

4-20-2009

Alcohol Beverage Control v. Boyd Clerk's Record v. 1 Dckt. 36124

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LAW CLERK Vol. 1 of 2

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

ALCOHOL BEVERAGE CONTROL

Plaintiff _____ and

Appellant
VS.

GORDON J. BOYD, Licensee dba

SHOT GLASS

Defendant _____ and

Respondent

Appealed from the District Court of the Second
Judicial District for the State of Idaho, in and

for Clearwater County

Hon. John Bradbury District Judge

Jenny C. Ghrunke, Deputy Attorney

General, P.O. Box 700

Boise, ID 83680-0700

Attorney x for Appellant

John H. Hathaway, Attorney at Law

P.O. Box 271

Orofino, ID 83544

Attorney x for Respondent

FILED - COPY

Filed this _____ day of _____, 20____

APR 20 2008

Clerk

By Supreme Court Court of Appeals Deputy

Entered on ATS by: _____

36124

**IN THE SUPREME COURT OF THE STATE OF IDAHO
DOCKET #36124-2009**

ALCOHOL BEVERAGE CONTROL,

Plaintiff/Appellant,

Vs.

**GORDON J. BOYD, Licensee dba,
SHOT GLASS,**

Defendant/Respondent,

Jenny C. Grunke, Deputy Attorney General, P.O. Box 700, Meridian, Idaho, 83680-0700

John H. Hathaway, Attorney at Law, P.O. Box 271, Orofino, ID 83544

TRANSCRIPT OF APPEAL

**Appealed from District Court of the Second Judicial District of the State of Idaho, in
and for the County of Clearwater**

Honorable John Bradbury, District Judge Presiding

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Opinion and Order	30
Petition for Judicial Review	01

ROBIN CHRISTENSEN
CLERK-DISTRICT COURT
CLEARWATER COUNTY
OROFINO, IDAHO

2008 JAN -2 P 1:01

CASE NO. W08-4

BY SLG DEPUTY

JOHN R. HATHAWAY
Attorney at Law
P.O. Box 271
Orofino, ID 83544-0271
(208) 476-9110
Fax (208) 476-5053
ISB # 3651

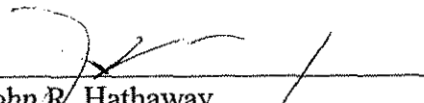
IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ALCOHOL BEVERAGE CONTROL,)	
	)	CASE NO: CV 2008 - 04
Plaintiff,)	
)	
vs.	)	PETITION FOR
	)	JUDICIAL REVIEW
GORDON J. BOYD,)	
dba SHOT GLASS,	)	Hearing No. 06ABC-COM077
	)	License No. 2007 - 3017
Defendant.	)	Premise No. 6C-18
)	

COMES NOW, GORDON J. BOYD, dba SHOT GLASS, the Respondent in the above-entitled matter by and through its attorney of record, John R. Hathaway, and pursuant to Idaho Code § 67-5270, et. seq. hereby respectfully petitions this Court for Judicial Review of the Findings of Fact and Conclusions of Law and Order entered by the Idaho State Alcohol Beverage Control, following a hearing held pursuant to Idaho Code Section 67-5240, et. seq., in the above referenced file numbers.

A copy of the Hearing Officer's Memorandum Decision and Preliminary Order is attached hereto.

DATED this 2nd day of January, 2008.


John R. Hathaway
Attorney for Defendant

000001

CERTIFICATE OF MAILING

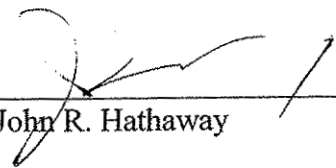
I hereby certify that a full, true and correct copy of the within and foregoing Instrument was hand delivered, faxed, or mailed postage prepaid this 2nd day of January, 2008, at Orofino, Idaho to the following:

Jenny C. Grunke
Deputy Attorney General
Idaho State Police
PO Box 700
Boise, Idaho 83680-0700

by hand
 by fax (208-884-7090)
 by mail

Edwin L. Litteneker
Hearing Officer
PO Box 231
Lewiston, Idaho 83501

by hand
 by fax (208-798-8387)
 by mail



John R. Hathaway

000002

**A CONTESTED MATTER BEFORE THE DIRECTOR
OF THE IDAHO STATE POLICE**

ALCOHOL BEVERAGE CONTROL,	)	Hearing No. 06ABC-COM077
	)	Hearing No. 06ABC-COM078
Plaintiff,	)	License No. 2007-3017
	)	Premise No. 6C-18
v)	
	)	MEMORANDUM, DECISION
GORDON BOYD, Licensee	)	& PRELIMINARY ORDER
dba, SHOT GLASS,)	
)	
Defendant.)	

The Alcohol Beverage Control Division of the Idaho State Patrol seeks to suspend the Retail Alcohol Beverage License of Gordon Boyd. Boyd holds Idaho Retail Alcohol Beverage License # 2007-3017 for premises number 6C-18, located at 238 Johnson Avenue, Orofino, Idaho and operates under the name of the "Shot Glass."

The Alcohol Beverage Control alleges two separate violations of over service occurring on September 16, 2006, one occurring early in the morning and the other one occurring at approximately 10:00 p.m. later that day. The two alleged violations were consolidated for hearing purposes.

This matter came before the undersigned Hearing Officer on the 15th day of November, 2007, at the Clearwater County Courthouse. Alcohol Beverage Control was represented by its Deputy Attorney General, Jenny C. Grunke, Mr. Boyd was represented by Orofino attorney, John R. Hathaway.

Witnesses were called including, Tim Davidson, Greg Harris, Tyler Carson, Dawn Molar, Lee McCallister, Gordon Boyd, E. Clayne Tyler, Ron Browning.

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COPY

Exhibits were made part of the record. The exhibit list is transmitted simultaneously with this Memorandum Opinion and Order. The hearing was recorded electronically and the tapes of the hearing are transmitted with the Transmittal of the Record.

Prior to the hearing, the Defendant filed a Motion to Dismiss the suspension violations based upon the unconstitutional vagueness of I.C. § 23-615. Alcohol Bureau Control and the Defendant briefed the issue thoroughly. The Hearing Officer orally declined to rule on the Motion to Dismiss citing, IDAPA 04.11.01.45 which restricts the Hearing Officer from making decisions on the constitutionality of the Idaho Code provisions unless there is a determination in State or Federal court that the statute in question or a substantially similar statute had been declared to be unconstitutional. No such showing was made here and Alcohol Bureau Control proceeded with its proof as to the alleged violations. The Shot Glass was advised of the issue of the unconstitutionality of I.C. § 23-615 had been preserved for any further proceedings.

Violation 06ABC-COM077

On the evening of September 15, 2006, Idaho State Patrol Officers, Corporal Tim Davidson and Sergeant Greg Harris were assigned to Alcohol Beverage Control and arrived in Orofino for an enforcement inspection of licensed premises within the City. Corporal Davidson and Sergeant Harris have previously been assigned patrol duties and are trained in identification of intoxicated people.

After identifying themselves to the Orofino Police Department they walked along several streets in downtown Orofino arriving at the Shot Glass at approximately 11:00 p.m. on the evening of September 15, 2006. It was Lumberjack Days in Orofino, as well as the Clearwater County Fair and the Shot Glass was packed. The Shot Glass featured a band. Ron Browning

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was at the door checking identification and another person was collecting a cover charge. It is likely that as many as four hundred and sixty people passed through the Shot Glass that evening.

