

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	3
III. STATEMENT OF THE CASE	4
IV. ARGUMENT	13
A. Standard of Review	13
B. The Board Committed an Error of Law in Determining that Collateral Estoppel Does Not Apply.	14
1. Identity of Issues.	16
2. Final Judgment on the Merits.	19
3. Privity.	21
4. Application of Collateral Estoppel Will Not Work an Injustice.	22
C. The Compliance Check Was Unlawful, Because It Was Not Conducted Pursuant to Any Rule Adopted by the Board.	25
D. The Compliance Check Was Unlawful Because Enforcement Officers Conducted the Compliance Check Using a Minor Investigative Aide to Enter into Licensee's Premises Which Were Designated and Posted Off-limits to Minors.	31
E. The Compliance Check Was Unlawful Because the Minor Investigative Aide Enforcement Officers Used to Conduct the Compliance Check Was Deceptively Mature in Appearance. . .	33

F. All Evidence Gained from the Unlawful Compliance Check Is Inadmissible and the Administrative Complaint Against Licensee Should Therefore Be Dismissed.	38
G. Request for Attorney Fees	40
V. CONCLUSION	44

TABLE OF AUTHORITIES

	Page
Cases	
<i>Alverado v. Washington Public Power Supply System</i> , 111 Wn.2d 424, 759 P.2d 427 (1988)	26
<i>Aponte v. State, Dept. of Social and Health Services</i> , 92 Wn.App. 604, 965 P.2d 626 (1998)	41
<i>Barlindal v. City of Bonney Lake</i> , 84 Wn.App. 135, 925 P.2d 1289 (1996)	15, 16, 17, 21, 22
<i>Brown v. City of Seattle</i> , 117 Wn.App. 781, 72 P.3d 764 (2003)	39
<i>Camara v. Municipal Court of City and County of San Francisco</i> , 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967)	25
<i>City of Seattle v. McCready</i> , 123 Wn.2d 260, 868 P.2d 134(1994)	25, 26
<i>Christensen v. Grant County Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 307, 96 P.3d 957 (2004)	15
<i>Costanich v. Washington State Dept. of Social and Health Services</i> , 164 Wn.2d 925, 194 P.3d 988 (2008)	41
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 852 P.2d 295 (1986)	14
<i>Hi-Starr, Inc. v. Washington State Liquor Control Bd.</i> , 106 Wn.2d 455, 722 P.2d 808 (1986)	27
<i>In re Electric Lightwave, Inc.</i> , 123 Wn.2d 530, 869 P.2d 1045 (1994)	30

<i>Lawrence v. Department of Health,</i> 133 Wn.App. 665, 138 P.3d 124 (2006)	36
<i>Ludeman v. State, Dept. of Health,</i> 89 Wn.App. 751, 951 P.2d 266 (1997)	13, 36
<i>McDaniel v. City of Seattle,</i> 65 Wn.App. 360, 828 P.2d 81 (1992)	39
<i>Puget Sound Harvesters Ass'n v. Washington State Dept. of Fish and Wildlife,</i> 157 Wn.App. 935, 239 P.3d 1140 (2010)	41
<i>Seymour v. Washington State Dept. of Health, Dental Quality Assur. Com',</i> 152 Wn.App. 156, 216 P.3d 1039 (2009)	38
<i>State v. Eisfeldt,</i> 163 Wn.2d 628, 185 P.3d 580 (2008)	18
<i>State v. Green,</i> 150 Wn.2d 740, 82 P.3d 239 (2004)	39
<i>State v. Melrose,</i> 2 Wn.App. 824, 470 P.2d 552 (1970)	39
<i>State v. Singleton,</i> 9 Wn.App. 327, 511 P.2d 1396 (1973)	39
<i>Thompson v. State, Dept. of Licensing,</i> 138 Wn.2d 783, 982 P.2d 601 (1999)	19, 20, 21, 22, 23, 24, 25
 Constitution, Statutes and Rules	
RCW 4.84.340	40
RCW 4.84.350	40
RCW 9A.16.070	34

RCW 10.31.100	39
RCW 34.05.452	17, 18, 38
RCW 66.08.030	33, 37
RCW 66.24.590	32
RCW 66.28.090	30
RCW 66.44.010	27
RCW 66.44.270	5, 10, 17, 18, 22, 35, 37
RCW 66.44.290	27, 28, 29, 30, 31
RCW 66.44.310	32
RCW 66.44.316	32
RCW 66.44.350	32
WAC 314-11-020	18, 37
WAC 314-21-005	29, 30
WAC 314-21-015	29
WAC 314-21-025	29, 33
United States Constitution, Fourth Amendment	25, 38
Washington State Constitution, Art. 1, Sec. 7	17, 18, 25

Other Authorities

Fine and Ende, 13B Wash. Prac., Criminal Law § 3003 (2008-09) 35

General Order 2010-1 1

Washington State Liquor Control Board
Enforcement Division Policy # 287 9, 12, 32, 33, 34, 37

I. INTRODUCTION

Pursuant to this Court's General Order 2010-1, Respondents Dublin Down, LLC ("Dublin Down"), and Top Shelf, LLC ("Top Shelf") (collectively "Licensees") file this opening brief. Licensees request that this Court affirm the Clark County Superior Court's orders reversing two final orders of the Washington State Liquor Control Board ("WSLCB" or "Board") sustaining administrative complaints filed against Licensees and suspending their liquor licenses as a result of compliance checks conducted by WSLCB Enforcement Division ("Enforcement") officers using an investigative aide who was under the age of 21, without the authority of any statute or administrative rule, on premises posted off-limits to individuals under that age.

Licensees' bartenders were criminally prosecuted as a result of these compliance checks. The Clark County District Court dismissed these criminal actions, on the grounds that the compliance checks were unlawful because Enforcement was not authorized to conduct the compliance checks by any statute or administrative rule adopted by the Board and the minor investigative aide violated several statutes in participating in the compliance checks. The District Court also found that

the minor investigative aide used in the compliance checks was deceptively mature in appearance. On appeal by the State, the Clark County Superior Court affirmed the District Court. The State did not seek further review.

In its final orders in these administrative proceedings, the Board affirmed the initial order of the Administrative Law Judge, ruling that the Board was not collaterally estopped by the orders entered in the criminal action, that Enforcement did not need the authority of any statute or administrative rule to conduct compliance checks using minor investigative aides, and that the compliance checks were lawful, regardless of whether the aide was deceptively mature in appearance.

Licensees appealed the Board's final orders in the administrative proceedings to the Clark County Superior Court. The Clark County Superior Court reversed the Board, and remanded to the Board to dismiss the administrative complaints against Licensees. The Superior Court ruled that the Board was collaterally estopped by the decisions in the criminal proceedings. The Superior Court also ruled that the compliance checks were conducted without authority of law and that all evidence obtained from these unlawful compliance checks should, therefore, have been

suppressed and the administrative proceedings dismissed. The Board filed the instant appeal.

