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STATE OF WASHINGTON

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COA NO. 69359-0-1 BY RONALD L. ...

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN F. KLINKERT,

Petitioner,

v.

WASHINGTON STATE
LIQUOR CONTROL BOARD,

Respondent.

**WASHINGTON STATE LIQUOR CONTROL BOARD'S
ANSWER TO PETITION FOR REVIEW**

ROBERT W. FERGUSON
Attorney General

KIM O'NEAL, WSBA #12939
Senior Counsel
ISAAC WILLIAMSON, WSBA #43921
Assistant Attorney General
P.O. Box 40100
Olympia, WA 98504
(360) 664-0542

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STATE OF WASHINGTON
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I. INTRODUCTION

On March 16, 2011, Appellant John F. Klinkert sold a pack of cigarettes to a 17-year-old youth operative working with the King County Department of Health. Based on this unlawful sale, the Liquor Control Board (Board) conducted a civil administrative action against Mr. Klinkert for unlawfully selling tobacco to a minor and ordered him to pay a \$100 civil penalty. Mr. Klinkert now seeks review of the Court of Appeals decision that affirmed the Board's final administrative order.

Mr. Klinkert raises no significant question of law under either the state or federal constitution. He challenges the constitutionality of the statutes under which he was cited and fined – RCW 70.155.100(3) and (4) – but there is no authority for Mr. Klinkert's argument that the statutes' reference to RCW 26.28.080 transforms the Board's enforcement of RCW 70.155.100 into a criminal prosecution and triggers a jury trial right. Further, a finding of a violation of RCW 70.155.100(3) is not a criminal conviction that would subject an individual to either criminal penalties or a criminal history. At no point was Mr. Klinkert charged with a crime or at risk of criminal penalties, and his argument that he was entitled to a jury trial is not supported by the facts or law. As such, the Court should deny Mr. Klinkert's petition for review.

II. IDENTITY OF RESPONDENT

Respondent is the Washington State Liquor Control Board.

III. COURT OF APPEALS DECISION

Division One of the Court of Appeals affirmed the Final Order of the Board in an unpublished decision on November 12, 2013, in case no. 69359-0-I.

IV. ISSUE PRESENTED FOR REVIEW

RCW 70.155.100 authorizes the Liquor Control Board to bring a civil enforcement action to adjudicate whether a licensee has violated RCW 26.28.080 by selling tobacco to a minor, and to impose a \$50 to \$100 penalty. May the Legislature provide for civil monetary penalties, awarded in a civil adjudicative proceeding, for conduct specified by reference to a statute defining a criminal offense?

V. STATEMENT OF THE CASE

A. Liquor Control Board's Authority Regarding Youth Tobacco Laws

The Legislature authorized the Board to regulate the sale of alcohol and tobacco. RCW 66.08.020; *see also* RCW 70.155.110. Persons who sell tobacco to the public are licensed by the Board and subject to the Board's jurisdiction. RCW 82.26.220, .190. The Board is granted the

authority to impose and adjudicate monetary penalties for violations of laws regulating the sale of tobacco. RCW 70.155.100.

The Board ensures compliance with laws and rules prohibiting the sale of tobacco to minors through random “compliance checks.” *See* RCW 70.155.110(4). A tobacco compliance check is conducted by using a youth operative. A youth operative is a minor who enters a licensed premises and attempts to buy tobacco products using a valid state identification card. If the licensee sells tobacco products to the youth operative, the Board may issue a notice of board action to the licensee, the licensee’s employee who made the sale, or both. *See* RCW 70.155.110(4); *see also* RCW 70.155.080(1).

The licensee or licensee’s employee may challenge a violation notice by requesting an administrative hearing pursuant to the Washington Administrative Procedure Act (APA). Following the hearing, an administrative law judge issues an initial order, which is subject to review by the Board. WAC 314-42-095.

In addition to its civil regulatory authority, the Board is also a “limited authority Washington law enforcement agency.” RCW 10.93.020(2). This allows the Board to issue criminal citations for violations of laws specifically related to the sale of alcohol and tobacco. *See* RCW 10.93.020(2). The Board can then refer these criminal citations

to the local prosecuting attorneys, who have authority to prosecute criminal actions. *See generally* RCW 36.27.020. The Board does not adjudicate criminal violations itself – that jurisdiction is reserved to the courts. *See* RCW 2.08.010; *see also* RCW 3.66.060.¹

B. Mr. Klinkert Sold Tobacco To A Minor

Mr. Klinkert worked as a service clerk at a checkout register at Walgreens Store Number 4157 in Seattle, Washington. Walgreens is a licensed retailer of tobacco products. On March 16, 2011, King County Department of Health staff conducted a tobacco compliance check at the Walgreens store while Mr. Klinkert was working at the register.