Corporal Davidson and Sergeant Harris went into the Shot Glass. The band was performing in the front of the bar which was quite crowded. Davidson and Harris moved through the bar to the back area. They then went to one of the bars and purchased a non alcoholic beer.

The officers' attention was directed to an individual who they observed to sway and swagger, had blood shot eyes, who would get physically close to other patrons and was being loud. The unidentified individual was consuming bottled beer.

Corporal Davidson observed the yet unidentified subject to purchase several beers from one of the bartenders in the back of the Shot Glass, where Davidson and Harris finally found a table. The area where they were seated had less people than in the front but was still crowded. Corporal Davidson observed the subject approach the bar, push items off of the bar and reach across the bar to shake someone's hand who did not appear to want to shake the unidentified subject's hand.

Corporal Davidson contacted the bartender for purposes of issuing a citation for the sale of an alcoholic beverage to an intoxicated person. When asked who the bartender had served, Corporal Davidson indicated she responded "Oh Justin". The bartender disputes that she indicated to Corporal Davidson that she said "Justin" was the person that she had just sold beer to. The bartender was identified as Dawn Molar. Ms. Molar indicated that it was obviously a busy evening and she was trying to get the customers served and collect money.

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Ms. Molar is a well experienced and competent bartender who understood that she was not to serve customers who were too drunk. Ms. Molar was also familiar with Justin Anderson as a customer of the Shot Glass and other local bars where she had previously worked.

Ms. Molar did not believe Mr. Anderson to be intoxicated that night. She thought that she was familiar enough with Justin that she knew when he was under the influence and she thought that she could tell the difference. Ms. Molar indicated that when Mr. Anderson had too much to drink he became belligerent, cocky, and talked with an attitude.

Sergeant Harris contacted the Orofino Police Department while Corporal Davidson was contacting Ms. Molar. Sergeant Harris then contacted Justin Anderson. Sergeant Harris observed Mr. Anderson to resent his efforts to identify Mr. Anderson with Mr. Anderson being belligerent, obnoxious, and confrontational. Sergeant Harris had some difficulties getting Mr. Anderson to cooperate in indentifying himself. Sergeant Harris' observation is consistent with how Ms. Molar described she had seen Mr. Anderson when he was under the influence. Orofino Sheriff Deputy Carson, who at the time worked for the City of Orofino, also observed Mr. Anderson outside the bar and observed blood shot eyes, and Mr. Anderson being belligerent and appearing unwilling to follow Sergeant Harris' directions.

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The Department seeks to suspend the Shot Glass's license based upon "over service" as defined in I.C. § 23-615, as the sale to any person "actually, apparently or obviously" intoxicated.¹

Mr. Anderson was *apparently or obviously* intoxicated based upon the observations of Ms. Molar, Corporal Davidson, Sergeant Harris and Deputy Carson. Without any proof or testing of Mr. Anderson's blood alcohol there is no proof in the record that he was *actually* under the influence.

The burden of proof in an administrative violation case is "more probable than not." Here that means was there a showing that it was more probable than not that Justin Anderson was *apparently or obviously* under the influence and Ms. Molar knew or should have known Justin Anderson's condition.

Ms. Molar has the obligation to insure that a sale to apparently or obviously intoxicated people does not occur. Ms. Molar's observations of what Mr. Anderson looks like when he is intoxicated are consistent with the observations of Sergeant Harris, Corporal Davidson and Deputy Carson. Even though it was a busy evening Ms. Molar had sufficient opportunity to determine whether it was appropriate to serve beer to Justin Anderson.

¹ RESTRICTIONS ON SALE. No person licensed pursuant to title 23, Idaho Code, or his or its employed agents, servants or bartenders shall sell, deliver or give away, or cause or permit to be sold, delivered, or given away, or allowed to be consumed, any alcohol beverage, including any distilled spirits, beer or wine, to:

(1) Any person under the age of twenty-one (21) years, proof of which shall be a validly issued state, district, territorial, possession, provincial, national or other equivalent government driver's license, identification card or military identification card bearing a photograph and date of birth, or a valid passport.

(2) Any person actually, apparently or obviously intoxicated.

(3) An habitual drunkard.

(4) An interdicted person.

Any person under the age of twenty-one (21) years, or other person, who knowingly misrepresents his or her qualifications for the purpose of entering licensed premises or for obtaining alcohol beverages from such licensee shall be equally guilty with such licensee and shall, upon conviction thereof, be guilty of a misdemeanor.

Mr. Boyd's bartender sold an alcoholic beverage to an apparently intoxicated Justin Anderson in violation of Idaho Code § 23-615.

Violation 06ABC-COM078

The next night, September 16, 2006, Idaho State Patrol, Officer Davidson and Sergeant Harris returned to the Shot Glass. The Shot Glass was just as busy as it had been the night before. Both officers observed an individual to be loud, argumentative and confrontational with a group of people in the back of the Shot Glass in the area they had positioned themselves the night before. The unidentified subject while holding a bottled beer appeared to try to provoke several people in the group to fight. Several other people in the group pulled him away several times, however, the rest of the group did not seem to be responding to the efforts of the unidentified person to get them to fight.

Officer Davidson and Sergeant Harris were unable to make contact with the unidentified subject as a result of one of the Shot Glass patrons coming up to them and asking if they were undercover police officers. The patron was then observed to go to the bar and talk to several other patrons of the Shot Glass pointing in their direction. Officer Davidson and Sergeant Harris not wanting to make a scene, left the Shot Glass without contacting the still unidentified subject or the bartender.

There is an insufficient showing as required by I.C. § 23-615 of the state of the intoxication of the unidentified subject. Without any contact of the unidentified patron there is not sufficient evidence of the level of intoxication of the unidentified patron to base a finding that a patron of the Shot Glass was over served.

CONCLUSION

The State has met its burden in 06ABC-COM077 and a factual and legal basis exists to suspend the Retail Alcohol Beverage License of the Shot Glass for this violation.

The State has not met its burden in 06ABC-COM078 and there is not a factual or legal basis to suspend the Retail Alcohol Beverage License of the Shot Glass.

ORDER

It is therefore, the Preliminary Order of the Department that the Retail Alcohol Beverage License No. 2007-3017 for premises 6C-18 shall be and is hereby suspended. A Notice of the Preliminary Order is attached to this Order and made a part of this Order by this reference.

DATED this 04 day of December 2007.



Edwin L. Litteneker
Hearing Officer

000009

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office

Sent by facsimile

Sent by Federal Express, overnight
Delivery

Hand delivered

To: John Hathaway
Attorney at Law
P.O. Box 321
Orofino, Idaho 83544

Jenny C. Grunke
Deputy Attorney General
P.O. Box 700
Meridian, Idaho 83680-0700

On this 04 day of December 2007.



