compliance checks" violate the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington State Constitution. Therefore, all evidence from Board personnel concerning the events of May 16, 2008, should have been suppressed.

b. The Test for Validity of an Administrative Inspection.

The Board's "compliance check" is clearly an administrative inspection. The Board claims that it engages in this practice to enforce the provisions of RCW 66. The Fourth Amendment to the United States Constitution states that "(T)he right of a people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." The Washington State Constitution contains a similarly worded prohibition in Article 1, Section 7, which states:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

These two provisions apply co-extensively to administrative searches. *Centimark Corp v. Department of Labor & Industries*, 129 Wn.App. 368, 375, 119 P.3d 865 (2005). Both apply when government agents enter upon private property to ascertain whether there is compliance with governmental regulations. *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (1994).

An administrative inspection can be sanctioned by a properly issued warrant supported by probable cause. *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *City of Seattle v. McCready, supra*, 123 Wn.2d at 273. The Board

did not obtain a warrant, however, authorizing the action that it took on May 16, 2008.

Even without a warrant, an administrative inspection can be justified by a statutory regulatory scheme that meets each of the following requirements:

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

New York v. Burger, 482 U.S. 691, 699-700, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987); *Alverado v. Washington Public Power System*, 111 Wn.2d 424, 439, 759 P.2d 427 (1988). The last of these three requirements is critical. It insures that administrative inspections have rational and reasoned limitations. As the Court recently stated in *Seymour v. Washington State Department of Health*, 152 Wn.App. 156, 167-68, 216 P.3d 1039 (2009):

Reining in the power of the executive branch in conducting administrative searches is a primary

concern of courts reviewing such statutory schemes. Where a statutory scheme is properly 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 requirement would provide The discretion of Government officials to determine what facilities to search and what violations to search for is thus directly curtailed by the regulatory scheme. . ." A proper regulatory scheme, "rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers . . . establishes a predictable and guided . . . regulatory presence . . ." Hence, the person subject to the inspection "is not left to wonder about the purposes of the inspector or the limits of his task. . ." The "regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. . ."

Finally, the regulatory scheme must be followed. If it is not, any fruits of the administrative inspection are subject to suppression. The seminal case supporting this proposition is *Colonnade Catering Corp v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970). In that case, congress had adopted a statutory scheme regulating the service of alcoholic beverage. The statute authorized inspection of licensed premises and provided for a \$500.00 fine for any person who refused to allow government inspection. Federal agents came to the business premises and

demanded access to a room where bottles of liquor were stored. When they were denied access, they broke a lock, entered, and retrieved bottles of liquor. The Court ruled that the seizure of the liquor violated the Fourth Amendment because the statutory scheme did not authorize a warrantless entry when access to a portion of the premises was denied. The Court noted that the sole remedy was the imposition of a \$500.00 fine upon refusal.

The Court reached a similar conclusion in *Seymour v. Washington State Department of Health, supra*. In that case, the statutory scheme required that any complaint be reviewed to determine whether reasonable grounds existed to believe unprofessional conduct had occurred. An investigation could be conducted only after such a determination had been made. Nonetheless, the Dental Quality Assurance Commission commenced an investigation against a dentist without making the required determination. In the course of the investigation, it obtained certain records from the dentist. The Court held that the investigation was not conducted according to any statutory scheme because the initial determination of merit had not been made. The Court stated:

Of critical importance to the validity of the warrantless inspection of Dr. Seymour's office is whether it satisfied the criterion of being authorized by a statute providing a constitutionally adequate substitute for the

Fourth Amendment's warrant requirement. It did not. Although Dr. Seymour does not contend that the UDA provides inadequate statutory authorization for warrantless administrative inspections, we nonetheless conclude that the inspection herein was not made pursuant to a statutory scheme sufficiently protective of Dr. Seymour's rights because it was not made pursuant to any recognized statutory scheme at all.

152 Wn.App. at 168.

As will be discussed below, the Board's "compliance checks" are not conducted pursuant to any statutory scheme. There is simply nothing in the statutes that allows the Board to engage in this activity.

c. The Regulatory Scheme Does Not Authorize "Compliance Checks."

There is simply nothing in the regulatory scheme that authorizes the "compliance checks" the Board performs.

The Board is expected to justify its "compliance checks" by reference to RCW 66.44.010(4). That statute provides in pertinent part:

The Board may appoint and employ, assign to duty and fix the compensation of, officers to be designated as liquor enforcement officers. Such liquor enforcement officer shall have the power, under the supervision of the board, to enforce the penal provisions of this title and the penal laws of this state relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor. They shall have the power and

authority to serve and execute all warrants in process of law issued by the courts and enforcing the penal provisions of this title or of any penal law of the state relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor. . . They shall have the power to arrest without a warrant any person or persons found in the act of violating any of the penal provisions of this title or of any penal law of this state relating to the manufacture, importation, transportation, possession, distribution, and sale of liquor. . .

There is nothing in this statute that authorizes the Board to direct persons under the age of twenty-one years to attempt to gain entry to premises that are off limits to them. The legislature could have inserted language into the statute to allow or to refer to “compliance checks” of the type that the Board utilizes but simply did not do so. The absence of any reference to the activity the Board calls “compliance checks” must be interpreted as an intentional omission by the legislature. Under the rule of *expressio unis est exclusion alterius* — the expression of one thing in a statute requires the exclusion of the other — the legislature’s omission in this regard is deemed to be an exclusion. *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008); *Clark County Public Utility District #1 v. Department of Revenue*, 153 Wn.App. 737, 747, 222 P.3d 1232 (2009).