During the compliance check, a 17-year-old youth operative entered Walgreens to attempt to purchase a pack of cigarettes. The youth operative carried her vertical Washington Driver's License during the check. The youth operative's license indicated that her birthdate was "02-22-1994." It also indicated that she would not be eighteen years of age until "02-22-2012." When the youth operative sought to purchase a pack of cigarettes, Mr. Klinkert asked for her identification, looked at her date of birth, mistakenly keyed the date of birth into the point of sale system as "2-22-1984" instead of "2-22-1994," and then sold her the cigarettes.

¹ No criminal citation was issued in this case and thus no referral was made to the local prosecutor.

C. Mr. Klinkert's Civil Administrative Proceeding

On March 24, 2011, Board staff issued a written Notice of Board Action on Tobacco Violation (referred to as an "Administrative Violation Notice") to Mr. Klinkert, alleging that he furnished tobacco to a minor. Appendix² at 1. Board staff sought a penalty of \$100 based on Mr. Klinkert's history of a previous violation for selling tobacco to a minor.³ Mr. Klinkert timely requested an administrative hearing.

On August 25, 2011, the administrative law judge conducted a hearing in which Mr. Klinkert stipulated to the fact that he sold cigarettes to a 17-year-old, as alleged. On October 24, 2011, the judge issued an Initial Order finding that Mr. Klinkert sold or supplied the youth operative with tobacco and imposing the \$100 penalty. Appendix at 11.

On December 27, 2011, the Board issued its Final Order upholding the Initial Order. Appendix at 14. The Superior Court affirmed the Board's Final Order. The Court of Appeals also affirmed the Board's order in an unpublished decision and without oral argument.

VI. REASONS WHY REVIEW SHOULD NOT BE GRANTED

Although Mr. Klinkert fails to cite any authority for why his petition for review should be granted, he appears to base his petition on

² The Appendix contains copies of the Administrative Violation Notice, initial order, and final order of the Board.

³ RCW 70.155.100(4) provides that the Board may impose a \$50 fine for a first time violation and \$100 for subsequent violations.

RAP 13.4(b). Pet. for Rev. at 6. Under RAP 13.4(b), a petition for discretionary review will be accepted “[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved. . . .” Mr. Klinkert fails to establish a significant question of constitutional law. It is well established that the Legislature may create dual enforcement mechanisms that empower agencies to enforce civil penalties for conduct that can also be punished criminally. When an agency chooses the civil enforcement mechanism, there is no constitutional right to a jury trial.

The Court of Appeals properly applied settled law regarding the authority of the Legislature to provide for civil penalties for conduct that can also be punished with criminal sanctions and found no constitutional violation. The Court of Appeals also correctly determined that Mr. Klinkert failed to meet his burden to prove beyond a reasonable doubt that RCW 70.155.100 is facially unconstitutional.

A. The Legislature May Constitutionally Empower Agencies To Civilly Enforce Violations For Conduct That Also Can Be Punished Criminally

RCW 70.155.100 provides, in relevant part, that the “[B]oard may impose a monetary penalty upon any person . . . if the [Board] finds that the person violated RCW 26.28.080.” RCW 70.155.100(3). This penalty is limited to \$50 or \$100. RCW 70.155.100(4)(a). The fact that

RCW 26.28.080 also could potentially be prosecuted as a gross misdemeanor is irrelevant to this case. In its decision, the Court of Appeals correctly explained that the Board assesses *civil* penalties in *civil* proceedings under RCW 70.155.100. *Klinkert v. Washington State Liquor Control Board*, No. 69359-0-I, at 4 (Ct. App. Nov. 12, 2013).

Enforcement mechanisms such as the one at issue here are consistent with both the state and federal constitutions. The Legislature may constitutionally provide for both criminal and civil sanctions for the same conduct. *Hudson v. U.S.*, 522 U.S. 93, 95-96, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). A civil enforcement statute's description of offending conduct "by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 491, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Indeed, "the Legislature may provide for both civil sanctions and criminal penalties in the same statute without thereby converting the civil

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proceeding to a criminal or penal one.” *Winchester v. Stein*, 135 Wn.2d 835, 852-53, 959 P.2d 1077 (1998).⁴ See also *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) (“only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty” (quoting *Hudson*, 522 U.S. at 100) (internal quotes omitted)); *In re Detention of Turay*, 139 Wn.2d 379, 417, 986 P.2d 790 (1999) (same). Thus, the Legislature may provide for civil enforcement mechanisms for conduct that also can be subject to criminal prosecution.