II. ASSIGNMENTS OF ERROR

A. Did the WSLCB err in holding that the doctrine of collateral estoppel does not apply to preclude relitigating in administrative proceedings against Licensees the issues of the lawfulness of the compliance checks or the admissibility of any evidence obtained by those checks determined in a criminal action against Licensees' employees?

B. Did the WSLCB err in holding that the compliance checks were not unlawful when the use of a minor investigative aide in the compliance checks was not authorized by any statute or rule adopted by the WSLCB?

C. Did the WSLCB err in holding that the compliance checks were not unlawful when Enforcement officers conducted the compliance checks using a minor investigative aide to enter into Licensees' premises which were designated and posted off-limits to minors?

D. Did the WSLCB err in holding that the compliance checks were not unlawful when the minor investigative aide Enforcement officers used to conduct the compliance check was deceptively mature in

appearance?

E. Did the WSLCB err in not holding that all evidence gained from the unlawful compliance checks is inadmissible and in not dismissing the administrative complaints against Licensees?

III. STATEMENT OF THE CASE

Licensees and the Washington State Liquor Control Board Education and Enforcement Division (“Enforcement”) stipulated to the material facts. This stipulation appears in the Administrative Record (“AR”) for both cases at pages 19 to 38.

Dublin Down and Top Shelf both hold liquor licenses and operate facilities located in Vancouver, Washington. All of these premises are restricted to people over 21 years of age. No part of any of the Licensees’ premises are open to people under 21 years of age. (AR 22.)

On December 2, 2008, Enforcement conducted compliance checks at Licensees’ facilities. All of these checks involved a minor investigative aide, Kyle Uren, who was 18 years of age on December 2, 2008. (AR 22.) In each of these checks, Mr. Uren entered into Licensees’ establishments, sat down at a table, and ordered a beer. (AR 22.) In the check involving Top Shelf, Mr. Uren was accompanied by an Enforcement officer. (Top

Shelf AR 22.) In the check involving Dublin Down, he went in alone but was observed from outside by an Enforcement officer. (Dublin Down AR 22.)

Mr. Uren was served a beer in each establishment by an employee of the respective Licensee. (AR 22.) Administrative Violation Notices were issued to each of the Licensees for furnishing liquor to a minor in violation of RCW 66.44.270. (AR 23.) Mr. Uren was photographed after the sales. (AR 23.) Copies of these photographs are attached as Exhibit 2 to the respective stipulated facts for each Licensee. (AR 23; 29 - 30.)

Cody Jones was the employee who served Mr. Uren at Dublin Downs. (Dublin Down AR 22.) Anthony Colavecchio was the employee who served Mr. Uren at Top Shelf. (Top Shelf AR 22.) Criminal citations were also issued to and criminal proceedings were instituted in Clark County, Washington, District Court, against each of these individuals as a result of the compliance checks, charging them with violations of RCW 66.44.270 for furnishing liquor to a minor. (AR 23.) Licensees' employees filed a motion to suppress and dismiss in the criminal proceeding. The Clark County District Court granted this motion, ordered all evidence gathered against Licensees' employees suppressed, and

dismissed the criminal action against them. (AR 24.) Licensees' employees' motion to suppress and dismiss, and supporting memorandum and affidavit in the criminal action appears in the administrative record at pages 55 to 63. The District Court's findings of fact and conclusions of law appear in the administrative record at pages 64 to 66. The District Court dismissed the criminal actions against Licensees' employees based on the following findings of fact and conclusions of law:

"II. FINDINGS OF FACT

"Based upon the foregoing testimony and documents, the Court finds as follows:

"2.1 The Court has jurisdiction over the parties.

"2.2 On December 2, 2008, while he was working as a bartender at the Top Shelf restaurant in Vancouver, Washington, Defendant Anthony J. Colavecchio was cited under RCW 66.44.270 for serving alcohol to a minor, and in fact did serve a minor alcohol.

"2.3 On December 2, 2008, while he was working as a bartender at the Boomers Sports Bar and Grill in Vancouver, Washington, Defendant Shawn K. Cavanaugh was cited under RCW 66.44.270 for serving alcohol to a minor, and in fact did serve a minor alcohol.

"2.4 On December 2, 2008, while he was working as a bartender at the Dublin Down Sports Bar in Vancouver, Washington, Defendant Cody G. Jones was cited under RCW 66.44.270 for serving alcohol to a minor, and in fact did serve a minor alcohol.

“2.5 All three of these citations occurred within a short time of each other and all three citations were made for furnishing the same individual alcohol. Said minor was an Investigative Aid (IA) of the Washington State Liquor Control Board. (WSLCB)

“2.6 Said minor was 18 years of age and was deceptively mature in appearance.

“2.7 The State Liquor Enforcement officers attempted to operate a “sting” proceeding pursuant to RCW 66.44.290 on three establishments, the Top Shelf restaurant, Boomers Sports Bar and Grill, and Dublin Down Sports Bar.

“2.8 All three establishments are bars which are prohibited from having minors on the premises and all three had signs posted to warn minors not to enter upon the premises.

“2.9 In spite of the warning signs, the WSLCB IA entered upon the above referenced premises and ordered and was served alcohol. On two of these occasions, he was accompanied by a WSLCB agent who was over 21 years of age and who was also served an alcoholic drink.

“2.10 The WSLCB agents and IA left the premises of all three establishments without paying for their drinks.

“2.11 The WSLCB has not adopted rules for a controlled purchase program pursuant to RCW 66.44.290, except for rules that apply to a private controlled purchase program, as outlined in WAC 314-21-025.

“2.12 The WSLCB’s attempt to execute a controlled purchase “sting” operation resulted in violations of RCW 9A.52.070 (trespass), RCW 66.44.316 (entering a tavern), RCW 66.44.290 (attempt to purchase alcohol), WAC 314-21-025 (using a deceptively mature agent), and RCW 19.48.110 (defrauding an innkeeper).

“2.13 Said conduct amounted to a misconduct pursuant to CrRLJ 8.3 (b).

“CONCLUSIONS OF LAW

“3.1 The Court hereby finds by clear, cogent and convincing evidence that the WSLCB cannot operate a “sting” or a controlled purchase program pursuant to RCW 66.44.290 or WAC Title 314 Chapter 314-21-025. RCW 66.44.290(1) requires the WSLCB to adopt rules under which a controlled purchase program can be authorized. WSLCB has not done so. WAC 314-21-025 does not apply, as it governs private controlled purchase programs.

“3.2 All evidence gathered against the three Defendants in these consolidated cases is suppressed.

“3.3 All three of these consolidated cases against the Defendants are dismissed with prejudice.” (AR 64-66.)