The legislature has not otherwise authorized the Board to send persons under the age of twenty-one years onto licensed premises as

part of “compliance checks.” Generally speaking, persons under the age of twenty-one years are not allowed to enter restricted premises. Any under-age person who does is guilty of a misdemeanor. RCW 66.44.310(1)(b) Importantly, the legislature has created certain exceptions to this general rule. Professional musicians, professional disc jockeys, professional sound or lighting technicians, persons supporting professional musicians or disc jockeys, persons performing janitorial services, employees of amusement device companies, security and law enforcement officers and fire fighters who are eighteen years of age or older may remain on restricted premises to perform their duties. RCW 66.44.316 Employees of a licensee who are between eighteen and twenty-one years of age can enter restricted parts of the establishment to perform work duties. RCW 66.44.350. The legislature has not seen fit to include under-aged persons engaged in the Board’s “compliance checks” to this list of exceptions. Once again, this omission must be deemed to be an intentional exclusion. It therefore reflects a legislative determination that the Board should not direct under-aged persons to attempt entry to premises off limits to them as part of a “compliance check.”

To date, the Board has not seen fit to use RCW 66.44.290(1) to justify its “compliance checks.” That statute provides:

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

(Emphasis added) This statutory language immunizes persons between the age of eighteen and twenty-one years from prosecution for purchasing or attempting to purchase alcoholic beverage in a “controlled purchase” program. It arguably applies to Mr. Mangan because he did attempt to purchase a bottle of beer while in the establishment. If this statute is interpreted to authorize the Board’s “compliance checks,” notwithstanding the fact that it does nothing other than immunize conduct that is otherwise criminal, it does not save the Board here. The statute expresses the legislature’s desire that any under-aged person participating in a “controlled purchase” program be over the age of eighteen years and that any such program be subject to administrative rules promulgated by the Board. Mr. Mangan was under the age of eighteen years on May 16, 2008. Furthermore, the Board has never adopted any rules governing its “compliance checks.” In short, if RCW 66.44.290(1) authorizes “compliance checks” under certain circumstances, the Board did not comply with the statutory requirements on May 16, 2008.

The Board has also not chosen to rely on RCW

66.28.090(1). That statute provides as follows:

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.

In *Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 558 P.2d 231 (1976), the Supreme Court determined that similarly worded statutes did not sufficiently delineate the purpose, scope, time, and place of inspection and therefore were not sufficient to authorize warrantless governmental intrusion onto commercial premises. The Court considered RCW 18.108.180, which provided as follows:

The director or any of his authorized representatives may at any time visit and inspect the premises of each massage business establishment in order to ascertain whether it is conducted in compliance with the law, including the provisions of this chapter, and the rules and regulations or the director. The operator of such massage business shall furnish such reports and information as may be required.

It also discussed RCW 18.108.190, which provides:

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

There is no greater specificity in RCW 66.28.090(1) than in former RCW 18.108.180 and RCW 18.108.190. In fact, there is less specificity. The language of former RCW 18.108.180 allowed inspections to determine whether the business was being conducted in compliance with the law. There is no such limitation in RCW 66.28.090(1). It allows Board officers to come onto licensed premises for any reason or for no reason at all. It is therefore infirm and cannot support the entry onto the premises and observations made by the Board officers.

d. If “Compliance Checks” Are Authorized, the Regulatory Scheme Is Inadequate Because It Allows Random Inspections.

As the Court noted in *Seymour v. Department of Health*, *supra*, a proper regulatory scheme establishes a predictable and guided regulatory presence and does not leave the frequency and purpose of inspections to the unchecked discretion of government officers. 152 Wn.App. at 167-8. If the Board’s “compliance check” on May 16, 2008, was somehow authorized by the regulatory scheme as a general proposition, then the scheme is infirm because it allows government officers the unchecked discretion to conduct random inspections.

On May 16, 2008, the Board had no particular reason to believe that Dodge City was allowing under-aged persons onto its premises. The “compliance check” was therefore nothing more than

random. On several occasions, the Supreme Court has held that random intrusions upon a person's private affairs violate the Fourth Amendment to the United States Constitution or Article 1, Section 7 of the Washington State Constitution. *State v. Marchand*, 104 Wn.2d 434, 706 P.2d 225 (1985) — holding that spot checks for driver's licenses violated the Fourth Amendment's ban on unlawful searches and seizures but did not reach the question of whether the practice violated Article 1, Section 7 of the Washington State Constitution; *City of Seattle v. Messiani*, 110 Wn.2d 454, 755 P.2d 775 (1988) — ruling that stopping all motorists at sobriety check points violated both the Fourth Amendment and Article 1, Section 7; *State v. Jordan*, 160 Wn.2d 121, 156 P.3d 893 (2007) — deciding that random searching of a motel registry violates Article 1, Section 7; *York v. Wahkiakum School District*, 163 Wn.2d 297, 178 P.3d 995 (2008) — ruling that random drug testing of student athletes violates Article I, Section 7. On that basis alone, the Board's "compliance checks" must be held constitutionally infirm.

The regulatory scheme does nothing to eliminate the randomness of the "compliance check" because it does not require some articulated suspicion before the Board conducts a "compliance check." The regulatory scheme therefore fails the requirement of providing an

adequate substitute for a warrant and is not sufficient to support the Board's conduct of "compliance checks."

e. The Board Invaded Dodge City's Reasonable Expectation of Privacy.

The Board may argue that its actions did not violate any reasonable expectation that Dodge City had. That is simply not the case. The test to determine whether a person has a reasonable expectation of privacy is based on the following two factors:

1. Did the person exhibit an actual (subjective) expectation of privacy by seeking to preserve something as private?
2. Does society recognize that expectation as reasonable?

State v. Young, 123 Wn.2d 173, 189-94, 867 P.2d 593 (1994). Both of these questions must be answered in the affirmative.

First of all, Dodge City demonstrated its desire to keep persons under the age of twenty-one years such as Mr. Mangan off the premises. It posted a sign on the exterior of the establishment indicating that the premises were off limits to persons under the age of twenty-one years. It also stationed a person at the door, namely, Mr. Hilker, to check for identification and to exclude all persons under the age of twenty-one years who sought admission.

Secondly, Dodge City's expectation that persons under the age of twenty-one years would not come onto its premises is regarded by society as reasonable. Mr. Mangan's attempt to gain entrance is a misdemeanor. RCW 66.44.310(1)(b). The legislature has also criminalized a licensee allowing a person under the age of twenty-one years from being on restricted premises. RCW 66.44.310(1)(a). This too is a misdemeanor. If the legislature has criminalized allowing under-aged persons onto restricted premises, a licensee's desire to keep such persons out of restricted premises must be viewed as reasonable.

f. Conclusion.

