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DIVISION II

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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KNOCK OUT, INC.,

Appellant,

v.

STATE OF WASHINGTON  
LIQUOR CONTROL BOARD,

Respondent.

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**BRIEF OF RESPONDENT  
LIQUOR CONTROL BOARD**

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## I. INTRODUCTION

Knock Out's employee sold cigarettes to a minor during a compliance check conducted by a health department employee. Knock Out's employee admitted to selling the cigarettes to the 17-year-old, who was serving as an investigative aide. The Liquor Control Board brought charges, held a hearing, and issued a Final Order finding that Knock Out had violated tobacco statutes it was required to obey, and the Board imposed an appropriate sanction.

The Board has statutory authority to regulate tobacco sales, which includes specific legislative direction to ensure minors do not have access to tobacco products. The legislature has expressly contemplated that compliance checks like the one at issue here would be conducted by the Board and by state and local health departments. Moreover, such checks are not warrantless searches. Knock Out's arguments seek to undermine a significant tool that the legislature provided for ensuring that minors do not have access to cigarettes. The compliance check at issue here was authorized by statute, and the Board was within its legal authority to discipline its licensee for selling cigarettes to a minor in violation of the Legislature's express direction that such products be kept from minors. The Board's Order should be affirmed.

## II. ISSUES PRESENTED FOR REVIEW

1. Where RCW 70.155.110 and .080 expressly contemplate the Board, local law enforcement, and local health departments will conduct random, unannounced compliance checks using minors, did the Liquor Control Board have authority to cite Knock Out for a violation of RCW 26.28.080 based on evidence obtained when Knock Out sold cigarettes to a minor investigative aide?
2. Did the compliance check carried out in the public area of Knock Out's convenience store constitute an unlawful warrantless search?

## III. STATEMENT OF THE CASE

Knock Out, Inc., d/b/a Star Mart ("Knock Out"), holds a license to sell tobacco products in Clark County, Washington. AR<sup>1</sup> 188. As such, Knock Out is subject to the Board's jurisdiction. AR 61. Knock Out is prohibited from selling tobacco products to any person under the age of 18 years. AR 60-62, 77.

The State Department of Health works with Board staff to monitor establishments licensed to sell tobacco products. AR 61-62. State and local health departments test compliance with laws and rules prohibiting minors from purchasing tobacco. AR 88-89; *see* RCW 26.28.080, RCW 70.155.110. They use minor investigative aides or "Youth Operatives" who attempt to purchase tobacco products. AR 61-62, 72-73.

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<sup>1</sup> "AR" refers to the administrative record for Liquor Control Board Case No. T-518.

On February 3, 2010, Clark County Public Health Department's (CCPH) health educator, Long Vue, and then-seventeen-year-old CCPH minor, Jenna Nelmark, engaged in a series of tobacco compliance checks. AR 32-33, 72-73. The compliance checks were part of CCPH's work as a contractor with the State Department of Health through its Youth Access Program. AR 72, 75, 78-79. Knock Out was one of the merchants they checked on February 3, 2010. AR 41.

Under Mr Vue's direction, the minor entered Knock Out's business and purchased a package of Marlboro Special Blend cigarettes. Upon the clerk's request, the minor produced her state issued identification, which identified her as being under the age of 18. AR 32-34. The clerk allowed her to purchase the cigarettes anyway. *Id.* CCPH forwarded the evidence of Knock Out's sale to the Board. AR 75. The Board charged Knock Out with the administrative violation of selling and/or allowing to be sold tobacco products to a person under 18 years of age, contrary to RCW 26.28.080 and subject to penalties per RCW 70.155.100 (3) and (4). AR 88-89 188, 202. This was Knock Out's third violation of selling tobacco products to a minor within a two-year period. AR 188.

Knock Out requested an administrative hearing to contest the charged violation. AR 152, 242-45. The Office of Administrative Hearings conducted an adjudicative hearing on January 25, 2011. AR 19,

25. At the hearing, Knock Out's employee, Jeremy Rubbelke, admitted that he sold a package of cigarettes to the minor, who was 17 years old on the day of the sale. AR 109, 112-13.