Edwin L. Litteneker

NOTICE OF PRELIMINARY ORDER

a. This is a preliminary order of the hearing officer. It can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

b. Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency. The service date of this Order is December 4, 2007.

c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on its own motion.

d. If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

e. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or
- iv. The real property or personal property that was the subject of the agency action is located. (7-1-93)

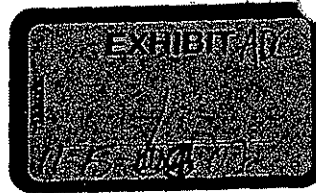
f. This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

EXHIBIT LIST

Alcohol Beverage Control v. Gordon Boyd d/b/a Shot Glass
Case No. 06ABC-COM078

Exhibit No.	Description	Admitted	Rejected	
1	Incident Report, Idaho State Police, dated 9/18/2006	√		
2	Incident Report, Idaho State Police, dated 9/16/2006	√		
3	Incident Report, Idaho State Police, dated 9/27/2006	√		
A	Idaho State Police Citation No. 1168852	√		

Ident Report IDAHO STATE POLICE



A06000136 Supple No
0001

Reported Date
09/18/2006
Nature of Call

Officer
HARRIS, GREG

Administrative Information

Agency IDAHO STATE POLICE	Case No A06000136	Supplement No 0001	Reported Date 09/18/2006	Reported Time 09:54	
Officer 2173/HARRIS, GREG			Assignment ALCOHOL BEVERAGE CONTROL SGT		Entered by 2173
Assignment ALCOHOL BEVERAGE CONTROL SGT		RMS Transfer Failed	Property? None	Approving Officer 2466	
Approval Date 09/26/2006	Approval Time 09:38:07				

Summary Narrative

Supplemental report to Trooper Davidson's citation for over service to Dawn Marie Moler.

Narrative

1. On September 15 and 16, 2006, Trooper Tim Davidson and myself were working under cover assisting Orofino Police Department looking for over service violations in the local bars.
2. At approximately 0005 hours, on September 16, 2006, Trooper Tim Davidson and myself were in the Shot Glass bar (6C-18). I observed a white male individual, later identified as Justin Anderson, in the establishment.
3. Anderson is described as a white male, 5'10", 150 pounds, 25 to 30 years old. Anderson was wearing a light blue in color button up short sleeve shirt, dark baseball cap, and blue Levis.
4. While I observed Anderson he was consuming bottles of Budweiser beer. His eyes were very bloodshot, his face was flush, and he swayed and staggered very noticeably as he walked. At times he would hang onto people and talk directly into their faces causing them to push him away. He was loud and boisterous.
5. Anderson walked up to the service window at the backside of the main bar. While standing there he swayed and staggered very noticeably. He had to prop himself up against the window ledge for support. While standing there he knocked items on the window ledge off onto the floor. The bar tender served Anderson two bottles of Budweiser beer. As Anderson walked away from the opening of the bar he swayed and staggered very noticeably as he walked.
6. Orofino P.D. Officers Tyler Carson and Tom Barnett responded to the Shot Glass bar to assist.
7. When the officers contacted Anderson near the pool tables they asked him to walk outside. Anderson appeared to be resistant. I walked up to Anderson and told him to produce an identification card. He produced an Idaho Identification Card.
8. As I talked with Anderson I told him whom I was and that I needed his current address. Anderson's speech was slurred and thick tongued to the point to being unintelligible. He swayed

Report Officer
2173/HARRIS, GREG

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09/26/2006 15:18

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Incident Report
IDAHO STATE POLICE

A06000136

Supple
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Narrative

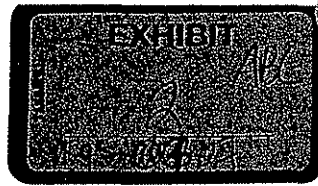
and staggered as he tried to stand.

9. At one point Anderson demanded that I give back his identification card. I told him I would return it when I was finished with it. Anderson appeared to become almost aggressive towards me saying words to the effect "give me back my fucking identification now" and started to take a step towards me. A couple of his friends grabbed and restrained him. When I was done with his identification I returned it to him.

10. Trooper Davidson cited the bartender for selling to an obviously intoxicated person.

11. Witness: Anderson, Justin E. DOB: 10/01/1980. Height 5'9", 160 pounds. Brown hair and blue eyes. Address: 1175 Ahsahka Road, Orofino, ID. Phone: none. Idaho OLN: XP254491D.

Incident Report IDAHO STATE POLICE



A06000136

Supplement No
ORI

Reported Date
09/16/2006
Nature of Call
ALCOHOL VI
Officer
DAVIDSON, TIM

Administrative Information

Agency IDAHO STATE POLICE	Case No A06000136	Supplement No ORIG	Reported Date 09/16/2006	Reported Time 00:05	Status COMMANDER
Nature of Call ALCOHOL VIOLATION		Report Title OVERSERVICE			
Location SHOT GLASS BAR			City OROFINO	County CLEARWATER COUNTY	
Region L2	From Date 09/16/2006	From Time 00:05	Officer 2643/DAVIDSON, TIM		
Assignment ALCOHOL BEVERAGE CONTROL TROOPER		Entered by 2643	Assignment ALCOHOL BEVERAGE CONTROL TROOPER		
RMS Transfer Successful	Property? None	Approving Officer 2173	Approval Date 09/18/2006	Approval Time 09:53:18	

Person Summary

Inv#	Inv No	Type	Name	MNI	Race	Sex	DOB
CIT	1	I	MOLER, DAWN MARIE	227264	W	F	[REDACTED]

Summary Narrative

On September 16, 2006, at approximately 0005 hours I, Timothy P. Davidson, was enforcing Idaho Alcohol Beverage Control laws in Orofino, Idaho. ISP Sgt. Harris and I were inside the Shot Glass bar (6C-18) located at 238 Johnson Avenue in Orofino, Clearwater County, Idaho. I observed Dawn Marie Moler, DOB [REDACTED] serve Justin E. Anderson, DOB [REDACTED] two bottles of beer while he was obviously intoxicated.

I issued Moler a citation for Overservice of Alcohol, IC 23-615(2).

ABC will issue an administrative violation to The Shotglass bar (6C-18) for Overserving An Obviously Intoxicated Person.

Report Officer
2643/DAVIDSON, TIM

Printed At
09/26/2006 15:33

Page 1 of 3

000015

**Incident Report
IDAHO STATE POLICE**

A06000136 Supplement
ORIG

CITED AND RELEASED/SERVED SUMMONS 1: MOLER, DAWN MARIE

Involvement CITED AND RELEASED/SERVED SUMMONS		Invl No 1	Type Individual	
Name MOLER, DAWN MARIE		MNI 227264	Race WHITE	Sex FEMALE
DOB 01/09/1964		Age 42	Height 5'06"	
Weight 160#	Hair Color BROWN	Eye Color HAZEL	RMS Transfer Empty field	
Type HOME	Address 4146 HWY 11		City OROFINO	State IDAHO
ZIP Code 83544				
Involvement CITED AND RELEASED		Arrest Type ON VIEW (WITHOUT WARRANT)	Arrest Date 09/16/2006	Arrest Time 00:05:00
Status CITED AND RELEASED		Armed UNARMED	Multi-arrests NOT APPLICABLE	
Charge 23 615 (2)		Level M	Charge Literal SELL ALCOHOL TO INFO	