B. There Was No Criminal Prosecution Here And Mr. Klinkert’s Arguments Do Not Support His Position That RCW 70.155.100 Is Facially Unconstitutional

Mr. Klinkert argues that RCW 70.155.100 is unconstitutional because the Board cannot adjudicate criminal violations. His argument is misplaced because the Board has never attempted to adjudicate criminal violations. Instead, all of Mr. Klinkert’s arguments rest on his faulty contention that, as a result of his administrative hearing, he was subjected to a criminal prosecution and convicted of a gross misdemeanor. Pet. for Rev. at 11. His contention is contradicted by the facts: he received a *civil*

⁴ Citing *Beckett v. Department of Soc. & Health Servs.*, 87 Wn.2d 184, 188, 550 P.2d 529 (1976), overruled on other grounds by *Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984); *Yakima County Clean Air Auth. v. Glascam Builders, Inc.*, 85 Wn.2d 255, 260, 534 P.2d 33 (1975); *State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 278, 510 P.2d 233 (1973).

Administrative Violation Notice, he was never arraigned, he was never summoned to court, the case was never referred to a criminal prosecuting attorney, he never faced the possibility of confinement or other criminal sanctions, and he was never found guilty of a crime or entered a guilty plea.

Although Mr. Klinkert was not subjected to any criminal proceeding under RCW 70.155.100, he claims that statute is unconstitutional because it denies a right to a jury. The right to trial by jury guaranteed by the state and federal constitutions exists only in the context of a “criminal prosecution.” Const. art. I, § 22; U.S. Const. amend. VI. While “criminal prosecution” is not defined in statute, a “conviction” means “an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030. Titles 10 and 13 RCW refer to criminal procedure for the courts and juvenile courts, respectively.

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Administrative agencies do not rely on Titles 10 or 13 RCW; rather, they adjudicate civil violations pursuant to Title 34 RCW, which contains Washington's APA.⁵

Mr. Klinkert seems to be asking this Court to treat the Board's administrative adjudication as a criminal prosecution, thereby requiring a jury trial, *see* Pet. for Rev. at 21, and he offers several misplaced arguments in support of his request.

Mr. Klinkert first argues that the Court of Appeals "appears to have misunderstood the gist of [his] complaint." Pet. for Rev. at 11. His argument appears to be that the Board cannot assess a monetary penalty under RCW 70.155.100 without first adjudicating whether a crime was committed under RCW 26.28.080. As explained above, however, the Legislature may provide for both civil sanctions and criminal penalties for the same conduct without converting the civil proceeding into a criminal prosecution and without requiring the application of criminal standards. Mr. Klinkert fundamentally mistakes the operation of RCW 70.155.100. No criminal sanctions were sought and none were imposed. This civil

⁵ *See State v. Ivie*, 136 Wn.2d 173, 177-78, 961 P.2d 941 (1998) (quoting Black's Law Dictionary 1221 (6th ed.1990) (defining "prosecution" as "[a] criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime") and stating that "the meaning of 'criminal prosecution' must further be determined from the statutory context in which it is used").

adjudication by a state agency is entirely separate from a potential criminal adjudication by the courts.

Mr. Klinkert next argues that the Court of Appeals provided a “misleading” summary of the *Winchester* decision. Pet. for Rev. at 14. Again, Mr. Klinkert misunderstands the law and the purpose for which the Court of Appeals cited *Winchester*. The Court of Appeals cited *Winchester* as an example of how the Legislature may constitutionally establish civil sanctions for conduct that also is criminal in nature. *Klinkert*, No. 69359-0-I, at 4 (Ct. App. Nov. 12, 2013). The fact that the defendant in *Winchester* “already had a criminal jury trial” is irrelevant to whether a dual enforcement mechanism is constitutional.