On February 4, 2011, the Administrative Law Judge issued an Amended Initial Order<sup>2</sup> with findings of fact and conclusions of law, affirming the violation but reducing the monetary penalty from one thousand dollars (\$1000) to five hundred dollars (\$500) and reducing the suspension time from six months (6) to three months (3). AR 267. The Order concluded that, "with some mitigating factors and no aggravating factors, the standard penalty for a third violation should be reduced." *Id.*

Board staff petitioned to uphold the conclusion that an illegal sale occurred, but asked the Board to reinstate the full standard monetary penalty of \$1000 and a six-month suspension. AR 276-81. By order dated May 24, 2011, the Board corrected some of the Initial Order's findings of fact and conclusions of law, adopted the decision that an illegal sale occurred, and reinstated the full standard penalty for a third violation of selling tobacco products to a minor. AR 282-86. In determining that the full penalty was appropriate, the Board found the record did not

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<sup>2</sup> The February 3, 2011 Initial Order was amended to correct clerical errors. AR 260.

establish sufficient cause for mitigation. *Id.* Thereafter, Knock Out timely sought Judicial Review of the Board's Final Order.

On judicial review, the superior court upheld the Board's Final Order. CP 38-42. Knock Out appealed.

#### IV. ARGUMENT

##### A. Standard Of Review

On appeal, Knock Out bears the burden of demonstrating the invalidity of agency action on judicial review. RCW 34.05.570(1)(a). "To reverse an administrative order, a reviewing court must find that the order: (1) is based on an error of law; (2) is based on findings not supported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond the statutory authority; or (6) the agency has engaged in an unlawful procedure or decision making process or has failed to follow a prescribed procedure." RCW 34.05.570(3); *In re Martin*, 154 Wn.App. 252, 260, 223 P.3d 1221 (2009); *see also Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). A court shall only grant relief if it determines that a person seeking judicial relief has been substantially prejudiced by the complained of action. RCW 34.05.570(1)(d).

Knock Out has not challenged any of the factual findings below, nor has it challenged the appropriateness of the Board's penalty.

Unchallenged findings are considered verities on appeal. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995). As to questions of law, the court applies a *de novo* standard of review. *Ames v. State Med. Quality Assur. Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). However, courts do give substantial weight to an agency's interpretation of its own laws and regulations. *Univ. of Wash. Med. Ctr. v. Dept. of Health*, 164 Wn.2d 95, 187 P.3d 243 (2008).

As a matter of law, state statute authorized the compliance check and the check did not require a warrant. As a result, this Court should affirm the Board's final order.

**B. The Compliance Check Of Knock Out's Convenience Store Was Authorized By Statute.**

The legislature has expressly contemplated that the Board *and* the state and local health departments will conduct compliance checks in order to enforce Washington's prohibition against the sale of cigarettes to minors.

The sale of cigarettes or other tobacco products to a person under the age of 18 years is prohibited by state law. Specifically, RCW 26.28.080 provides that "[e]very 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.”

RCW 70.155 was enacted to address the Legislature’s concern that minors had easy access to tobacco, in spite of state laws prohibiting the sale and distribution of tobacco to minors. RCW 70.155.005. The Legislature found it is imperative to effectively reduce the sale, distribution, and availability of tobacco products to minors. *Id.*

One of the methods the Legislature enacted to combat this problem is an express grant of authority to the Liquor Control Board to enforce RCW 70.155 and RCW 26.28.080. The Board has “full power and authority to enter any place of business where tobacco products are sold for the purpose of enforcing” RCW 70.155. RCW 70.155.110(2). In addition, the legislature has provided that the Board may “work with local county health departments or districts and local law enforcement agencies to conduct random, unannounced, inspections to assure compliance.” RCW 70.155.110(4). Thus, the legislature expressly contemplated that local health departments would participate in these random, unannounced checks.