Narrative

- On September 16, 2006, at approximately 0005 hours I, Timothy P. Davidson, was enforcing Idaho Alcohol Beverage Control laws in Orofino, Idaho. ISP Sgt. Harris and I were inside the Shot Glass bar (6C-18) located at 238 Johnson Avenue in Orofino, Clearwater County, Idaho. I observed Dawn Marie Moler, DOB [REDACTED] serve Justin E. Anderson, DOB [REDACTED] two bottles of beer while he was obviously intoxicated.
- I saw Anderson, who was wearing a light colored, short-sleeve shirt, blue jeans, and a dark ball cap, stumble as he walked past me. I watched Anderson walking around the establishment and as he walked he was swaying from left to right, bumping into people and furniture, and slurring his speech as he talked to people. When he was near me I could see that his eyes were bloodshot, his eyelids were partially closed, and his face was flush. He was also holding onto a Budweiser beer bottle and drinking out of it the entire time I was watching him.
- I saw Anderson approach the window opening at the rear of the bar. As he stood there talking to the bartender he knocked several items off the shelf at the opening. As Anderson stood at the window talking to the bartender and another male who was standing behind the bar Anderson was reaching through the opening and grabbing the shoulder of the male and grabbing his hand to shake it several times. Anderson would not release the hand of the male. The male did not want to hold Anderson's hand and tried to pull away several times. I watched Anderson knock more items off the shelf as he noticeably swayed while standing at the opening and leaning against the wall. Moler came to the opening several times as she was working behind the bar and I watched her as she talked with Anderson each time. I watched Anderson give Moler some currency for payment and then he received multiple bottles of Budweiser beer from her.
- I contacted Orofino Police and Officers Tyler Carson and Tom Barnett responded to the Shot Glass bar to assist Sgt. Harris and myself. I directed them to Sgt. Harris and they assisted in the identification of Justin Anderson. Refer to Sgt. Harris' report for supplemental information.
- I contacted Dawn Moler and identified her using her Idaho driver's license. I explained to her that I was going to issue her a citation for over serving a patron. She asked whom she over served and I described the contact she had just made with the male by the window and she said, "Oh, Justin."

Report Officer
2643/DAVIDSON, TIM

Printed At
09/26/2006 15:33

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000016

Incident Report
IDAHO STATE POLICE

A06000136

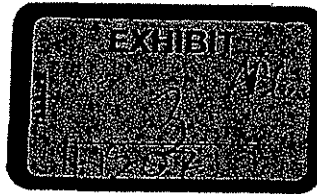
Supplemental
ORIG

Narrative

6. I issued Moler a citation for Overservice of Alcohol, IC 23-615.

7. ABC will issue an administrative violation to the Shot Glass bar for Overserving An Obviously Intoxicated Person.

**Incident Report
IDAHO STATE POLICE**



A06000139

Supplem:
ORIG



Reported Date
09/27/2006
Nature of Call
ALCOHOL VI
Officer
DAVIDSON, TIM

Administrative Information

Agency IDAHO STATE POLICE	Case No A06000139	Supplement No ORIG	Reported Date 09/27/2006	Reported Time 15:20	Status COMMANDER
Nature of Call ALCOHOL VIOLATION	Report Title OVERSERVICE				
Location THE SHOT GLASS			City OROFINO	County CLEARWATER COUNTY	
Region L2	From Date 09/27/2006	From Time 15:20	Officer 2643/DAVIDSON, TIM		
Assignment ALCOHOL BEVERAGE CONTROL TROOPER		Entered by 2643	Assignment ALCOHOL BEVERAGE CONTROL TROOPER		
RMS Transfer Successful	Approving Officer 2173	Approval Date 10/02/2006	Approval Time 14:03:59		

Summary Narrative

On September 16, 2006, from 2330 to 0010 hours, Sgt. Harris and I, Timothy P. Davidson, observed a white male adult in The Shotglass Bar (6C-18), in Orofino, Clearwater County, Idaho, who was obviously intoxicated while being served bottled beer in the establishment.

ABC will file an Administrative Violation on the licensee of the Shot Glass.

Incident Report IDAHO STATE POLICE

A06000139

Suppleme
ORIG

Narrative

1. On September 16 2006, from 2330 to 0010 hours Sgt. Harris and I observed a white male adult in The Shotglass Bar (6C-18), located at 238 Johnson Avenue, Orofino, Clearwater County, Idaho, who was obviously intoxicated and still being served bottled beer by the establishment.
2. The obviously intoxicated male subject was wearing blue jeans, a blue short-sleeve t-shirt, and a dark ball cap with an iron-cross embroidered on it. He was about 5'5" tall, 155 pounds, with brown hair, and bloodshot eyes. The intoxicated male drank bottled beer as he moved around inside the bar. He was talking loud, swaying significantly, and bumping into people and furniture.
3. When I first saw the subject his shirt was not torn, but when I saw him at approximately 2350 hours I saw that his shirt was torn from the front, bottom hem up to the front of his collar. While I watched him I saw two females grab his arms and place their arms around his waist obviously trying to pull him from the immediate presence of four other males standing in one location and talking peacefully. The intoxicated person appeared to be angry and his anger appeared to be directed toward one of the four males standing together. The intoxicated subject broke the grip of the two females and returned to the group of four males where he confronted one of them angrily. He yelled at the male he was confronting as he leaned in close to him. Again, the two females physically pulled the obviously intoxicated male from the presence of the four other males before a physical altercation ensued.
4. ABC will file an Administrative Violation against the licensee of the Shot Glass for Overserving an Obviously Intoxicated Person.

000019

IN THE DISTRICT COURT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER, JUDICIAL DISTRICT OF 2

ROBIN CHRISTENSEN CLERK - DISTRICT COURT AND SUMMONS CLEARWATER COUNTY, IDAHO

Moter vs. Last Name

Dawn Marie First Name Middle Initial

2006 SEP 20 12:29

Infraction Citation OR Misdemeanor Citation

Accident Involved

CASE NO. CRN-1025

USDOT TK

Operator Class A Class B Class C Class D Other

GVWR 26001 + 8 + Persons P Hazardous Materials OR# A06000136

Home Address 4140 Hwy 11, Oriskany, ID 83544

Company Name Phone #

THE UNDERSIGNED OFFICER (PARTY) HEREBY CERTIFIES AND SAYS:

I certify I have reasonable grounds, and believe the above-named defendant,

DL or SS# XP6188C State: ID Sex: M F

Height 5-6 Wt. 160 Hair Brn Eyes Haz DOB 1-9-64

Veh. Lic # State Yr. of Vehicle Make

Model Color

Did commit the following act(s) on Sep 16, 2006 at 0005 o'clock A.M.

Vio. #1 Cur service of Alcohol Code Section 23-605

Vio. #2 Code Section

Location The shotglass bar

Hwy. Mp. Clearwater County, Idaho.

Date 9-16-06 Officer/Party T. Davison Serial #/Address 2643 Dept. 18P

Date Witnessing Officer Serial #/Address Dept.

THE STATE OF IDAHO TO THE ABOVE NAMED DEFENDANT

You are hereby summoned to appear before the Clerk of the Magistrate's Division of the

District Court of Clearwater County, Idaho,

located at Court House on the 25

day of Sep, 2006, (OR) on or after

20 and on or before

at 1 o'clock P M

I acknowledge receipt of this summons and I promise to appear at the time indicated.