This dismissal was appealed by the State of Washington to the Clark County Superior Court, which by a Memorandum Opinion dated March 21, 2010 affirmed the District Court. Licensees submitted a copy of this Memorandum Opinion to the Board with their Petition for Review of the Administrative Hearing Administrative Law Judge’s Findings of Fact, Conclusions of Law and Initial Order. (AR 200 - 202.) The Superior Court ruled that the compliance checks by Enforcement utilizing a minor investigative aide were not authorized by statute or administrative rule, and were therefore conducted in violation of statutes regarding minors in the premises and minors attempting to purchase alcohol. (AR 201.) The

Superior Court also found sufficient evidence to support the finding of the District Court that the minor investigative aide used by Enforcement was deceptively mature in appearance. (AR 201 - 202.) The Superior Court upheld the decision of the District Court to grant the motion to suppress evidence, because as the compliance check was not authorized by law, the State would be unable to utilize the evidence of Licensees serving the minor aide, which would result in dismissal of the case. (AR 202.)

Subsequent to the District Court's decision in the criminal action, Licensees obtained a copy of Enforcement's internal policy applicable to compliance checks conducted by its own officers, Enforcement Division Policy #287. A copy of this policy was submitted by Licensees in their briefing to the Administrative Law Judge and appears in the administrative record at pages 97 to 100. A copy of this policy was also submitted by Licensees' employees in their briefing to the Superior Court in the criminal action. The Superior Court held that, in light of this policy, Enforcement's use of a minor aide did not rise to the level of governmental misconduct which would warrant dismissal of the criminal action pursuant to CrRLJ 8.3(b). (AR 202.)

Licensees moved for dismissal of the subject administrative

proceedings against them on the grounds that the criminal action collaterally estopped the WSLCB from relitigating the issue of whether the compliance checks were lawful, and on the grounds that even if collateral estoppel did not apply the grounds found by the District Court for dismissal of the criminal charges against Licensees' employees applied equally in the administrative actions against Licensees and required dismissal of these administrative proceedings as well. The Administrative Law Judge held that collateral estoppel was not appropriate, although Licensees are also charged in these administrative proceedings with violations of RCW 66.44.270 for selling liquor to a minor, because these charges relate to Licensees' privileges under their liquor licenses, not to the criminal charges filed against Licensees' employees. (AR 165.)

Although the Administrative Law Judge's initial order was entered on July 2, 2010 (AR 169), the last briefing to the Administrative Law Judge, Enforcement's reply to licensees' motions for collateral estoppel, suppression, and dismissal, was filed on October 5, 2009. (AR 154).

Thus, the briefing to the Administrative Law Judge was concluded before the Superior Court issued its memorandum opinion in the appeal in the criminal actions on March 21, 2010. (AR 202.) Without the benefit of the

Superior Court's memorandum opinion, the Administrative Law Judge also held that collateral estoppel did not apply because there had not been a final decision on the merits. (AR 165.) The Administrative Law Judge also concluded that Enforcement officers do not need the authority of any statute or administrative rule to conduct compliance checks using minor aides. (AR 167.) The Administrative Law Judge also concluded that Licensees are responsible for any sale of liquor to a minor regardless of the minor's appearance, so whether Mr. Uren was deceptively mature in appearance was irrelevant. (AR 168.)

Licensees petitioned the Board for review of the Administrative Law Judge's initial order, requesting that the Board reverse the Administrative Law Judge, on the grounds that collateral estoppel does apply, and on the grounds that the compliance checks were unlawful, because they were conducted without the authority of law and using a deceptively mature minor aide. (AR 171 - 184.) Licensees submitted a copy of the Superior Court's memorandum opinion in the criminal action to the Board along with their petition for review, noting that the State had appealed the District Court's decision, that the Superior Court had affirmed this decision, and that the State had not appealed from this holding. (AR

171 - 172; 200 - 202.) Licensees also submitted a copy of Enforcement Policy #287 with their petition for review. (AR 173; 208 – 211.)

The WSLCB rejected Licensees' arguments. On August 17, 2000, the WSLCB adopted the Administrative Law Judge's initial order and entered its final order sustaining the administrative complaints against Licensees. (AR 246 - 250.) After the Board denied Licensees' motion for reconsideration, Licensees timely filed a petition for judicial review by the Clark County Superior Court. (CP Sub 2 & 6.) On October 26, 2011, the Superior Court issued its order and memorandum of opinion, reversing the Board and remanding to the Board to dismiss the administrative complaints against Licensees. (CP Sub 23.) The Superior ruled that the Board erred in its application of the doctrine of collateral estoppel, because the issue in the criminal action and in the administrative proceedings, whether evidence should be suppressed because it was collected in violation of the Constitution and applicable statutes, is identical, the District and Superior Courts entered a final judgment on the merits, the party against whom collateral estoppel is asserted was the same in both proceedings, and application of the doctrine did not work an justice. (CP Sub 23, 3 - 4.) The Superior Court also ruled that the Board erred in

concluding that compliance checks were lawful, holding that the compliance checks were conducted without authority of law. (CP Sub 23, 4 - 8.) The Superior Court held that the Board did not err in rejecting Licensees' argument that evidence from the compliance checks should have been suppressed because the investigative aide was deceptively mature in appearance. (CP Sub 23, 8.) The Superior Court also held that the Board did not err by rejecting Licensees' entrapment defense. (CP Sub 23, 8.) The Superior Court concluded that all evidence obtained from the unlawful compliance checks should have been suppressed and the administrative proceedings dismissed. (CP Sub 23, 8.) The Board filed the instant appeal.

IV. ARGUMENT

A. Standard of Review.

In *Ludeman v. State, Dept. of Health*, 89 Wn.App. 751, 755, 951 P.2d 266 (1997), the Court set out the following standards for an appeal from an administrative decision:

“Judicial review of a final administrative decision is governed by RCW 34.05.570(3). In reviewing an administrative decision, we stand in the same position as the superior court. We apply the appropriate standard of review directly to the administrative record.

“We will grant relief from an agency order in an adjudicative proceeding where the agency has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or the order is arbitrary and capricious. Under the error of law standard, we accord substantial weight to the agency's interpretation of the law, but may substitute our own judgment for that of the agency. We may defer to the agency's interpretation of the law only where the agency is interpreting the body of law it administers or enforces.” (Footnotes and citations omitted.)

The Board erroneously determined that collateral estoppel does not apply. The Board's conclusion that the compliance checks were lawful also resulted from an erroneous interpretation and application of the law.

B. The Board Committed an Error of Law in Determining that Collateral Estoppel Does Not Apply.

In determining whether the doctrine of collateral estoppel applies, the Board was not interpreting the body of law it administers or enforces, so this Court is not required to give deference to the Board's conclusion that this doctrine does not apply. The Board was incorrect in this conclusion as a matter of law, because all of the elements of collateral estoppel are met in the present case.

As explained in *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561-62, 852 P.2d 295 (1986):

“The doctrine of collateral estoppel prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case. The purpose of the doctrine is to promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience

to litigants. The doctrine may be applied in a civil action in which a party seeks to retry issues resolved against a defendant in a previous criminal case, as well as in a civil rights action in which issues raised are the same as those determined in a criminal case.”