Evidence obtained in violation of constitutional requirements cannot be used in administrative proceedings. RCW 34.05.452(1); *Seymour v. Washington State Department of Health, supra*. Therefore, the Court should not have heard testimony from Board officers or from Mr. Mangan because the evidence was obtained in violation of the Fourth Amendment to the United States Constitution and Article 1, Section 7 of the Washington State Constitution. The failure to exclude this evidence amounted to an improper procedure, an improper interpretation of the law, and an order based on a violation of constitutional requirements. RCW 34.05.570(3)(a), (c), (d). Without the testimony from these individuals, there would have been no evidence and the matter

would have to be dismissed. On that basis, the Board's order must be set aside. RCW 34.05.574(1)(b).

III. Dodge City was Entrapped.

Dodge City claimed that the defense of entrapment applied. The Administrative Law Judge recognized this claim but rejected it without making specific findings of fact. (AR 505, Conclusion of Law No. 9, set out fully in the Appendix) The Board apparently agreed since it adopted the decision of the Administrative Law Judge without making comment on the entrapment issue. (AR 551-54) This decision was not supported by substantial evidence and amounted to an improper interpretation of the law. Dodge City is entitled to vacation of the Board's order on that basis.

The Board charged Dodge City with violation of RCW 66.44.310(1)(a) and WAC 314-11-020(2). The statute provides as follows:

Except as otherwise provided by RCW 66.44.316 and RCW 66.44.350, it shall be a misdemeanor to:

- (a) To serve or allow to remain in any area classified by the board as off-limits to any person under the age of twenty-one years. . .

The regulation reads as follows:

Per RCW 66.44.310, licensees or employees may not allow persons under twenty-one years of age to remain in any premises or area of a premises classified as off-limits to persons under twenty-one.

The regulation does nothing more than refer to the statute that criminalizes certain behavior.

Entrapment is a defense to any prosecution of a crime. RCW 9A.16.070(1). Since the Board charged a crime, albeit in an administrative proceeding, the defense of entrapment is available.

No Washington case has yet decided whether entrapment can be used as a defense in administrative proceedings to sanction a licensee. Other jurisdictions have concluded that the defense is available. *Fumusa v. Arizona State Board of Pharmacy*, 25 Ariz.App. 584, 545 P.2d 432 (1976), disapproved of on other grounds, *Sarwark v. Thorneycroft*, 123 Ariz. 23, 597 P.2d 9 (1979); *Patty v. Board of Medical Examiners*, 9 Cal.3d 356, 508 P.2d 1121, 107 Cal.Rptr. 473 (1973); *Smith v. Pennsylvania State Horse Racing Commission*, 517 Pa. 233, 535 A.2d 596 (1988). See also *One Way Fare v. State, Department of Consumer Protection*, 2005 W.L. 701695 (Conn.Super. 2005).³ These decisions are based on public policy — no societal interest is served by any governmental agency committing a crime in pursuit of the enforcement of licensing statutes. Luring people into violations also does not serve the

³ Unpublished opinions from the courts of other jurisdictions may be cited if citation to that opinion is permitted under the law of the jurisdiction of the issuing court. GR 14.1(b). Connecticut allows citation to unpublished opinions if a copy is provided to the Court and the opposing party. Ct.R.Super.Ct.Gen. §5-9.

dignity with which administrative proceedings should be clothed. *Patty v. Board of Medical Examiners, supra*, 9 Cal.3d at 363-67.

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

1. The criminal design originated in the mind of law enforcement officials, or any person acting under their direction; and
2. The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

RCW 9A.16.070(1). In this context, inducement, for the purposes of the second element, is governmental conduct that creates a substantial risk that an otherwise law-abiding citizen would commit the offense. As to the first element, predisposition or lack thereof may be inferred from a defendant's history of involvement of the type of criminal activity for which he or she has been charged combined with his ready response to the inducement. *State v. Hansen*, 69 Wn.App 750, 764 *fn.* 9, 850 P.2d 571 (1993).

The substantial evidence in this case shows that both elements were satisfied. The criminal design originated in the mind of law enforcement officials. It was part and parcel of the Board's "compliance check." Board personnel selected Mr. Mangan and directed him to attempt to secure entry on a weekend night, one of Dodge City's busiest times. It should be noted that Mr. Mangan looked older than his stated

age. He was tall, possessed of a deep voice, and growing facial hair. Clearly, Mr. Hilker had no predisposition to commit the offense. There is no evidence that he has ever allowed an under-aged person to be on off limits premises. Mr. Hilker asked Mr. Mangan to produce identification. He then checked the identification with a black light to make sure that it was valid. In other words, Mr. Hilker took all necessary steps to make sure that he would not admit an under-aged person to the premises. If in fact Mr. Mangan produced a piece of identification that correctly stated his age, the worst that could be said of Mr. Hilker is that he misread that piece of identification.

Dodge City also had no intention to commit the offense. It maintained a policy prohibiting the admission of persons under the age of twenty-one years. It employed security personnel whose job it was to check the identification of persons seeking admission. It had a sign on the exterior of the premises indicating that persons under the age of twenty-one years are not welcome.

A clearer case of entrapment is hard to imagine. It is supported by substantial evidence in the record. Any contrary decision is not supported by substantial evidence. The failure to dismiss on that basis further amounts to an erroneous interpretation or application of the law. Dodge City is therefore entitled to relief. RCW 34.05.570(3)(d), (e). On this

basis, the trial court erred by not dismissing all charges against Dodge City as was required by RCW 34.05.574(1)(b).

IV. The Wrong Standard of Proof Was Applied.

a. Introduction.

The Board's Findings of Fact were made based upon a preponderance of evidence standard. (AR 504-5) This was error. In license suspension matters, all facts must be proven by clear and convincing evidence. This is not merely an academic argument. A number of factual issues in this case were hotly contested. This issue colors several Findings of Fact that were made.

b. All Facts Must Be Proven by Clear and Convincing Evidence.

