

NO. 69359-0-I

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

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JOHN F. KLINKERT,

Appellant,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent.

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**BRIEF OF RESPONDENT**

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**FILED**  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2013 FEB 11 PM 1:51

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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 Washington State Department of Health. The Liquor Control Board (Board) initiated an administrative action against Mr. Klinkert for his conduct and, after a hearing, issued a Final Order finding he committed the violation and ordering him to pay a \$100 civil penalty.

Mr. Klinkert now challenges the constitutionality of the statutes under which he was cited and fined – RCW 70.155.100(3) and (4).<sup>1</sup> No authority exists for Mr. Klinkert’s argument that the tobacco regulatory statutes’ reference to elements enumerated in RCW 26.28.080 transforms the Board’s enforcement of RCW 70.155.100 into a criminal prosecution. At no point was Mr. Klinkert charged with a crime or at risk of imprisonment or other criminal penalties, and his argument that he was entitled to a jury trial is not supported by the facts or law. The Board afforded Mr. Klinkert all the process he was due in an administrative action. As such, this Court should affirm the Board’s finding that Mr. Klinkert violated RCW 70.155.100 and its imposition of a civil penalty.

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<sup>1</sup> Appellant’s brief (Apl’t’s Br.) at 19.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Is RCW 70.155.100's imposition of an administrative penalty, upon a person who sells tobacco to a minor, constitutional?

2. Is Mr. Klinkert entitled to recover costs under RCW 4.84.350?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Overview Of Liquor Control Board Proceedings**

The Legislature established the Board to regulate the sale of alcohol and tobacco for the protection of the "welfare, health, peace, morals, and safety of the people of the state." RCW 66.08.010; also, see generally RCW 70.155.100. Persons who sell tobacco to the public are subject to the Board's jurisdiction. RCW 82.26.220; RCW 82.26.190.

The Board has the authority to adjudicate and impose monetary penalties for violations of laws regulating the sale of tobacco. RCW 70.155.100. In its ongoing responsibility to monitor licensed establishments, the Board ensures compliance with laws and rules prohibiting the sale of tobacco to minors through random "compliance checks." CP 156<sup>2</sup>; RCW 70.155.110. Staff from state and county health departments coordinate with Board staff in conducting these tobacco

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<sup>2</sup> The complete certified administrative record is contained in the Clerk's Papers at 94-301 and includes a transcript of the proceedings. From 301-396 is another copy of the transcript and Mr. Klinkert's petitioner for review. The Clerk's Papers will be referred to as "CP."

compliance checks. RCW 70.155.110(4). A tobacco compliance check is conducted by using a youth operative. CP 156-57. The youth operative is a minor, working with employees of the respective health departments, who enters a licensed premises and attempts to buy tobacco products using a valid state identification card. CP 156-58. If the licensee sells tobacco products to the youth operative then the health department refers that information to Board staff, who may issue an administrative violation notice to either or both the licensee and licensee's employee who made the sale. *See generally* RCW 70.155.110(4); *see also* RCW 70.155.080(1).

The licensee or licensee's employee may challenge the violation by requesting an administrative hearing pursuant to the Washington Administrative Procedure Act (APA). *See* RCW 70.155.100(8). If a hearing is requested, Board staff issue a complaint and request the Office of Administrative Hearings conduct an administrative hearing to determine whether a violation occurred. *See generally* WAC 314-42-051. 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 violation 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. It is within the Board’s discretion whether to prosecute a violation administratively or refer it for criminal proceedings. *See* RCW 70.155.100; *see also* RCW 70.155.110; RCW 10.93.020(2).

**B. Facts**

On March 16, 2011, at approximately 4:00 p.m., state Department of Health staff conducted a tobacco compliance check on Walgreens Store Number 4157 (Walgreens) in Seattle, Washington. CP 153-54, 156. Walgreens is a licensed retailer of tobacco products in King County, Washington. CP 244. Mr. Klinkert worked as a service clerk at a register during the compliance check. CP 156.

During the compliance check, the 17-year-old youth operative entered Walgreens to attempt to purchase a pack of cigarettes. CP 156-58. The youth operative carried her vertical Washington Driver’s License on her person during the check. CP 247, 249, 251-52, 256. Washington driver’s licenses issued to minors are printed vertically so as to distinguish them from those of drivers over the age of 21. The youth operative’s

license indicated that her birthdate was “02-22-1994.” *Id.* It also indicated that she would not be eighteen years of age until “02-22-2012.” CP 251. During the check, 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 cigarettes. CP 158-59.