Collateral estoppel applies where: (1) there are an identity of issues in the two proceedings; (2) there is a final judgment on the merits in the prior adjudication; (3) there is privity of the party against whom collateral estoppel is asserted with a party to the prior proceeding; and (4) where application of the doctrine will not result in an injustice. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

In *Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 142, 925 P.2d 1289 (1996), the Court applied collateral estoppel in a civil forfeiture action based on suppression of evidence and dismissal of a criminal action against the plaintiff. During a search of the plaintiff’s home, the police had seized, among other things, methamphetamine and over 200 firearms. In the resulting criminal action against the plaintiff, the trial court ruled that the search and seizure of these firearms was unlawful. The trial court then ordered all the evidence suppressed and dismissed the criminal charges. But before the criminal action was dismissed, the City notified the plaintiff of its intent to seek administrative forfeiture of the seized items under the Uniform Controlled Substances Act (UCSA). The

plaintiff then removed the administrative forfeiture proceeding to the superior court through a replevin action. In this civil action, the trial court applied collateral estoppel and again excluded all evidence of the firearms being present at the time of the search, because the search had already been determined to be unlawful in the prior criminal proceeding. The civil trial court then ruled that the City could not establish probable cause to forfeit the firearms and ordered it to return them to the plaintiff.

Barlindal, 84 Wn.App. at 137-39. On appeal, the Court of Appeals found that all four of the requirements to apply collateral estoppel were met.

Barlindal, 84 Wn.App. at 145.

1. Identity of Issues.

In *Barlindal*, the suspected drug dealer successfully argued in the criminal action that the search warrant was invalid because the police did not have probable cause to believe there were drugs in his residence. In the subsequent civil action, the City argued that the police did have probable cause and the search warrant was valid, because without probable cause to support a warrant to search the residence the City had insufficient evidence to believe the suspected drug dealer owned firearms connected to illegal drug activity. The *Barlindal* Court held that this was a sufficient

identity of issues to satisfy the first requirement for application of collateral estoppel. *Barlindal*, 84 Wn.App. at 142.

In the subject cases the issues in this action are identical to the determinative issues in the earlier criminal action. In the criminal actions, the State sought to convict Licensee's employee of a criminal violation for furnishing liquor to a minor under RCW 66.44.270(1). In the present administrative proceedings, the WSLCB convicted Licensees of administrative violations for furnishing liquor to a minor under RCW 66.44.270(1), based on the same compliance check involving the same employee as involved in the criminal action. To convict in the criminal action, the State had to establish through admissible evidence that the employee furnished liquor to a minor. To establish an administrative violation in the subject proceedings, the WSLCB also had to establish through admissible evidence that Licensee's employees furnished liquor to a minor. *See* RCW 34.05.452(1) ("The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds * * *.") In the criminal actions, the State could not convict if the compliance checks were not lawful, because Article 1, Section 7 of the Washington State Constitution provides that no searches may be conducted "without

authority of law,” and the remedy for a violation of Article 1, Section 7, is suppression of evidence obtained through the unlawful search without authority of law. *See State v. Eisfeldt*, 163 Wn.2d 628, 639-40, 185 P.3d 580 (2008). For the same reasons, the WSLCB could not establish administrative violations in the present case if the compliance checks were unlawful, because then all evidence gained from them must be excluded in these proceedings under RCW 34.05.452(1).

One of the reasons given by the Administrative Law Judge as a basis for concluding that collateral estoppel does not apply was that the issues in the two proceedings are not identical. The Administrative Law Judge ruled that the issue in these administrative proceeding is whether Licensee sold liquor to a minor in violation of RCW 66.44.270 and WAC 314-11-020. (AR 165.). But Licensees respectfully submit that this is not the issue in these administrative proceedings. This is a factual issue that never has been disputed in either the criminal action or in these administrative proceedings. The issue in both proceedings is not the factual issue of whether the minor aide used by Enforcement in the compliance checks was sold alcohol. The determinative issue in both proceedings is the legal issue of whether Enforcement’s use of a minor in

the compliance check was lawful. Indeed, as reflected in her initial order, the Administrative Law Judge recognized that this was the determinative issue on Licensees' motion to suppress and dismiss, spending two pages of her initial order discussing this issue. (AR 166 - 67.)

2. Final Judgment on the Merits.

The District Court dismissed the criminal action against Licensee's employee after a hearing on his motion to dismiss. This dismissal was appealed and affirmed by the Clark County Superior Court. The State did not appeal. The District Court's dismissal of the criminal actions was a final judgment after a hearing on the merits.

The Administrative Law Judge ruled that collateral estoppel does not apply because the District Court "suppressed the evidence and dismissed the charges", which the Administrative Law Judge ruled was not a final decision on the merits. (AR 165.) Again, Licensee respectfully submits that the Administrative Law Judge committed an error of law in reaching this conclusion.

A District Court's dismissal of an action after suppression of evidence is a final judgment on the merits for the purposes of application of collateral estoppel. *Thompson v. State, Dept. of Licensing*, 138 Wn.2d

783, 793, 982 P.2d 601 (1999). In *Thompson*, a commercial driver appealed the disqualification of his commercial license by the Department of Licensing. During a random commercial vehicle check, a State Trooper noted signs of alcohol consumption. After giving him two informed consent warnings, a general DUI warning and a specific warning for commercial drivers, a State Trooper gave the driver a BAC test. This test returned readings of 0.07 and 0.08. The State then started two proceedings against the driver. A Clark County prosecutor filed charges against him for driving a commercial vehicle with alcohol in his system, a gross misdemeanor. The Department of Licensing also began administrative commercial license disqualification proceedings against him, which are instituted whenever the Department receives a report from a law enforcement agency that a holder of a commercial driver's license was driving a commercial vehicle with a blood alcohol concentration of 0.04 or more. The Washington Supreme Court noted that the gross misdemeanor criminal case was apparently dismissed upon the suppression of the BAC results and the State did not appeal. *Thompson*, 138 Wn.2d at 786-87. The Court held that collateral estoppel applied, even though the District Court may have erred in applying the law in suppressing the evidence of

the driver's blood alcohol level. *Thompson*, 138 Wn.2d at 779-80.

3. Privity.

The *Barlindal* Court found that there was privity between the City and the County, because, among other things, they were both acting under authority of state law, they both participated in the acquisition of the search warrant and subsequent search, and they both had a unity of purpose in seeing the plaintiff convicted. *Barlindal*, 84 Wn.App. at 143-44.