Dawn Marie Defendant's Signature

I hereby certify service upon the defendant personally on the day of , 20

Officer

NOTICE: See reverse side of your copy for PENALTY and COMPLIANCE instructions.

COURT COPY VIOLATION #1



1168852

M.I.

FIRST

LAST

Defendant's Name:

**A CONTESTED MATTER BEFORE THE DIRECTOR
OF THE IDAHO STATE POLICE**

ALCOHOL BEVERAGE CONTROL,	)	Hearing No. 06ABC-COM077
	)	Hearing No. 06ABC-COM078
Plaintiff,	)	License No. 2007-3017
	)	Premise No. 6C-18
vs.)	
	)	TRANSMITTAL OF THE
GORDON BOYD, Licensee	)	RECORD
dba, SHOT GLASS,)	
)	
Defendant.)	
)	


I, Edwin L. Litteneker, the Hearing Officer for the above-entitled hearing, transmit the following to the Idaho State Police:

1. Administrative Violation Notice for 06ABC-COM077, dated October 12, 2006.
2. Administrative Violation Notice for 06ABC-COM078, dated October 12, 2006.
3. Complaint for Suspension of Retail Alcohol Beverage License for 06ABC-COM077, dated December 21, 2006.
4. Complaint for Suspension of Retail Alcohol Beverage License for 06ABC-COM078, dated December 21, 2006.
5. Answer to Complaint for Suspension for 06ABC-COM077, dated January 12, 2007.
6. Answer to Complaint for Suspension for 06ABC-COM078, dated January 12, 2007.
7. Notice of Scheduling Conference by Telephone, dated September 14, 2007;
8. Scheduling Order, dated September 21, 2007;
9. Complainant's Witness and Exhibit List, dated October 23, 2007;
10. Defendant's Witness and Exhibit List for 06ABC-COM-77, dated October 26, 2007;
11. Defendant's Witness and Exhibit List for 06ABC-COM078, dated October 26, 2007;
12. Defendant's Motion to Dismiss for 06ABC-COM077, dated October 26, 2007;

000021
COPY

13. Defendant's Motion to Dismiss for 06ABC-COM078, dated October 26, 2007;
14. Memorandum in Support of Motion to Dismiss for 06ABC-COM077, dated October 26, 2007;
15. Memorandum in Support of Motion to Dismiss for 06ABC-COM078, dated October 26, 2007;
16. Defendant's Amended Witness and Exhibit List, dated November 9, 2007;
17. Complainant's Pre-Hearing Memorandum, dated November 13, 2007;
18. 5 tapes of November 15, 2007 Hearing;
19. Complainant's Closing Argument, dated November 26, 2007;
20. Defendant's Closing Argument for 06ABC-COM077, dated November 26, 2007
21. Defendant's Closing Argument for 06ABC-COM078, dated November, 26, 2007;
and
22. Memorandum Decision and Order, dated December 4, 2007.

DATED this 4 day of December 2007.



Edwin L. Litteneker
Hearing Officer

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office without the Administrative
Record attached

To: Gordon Boyd
c/o John R. Hathaway
Attorney at Law
P.O. Box 271
Orofino, Idaho 83544

Mailed by regular first class mail,
And deposited in the United States
Post Office with the original Administrative
Record attached

To: Jenny C. Grunke
Deputy Attorney General
Idaho State Police
P.O. Box 700
Meridian, Idaho 83680-0700

On this 04 day of December 2007.



Edwin L. Litteneker

JOHN R. HATHAWAY
Attorney at Law
P.O. Box 271
Orofino, ID 83544-0271
(208) 476-9110
Fax (208) 476-5053
ISB # 3651

ROBIN CHRISTENSEN
CLERK-DISTRICT COURT
CLEARWATER COUNTY
OROFINO, IDAHO

2008 JAN -2 P 2: 20

CASE NO. CW08-4

BY Ses DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ALCOHOL BEVERAGE CONTROL,)
)
Plaintiff,)
)
vs.)
)
GORDON J. BOYD,)
dba SHOT GLASS,)
)
Defendant.)

CASE NO: CV 2008 - 04

EXPARTE ORDER FOR STAY
PENDING JUDICIAL REVIEW

Hearing No. 06ABC-COM077

License No. 2007 - 3017

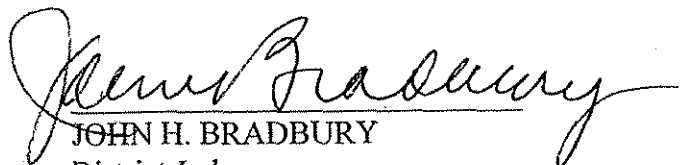
Premise No. 6C-18

The Motion of the Defendant for stay pending Judicial Review having been presented before this Court, and good cause appearing therefore;

NOW, THEREFORE, IT IS HEREBY ORDERED that the execution and/or enforcement of the Order of the Alcohol Beverage Control Division of the Idaho State Police suspending the Defendant's liquor license or privilege to sell alcohol beverages be, and the same is hereby STAYED during the pendency of Judicial Review of said Order.

THEREFORE, Defendant's liquor license is ordered reinstated during the pendency of Judicial Review.

DATED this 2 day of January, 2008.


JOHN H. BRADBURY
District Judge

000024

CERTIFICATE OF MAILING

I hereby certify that a full, true and correct copy of the within and foregoing Instrument was hand delivered, faxed, or mailed postage prepaid this 2nd day of January, 2008, at Orofino, Idaho to the following:

Jenny C. Grunke
Deputy Attorney General
Idaho State Police
PO Box 700
Boise, Idaho 83680-0700

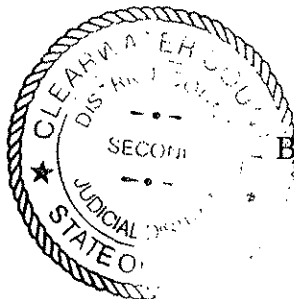
by hand
 by fax (208-884-7090)
 by mail

Edwin L. Litteneker
Hearing Officer
PO Box 231
Lewiston, Idaho 83501

by hand
 by fax (208-798-8387)
 by mail

John R. Hathaway
Attorney at Law
P.O. Box 271
Orofino, Idaho 83544

by hand
 by fax
 by mail



ROBIN CHRISTENSEN, Clerk

BY: Sue B. Summerton
Deputy

LAWRENCE G. WARDEN
Attorney General

STEPHANIE A. ALTIG
Lead Deputy Attorney General
Idaho State Police
Idaho State Bar No. 4620

JENNY C. GRUNKE
Deputy Attorney General
Idaho State Police
Idaho State Bar No. 6191
P.O. Box 700
Meridian, Idaho 83680-0700
Telephone: (208) 884-7050

CARRIE BIRD
CLERK-DISTRICT COURT
CLEARWATER COUNTY
OROFINO, IDAHO

2008 FEB 11 A 11:41

CASE NO. CV08-4

BY DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

ALCOHOL BEVERAGE CONTROL,)	
	)	CV-2008-000004
Plaintiff/Respondent,)	
	)	NOTICE OF LODGING AGENCY
vs	)	RECORD
)	
GORDON BOYD, Licensee)	
dba, SHOT GLASS,)	
)	
Defendant/Appellant.)	