Dodge City's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 3 of the Washington State Constitution requires proof by clear and convincing evidence before its license can be suspended. This conclusion necessarily follows from the decisions by the Supreme Court in *Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001) and *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006).

In *Nguyen v. Department of Health, supra*, the Court held that considerations of due process required that any interference with a

physician's license to practice medicine be supported by clear and convincing evidence. In *Ongom v. Department of Health, supra*, it ruled that the convincing evidence standard also applied to proceedings to suspend the license of a nursing assistant. Based upon these two holdings, the Court of Appeals appears to have accepted the notion that the clear and convincing standard applies to all proceedings to suspend or revoke any professional license. *Chandler v. Office of Insurance Commissioner*, 141 Wn.App. 639, 644, 173 P.3d 275 (2007) — license of an insurance agent. Division Two of the Court of Appeals had come to that same conclusion prior to the decision in *Ongom v. Department of Health, supra*. *Nims v. Board of Professional Engineers and Land Surveyors*, 113 Wn.App. 499, 53 P.3d 52 (2002).

In both *Ongom v. Department of Health, supra*, and *Nguyen v. Department of Health, supra*, the Court adopted a three part test set out by the Supreme Court of the United States in *Mathews v. Eldredge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), identifying three factors to be employed to determine what burden of proof should be applied. These are the following:

1. The nature of the property interest;
2. The risk of an erroneous deprivation of that interest through the procedures used; and

3. The government's interest in the added fiscal and administrative burden that the increased burden of proof might cause.

Nguyen v. Department of Health, supra, 144 Wn.2d at 526-7; *Ongom v. Department of Health, supra*, 159 Wn.2d at 138.

No viable distinction can be made between Dodge City's retail liquor license on the one hand and the physician's license and nursing assistant's license of Dr. Nguyen and Ms. Ongom, respectively. Just as the ability of a professional to practice his or her occupation is valuable as the Court noted in *Ongom v. Department of Health, supra*, and *Nguyen v. Department of Health, supra*, Dodge City's retail liquor license is also valuable. It allows Dodge City to pursue its chosen business. Furthermore, Dodge City has expended considerable effort and capital in its business. It has employees dependent upon it for their livelihood. The value of the license cannot be questioned.

There is also no distinction as to the second factor — erroneous deprivation of rights. In *Ongom v. Department of Health, supra*, the Court stated that the risk was no different based upon the profession at issue — medical doctor versus nursing assistant. 159 Wn.2d at 140. There can also be no difference in the risk of erroneous deprivation of a license between a nursing assistant on the one hand and a retail liquor licensee on the other.

The third and final factor is the fiscal burden on the governmental agency that might follow from the increased burden of proof. In *Ongom v. Department of Health, supra*, the Court noted that a change in the burden of proof does not affect the cost of the hearing in anyway. 159 Wn.2d at 151. It also questioned whether a lesser burden of proof is in the public interest. It stated that the public's proper concern lies in obtaining an accurate result and the requirement of clear and convincing evidence advances that goal. *Ongom v. Department of Health, supra*, 159 Wn.2d at 141-42.

The Board is expected to argue that Dodge City's license is a "business" license as opposed to a "professional" license. That distinction is not particularly helpful because it will not stand the scrutiny of the three part test the Court adopted from *Mathews v. Eldredge, supra*. As discussed above, Dodge City's retail liquor license is just as valuable as a professional license; the risk of erroneous deprivation of that license is the same as in the professional license setting; and the heightened burden of proof presents no fiscal burden. In this regard, the Courts of Florida found no distinction between a professional license and a business license. In *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987), the Court held that the clear and convincing evidence standard applied in an action to revoke the license of a teacher. It subsequently held that the same test was

applicable in an action to revoke a business license including a retail liquor license. This holding led the Florida Court of Appeals to rule that the clear and convincing evidence standard also applied in a proceeding to suspend a store's license to sell liquor. *Pic N' Save Central Florida, Inc. v. Department of Business Regulation*, 601 So.2d 245 (Fla.App. 1992).

The Board may seek to rely on the Court's decision in *Brunson v. Pierce County*, 149 Wn.App. 855, 205 P.3d 963 (2009). In that case, the Court held that the clear and convincing evidence standard did not have to be applied to proceedings to revoke the license of exotic dancers. In coming to its conclusion, the Court distinguished *Ongom v. Department of Health, supra*, and *Nguyen v. Department of Health, supra*, on the basis that exotic dance licenses do not require any schooling or qualifying examination. It noted that a person could obtain such a license simply by paying a required fee, providing a notarized signature with identifying information, a photograph, fingerprints, social security number, and proof of age. 149 Wn.App. at 866, *fn.* 7. The requirements for Dodge City to obtain a liquor license are hardly that minimal. Any applicant for a retail liquor license must present information concerning criminal history. The Board may conduct a financial investigation to verify the source of the funds used for acquisition and start up of the business together with the applicant's right to the real and personal

property upon which the business will be operated. The Board also inspects the proposed premises to see if the applicant is in compliance with all necessary requirements. WAC 314-07-020. A licensee must go to the trouble and expense to acquire, equip, and develop the premises upon which the business will be operated. After the licensee has gone to this expense, the Board conducts an inspection to ensure that they are satisfactory. If they are not, the license can be denied. WAC 314-07-020(8). For a corporation such as Dodge City, all corporate officers or shareholders with more than 10% of the outstanding stock must qualify. WAC 314-07-035. The Board can deny a license if a local law enforcement authority objects for any reason. WAC 314-07-060(2).