In *Thompson*, the Department of Licensing initially argued that it was not in privity with the Clark County Prosecutor's Office. The Washington State Supreme Court dismissed this argument out of hand:

“The third part of the analysis asks whether the same party or parties in privity with the parties from the first action are involved in both proceedings. They were. In the district court action, the prosecutor was the State of Washington in the person of a Clark County deputy prosecuting attorney. In the administrative action, the State of Washington appeared in the person of the Department of Licensing. Although the Department argued in the Court of Appeals the Clark County deputy prosecutor, appearing for the State, and the Department itself, are two different entities for the purpose of the privity question, see Br. of Resp't at 14-15, it has since abandoned that untenable argument and has failed to repeat it in either its Response to Petition for Discretionary Review or its Supplemental Brief of Respondent. In *State v. Cleveland*, 58 Wn.App. 634, 639-40, 794 P.2d 546 (1990), cert. denied, 499 U.S. 948, 111 S.Ct. 1415, 113 L.Ed.2d 468 (1991), the Court of Appeals considered the identity of the parties in a collateral estoppel

analysis and said, ‘It is immaterial that in the dependency proceeding, the State was represented by the Attorney General and in the criminal prosecution was represented by the county prosecuting attorney.’ As we said in *State v. Dupard*, 93 Wn.2d 268, 273, 609 P.2d 961 (1980), ‘The same sovereign is involved in both instances.’ *Accord Williams*, 132 Wn.2d at 255, 937 P.2d 1052 (assistant attorney general and prosecutor both represent the State). The same parties were involved in both proceedings here.” *Thompson*, 138 Wn.2d at 794.

The privity between WSLCB and the State is even stronger in the present case than in *Barlindal*. More than just participate in the compliance checks, the criminal action against the Licensee’s employee was based on the WSLCB’s compliance checks. Both the WSLCB and the State had a unity of purpose in seeing Licensee’s employees and Licensee convicted of violating RCW 66.44.270 by furnishing liquor to a minor. As in *Thompson*, the same sovereign, the State of Washington, was involved in both the criminal action and these administrative proceedings. Therefore, the privity requirement for application of the doctrine of collateral estoppel is also met.

4. Application of Collateral Estoppel Will Not Work an Injustice.

The State in *Thompson* argued that, “because the trial court’s ruling was incorrect as a matter of law, it would work an injustice to give that ruling preclusive effect.” *Thompson*, 138 Wn.2d at 795. In refuting

this argument, the Court first noted that the injustice element addresses procedural injustice, not substantive injustice. The issue is not whether the prior decision is substantively correct or incorrect, the issue is whether the “parties to the earlier proceeding received a full and fair hearing on the issue in question.” *Thompson*, 138 Wn.2d at 795-96 (citing to *In re Marriage of Murphy*, 90 Wn.App. 488, 498, 952 P.2d 624 (1998)).

In *Thompson*, the Department also argued that applying collateral estoppel would be unjust for policy reasons, because the outcome of the criminal proceeding had no bearing on the outcome of the administrative proceeding, and because a different standard of proof applies in criminal and civil proceedings. The Court rejected these arguments as well, reasoning that even if the outcome of the criminal case had no effect on the administrative one, and even though different standards of proof control the final outcomes of the two proceedings, a fully litigated evidentiary ruling in a criminal trial has preclusive effect in a subsequent administrative proceeding where the same law as to admissibility applies. *Thompson*, 138 Wn.2d at 797.

Enforcement may argue that applying collateral estoppel in the present case will work an injustice, because the District Court’s dismissal

was based in part on a criminal rule, CrRLJ 8(b), that does not apply in the present case. But as explained by the Superior Court in the appeal in the criminal action, dismissal was warranted regardless of whether Enforcement violated this rule:

“This court upholds the decision of the trial court to grant the motion to suppress evidence. Based upon this decision, State would be unable to utilize the evidence regarding defendants serving the minor aide, which would presumably result in dismissal of the case. However, the trial court also found the enforcement actions constituted misconduct under CrRLJ 8.3(b). With the additional information of authorization under Policy #87 [sic, should be #287], this court concludes the investigation by the Enforcement Division of the WSLCB utilizing a minor aide falls short of the standard of ‘governmental misconduct’ which would warrant dismissal pursuant to CrRLJ 8.3(b). Dismissal is not justified when suppression of evidence is an adequate remedy, *State v. McReynolds*, 104 Wn.App. 560, 579, 17 P.3d 608 (2000).” (AR 202.)

In *Thompson*, the Court explained that collateral estoppel applies even if the District Court may have been incorrect in applying the law:

“Here, the State had every incentive to litigate fully the issue of the admissibility of the BAC results in the criminal proceeding. The criminal proceeding had more dire consequences for Thompson, affecting both Thompson's liberty and his commercial driver's license. The State had the capability to present the issue through the good offices of the Clark County Prosecuting Attorney. The State had the opportunity to litigate the issue in the district court and correct the erroneous result if necessary by appeal to superior court. That it did not do so means the result in the first proceeding has preclusive effect. The public policy of avoiding a duplication of proceedings where the parties had ample incentive and

opportunity to litigate an issue indicates that no injustice is done in giving preclusive effect to a decision from the first proceeding, even if, as here, we may have reason to believe the first result was erroneous.” *Thompson*, 138 Wn.2d at 799.

In the present case, the State did appeal to the Superior Court, which affirmed the District Court.

Enforcement is, therefore, collaterally estopped by the District Court’s decision from relitigating in this administrative proceeding the District Court’s conclusions that the compliance check was unlawful and that all evidence from the unlawful compliance check must be suppressed. The Board erred as a matter of law in holding that collateral estoppel does not apply.

C. The Compliance Check Was Unlawful, Because It Was Not Conducted Pursuant to Any Rule Adopted by the Board.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Article I, Section 7, of Washington’s Constitution precludes governmental interference in a person’s private affairs. These constitutional provisions apply when the government purports to enter upon private property to ascertain whether there is compliance with governmental regulations. *City of Seattle v. McCreedy*, 123 Wn.2d 260, 868 P.2d 134(1994).

Such intrusions may be conducted with a properly issued warrant supported by probable cause. *Camara v. Municipal Court of City and*

County of San Francisco, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *City of Seattle v. McCreedy*, *supra*, 123 Wn.2d at 273. Valid administrative searches of regulated industries may be made without a warrant under certain circumstances:

“In a long line of cases beginning with *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the United States Supreme Court has set forth the requirements for valid administrative searches. Because routine inspections are often essential to adequate enforcement of valid government regulation, probable cause is not required. While warrants are still required for code-enforcement inspections of a home and most businesses, *Camara v. Municipal Court*, *supra*, and *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), warrantless searches are constitutionally tolerable as an exception to the warrant requirement for administrative inspections in ‘pervasively regulated industries.’ See *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor business); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms and munitions dealers); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (underground and surface mines); and *New York v. Burger*, 469 U.S. 325, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (automobile junkyard).” *Alverado v. Washington Public Power System*, 111 Wn.2d 424, 435-36, 759 P.2d 427 (1988).

The requirements for an administrative search without a warrant are: (1) the regulatory scheme shows a substantial government interest is at stake; (2) the warrantless search is necessary to further the regulatory scheme; and (3) procedures in the regulatory scheme provide a constitutionally adequate substitute for a warrant. *Alverado*, 111 Wn.2d at 439. In the present case, however, the WSLCB compliance check of Dublin Down was not authorized by and directly violated the regulatory scheme applicable to Licensees.