Comes now, the Bureau of Alcohol Beverage Control, the Respondent in the above matter, and pursuant to I. C. §§ 67-5249, 67-5275(1)(b) and I.R.C.P. 84(j), gives notice that the agency record has been transmitted to the Court and contains the following documents:

DATE	DOCUMENT
December 21, 2006	Complaint for Suspension of Retail Alcohol Beverage License; 06ABC-COM077
December 21, 2006	Complaint for Suspension of Retail Alcohol Beverage License; 06ABC-COM078
January 12, 2007	Answer to Complaint for Suspension 06ABC-COM077

NOTICE OF LODGING AGENCY RECORD - 1

000026

January 12, 2007	Answer to Complaint for Suspension 06ABC-COM078
September 14, 2007	Notice of Scheduling Conference by Telephone 06ABC-COM077; 06ABC-COM078
September 20, 2007	Scheduling Order 06ABC-COM077; 06ABC-COM078
October 23, 2007	Complaint's Witness and Exhibit Lists 06ABC-COM077; 06ABC-COM078
October 26, 2007	Defendant's Witness and Exhibit List 06ABC-COM077
October 26, 2007	Defendant's Witness and Exhibit List 06ABC-COM078
October 26, 2007	Motion to Dismiss; 06ABC-COM077
October 26, 2007	Motion to Dismiss; 06ABC-COM078
October 26, 2007	Memorandum in Support of Motion to Dismiss 06ABC-COM077
October 26, 2007	Memorandum in Support of Motion to Dismiss 06ABC-COM078
November 9, 2007	Defendant's Amended Witness and Exhibit List 06ABC-COM077
November 13, 2007	Complainant's Pre-Hearing Memorandum 06ABC-COM077; 06ABC-COM078
November 26, 2007	Complainant's Closing Argument 06ABC-COM077; 06ABC-COM078
November 26, 2007	Defendant's Closing Argument 06ABC-COM077
November 26, 2007	Defendant's Closing Argument 06ABC-COM078
December 4, 2007	Memorandum, Decision & Preliminary Order 06ABC-COM077; 06ABC-COM078

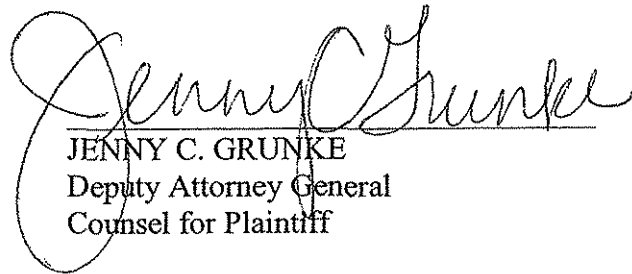
December 4, 2007

Transmittal of the Record
06ABC-COM077; 06ABC-COM078

November 15, 2007

Transcription of Audio Proceedings,
Before Edwin L. Litteneker, Hearing Officer

DATED this 6th day of February 2008.

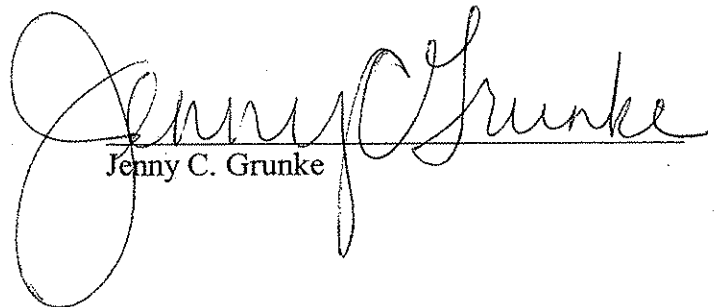

JENNY C. GRUNKE
Deputy Attorney General
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE OF LODGING AGENCY RECORD was served on the following on this 6th day of February 2008, by the following method:

John R. Hathaway
Attorney of Law
P.O. Box 271
Orofino Idaho 83544

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail


Jenny C. Grunke

SCANNED

12-31-08

CARRIE LIND
CLERK-DISTRICT COURT
CLEARWATER COUNTY
OROFINO, IDAHO

2008 DEC 23 P 3:13

CASE NO. CW08-4

BY SRS DEPUT

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ALCOHOL BEVERAGE CONTROL,

Plaintiff/Respondent,

v.

GORDON J. BOYD, Licensee
dba, SHOT GLASS,

Defendant/Appellant.

Case No.: CV 2008-0004

OPINION AND ORDER

This case comes before me on appeal from the decision of Administrative Hearing Officer Edwin L. Litteneker in the matter of the suspension of Gordon Boyd's Retail Alcohol Beverage License. I heard oral arguments on November 18, 2008.

I. FACTS

Gordon Boyd holds Idaho Retail Alcohol Beverage License Number 2007-3017 allowing him to sell alcoholic beverages on the premises known as the Shot Glass bar in Orofino, Idaho. Mr. Boyd employs bartenders to serve drinks at the establishment. At the time of the events at issue here, Mr. Boyed employed Dawn Moler as a bartender.

The Shot Glass was open both Friday, September 15 and Saturday, September 16, 2006, days that also coincided with the annual Clearwater County Fair and Lumberjack Days celebration. The Shot Glass was extremely crowded both nights.

On September 15, Idaho State Police Corporal Tim Davidson and Sergeant Greg Harris, who were at that time assigned to Alcohol Beverage Control (ABC), entered the Shot Glass for the purpose of enforcement inspection.¹ They observed a male patron who staggered and was boisterous. The officers also observed him approach a service window behind the bar and knock items off the window ledge. He ordered and Dawn Moler served him two bottles of beer.

Based on their observations, the officers requested the Orofino Police Department assist them in contacting and identifying the male patron, Justin Anderson. After checking Mr. Anderson's identification, Corporal Davidson cited Ms. Moler for a misdemeanor violation of Idaho Code section 23-615 (Citation No. 1168852), and advised her that the citation was for serving an obviously intoxicated person. The officers also advised Shot Glass manager Lee McAlister of the citation.

The following night, September 16, Corporal Davidson and Sergeant Harris again entered the Shot Glass. Again, the bar was extremely crowded. The officers observed a different male patron they believed was intoxicated. They said he swayed noticeably, bumped into people and furniture, and was loud and aggressive. At one point he attempted to provoke a fight with other patrons. Before the officers could contact him or complete their investigation, some patrons identified them as police officers. They left the bar to avoid trouble with other patrons. While no citations were issued September 16, an Administrative Violation for serving an obviously intoxicated person was filed.

¹ The officers were working "under-cover" and wore normal civilian attire rather than uniforms. They ordered non-alcoholic beer, and stood or sat among the other patrons. Administrative Hearing Transcript at 23-24, Alcohol Beverage Control v. Gordon Boyd (2007).

ABC referred Dawn Moler's misdemeanor citation to the City Attorney. The City Attorney, citing a conflict of interest, referred the case to the County Prosecuting Attorney. She dismissed the charge on January 31, 2007.

On October 12, 2006, ABC filed Administrative Violation Notices for cases 06ABC-COM077 and 06ABC-COM078, relating to the incidents of September 15 and 16. Complaints for Suspension of Retail Alcohol Beverage License for each case were filed December 21, 2006. On October 26, 2007, Mr. Boyd moved to dismiss both violations on the grounds that I.C. § 23-615(2) is unconstitutionally vague and indefinite, and thus facially invalid. Prior to the scheduled hearing, the Hearing Officer denied the motions for want of statutory authority to rule on a motion presenting constitutional issues. The hearing was held November 15, 2007.