Mr. Klinkert next argues that the *absence* of any reference to a criminal charge in the administrative citation shows that the administrative citation itself is a criminal charge, unconstitutionally authorized by RCW 70.155.100. Pet. for Rev. at 15-16. Once again, Mr. Klinkert fundamentally mischaracterizes the nature of proceedings under RCW 70.155.100. Neither the administrative law judge nor the Board attempted to adjudicate a criminal prosecution or impose a criminal sentence. No criminal prosecution happened here, and none is allowed by

RCW 70.155.100. RCW 70.155.100 simply allows the Board to adjudicate a civil violation against a person who sells tobacco to a minor.⁶

Finally, the Court of Appeals correctly rejected Mr. Klinkert's arguments that he is entitled to a jury trial. *Klinkert*, No. 69359-0-I, at 4 (Ct. App. Nov. 12, 2013). His argument depends entirely on his mistaken contention that he was subject to a criminal prosecution. He was not. This violation was handled solely by an administrative agency pursuant to its civil regulatory authority, and he was never subject to any potential criminal penalty at any stage of these administrative proceedings. Because there was no criminal charge and no criminal prosecution, there was no violation of his constitutional right to a jury trial.

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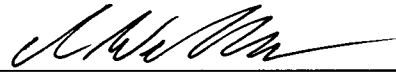
⁶ Mr. Klinkert's argument that the APA does not authorize criminal proceedings, Pet. for Rev. at 16-17, while correct, is irrelevant, since no criminal proceeding was undertaken here.

VII. CONCLUSION

Mr. Klinkert fails to establish any of the grounds for granting review under RAP 13.4(b). The Court of Appeals committed no error in concluding that Mr. Klinkert failed to establish beyond a reasonable doubt that RCW 70.155.100 is facially unconstitutional. Mr. Klinkert's petition for review should be denied.

RESPECTFULLY SUBMITTED this 14³th day of January, 2014.

ROBERT W. FERGUSON
Attorney General



KIM O'NEAL, WSBA #12939
Senior Counsel
ISAAC WILLIAMSON, WSBA #43921
Assistant Attorney General
Attorneys for Respondent Washington State
Liquor Control Board

NOTICE OF BOARD ACTION ON TOBACCO VIOLATION

Licensee Case # <u>Walgreens Co.</u>	Individual Case # <u>2A1075A</u>
Licensee Name <u>Walgreens #4157</u>	Name (Last, First, MI) Age # <u>KLINKERT JOHN F 14316 11th PL WJ</u>
Trade Name <u>857 NE Northgate Way</u>	Address <u>Lynnwood, WA 98087</u>
Address <u>Seattle, WA 98125</u>	City, State, Zip-4 <u>425-711-7195 9-3-41</u>
City, State, Zip-4 <u>6074009440010026</u>	Phone <u>M 5-11 210</u>
UBI No. <u>405796</u>	DOB <u>[REDACTED]</u>
License No.	Driver's License/ID Card No.

Physical Location of Violation (If licensee address is a mailing address)

857 NE Northgate Seattle 98125
Street Address City Zip

3-16-11 1615
Date of Violation Time of Violation

- RCW 26.28.080 - Sale of Tobacco Products to a Person under Age 18
- RCW 70.155.040 - Cigarettes must be sold in Original Package
- Other _____

Proposed Penalty per RCW 70.155.100 (Violations within a Two Year Period)

Licensee (Owner):

1st Violation: \$100 2nd Violation: \$300 3rd Violation: \$1000 & 6 months suspension Other _____

Date and Time for Suspension to start: _____

Employee Making Sale:

1st Violation: \$50 or attend ID Checking Class 2nd and Subsequent Violations \$100

Served On: Licensee Manager Employee

Issued by Officer: [Signature] No. 31195
Signature

Date: 3-24-11 Time: 1513

- Please read your options and instructions on both sides carefully.
- The Board must receive your request to contest this violation notice within 20 days from the date this notice was issued.
- If you do not respond, the monetary penalty must be received within 30 days of the issue date or legal action to collect civil penalties including attorney fees and court costs will result.

White - Headquarters; Canary - Officer; Pink - Individual

ADMINISTRATIVE VIOLATION PROCESS

Please check the appropriate box. I choose to:

- Pay the monetary penalty indicated on the front of this notice. Payment attached. (Make check or money order payable to: Washington State Liquor Control Board and include the case number on the front of this notice.)

Any monetary payment (Check or Money Order) must be received within 30 days of the date this notice was issued. Mail to:

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

- Request a settlement conference with a representative of the Liquor Control Board to discuss mitigating or unusual circumstances. (I understand I will receive a call to set this appointment. I also understand that if I am not satisfied with the results of the conference, I can still request a hearing.) Write your phone number below:

Contact Phone Number ()

Best time to reach me is: _____

- Request a Formal Administrative Hearing. I understand I will be notified of the date, time and location of the hearing. Please include correct mailing address if different than on the front of this notice.

If you request an ADMINISTRATIVE HEARING and need an interpreter accommodation, please indicate the type of interpreter service needed and you will be contacted regarding your specific needs.