The legislature also granted explicit statutory authority to conduct such compliance checks using minors. RCW 70.155.080(1). While RCW 70.155.080(1) prohibits a minor from purchasing tobacco products,

it creates an exception to the prohibition if a minor is participating in a “controlled purchase as part of a liquor control board, law enforcement, *or local health department* activity.” (Emphasis added.) This provision also shows that the legislature expressly contemplated that local health departments will be involved in conducting controlled purchases using underage shoppers. If a retailer or wholesaler fails to comply with the statutory requirements and sells cigarettes to a minor, the Board then has authority to revoke or suspend the license. *See* RCW 70.155.110.<sup>3</sup>

These statutes show the legislature intended the Board, as well as local health departments and local law enforcement, to perform tobacco compliance checks using minor investigative aides. Accordingly, the compliance check conducted by the Clark County Public Health Department using a minor in Knock Out’s premises, and the Board’s subsequent administrative enforcement proceeding using evidence obtained at that compliance check, were fully authorized. The compliance check in this case was authorized under RCW 70.155, and the evidence obtained from it was properly admitted in the case against Knock Out.

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<sup>3</sup> Washington law requires a business to obtain a license from the Board in order to conduct the business of selling cigarettes. RCW 82.24.500-.510.

**C. Rulemaking Is Not Necessary To Implement The Statutory Authority To Engage In Tobacco Compliance Checks**

The Board was not required to promulgate specific rules pertaining to tobacco compliance checks, nor was the Board required to authorize health departments to conduct tobacco compliance checks where the tobacco enforcement statutes already provided that authority. *See* Aplt's Br. at 6-8.

Knock Out cites no on-point legal authority for the proposition that the Board was required to adopt rules authorizing tobacco compliance checks. Knock Out cites only to statutes in a different chapter of state law, which are inapplicable to this case. Aplt's Br. at 8. Given the express and specific statutory authority authorizing these *tobacco* compliance checks, there is no requirement that the Board go to the unnecessary effort to adopt duplicative rules.

Knock Out mistakenly refers to Board rules adopted under RCW 66.44.290. Aplt's Br. at 8. In RCW 66.44.290, the Legislature authorized the Board to adopt rules under which liquor licensees would be allowed to engage in their own, licensee-operated compliance checks to determine whether the licensee's employees are meeting the requirements of the liquor laws relating to sales to minors. The legal authority granted in RCW 66.44.290 was necessary in part because without the statute and

rules, minors assisting a licensee in conducting a compliance check would commit a criminal offense. RCW 66.44.290(1).

In any event, nothing about the permissive authority granted in RCW 66.44.290 to adopt rules for a different type of compliance program to regulate liquor is relevant to the Board's enforcement authority relating to regulating minors' access to tobacco. Knock Out provides no relevant legal authority which would require the Board to promulgate rules to use compliance checks to assure its licensees are complying with the laws prohibiting the sale of tobacco to minors.

**D. A Compliance Check Conducted To Ensure A Licensed Seller Of Tobacco Is Abiding By State Law Is Not A Search, And Any Evidence Obtained Is Admissible In Subsequent Administrative Enforcement Proceedings**

1. **Knock Out fails to establish that a search occurred during the compliance check conducted on its premises or that the exclusionary rule should apply. A compliance check is not a search.**

Here, an adult employee of the Clark County Public Health Department and a minor working with that department entered Knock Out's publicly open convenience store and purchased cigarettes. AR 33-34, 72-73. There is no evidence that they entered any non-public area of the business. There simply was never a search, as this court recently held in almost identical circumstances in *Dodge City Saloon v. Liquor Control Board*, 168 Wn.App. 388, 396, 288 P.3d 343 (2012).

In *Dodge City Saloon*, this Court held that a liquor licensee has no privacy interest in the area of its business which is open to the public, and rejected the notion that a minor conducted a warrantless search when he purchased alcohol in that public area. *Dodge City*, 168 Wn. App. at 398-99. Here, Knock Out runs a business that it holds open to the public, AR 122-25. The minor entered and remained in the public portion of Knock Out's premises. AR 33. A Knock Out employee admittedly sold the minor a package of Marlboro Special Blend cigarettes while the minor was in the public portion of the store. AR 33-34. The minor never went outside the public areas of the business. *Id.* Knock Out's expectation of privacy does not extend to the area that Knock Out voluntarily exposed to the public, and thus, no "search" occurred.

In addition, Knock Out accepted its license with the understanding that the premises would be open to inspection by local law enforcement authorities, local county public health departments, and the Board staff. RCW 70.155.110(4). It cannot now argue that it was unaware that its heavily regulated premises would not be visited by government officers or other law enforcement during its business hours. The protections of the Fourth Amendment and Article I, section 7 are not applicable in this case.