On December 4, 2007, the Hearing Officer filed a Memorandum Decision and Order deciding the two cases. The Hearing Officer concluded that the State had met its burden of proof in 06ABC-COM077 (the September 15 incident) but did not meet its burden in 06ABC-COM078. On the basis of the September 15 violation, he entered a preliminary order suspending Retail Alcohol Beverage License No. 2007-3017. The Memorandum Decision and Order contained a Notice of Preliminary Order consistent with Idaho Code section 67-5245 advising Mr. Boyd that service date of the order was December 4, 2007. Mr. Boyd did not seek agency review, and the order became final on December 18, 2007.

Mr. Boyd appealed the decision January 2, 2008, within the twenty-eight days allowed by statute for filing of an appeal and also moved to stay the suspension of the

permit. I granted his motion to stay further proceedings pending the outcome of this appeal.

II. CONTENTIONS

Mr. Boyd contends that Idaho Code section 23-615 is unconstitutionally vague and/or overbroad because there is no objective standard by which licensees or their employees can determine when a patron is "obviously intoxicated." He also argues this lack of an objective measure provides no notice to licensees of the standard ABC uses to enforce the statute, leaving the determination of intoxication solely to the discretion of the police rather than the perception of the licensee. Thus, he contends, the statute is facially unconstitutional and/or unconstitutional as applied. Mr. Boyd also posits that the Administrative Hearing Officer erred in determining that the patron, Mr. Anderson, was obviously intoxicated when he was served.

ABC contends that the meaning of "intoxication" is within the common knowledge of most laypeople, and that intoxication manifests itself in distinct characteristics readily identifiable by the public at large. Moreover, ABC argues that application of I.C. § 23-615 does not encroach upon constitutionally protected conduct, and is thus not overbroad. Finally, ABC contends that the statute creates a strict liability standard that requires no element of *scienter* in proving a violation.

III. DISCUSSION

A. Jurisdiction

The Idaho Administrative Procedures Act (IDAPA) governs the review of agency decisions. *Gibson v. Ada County Sheriff's Dept.*, 139 Idaho 5, 7 (2003). Alcohol Beverage Control is a bureau of the Idaho State Police, and is thus an agency within the meaning of

Idaho Code section 67-5201(2). The agency action at issue here concluded with the issuance of an order, and is therefore a "contested case" as provided by IDAPA. I.C. § 67-5240. Judicial review of agency decisions by district courts is provided by Idaho Code section 67-5270, which requires, in relevant part that the party requesting review must exhaust all administrative remedies prior to petitioning for review. However, while agency review of a preliminary order is available under Idaho Code section 67-5245, Idaho Code section 67-5271(2) provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency action would not provide an adequate remedy."

In this case, Mr. Boyd alleges a constitutional infirmity in the statutory scheme applicable to licensees. While the legislature may vest administrative agencies with quasi-judicial authority over administrative actions, Article V, section 2 of the Idaho Constitution vests judicial authority in the courts. Constitutional interpretation is a fundamental responsibility of the judiciary. *Miles v. Idaho Power Co.*, 116 Idaho 635, 640 (1989). I conclude, as the Hearing Officer did in denying the motion to dismiss, that ABC lacks the authority to pass upon the constitutional question raised by Mr. Boyd, and that further agency action would not have provided a remedy. Therefore, Mr. Boyd's appeal from the preliminary order is properly before me.

B. The Administrative Hearing Officer did not err in concluding that the patron, Mr. Anderson, was served when he was "obviously intoxicated."

1. Standard of Review.

When reviewing agency decisions, I may not reverse an agency on questions of fact if the agency's decision is supported by substantial evidence on the record considered as a whole. *Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99

Idaho 630, 633 (1978). Further, I may not "substitute [my] judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. § 67-5215(g).

2. The Administrative Hearing Officer's conclusion that Mr. Anderson was served when he was "obviously intoxicated" is supported by substantial evidence.

The question presented to the Hearing Officer was whether Mr. Boyd's agent, Ms. Moler, violated Idaho Code section 23-615 which provides as follows:

No person licensed pursuant to title 23, Idaho Code, or his or its employed agents, servants or bartenders shall sell, deliver or give away, or cause or permit to be sold, delivered, or given away, or allowed to be consumed, any alcohol beverage, including any distilled spirits, beer or wine, to:

- (1) Any person under the age of twenty-one (21) years, proof of which shall be a validly issued state, district, territorial, possession, provincial, national or other equivalent government driver's license, identification card or military identification card bearing a photograph and date of birth, or a valid passport.
- (2) Any person actually, apparently or obviously intoxicated.
- (3) An habitual drunkard.
- (4) An interdicted person.

....

ABC alleges that Ms. Moler violated subsection 2 of the statute by serving a patron who was "obviously intoxicated." The hearing officer's role was to weigh the evidence before him to determine whether Ms. Moler's actions violated the statute as written.

In reaching his decision, the Hearing Officer relied on the testimony of three police officers who testified that Justin Anderson exhibited signs of intoxication. Sergeant Harris testified that he observed Mr. Anderson and that Mr. Anderson was "swaying and staggering as he walked," that "his eyes were bloodshot," and he was being "loud and boisterous." Administrative Hearing Transcript at 16, *Alcohol Beverage Control v. Gordon Boyd* (2007). Sergeant Harris also testified that he watched Mr. Anderson knock items off the bar while he was waiting to be served by Ms. Moler. Admin. Hr'g Tr. at 17. Corporal Davidson testified that Mr. Anderson was "stumbling and bumping into people," "knocking things off the window sill," and "not in control, full control of his bodily movements." Admin. Hr'g Tr. at 58-60. Corporal Davidson also testified that he was able to hear Mr. Anderson's speech, which was slurred. Admin. Hr'g Tr. at 61. Clearwater County Sheriff's Deputy Tyler Carson, who arrived at the Shot Glass to assist the two ABC investigators, testified that when he contacted Mr. Anderson, Mr. Anderson's speech was slurred, his eyes were "bloodshot and glassy," "he had trouble standing," and that "he would sway and stumble" when standing. Admin. Hr'g Tr. at 98-99.

Ms. Moler testified that she saw Mr. Anderson enter the Shot Glass and that she served him, but that she did not otherwise observe his behavior. Admin. Hr'g Tr. at 121. She testified that she had seen Mr. Anderson on previous occasions when he was intoxicated. According to Ms. Moler's testimony, she was familiar with Mr. Anderson's behavior when intoxicated, and that Mr. Anderson "cuts himself off." Admin. Hr'g Tr. at 139-140. No other testimony was introduced to dispute the officers' claims that Mr. Anderson was intoxicated.

In rendering his decision, the Hearing Officer concluded that the observations of "Ms. Molar [sic], Corporal Davidson, Sergeant Harris and Deputy Carson" indicated that Mr. Anderson was apparently or obviously intoxicated.² Although Ms. Moler did not testify that she observed Mr. Anderson exhibiting behavior consistent with intoxication, the Hearing Officer determined that the observations of the officers were consistent with Ms. Moler's testimony of Mr. Anderson's behavior when he was intoxicated before this particular episode.