**C. Procedural History**

On March 24, 2011, Board staff issued a written Notice of Board Action on Tobacco Violation (AVN) to Mr. Klinkert, alleging that he furnished tobacco to a minor. CP 169-70, 196-97. Board staff sought a penalty of \$100 based on Mr. Klinkert’s violation history of a single previous violation for selling tobacco to a minor.<sup>3</sup> CP 159-60, 244. Mr. Klinkert timely requested an administrative hearing to contest the violation. CP 245. On May 16, 2011, Board staff issued an administrative complaint based on the above-referenced AVN, charging that “on or about March 16, 2011, the above-named Individual [Mr. Klinkert], 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).” CP 195.

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<sup>3</sup> RCW 70.155.100(4) provides that the Board may impose a \$50 fine for the first violation of RCW 26.28.080 and \$100 for subsequent violations.

On August 25, 2011, the administrative law judge conducted a telephonic administrative hearing based on stipulated facts. CP 131, 149-72. On October 24, 2011, the judge issued an Initial Order finding that Mr. Klinkert sold or supplied the youth operative with tobacco, thus, sustaining the complaint. CP 267-77. The judge also upheld the \$100 penalty.

Mr. Klinkert then petitioned the Board for review of the Initial Order, asserting that he should have been entitled to a jury trial and proof beyond a reasonable doubt, and that the Board and Office of Administrative Hearings lacked jurisdiction over his case. CP 278-95. On December 27, 2011, the Board issued its Final Order upholding the Initial Order. CP 296-301. Thereafter, Mr. Klinkert filed a petition for judicial review in Snohomish County Superior Court, which affirmed the Board's Final Order. CP 80-93; 8-13. Mr. Klinkert timely appealed.

#### **IV. STANDARD OF REVIEW**

The APA governs review of a final decision by an agency. RCW 34.05.510. When reviewing an agency's decision, an appellate court sits in the same position as the superior court and applies the standards of review directly to the agency record. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Constitutional

challenges are questions of law subject to *de novo* review. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006).

## V. ARGUMENT

### A. RCW 70.155.100 Is Constitutional

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). RCW 26.28.080 prohibits selling a tobacco product to a minor and provides that a person who does so “is guilty of a gross misdemeanor.”

Mr. Klinkert asserts that RCW 70.155.100 is facially unconstitutional because it does not provide for a jury trial. Aplt’s Br. at 25. His argument is without merit. Mr. Klinkert fails to carry his burden to establish facial unconstitutionality because: 1) the same conduct can give rise to both civil and criminal liability; 2) a statute is not converted from civil to criminal merely by referencing conduct that can be punished criminally; and 3) the Legislature intended for enforcement of RCW 70.155.100 to be a civil action. Mr. Klinkert’s assertion that RCW 70.155.100’s reliance on RCW 26.28.080 converts enforcement under the former into a criminal action is unsupported.

**1. A Party Challenging The Constitutionality Of A Statute Bears The Heavy Burden Of Establishing Its Unconstitutionality.**

A “party challenging the statute’s constitutionality bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000). Reasonable doubt is “resolved in favor of constitutionality.” *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003) (citation omitted). Further, “it is the duty of this court to construe a statute so as to uphold its constitutionality.” *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985). A statute is facially unconstitutional if “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Any analysis of the statute must be done in the context of the entire statutory scheme and its purpose. *See State v. Manro*, 125 Wn. App. 165, 173, 104 P.3d 708 (2005). Further, courts avoid statutory interpretation that leads to absurd results or renders a portion of a statute a nullity. *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010).

**2. That RCW 70.155.100 References Conduct That Can Be Punished As A Gross Misdemeanor Does Not Transform RCW 70.155.100 Into A Criminal Statute.**

The Legislature may constitutionally impose criminal and civil sanctions for the same conduct. *Hudson v. U.S.*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Additionally, “the Legislature may provide for both civil sanctions and criminal penalties in the same statute without thereby converting the civil proceeding to a criminal or penal one.” *Winchester v. Stein*, 135 Wn.2d 835, 853, 959 P.2d 1077 (1998).

Further, the Legislature may rely on language or elements from another statute to establish a civil regulatory scheme. 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). In *Sedima*, the court considered a provision of RICO allowing a private civil cause of action for violation of the criminal statute. *Id.* at 482-83. The court explained that a civil plaintiff need only prove a defendant violated RICO by a preponderance of the evidence – not beyond a reasonable doubt – even though the civil enforcement mechanism referred to a violation of the criminal act. *Id.* at 491. Thus, a legislative

decision to reference another statute does not hinder prosecutions or enforcement proceedings involving the same illegal conduct.

Here, the Board's imposition of an administrative, i.e., civil, penalty for the sale of tobacco to a minor under RCW 70.155.100 is not converted into a criminal action merely because the behavior can also be punished as a gross misdemeanor. Proceedings to enforce the state's prohibition against sale of tobacco to a minor can take two forms.