Because no search occurred, no constitutional violation exists, and there is no basis for arguing the exclusionary rule operates to exclude the evidence of Star Mart's unlawful tobacco sale to a minor.

**2. This Administrative Enforcement Proceeding Is Not Quasi-Criminal In Nature**

This administrative proceeding is one designed to ensure compliance with the licensing restrictions. It is not a quasi-criminal proceeding, and for this additional reason, the exclusionary rule does not apply to this case. Aplt's Br. at 11.<sup>4</sup>

Knock Out is a corporation that was issued a license to sell tobacco at a retail store. The Board's authority with regard to Knock Out's tobacco license is governed by RCW 70.155. RCW 70.155.100(8) and .110(1). Board proceedings to adjudicate violations of RCW 70.155 or RCW 26.28.080 are carried out under the Washington Administrative Procedure Act, RCW 34.05 (APA). RCW 70.155.100(8). Therefore, any action taken against a licensee is an administrative action under the RCW 70.155 and APA, not a criminal action under Titles 9 or 9A RCW.

Furthermore, administrative matters are not quasi-criminal because the proceedings and potential penalties are remedial and not punitive in

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<sup>4</sup> Knock Out misstates the Board's Final Order, which provides that Knock Out: "shall be subject to a monetary penalty of one thousand dollars and a six-month suspension of its tobacco license privileges . . . . Failure to comply with the terms of [the] order will subject the Licensee to further disciplinary action." AR 282-286.

nature. *See State v. Catlett*, 133 Wn.2d 355, 365-69 945 P.2d 700 (1997). Absent any indication that a criminal enforcement was intended, the stated civil goals of the agency are controlling. *Catlett*, 133 Wn.2d at 367 (citing *In re Young*, 122 Wn.2d at 23). For example, in *Jow Sin Quan v. Washington State Liquor Control Board*, 69 Wn.2d 373, 418 P.2d 424 (1966), the Washington Supreme Court held that the Board's revocation of a liquor license was not a criminal proceeding. The Board's proceeding was "civil and disciplinary in nature - the purpose of which is to protect the public health, safety and morals from imprudent, improper, and/or unlawful actions of the board's licensees in the exercise of the privilege conferred upon them." *See Jow Sin Quan*, 69 Wn.2d at 382.

As with the Board's revocation in *Jow Sin Quan*, the penalties contained in RCW 70.155.100 are not intended to punish the licensees, rather they are meant to reduce the availability of tobacco products to minors. RCW 70.155.005. Compliance checks are a tool used to determine whether minors are being protected from access to tobacco as the Legislature intended. As in *Jow Sin Quan*, the penalty against Knock Out's tobacco license is remedial, intended to ensure that minors will not, in the future, gain such easy access to tobacco products at the Knock Out establishment.

Because Knock Out's argument that this proceeding is quasi-criminal fails, its argument that the exclusionary rule applies also fails.

V. CONCLUSION

Based on the foregoing, the Liquor Control Board respectfully requests this Court affirm its Final Order. Knock Out illegally sold cigarettes to a minor. It should be held accountable.

RESPECTFULLY SUBMITTED this 17th day of December,  
2013.

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NO. 44914-5-II

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CERTIFICATE OF  
SERVICE

FILED  
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DIVISION II  
2013 DEC 18 PM 1:10  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

I, Hang Nguyen-Le, declare as follows:

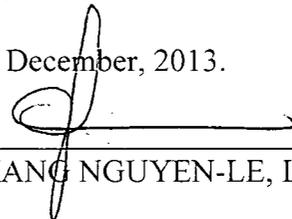
1. I am over the age of 18 years, am competent to testify, and have personal knowledge of the matters stated herein.

2. I hereby certify that on December 17, 2013, I caused to be served a true and correct copy of the Brief of Respondent and this Certificate of Service, via U.S. mail, upon the parties herein, as indicated below:

QUINN HARRISON POSNER  
LANGSDORF, FERGUSON & POSNER, PLLC  
415 E 17<sup>TH</sup> STREET  
VANCOUVER, WA 98663-3423

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

DATED this 17<sup>th</sup> day of December, 2013.

  
\_\_\_\_\_  
HANG NGUYEN-LE, Legal Assistant