The Supreme Court may shortly give guidance on this issue when it decides *Hardee v. Department of Social and Health Services*, 152 Wn.App. 48, 215 P.3d 214 (2009), review granted, *Hardee v. Department of Social and Health Services*, 168 Wn.2d 1006, 226 P.3d 781 (2010). The issue presented in that case is whether the clear and convincing evidence standard must be applied in proceedings to revoke a home daycare operator's license. Without analyzing the three *Mathews v. Eldridge*, *supra*, factors, the Court of Appeals in *Hardee v. Department of Social and Health Services*, *supra*, stated that the decisions in *Nguyen v. Department of Health*, *supra*, and *Ongom v. Department of Health*, *supra*, were limited

to cases involving suspension of professional licenses. It ruled that the preponderance of evidence standard was sufficient because the license was “was in the nature of a site license, obtainable by the licensee’s completion of twenty clock hours of basic training approved by the Washington State Training and Registry System.” 152 Wn.App. at 56. Dodge City submits that this reasoning was faulty because of the failure to engage in and properly apply the three factor test required by the decisions in *Nguyen v. Department of Health, supra*, and *Ongom v. Department of Health, supra*. In any event, and as indicated, the Supreme Court will hopefully resolve this issue in the near future.

c. Several Findings of Fact Would Be Affected by This Issue.

The most critical factual issue in this case was precisely the nature and content of the identification that Mr. Mangan presented to Mr. Hilker. Mr. Hilker was adamant that Mr. Mangan had presented a vertical card showing that he was twenty-one years of age. (AR 450) Mr. Mangan denied that he had done so.

Testimony from the Board’s witness on this and related matters calls Mr. Mangan’s testimony into question. First of all, a person in Mr. Mangan’s position is allowed to carry only one piece of identification. Mr. Mangan claimed to be carrying two pieces of identification. The Board’s practices require that Mr. Mangan be searched

prior to entering Dodge City's premises. Board Officer Edmonds testified that he did not search Mr. Mangan and did not know who did. Board Officer Peters stated that Board Officer Karic conducted the search. Mr. Karic and Mr. Mangan stated that Mr. Edmonds conducted the search. This confusion between the witnesses would justify a trier of fact to conclude that no one had searched Mr. Mangan before he attempted entry to Dodge City's premises.

After Mr. Karic advised Mr. Hilker that he had admitted an under-aged person, Mr. Hilker and Mr. Kutch demanded the opportunity to search Mr. Mangan to see exactly what identification he was carrying. This request was denied.

Finally, Mr. Mangan claims to have purchased a bottle of Bud light after he entered the premises. According to Ms. Peters, he purchased a Coors light.

The confusion on critical points calls into question all of the testimony given by Board witnesses on precisely what identification Mr. Mangan produced. Obviously, if Mr. Mangan produced an identification card demonstrated to be valid but showing him to be over the age of twenty-one years, Dodge City could not be held to guilty of any violation.

In Findings of Fact Nos. 5-10, the Administrative Law Judge and the Board found Mr. Mangan had two pieces of identification on his person at the time notwithstanding the Board's practice to allow only one piece; that Mr. Edmonds searched him notwithstanding that Mr. Edmonds denied doing so; that Mr. Mangan's identification showed him to be under the age of twenty-one years; and that Mr. Mangan presented identification to Mr. Hilker showing him to be under the age of twenty-one years. (AR 502-3)⁴ Given procedural confusion at the time of the incident, these findings were not supported by substantial evidence that was clear and convincing. Making these findings amounted to error. RCW 34.05.570(3)(e).

V. Dodge City's Motion for Continuance Should Not Have Been Denied.

The Board chose to cite Jeffery Hilker for violating RCW 66.44.310(1)(a), permitting a person under the age of twenty-one years to be on restricted premises. That matter had not been resolved at the time of the hearing.⁵ Quite understandably, Mr. Hilker declined to testify at the

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⁴ These findings are set out in full in the Appendix.

⁵ All charges against Mr. Hilker have now been dismissed.

hearing to preserve his privilege against self-incrimination. Dodge City moved for a continuance on that basis. Its motion was denied. The failure to allow that continuance was error.

Mr. Hilker was Dodge City's most important witness. He would have testified that the identification document that Mr. Mangan tendered showed him to be over the age of twenty-one years. He would have also testified that he had absolutely no intent, proclivity, or desire to let any under-aged person into Dodge City's premises. His testimony would have assisted with Dodge City's defense of entrapment.

In an adjudicative proceeding, the presiding officer must afford all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence. RCW 34.05.449(2). The failure of the Administrative Law Judge to grant a continuance so that Dodge City's most important witness could testify violated this requirement. It amounted to an improper procedure entitling Dodge City to relief. RCW 34.05.570(3)(c). This error alone calls for remand and a new hearing. RCW 34.05.574(1)(b).

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VI. The Complaint Should Be Dismissed Due to the Board's Outrageous Conduct.

An entity facing suspension of a retail liquor license such as Dodge City is entitled to due process of law. As RCW 66.08.150 provides in pertinent part:

The action, order, or decision of the board . . . as to any revocation, suspension, or modification of any permit or license shall be an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW.

Due process of law is violated when governmental conduct is sufficiently outrageous. This outrageousness can be found when law enforcement personnel instigate the violation at issue. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996). Several factors must be evaluated to determine whether the governmental conduct is sufficiently outrageous. These are:

- (1) Whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity.
- (2) Whether the defendants' reluctance was overcome by pleas, sympathy, promises of excessive profits, or persistent solicitation.
- (3) Whether the government controls the criminal activity or simply allows the criminal activity to occur.
- (4) Whether the police motive was to prevent crime or protect the public.
- (5) Whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

State v. Lively, supra, 130 Wn.2d at 22. A consideration of these factors demonstrates that the Board's conduct was sufficiently outrageous to warrant dismissal.

It is clear that the Board instigated a crime. There is no evidence of any kind that it was simply infiltrating ongoing criminal activity. The Board's directing of a "compliance check" at Dodge City was not based on any information it had obtained to suggest that Dodge City was letting minors onto restricted premises as a matter of course. For his part, there is no evidence that Mr. Hilker had been charged with any violation involving allowing under-aged persons onto restricted premises.

There is also evidence from Mr. Hilker and Mr. Kutch that Mr. Mangan attempted to bribe them to allow his entry onto the premises. This would show the making of improper solicitation under the second factor.

The third factor is also satisfied. The Board obviously controlled Mr. Mangan's activities.

It is also clear that the Board had no motive to protect the public or prevent crime by directing Mr. Mangan to attempt to gain access to Dodge City's premises. It had no information that Dodge City was improperly admitting minors to its establishment. The Board was merely trying to create a violation it could then enforce.