- Hearing interpreter Language Interpreter Language: _____

The Board must receive your response to this notice within 20 days of the date the notice was issued or the original penalty goes into effect.

Once you have chosen from one of the three options above, please send this form to:

Washington State Liquor Control Board
Enforcement and Education Division
PO Box 43094
Olympia, WA 98504-3094

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OCT 28 2011

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

Liquor Control Board
Board Administration

In The Matter Of:

JOHN F. KLINKERT, AN INDIVIDUAL,
RESPONDENT.

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

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND INITIAL ORDER

1. STATEMENT OF THE CASE:

Hearing

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

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

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

Issues for Hearing

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

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and Initial Order
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Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402
Tel: (253) 476-6888 Fax: (253) 593-2200

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

Initial Order Summary

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

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

Appearances and Representation

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

Witnesses

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

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

Exhibits

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

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

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

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

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

Non-Evidentiary Documents Received And Considered By The ALJ

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

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

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

2. PREHEARING MOTIONS:

Motion to Deny Jurisdiction

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

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

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

Motion to Construe RCW 70.155.090 Reasonably

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

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

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

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

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

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

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

3. **FINDINGS OF FACT:**

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

Jurisdictional Facts

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

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

Alleged Sale of Tobacco to Person Under Age 18 Years

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

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

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

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

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

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

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

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

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

4. CONCLUSIONS OF LAW

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

Jurisdiction

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

Sale of Tobacco to Person Under Age 18 Years

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

4.3 RCW 70.15 5.100 states:

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

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

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

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

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

5. INITIAL ORDER

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

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

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

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

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



Steven C. Smith
Administrative Law Judge
Office of Administrative Hearings

NOTICE TO PARTIES OF FURTHER APPEAL RIGHTS - READ CAREFULLY

Petition for Review of Initial Order

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

The petition for review must:

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

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

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

Address for filing a petition for review with the Board:

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

Final Order and Additional Appeal Rights

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

Following this review, the board will enter a final order. WAC 314-42-095(4). Within ten days of the service of a final order, any party may file a petition for reconsideration with the board, stating the specific grounds upon which relief is requested. RCW 34.05.470 and WAC 10-08-215.

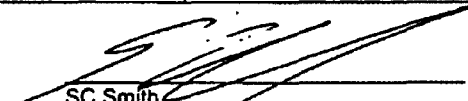
The final decision of the board is appealable to the Superior Court under the provisions of RCW 34.05.510 through 34.05.598 (Washington Administrative Procedure Act).

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

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

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

Date: October 24, 2011


SC Smith
Office of Administrative Hearings

Certificate of Service
Page 1 of 1

Office of Administrative Hearings
949 Market Street, Suite 500
Tacoma, WA 98402
Tel: (253) 476-6888 • Fax: (253) 593-2200

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BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

In The Matter Of the Hearing Of:

JOHN F. KLINKERT

14316 11TH PLACE W
LYNNWOOD, WA 98087-6085

AN INDIVIDUAL

TVN: 2A1075A

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

FINAL ORDER OF THE BOARD

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

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

FINAL ORDER T-537
JOHN F. KLINKERT

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

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

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

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

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

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

Payment should be sent to:

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

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

WASHINGTON STATE LIQUOR CONTROL BOARD

Sharon Foster
Ruthanah Rose Smith per telephonic approval
Charm

FINAL ORDER T-537
JOHN F. KLINKERT

2

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

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

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

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

FINAL ORDER T-537
JOHN F. KLINKERT

3

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

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

FINAL ORDER T-537
JOHN F. KLINKERT

4

Washington State Liquor Control Board
3000 Pacific Ave. S.E.
P.O. Box 43076
Olympia, WA 98504-3076
Phone: 360-464-1607

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RECEIVED
SUPREME COURT
STATE OF WASHINGTON

COA NO. 69359-0- I

2014 JAN 13 P 3: 23

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN F. KLINKERT,

Petitioner,

v.

WASHINGTON STATE
LIQUOR CONTROL BOARD,

Respondent.

CERTIFICATE OF
SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on January 13, 2014, I served a true and correct copy of the Washington State Liquor Control Board's Answer to Petition for Review and this Declaration of Service by placing same in the U.S. mail via state Consolidated Mail Service with proper postage affixed to:

JOHN F. KLINKERT
14316 - 11TH PLACE WEST
LYNNWOOD, WA 98087

DATED this 13th day of January, 2014, at Olympia, Washington.


MARLENA MULKINS
Legal Assistant