On the civil side, as evidenced here, the Board can issue an administrative complaint against the seller. *See generally* WAC 314-42-051. These proceedings are conducted in accordance with the APA. RCW 70.155.100(8). If, following a hearing, the Board "finds that the person has violated RCW 26.28.080" then the Board can "impose a monetary penalty." RCW 70.155.100(3). The monetary penalty imposed "may not exceed . . . fifty dollars for the first violation and one hundred dollars for each subsequent violation." RCW 70.155.100(4).

On the criminal side, the limited law enforcement designation allows Board staff to issue criminal citations and, just like any other law enforcement officer, refer their investigation to the local prosecuting attorney. *See* RCW 10.93.020(2). The prosecutor then decides whether to pursue a criminal penalty under RCW 26.28.080. RCW 26.28.080 provides that selling tobacco to a minor is conduct punishable as a gross

misdemeanor. Punishment for a gross misdemeanor may be imprisonment in the county jail for up to 364 days, or imposition of a fine of up to \$5,000, or both. RCW 9.92.020.

Nothing in RCW 26.28.080 supplants, or prohibits, a civil enforcement proceeding against an individual for selling tobacco. RCW 26.28.080 only provides that a person who sells tobacco to a minor “is guilty of” a gross misdemeanor. It does not mandate that prosecution for a gross misdemeanor is the only enforcement available.

Mr. Klinkert cites no authority for his position that this dual enforcement mechanism is unconstitutional or that he was entitled to criminal procedures during his administrative hearing. In fact, as discussed above, the case law demonstrates otherwise. Merely because the civil enforcement statute – RCW 70.155.100 – references conduct that can also result in criminal enforcement does not render all proceedings thereunder criminal. Mr. Klinkert received all the process to which he is due. Because Mr. Klinkert carries the burden to establish that RCW 70.155.100 is unconstitutional beyond a reasonable doubt, his unsupported arguments to the contrary must fail.

**3. The Legislature Intended Its Prohibition To Sell Tobacco To A Minor To Include A Civil Enforcement Component.**

Even if a statute does not expressly provide that it is civil in nature, the fact that authority to impose the sanction is conferred upon an agency is “prima facie evidence that Congress intended to provide for a civil sanction.” *Hudson v. U.S.*, 522 U.S. 93, 103, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). Intent that a statute be civil can also be inferred from the procedural mechanisms established for its enforcement. *See U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 363, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984). In *One Assortment*, the U.S. Supreme Court explained that a state legislature can express its intent that a statute be civil in nature by creating “distinctly civil procedures.” *Id.*

By passing RCW 70.155.100, the Legislature empowered the Board – an administrative agency – to impose civil penalties and enforce the prohibition against the sale of tobacco to minors. The Legislature also established distinctly civil adjudicative proceedings for its enforcement by requiring that all proceedings to enforce RCW 70.155.100 be conducted in accordance with the APA. RCW 70.155.100(8). This grant of authority and distinct civil procedures separates the Board’s administrative enforcement from the criminal authority granted to the courts.

**B. Mr. Klinkert's Request For Costs On Appeal Should Be Denied Because The Board's Action Is Substantially Justified.**

Under RCW 4.84.350, a prevailing party is not entitled to costs on appeal if the agency action was substantially justified. RCW 4.84.350(1). Substantially justified means "justified to a degree that would satisfy a reasonable person." *Silverstreak Inc. v. Washington State Dep't. of Labor & Industries*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (citation omitted). "It requires the State to show that its position had a reasonable basis in law and fact." *Id.* at 892. The relevant factors in determining whether the Board was substantially justified here are "the strength of the factual and legal basis for the action, not the manner of the investigation and the underlying legal decision." *Id.*

As demonstrated above, the Board's actions were substantially justified. Mr. Klinkert never denied, and the record demonstrates without doubt, that he sold tobacco to a minor. CP 156-58. In fact, he did so twice. CP 159-60. As such, he violated the law and the Board acted within its authority in penalizing his illegal behavior. This constitutes substantial justification. Further, because the Board has demonstrated that the current laws and procedures under which it acted are constitutional, it is further substantially justified in ordering penalties.

Mr. Klinkert argues that the Board should have known that RCW 70.155.100 was unconstitutional because the state is required to review its liquor laws under the Synar Amendment and the Substance Abuse Prevention and Treatment Block Grant. Aplt's Br. at 32-33. However, as discussed above, there is no case law supporting that RCW 70.155.100 is unconstitutional or that the Board's reliance on it was unreasonable.

Accordingly, Mr. Klinkert's request for an award of costs is without merit and should be denied.<sup>4</sup>

## VI. CONCLUSION

Based on the foregoing, the Board respectfully requests the Court affirm the Board's Final Order in the above captioned case and this appeal be dismissed.

RESPECTFULLY SUBMITTED this 8th day of February, 2013.

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<sup>4</sup> Mr. Klinkert asserts that his costs include the \$100 penalty imposed by the Board. Aplt's Br. at 33. However, the penalty is not a cost of the litigation.