The most troubling aspect is the fact that the Board's conduct amounted to criminal activity and also conduct "repugnant to a sense of justice." Board officers directed Mr. Mangan to create a number of violations of criminal statute. First of all, the Board directed Mr. Mangan to go onto restricted premises in violation of RCW 66.44.310(1)(b). Coming into Dodge City's establishment also amounted to First Degree Trespass in violation of RCW 9A.52.070 because there was a sign on the exterior of the premises indicating that persons under the age of twenty-one years were not welcome. The Board also directed Mr. Mangan to purchase alcoholic beverage while he was inside. This was a violation of RCW 66.44.270(2)(a). By doing so, the Board was attempting to involve Mr. Mangan in a "controlled purchase" of alcoholic beverage. He would have been immune from prosecution for that offense if he were over the age of eighteen years. As RCW 66.44.290 provides in pertinent part:

(1) Every person under the age of twenty-one years who purchases or attempts to purchase liquor shall be guilty of a violation of this title. This section does not apply to persons between the ages of eighteen and twenty-one years who are participating in a controlled purchase program authorized by the liquor control board under rules adopted by the board. . .

Even if the Board had promulgated regulations governing its "compliance checks," Mr. Mangan would not have been immune because he was under the age of eighteen years.

Simply put, the Board should not solicit violations of law by minors, especially when it has no reason to believe that the object of its investigative efforts is engaged in any illicit activities involving persons under the age of twenty-one years. The actions of state agencies should promote respect for all laws. Conversely, the state agency should not solicit any activity that violates state law especially when persons under the age of twenty-one years are concerned.

The failure to dismiss the complaint on these grounds was an improper interpretation of law. Dodge City is therefore entitled to relief. RCW 34.05.570(3)(d). Because the Board's action was outrageous, the Court should set aside the Board's decision and dismiss the complaint. RCW 34.05.574(1)(b).

VII. The Trial Court Should Have Awarded Dodge City Its Attorney's Fees.

The trial court erred by affirming the Board's decision. Had it granted Dodge City relief as it should have done, it should also have allowed Dodge City an award of attorney's fees under the terms of RCW 4.84.350. The justification for this relief is discussed below in the section entitled Statement Required by RAP 18.1(a) and will not be repeated here. The matter should therefore be remanded so that Dodge City can recover the fees and costs it incurred before the trial court.

STATEMENT REQUIRED BY RAP 18.1(a)

Dodge City requests an award of attorney's fees on appeal. Its request is based on RCW 4.84.350(1). That statute provides as follows:

Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

The requirements for an award of attorney's fees, therefore, are the following:

1. The petitioner must be a qualified party;
2. The matter must be judicial review of an agency action;
3. The party seeking attorney's fees must prevail; and
4. The agency action must not be substantially justified.

All these requirements are met here.

Dodge City is a qualified party. That term is defined to include corporations whose net worth does not exceed \$5 million at the time that the initial petition review is filed. RCW 4.84.340(5). Dodge City's net worth is less than \$5 million. (CP 58-59)

This proceeding is judicial review of an agency action. The term “agency” refers to any state board other than those in the legislative or judicial branches, the governor, or the attorney general. RCW 4.84.340(1). The Board is clearly a “state board” and therefore an agency. The term “agency action” has the same definition as in RCW 34.05. RCW 4.84.340(2). The term “agency action” is defined in RCW 34.05.010(3) to include “imposition of sanctions.” In this case, the Board sought to impose the sanction of a license suspension. That clearly amounts to an “agency action.” Finally, the term “judicial review” also has the same definition as in RCW 34.05. RCW 4.84.340(4). There is no specific definition of the term “judicial review” in RCW 34.05. However, RCW 34.05 discusses and provides for judicial review in Part V. The administrative proceeding and the subsequent appeal were brought under the provisions of that part, RCW 34.05.510 *et seq.* The proceeding therefore amounts to “judicial review of an agency action.”

Dodge City should prevail in this appeal. A party prevails for the purposes of RCW 4.84.350 if the party obtains relief on a significant issue that achieves some benefit that the qualified party sought. RCW 4.84.350(1). A party does not have to obtain substantive relief in order to have substantially prevailed. In *Western Washington Operating Engineers Apprenticeship Committee v. Washington State Apprenticeship and*

Training Council, 144 Wn.App. 145, 190 P.3d 506 (2008), certain Joint Apprenticeship Committees sought judicial review of an approval given by the Washington State Apprenticeship and Training Council of a proposed apprenticeship program offered by the Construction Industry Training Council of Washington. The Court remanded the matter for further consideration because the administrative agency had considered unsworn testimony in making its decision. It also addressed the qualifications of who would be appointed to consider the issue because the matter was to be remanded in any event. 144 Wn.App. at 163. The Court ruled that attorney's fees were warranted because the Joint Apprenticeship Training Committee had prevailed on the procedural challenge.

Dodge City has made both substantive and procedural challenges here. If it prevails on any of them, it will be deemed to have prevailed for the purposes of RCW 4.84.350.

Finally, attorney's fees may be denied if the Court finds that the agency's action was substantially justified. RCW 4.84.350(1). The agency bears the burden of showing that its action was substantially justified. *Aponte v. Department of Social and Health Services*, 92 Wn.App. 604, 623, 965 P.2d 626 (1998). The test for determining whether an agency action is "substantially justified" is whether the action is justified to a degree that would satisfy a reasonable person. The agency must show that

its position had a reasonable basis in law and fact. The relevant factors in determining whether the action was substantially justified consist of the strength and the factual and legal basis for the action. *Silverstreak, Inc. v. Department of Labor & Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007).

In this case, the Board's action lacked any justification. The Board conducted an administrative inspection without securing a warrant and in complete disregard of its regulatory scheme. It could conceivably justified its position if it had directed a person who was eighteen years or older to attempt entry into Dodge City's facility or if it had promulgated and regulations justifying its actions. (See page 19 above) The Board has not yet put relevant regulations into effect, and Mr. Mangan was seventeen years old on May 16, 2008. Furthermore, reasonable persons could only conclude that the Board improperly entrapped Dodge City. No administrative agency should engage in such conduct. The incorrect standard of proof was used in this proceeding. Finally, any reasonable person would conclude that Dodge City should have been allowed a continuance to secure the testimony of its key and critical witness.