As explained in *Hi-Starr, Inc. v. Washington State Liquor Control Bd.*, 106 Wn.2d 455, 458-59, 722 P.2d 808 (1986), while the Board has broad police powers with regard to enforcing RCW Title 66.08, that power is not all inclusive and must be exercised consistently with the statutory guidelines contained in this Title:

“The dominion of the Board is broad and extensive. *Quan v. State Liquor Control Bd.*, 69 Wn.2d 373, 379, 418 P.2d 424 (1966). The broad powers of the Board are, in part, enumerated under RCW 66.08.050. The Board has the authority to make necessary and advisable regulations consistent with the spirit of RCW 66. RCW 66.08.030(1); see *State ex rel. Thornbury v. Gregory*, 191 Wash. 70, 78, 70 P.2d 788 (1937). However, the broad and extensive powers given the Board are not all inclusive. Numerous statutory guidelines have been provided which broadly define the authority and duty of the Board and which insure procedural safeguards against arbitrary administrative action and abuse of discretionary power. See in particular RCW 66.08.010; .030; .050; .150; RCW 66.24.010; .400-.450; RCW 66.98.070; see also RCW 34.04.”

The administrative complaint against Licensee is based on the Enforcement’s use of a minor to enter into its bar, which is posted as off-limits to minors, and order a beer. Under RCW 66.44.290(1), a minor who attempts to purchase alcohol is guilty of a criminal offense unless that minor is participating in a controlled purchase program authorized under rules adopted by the Liquor Control Board:

“(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.

“(2) An employer who conducts an in-house controlled purchase program authorized under this section shall provide his or her employees a written description of the employer's in-house controlled purchase program. The written description must include notice of actions an employer may take as a consequence of an employee's failure to comply with company policies regarding the sale of alcohol during an in-house controlled purchase.

“(3) An in-house controlled purchase program authorized under this section shall be for the purposes of employee training and employer self-compliance checks. An employer may not terminate an employee solely for a first-time failure to comply with company policies regarding the sale of alcohol during an in-house controlled purchase program authorized under this section.

“(4) Every person between the ages of eighteen and twenty, inclusive, who is convicted of a violation of this section is guilty of a misdemeanor punishable as provided by RCW 9A.20.021, except that a minimum fine of two hundred fifty dollars shall be imposed and any sentence requiring community restitution shall require not fewer than twenty-five hours of community restitution.”

RCW 66.44.290(1) does not make any distinction between private controlled purchase programs conducted by liquor licensees and those conducted by Enforcement. It only shields licensees and their employees conducting and participating in authorized private programs from criminal or administrative prosecution. Sections (2) and (3) of RCW 66.44.290 do impose certain requirements on licensees conducting in-house controlled purchase programs. But these sections in no way limit or restrict the application of RCW 66.44.290(1).

The first sentence of RCW 66.44.290(1) provides that any person under the age of 21 who attempts to purchase liquor is in violation of the title. The second sentence of this statute then provides: “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.” The statute is clear on its face. A minor commits a violation by attempting to purchase alcohol unless he or she is participating in a controlled purchase program authorized by the Board under rules adopted by the Board.

Therefore, unless Enforcement’s use of a minor investigative aide in its compliance check was authorized by and conducted pursuant to rules adopted by the Board, the Enforcement officers were not acting pursuant to any authority granted by the Legislature to the Board in using a minor investigative aide to conduct the compliance checks.

The only rules formerly adopted by the Board pursuant to RCW 66.44.290 are contained in WAC Chapter 314-21. But while this chapter is titled “Controlled Purchase Programs,” the three regulations contained in this chapter, WAC 314-21-005, WAC 314-21-015, and WAC 314-21-025, all only address in-house programs conducted by liquor licensees themselves, not Enforcement. WAC 314-21-005 explains:

“(1) Per RCW 66.44.290, an in-house controlled purchase program is a program that allows retail liquor licensees to use eighteen, nineteen, or twenty year old persons to attempt to purchase alcohol for the purpose of evaluating the licensee's training program regarding the sale of liquor to persons under twenty-one years of age.

“(2) The licensee's controlled purchase program must meet the requirements of RCW 66.44.290, WAC 314-21-015, and 314-21-025.

(3) Per RCW 66.44.290, violations occurring under an in-house controlled purchase program may not be used for criminal

prosecution or administrative action by the liquor control board.”

These regulations very clearly only apply to in-house controlled purchase programs. None of these regulations address controlled purchase compliance checks conducted by Enforcement’s own officers.

WAC Chapter 314-21 contains the only rules formerly adopted by the Board concerning the use of minors in controlled purchase programs. The State nevertheless argues that the Enforcement officers have broad general regulatory authority to use a minor investigative aides as decoys in compliance checks, even checks conducted on premises posted off-limits to minors.

The sale of liquor is a highly regulated industry and the WSLCB unquestionably has broad powers with regard to the regulation of the sale of liquor in Washington. But administrative agencies have only the powers that are either conferred to them expressly or by necessary implication by their enabling statutes. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-37, 869 P.2d 1045 (1994). RCW 66.44.010(2) only authorizes the Board to employ liquor enforcement officers to enforce the penal provisions of RCW Title 66.44. RCW 66.28.090 only grants liquor enforcement officers, inspectors and peace officers the authority to inspect licensed premises. Neither of these statutes expressly grant the Board the power to employ minors to enforce the penal provisions of RCW Title 66.44. Neither is this power necessarily implied by these statutes. The only statute specifically referencing the use of minors in compliance

checks is RCW 66.44.290(1). This statute does specifically provide for controlled purchase plans using minors in programs authorized by the Board and under rules adopted by the Board. But the Board has never adopted a rule authorizing Enforcement to use minors in controlled purchase programs pursuant to this statute.

Licensee does not contend that Enforcement lacks the authority to use minors in controlled purchase compliance checks, only that any such compliance checks must be authorized by and conducted according to rules adopted by the Board. The compliance checks involving Licensees were not conducted according to any statutes contained in Title 66 or rules adopted by the Board thereunder and were, therefore, unlawful.

D. The Compliance Check Was Unlawful Because Enforcement Officers Conducted the Compliance Check Using a Minor Investigative Aide to Enter into Licensee's Premises Which Were Designated and Posted Off-limits to Minors.

RCW 66.44.290 appears in Chapter 66.44 RCW, the enforcement regulations for RCW Title 66, the alcoholic beverage control regulatory scheme in Washington. Reading RCW 66.44.290 together with other statutes in Chapter 66.44 makes clear that controlled purchase programs utilizing minors can only be conducted on premises onto which a minor may lawfully enter, such as grocery stores and restaurants, not premises posted as off-limits to minors, such as taverns and bars.