There is no doubt here, Dodge is entitled to an award of attorney's fees on appeal.

CONCLUSION

The trial court incorrectly affirmed the Board's decision suspending Dodge City's retail liquor license for seven days. That decision should be reversed. Because the Board's "compliance check" violated constitutional requirements, all evidence from Board personnel should have been suppressed. Since no other evidence could be submitted; since Dodge City was clearly entrapped; and since the Board's conduct was outrageous, the complaint against it should be dismissed. Since the Board improperly failed to grant Dodge City's motion for continuance, the matter should be remanded for a new hearing at which Mr. Hilker can testify. Because the Board utilized an incorrect burden of proof, the evidence should be reconsidered to determine whether clear and convincing evidence supports the charges the Board made. Dodge City should also be awarded its attorney's fees on appeal. The matter should be remanded for Dodge City to recover its attorney's fees at the trial court level.

DATED this 2 day of FEB, 2011.



BEN SHAFTON, WSB #6280
Of Attorneys for Dodge City Saloon, Inc.

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FINDINGS OF FACT:

5. It is the Board's practice to allow their investigative aides to carry one piece of identification during the compliance check. Mr. Mangan 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 [sic] 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 Mr. Mangan before allowing him to proceed as part of the compliance check. Both the state identification card and the license were in Mr. Mangan's wallet. However, Lt. Edmonds only saw the identification card. It was his believe [sic] that Mr. Mangan had only one piece of identification on him.
7. We find that Mr. Mangan 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 Mr. Mangan's 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, Mr. Mangan, 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 Mr. Mangan to pay his \$5 cover fee. He received a stamp on his hand and he was allowed into the establishment.

CONCLUSION OF LAW:

9. In the present case, the Licensee violated both the statute and the regulation when its staff member allow [sic] a minor to enter and remain on the premises. The Licensee argued that Mr. Mangan was deceptively mature looking and therefore, the Licensee was some how [sic] entrapped by the compliance check. That argument fails because Mr. Mangan's 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 [sic] card itself stated clearly when Mr. Mangan would turn 18, which also clearly meant that at the time he was not 21 either. Irrespective of how Mr. Mangan looked, his valid identification card indicated that he was too young to be granted admittance.

STATUTES

RCW 4.84.340(1),(2),(4), and (5):

- (1) “Agency” means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.
- (2) “Agency action” means agency action as defined by chapter 34.05 RCW.
- (4) “Judicial review” means a judicial review as defined by chapter 34.05 RCW.
- (5) “Qualified party” means (a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141J(a)), may be a party regardless of the net worth of such organization or cooperative association.

RCW 4.84.350(1):

- (1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 9A.16.070(1):

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

RCW 9A.52.070:

- (1) A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.
- (2) Criminal trespass in the first degree is a gross misdemeanor.

RCW 18.108.190:

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

RCW 34.05.010(3):

- (3) "Agency action" means licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

RCW 34.05.449(2):

- (2) To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

RCW 34.05.452(1):

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

RCW 34.05.570(3)(a),(c),(d), and (e):

- (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
 - (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
 - (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

RCW 34.05.574(1)(b):

- (1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

RCW 66.08.150:

The action, order, or decision of the board as to any denial of an application for the reissuance of a permit or license or as to any revocation, suspension, or modification of any permit or license shall be an adjudicative proceeding and subject to the applicable provisions of chapter 34.05 RCW.

- (1) An opportunity for a hearing may be provided an applicant for the reissuance of a permit or license prior to the disposition of the application, and if no such opportunity for a prior hearing is provided then an opportunity for a hearing to reconsider the application must be provided the applicant.
- (2) An opportunity for a hearing must be provided a permittee or licensee prior to a revocation or modification of any permit or license and, except as provided in subsection (4) of this section, prior to the suspension of any permit or license.
- (3) No hearing shall be required until demanded by the applicant, permittee, or licensee.
- (4) The board may summarily suspend a license or permit for a period of up to one hundred eighty days without a prior hearing if it finds that public health, safety, or welfare imperatively require emergency action, and it incorporates a finding to that effect in its order. Proceedings for revocation or other action must be

promptly instituted and determined. An administrative law judge may extend the summary suspension period for up to one calendar year in the event the proceedings for revocation or other action cannot be completed during the initial one hundred eighty day period due to actions by the licensee or permittee. The board's enforcement division shall complete a preliminary staff investigation of the violation before requesting an emergency suspension by the board.

RCW 66.28.090(1):

- (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.

RCW 66.44.010(4):

- (4) The board may appoint and employ, assign to duty and fix the compensation of, officers to be designated as liquor enforcement officers. Such liquor enforcement officers shall have the power, under the supervision of the board, to enforce the penal provisions of this title and the penal laws of this state relating to the manufacture, importation, transportation, possession, distribution and sale of liquor. They shall have the power and authority to serve and execute all warrants and process of law issued by the courts in enforcing the penal provisions of this title or of any penal law of this state relating to the manufacture, importation, transportation, possession, distribution and sale of liquor, and the provisions of chapters 82.24 and 82.26 RCW. They shall have the power to arrest without a warrant any person or persons found in the act of violating any of the penal provisions of this title or of any penal law of this state relating to the manufacture, importation, transportation, possession, distribution and sale of liquor, and the provisions of chapters 82.24 and 82.26 RCW.

RCW 66.44.270(2)(a):

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

RCW 66.44.290(1):

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

controlled purchase program authorized by the liquor control board may not be used for criminal or administrative prosecution.