RCW 66.44.290(1) only allows a minor participating in an authorized and properly conducted controlled purchase program to attempt

to purchase alcohol without criminal penalty. This statute does not authorize a minor to enter onto premises classified and posted as off-limits to minors in connection with a controlled purchase program. RCW 66.44.310 provides that, except as otherwise provided by RCW 66.44.316, RCW 66.44.350, and RCW 66.24.590, it is a misdemeanor for any person under 21 years of age to enter or remain in any area classified as off-limits to such a person. There is no exception in RCW 66.44.310 for a minor participating in a controlled purchase program. None of the exceptions provided for by RCW 66.44.316, 6.44.350, or 66.24.590, apply. RCW 66.44.316 only creates an exception for professional musicians and band members, janitors, amusement device company employees, security and law enforcement officers, and firefighters. RCW 66.44.350 only creates an exception for restaurant employees, who are permitted to serve alcohol. RCW 66.24.590 only creates an exception for hotel employees, who are permitted in areas of a hotel where alcohol may be consumed but is incidental to the primary use of the area.

Washington State Liquor Control Board Enforcement Policy #287 does specifically authorize Enforcement officers to use minor investigative aides in compliance checks under certain conditions. But this policy is not a rule formerly adopted by the WSLCB and, therefore, does not provide legal authority for Enforcement to use minor investigative aides in compliance checks. And even by its own terms Policy # 287 does not grant Enforcement officers the authority to use minor investigative aides in

compliance checks on premises classified and posted as off-limits to minors. In policy statement 5, Policy #287 specifically states that:

“5. Investigative aide's safety is paramount. Enforcement officers shall not allow investigative aides to engage in arguing or other actions with sales clerks.” (WSLCB Record, pg. 98.)

Allowing minor aides to enter into bars posted off limits to minors is not conducive to their safety. Bartenders and other bar employees are not commonly referred to as “sales clerks.”

The issue is not whether it has the Board has the authority to pass a rule pursuant to RCW 66.08.030 allowing Enforcement to use minors in compliance checks at facilities that are restricted to adults. The issue is whether, in the absence of a such a rule, Enforcement may do so. Washington law is clear that, without the authority of a rule formerly adopted by the WSLCB, Enforcement officers do not have the legal authority to use minor investigative aides in compliance checks posted off limits to minors.

E. The Compliance Check Was Unlawful Because the Minor Investigative Aide Enforcement Officers Used to Conduct the Compliance Check Was Deceptively Mature in Appearance.

WAC 314-21-025 sets out the Board’s rules for in-house controlled purchase programs conducted by liquor licensees. One of these rules is that:

“(4) the persons participating in the in-house controlled purchase program may not use fraudulent identification and should not be deceptively mature in appearance.”

Policy #287 similarly provides that: “Investigative aides must not be deceptively mature in appearance.” (AR 97.)

The copies of the photographs of Mr. Uren taken shortly after the compliance checks contained in the administrative record at pages 29 and 30 show a mature individual with a well-established beard. In addition, Licensees submitted evidence to the WSLCB that the between them the bartenders involved in the compliance checks using Mr. Uren have worked in the industry for many years during which time they have served tens of thousands of customers, but had never before been cited for serving a minor. But all three served the investigative aide without question. (AR 62-63.) Mr. Uren testified that he went to eight different establishments including on the same day. Five of eight experienced bartenders or clerks sold liquor to Mr. Uren without asking for identification. One of these was a Washington State Liquor Store. (AR 67-70.) Based on this evidence, in Finding of Fact 2.6, the District Court specifically found that: “Said minor was 18 years of age and was deceptively mature in appearance.” (AR 65.)

RCW 9A.16.070 provides:

“(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.

“(2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.”

This administrative proceeding involves prosecution of Licensees for furnishing liquor to a minor in violation of RCW 66.44.270. Violation of this statute is a gross misdemeanor.

A explained in *Fine and Ende*, 13B Wash. Prac., Criminal Law § 3003 (2008-09):

“Establishing the defense of entrapment requires proof of two elements: (1) That the defendant was tricked or induced into committing the crime by acts of trickery by law enforcement agents; (2) that the defendant would not otherwise have committed the crime. Washington's entrapment defense has been described as ‘subjective.’ This means that the primary focus of the test is on whether an unwary defendant was entrapped into committing a crime that would not otherwise have been committed. Even though a criminal design originates in a police officer's mind, if the defendant willingly participates in a developing transaction, this will not constitute entrapment. Thus, although the defense requires inducement by law enforcement officials or a person acting on behalf of such officials, unethical police conduct does not, by itself, constitute entrapment.

“This does not mean that the propriety of the police conduct is irrelevant to a defense of entrapment. To the contrary, entrapment requires not mere solicitation, but undue solicitation. Inducement in this context has been described as government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense. The use of a normal amount of persuasion to overcome a defendant's reluctance does not constitute entrapment.”

Licensees' employees were tricked by Enforcement into furnishing alcohol to a minor by Enforcement's use of a deceptively mature minor investigative aide in its compliance check. That but for this trickery Licensees' employees would not have furnished alcohol to the

investigative aide is established by the facts that the employees had worked in the industry for many years during which time they had served literally thousands of customers, but had never been cited for serving a minor before the subject incident. That Enforcement's trickery created a substantial risk that an otherwise law-abiding citizen would commit the same offense is established by the facts that the minor investigative aide went to eight different establishments including Licensee's on the same day, and five of eight experienced bartenders or clerks sold liquor to him without asking for identification, including a Washington State Liquor Store.

Whether the investigative aide was deceptively mature in appearance is directly relevant on the issue of whether Enforcement acted lawfully in conducting the compliance checks. One of the grounds for reversing administrative action is where the agency acts arbitrarily and capriciously. *Ludeman v. State, Dept. of Health*, 89 Wn.App. 751, 755, 951 P.2d 266 (1997). "Under the APA, an agency acts arbitrarily and capriciously when its action is willful, unreasoning, and taken without regard to facts or circumstances." *Lawrence v. Department of Health*, 133 Wn.App. 665, 672, 138 P.3d 124 (2006).

If as Enforcement contends it is not bound by any statute, rule, regulation, or internal Board policy concerning its use of minor investigative aides in conducting controlled purchase programs, Enforcement would be free to use minor investigative aides in any fashion

it chooses with impunity. In addition to prohibiting the use of deceptively mature investigative aides, Policy #287 also prohibits Enforcement from the use of a disguise to make the aide look older. If an investigative aide's appearance is not relevant in determining the lawfulness of compliance checks resulting in administrative sanctions under RCW 66.44.270 and WAC 314-11-020 for furnishing liquor to a minor, nothing would prevent Enforcement from charging a violation of this statute and regulation based on a licensee selling liquor to an investigative aide who is an aspiring actor, who is already deceptively mature in appearance, and who is then professionally made up to look and told to act 60 years old. Indeed, if Enforcement is not constrained by any statute or administrative rule in conducting compliance checks using minor aides, nothing prevents it from having minor aides use false identification, because under Enforcement's analysis, a licensee is strictly liable for serving a minor regardless of any trickery used by Enforcement in the compliance check.

Without the guidelines of a regulation adopted pursuant to RCW 66.08.030, Enforcement is free to use minors in compliance checks without any safeguards for the protection of either the minor or the licensee, who is engaged in a legitimate business that generates substantial revenue for the State. Allowing Enforcement to use a deceptively mature appearing minor in compliance checks at facilities restricted to adults without the authority of a regulation adopted by the WSLCB invites

arbitrary administrative action by Enforcement and abuse of Enforcement's discretionary power.

F. All Evidence Gained from the Unlawful Compliance Check Is Inadmissible and the Administrative Complaint Against Licensee Should Therefore Be Dismissed.

Washington's Administrative Procedure Act governs this administrative proceeding. The rule for admissibility of evidence in these proceedings is set out in RCW 34.05.452(1), as follows:

“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.”

The mandate of this statute is clear. Evidence that is excludable on constitutional or statutory grounds cannot be admitted in administrative proceedings.

“[T]he Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property.” *Seymour v. Washington State Dept. of Health, Dental Quality Assur. Com'*, 152 Wn.App. 156, 164-65, 216 P.3d 1039 (2009)(citing to *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978)). The Fourth Amendment exclusionary rule applies in

civil proceedings that are quasi-criminal in nature. *McDaniel v. City of Seattle*, 65 Wn.App. 360, 363-64, 828 P.2d 81 (1992).

Law enforcement violations of statutes in other contexts have led to suppression of evidence. For example, police officers may make arrests for certain misdemeanors, but only if the misdemeanor is committed in the officer's presence. RCW 10.31.100. If an officer makes an arrest for a misdemeanor not committed in the officer's presence, the remedy is suppression of all evidence and statements obtained from the defendant or as a result of the arrest. *State v. Melrose*, 2 Wn.App. 824, 828-29, 470 P.2d 552 (1970). *See also State v. Green*, 150 Wn.2d 740, 744, 82 P.3d 239 (2004). Other statutes provide for impound of vehicles. If a vehicle impound is not authorized by statute, evidence seized pursuant to an impound search must also be suppressed. *State v. Singleton*, 9 Wn.App. 327, 511 P.2d 1396 (1973).

Enforcement's use of minor investigative aides in compliance checks in premises posted off-limits to minors without the authority of any statute or regulation is also an arbitrary governmental action in violation of Licensee's right to substantive due process, guaranteed by the Fifth and Fourteenth Amendments of the Federal Constitution and Article I, Section 3 of the Washington State Constitution. *See Brown v. City of Seattle*, 117 Wn.App. 781, 798, 72 P.3d 764 (2003).

Thus, all of the evidence gathered by Enforcement in its compliance checks of Licensees' operations is excludable on constitutional

and statutory grounds. Without this evidence, Enforcement cannot show an administrative violation by Licensee.

G. Request for Attorney Fees.

RCW 4.84.350(1) provides that:

“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.”

Under RCW 4.84.350(1), the attorney fees that may be awarded under this statute may not exceed \$25,000. Under RCW 4.84.340(5), a “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 * * *”

Attorney fees are awarded under the Equal Access to Justice Act (“EAJA”) to provide a greater opportunity for parties to defend themselves against inappropriate agency action:

“The EAJA is meant to provide equal access to the courts to private litigants defending against government actions. Specifically, the legislature found that

[c]ertain individuals ... may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings.... The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

“Laws of 1995, ch. 403 § 901 (legislative findings).” *Costanich v. Washington State Dept. of Social and Health Services*, 164 Wn.2d 925, 931, 194 P.3d 988 (2008).

The \$25,000 cap on the amount of attorney fees a court may award under the EAJA applies separately to each level of judicial review, the Superior Court, the Court of Appeals, and the Supreme Court. *Costanich, supra*, 164 Wn.2d at 933.

The government has the burden of demonstrating that its actions were “substantially justified” and that fees should be denied to a qualified party under the EAJA. *Aponte v. State, Dept. of Social and Health Services*, 92 Wn.App. 604, 623, 965 P.2d 626 (1998).

“‘Substantially justified’ means justified to a degree that would satisfy a reasonable person. *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (quoting *Moen*, 110 Wn.App. at 721, 42 P.3d 456). The State must show that its position has a reasonable basis in law and fact. *Const. Indus. Training Council v. Wash. State Apprenticeship & Training Council*, 96 Wn.App. 59, 68, 977 P.2d 655 (1999).” *Puget Sound Harvesters Ass’n v. Washington State Dept. of Fish and Wildlife*, 157 Wn.App. 935, 951-52, 239 P.3d 1140 (2010).

In the present case, the State determined not to file an appeal from adverse rulings against the State in the criminal proceedings against Licensees’ employees that were directly determinative of Licensees’ liability in these administrative proceedings. The Liquor Control Board’s refusal to honor the decisions in the criminal proceedings and continued prosecution of an administrative action against Licensees were not

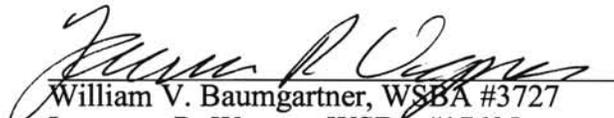
substantially justified. Licensees should, therefore, be awarded their attorney fees in this appeal.

V. CONCLUSION

Restaurant and bar owners operate legitimate businesses which pay significant taxes and payrolls. They do not deserve to be treated like drug dealers or other criminals, and be held strictly liable for offenses that affect both their livelihoods and the livelihoods of their employees based on unregulated undercover sting operations, particularly when the WSLCB has been granted the express authority by the Legislature to adopt rules providing for Enforcement's use of minors in controlled purchase programs, but refuses to do so. Until the WSLCB does adopt a rule spelling out the circumstances under which Enforcement may use minors in compliance checks on premises posted off limits to them, for the protection of both the minor and the legitimate business being checked, all evidence gained by Enforcement's unlawful use of minors in compliance checks should be suppressed and all citations issued by Enforcement as a result of such unlawful checks should be dismissed.

Respectfully submitted this 6th day of February, 2012.

BAUMGARTNER, NELSON & PRICE, PLLC


William V. Baumgartner, WSBA #3727
Laurence R. Wagner, WSBA #17605
Attorneys for Respondents

COA No. 42827-0-II

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

12 FEB -8 10:11 AM
STATE OF WASHINGTON
BY *[Signature]*
CLERK

WASHINGTON STATE LIQUOR)	
CONTROL BOARD,)	CERTIFICATE
)	OF SERVICE
Appellant,)	
)	
v.)	
)	
DUBLIN DOWN, LLC,)	
)	
Respondent,)	
)	
v.)	
)	
TOP SHELF, LLC,)	
)	
Respondent.)	
_____)	

I, Sherry Lowe, make the following declaration:

1. I am over the age of 18, a resident of Clark County, Washington, and not a party to the above action.
2. On February 6, 2012, I caused to be served a true and correct copy of respondent's opening brief via US mail and e-mail to:

Gordon P. Karg
Assistant Attorney General
1125 Washington Street SE
PO Box 40100

Olympia, WA 98504-0100
(360) 586-0092

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 6th day of February, 2012, in Vancouver,
Washington.



Sherry Lowe