RCW 66.44.310(1)(a) and (b):

- (1) Except as otherwise provided by RCW 66.44.316, 66.44.350, and 66.24.590, it shall be a misdemeanor:
 - (a) To serve or allow to remain in any area classified by the board as off-limits to any person under the age of twenty-one years;
 - (b) For any person under the age of twenty-one years to enter or remain in any area classified as off-limits to such a person, but persons under twenty-one years of age may pass through a restricted area in a facility holding a spirits, beer, and wine private club license;

RCW 66.44.316:

It is lawful for:

- (1) Professional musicians, professional disc jockeys, or professional sound or lighting technicians actively engaged in support of professional musicians or professional disc jockeys, eighteen years of age and older, to enter and to remain in any premises licensed under the provisions of Title 66 RCW, but only during and in the course of their employment as musicians, disc jockeys, or sound or lighting technicians;
- (2) Persons eighteen years of age and older performing janitorial services to enter and remain on premises licensed under the provisions of Title 66 RCW when the premises are closed but only during and in the course of their performance of janitorial services;
- (3) Employees of amusement device companies, which employees are eighteen years of age or older, to enter and to remain in any premises licensed under the provisions of Title 66 RCW, but only during and in the course of their employment for the purpose of installing, maintaining, repairing, or removing an amusement device. For the purposes of this section amusement device means coin-operated video games, pinball machines, juke boxes, or other similar devices; and
- (4) Security and law enforcement officers, and firefighters eighteen years of age or older to enter and to remain in any premises licensed under Title 66 RCW, but only during and in the course of their official duties and only if they are not the direct employees of the licensee. However, the application of the [this] subsection to security officers is limited to casual, isolated incidents arising in the course of

their duties and does not extend to continuous or frequent entering or remaining in any licensed premises.

This section shall not be construed as permitting the sale or distribution of any alcoholic beverages to any person under the age of twenty-one years.

RCW 66.44.350

Notwithstanding provisions of RCW 66.44.310, employees holding beer and/or wine restaurant; beer and/or wine private club; snack bar; spirits, beer, and wine restaurant; spirits, beer, and wine private club; and sports entertainment facility licenses who are licensees eighteen years of age and over may take orders for, serve and sell liquor in any part of the licensed premises except cocktail lounges, bars, or other areas classified by the Washington state liquor control board as off-limits to persons under twenty-one years of age: PROVIDED, That such employees may enter such restricted areas to perform work assignments including picking up liquor for service in other parts of the licensed premises, performing clean up work, setting up and arranging tables, delivering supplies, delivering messages, serving food, and seating patrons: PROVIDED FURTHER, That such employees shall remain in the areas off-limits to minors no longer than is necessary to carry out their aforementioned duties: PROVIDED FURTHER, That such employees shall not be permitted to perform activities or functions of a bartender.

REGULATIONS

WAC 314-07-020(8):

Each liquor license application is unique and investigated individually. The board may inquire and request documents regarding all matters in connection with the liquor license application. Following is a general outline of the liquor license application process.

- (8) The board may conduct a final inspection of the proposed licensed business, in order to determine if the applicant has complied with all the requirements of the license or privilege requested.

WAC 314-07-035:

Per RCW 66.24.010(1), a liquor license must be issued in the name(s) of the true party(ies) of interest.

(1) **True parties of interest** - For purposes of this title, 'true party of interest' means:

True party of interest	Persons to be qualified
Sole proprietorship	Sole proprietor and spouse.
General partnership	All partners and spouses.
Limited partnership, limited liability partnership, or limited liability limited partnership	. All general partners and spouses; All limited partners that have more than 10% interest in the partnership and their spouses.
Limited liability company	. All members with more than 10% interest in the LLC and spouses. (Note: In order for the liquor control board to identify the persons to be qualified, we will need to know all parties that have an interest in the limited liability company or have a pending interest.)
Privately held corporation	. All managers and their spouses. All corporate officers (or persons with equivalent title). All stockholders who hold more than 10% of the issued or outstanding stock. (Note: In order for the liquor control board to identify the persons to be qualified, we will need to know all parties who have been issued or will be issued corporate stock.)
Publicly held corporation	All corporate officers (or persons with equivalent title).
Multi-level ownership structures	The liquor control board will review each entity to determine which individuals are to qualify

Any entity

according to the guidelines in this rule.

Any person who is in receipt of, or has the right to receive, more than ten percent of the gross or net sales from the licensed business during any full or partial calendar or fiscal year. For the purposes of this chapter:

‘Gross sales’ includes the entire gross receipts from all sales and services made in, upon, or from the licensed business.

‘Net sales’ means gross sales minus cost of goods sold.

- (2) For purposes of this section, ‘true party of interest’ does not mean:
- (a) A person or entity receiving reasonable payment for rent on a fixed or percentage basis under a bona fide lease or rental obligation, unless the lessor or property manager exercises control over or participates in the management of the business.
 - (b) A person who receives a bonus as an employee, if: The employee is on a fixed wage or salary and the bonus is not more than twenty-five percent of the employee's prebonus annual compensation; or the bonus is based on a written incentive/bonus program that is not out of the ordinary for the services rendered.
 - (c) A person or entity contracting with the applicant(s) to sell the property, unless the contract holder exercises control over or participates in the management of the licensed business.
 - (d) A person or entity receiving payment of franchise fees on a fixed or percentage basis under a bona fide franchise agreement, unless the person or entity receiving payment of franchise fees exercises control over or participates in the management of the licensed business.
- (3) **Financiers**-The board may conduct a financial investigation of financiers.
- (4) **Persons who exercise control of business**-The board may conduct an investigation of any person or entity who exercises any control over the applicant's business operations.

WAC 314-07-060(2):

Following is a list of reasons a temporary permit may not be issued or can be revoked. Per RCW 66.24.010, the board has broad discretionary authority to approve or deny a liquor license or permit application. Refusal by the board to issue or extend a temporary license shall not entitle the applicant to request a hearing.

- (2) The local authority objects for any reason.

WAC 314-11-020(2):

- (2) Per RCW 66.44.310, licensees or employees may not allow persons under twenty-one years of age to remain in any premises or area of a premises classified as off-limits to persons under twenty-one. (See RCW 66.44.310 (1)(b) regarding nonprofit, private club licensees.)

NO. 414554-6-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DODGE CITY SALOON,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT A. LEWIS

AFFIDAVIT OF MAILING

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