In any event, the Hearing Officer was apparently persuaded by the weight of the officers' testimony. The testimony of the three law enforcement agents trained to recognize signs of intoxication was substantial enough to support the Hearing Officer's decision that the police officers concluded Mr. Anderson was obviously intoxicated.

C. Idaho Code section 23-615 is unconstitutional on its face.

1. Standard of Review.

The constitutionality of statutes is a question of law. *State v. Cobb*, 132 Idaho 195, 196 (1998). The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709 (1990). In a facial challenge to the overbreadth and vagueness of a law, my first task is to determine whether the statute reaches constitutionally protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). If I find that no constitutionally protected conduct is implicated, I must then examine the facial vagueness challenge. For a facial vagueness challenge to succeed, the statute must be impermissibly

² Presumably, the inclusion of Ms. Moler's name was inadvertent, as the Hearing Officer referred earlier in the decision to Ms. Moler's belief that Mr. Anderson was *not* intoxicated. Memorandum Decision & Order at 4.

vague in all of its applications. *Hoffman Estates*, 455 U.S. at 494-95; *State v. Cobb*, 132 Idaho 195, 197 (1998).

2. Idaho Code section 23-615 infringes on a constitutionally protected property interest, and is thus an impermissible exercise of state power.

The overbreadth doctrine applies to statutes which, though designed to prohibit legitimately regulated conduct, include within their prohibitions constitutionally protected freedoms. *State v. Leferink*, 133 Idaho 780, 785 (1999), citing *State v. Richards*, 127 Idaho 31 (Ct.App.1995). Mr. Boyd does not argue that the licensure provisions contained within the regulations of the sale of alcoholic beverages are an improper or illegitimate exercise of the State's police powers, but rather that interference with a protected property interest in the license is impermissible.

ABC argues that there is no constitutional issue here because "there is no constitutional right involved in the service or consumption of alcoholic beverages." Respondent's Br. at 9. The sale or consumption of alcohol is not the issue. The right at issue here is the right to not be deprived of a property interest.

Idaho Code section 23-903 provides that the Idaho State Police are empowered to issue licenses to "qualified applicants" to allow the retail sale of alcoholic beverages. No person may sell liquor legally in the State of Idaho without a valid license. I.C. § 23-938. A license to sell alcoholic beverages, like a license to practice medicine or law, is a privilege granted by the legislature. Where retail sale of alcoholic beverages is concerned, the legislature "may grant or withhold [a license] at its pleasure." *State v. Meyers*, 85 Idaho 129, 133 (1962). See also *Uptick Corp. v. Ahlin*, 103 Idaho 364, 368 (1982); *Nampa Lodge No. 1389 B. P. O. E. v. Smylie*, 71 Idaho 212, 215-16 (1951); *State v.*

Rorvick, 76 Idaho 58, 67 (1954); *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762, 764-65 (1977).³

Whether the State characterizes the benefit granted by the license as a "privilege" or as a "right" is immaterial to the constitutional question. *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 347 U.S. 254, 262 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972). The protections afforded by the constitution prevent the state from terminating an entitlement "whether the entitlement is denominated a 'right' or a 'privilege'." *Bell v. Burson*, 402 U.S. 535, 539 (1971). The concepts of liberty and property "relate to the whole domain of social and economic fact" and are "purposely left to gather meaning from experience." *Roth*, 408 U.S. at 571, quoting *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting). Our experience has been that business opportunities imparted by the government create a benefit relied upon by the franchisee or licensee to the exclusion of other businesses or livelihoods. The specialization engendered by licensure creates the danger that suspension or revocation of a license may foreclose all other meaningful business opportunities to the affected licensee.

While the *grant* of a license may rest solely within the discretion of the legislature or statutorily empowered administrative agency, once a license is issued, the licensee has a legal right to engage in the business permitted by the license. The "right to conduct a business is property." *Robison v. H. & R.E. Local # 782*, 35 Idaho 418, 429 (1922). See

³ The idea that a license to sell alcoholic beverages is not a property right is by no means a recent development in Idaho law. In addition to the more modern post-Liquor Act cases cited here, the Supreme Court has held since the earliest days of the State that a license to sell alcoholic beverages is a privilege rather than an inherent right. See, e.g., *State v. Calloway*, 11 Idaho 719 (1906); *Roberts v. Boise City*, 23 Idaho 716 (1913).

also, *Coeur d'Alene Garbage Service v. Coeur d'Alene*, 114 Idaho 588 (1988); *O'Connor v. City of Moscow*, 69 Idaho 37, 42-43 (1949); *Winther v. Village of Weippe*, 91 Idaho 798, 803 (1967).

When the state grants a license, it creates an expectation that the licensee will be free to engage in the licensed activity. The continued enjoyment of a license is a "claim of entitlement . . . that [the licensee] may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). See also *Barry v. Barchi*, 443 U.S. 55, 65 n.11 (1979). An entitlement arising from state law "cannot be removed except for cause." *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430 (1982) citing *Memphis Light Gas, & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (internal quotations omitted). Once an entitlement is found, "the types of interests protected as property are varied and, as often as not, intangible, relating to the whole domain of social and economic fact." *Logan*, 455 U.S. at 430, citing *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (internal quotations omitted). Where the state creates an entitlement, the beneficiary of the entitlement "has an interest in the continued receipt of those benefits that is safeguarded by procedural due process." *Roth*, 408 U.S. at 576.

Whether denominated a "right" or a "privilege" by the state, a license creates an entitlement that establishes a property interest in the continued benefit afforded by the license. While there may be no property interest in the license itself, the continued ability – secured by the license – to conduct a business is a valuable economic interest. Once the license is granted, the interest of a licensee to continued employment and opportunity is an interest in property, and thus subject to the protection of the Fourteenth Amendment.

Idaho Code section 23-615 directly affects the constitutionally protected property right to continue to operate a business. The statute is, therefore, overbroad.

3. Idaho Code section 23-615 is impermissibly vague.

While Idaho Code section 23-615 does not satisfy the overbreadth test, it may also be challenged on its face as unduly vague, in violation of due process. *Hoffman Estates*, 455 U.S. at 497. To succeed, however, Mr. Boyd must demonstrate that the statute is impermissibly vague in all of its applications. *Id.*

Where the prohibitions established by a law are not clearly defined, the law is void for vagueness. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). In assessing whether the prohibitions in question are “clearly defined,” the dispositive issue is whether the statute “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *Id.* The level of particularity required must be such that the statute provides “reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.” *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (citations omitted). The chief danger of a vague law lies in its delegation of policy matters to police officers and courts “for resolution on an ad hoc and *subjective basis*” which leads, necessarily to “arbitrary and discriminatory enforcement.” *Grayned*, 408 U.S. at 108-109 (emphasis added).

The prohibition at issue here is the provision in Idaho Code section 23-615(2) that forbids the service of alcoholic beverages to “any person actually, apparently or obviously intoxicated.” Mr. Boyd argues that because “apparently” and “obviously” are inherently subjective, the unlimited discretion over enforcement vested in the police

requires license holders to guess the level of intoxication at which the police consider a patron intoxicated.

In considering the provision, I note that Idaho stands among the minority of states that have no law providing for either mandatory or voluntary beverage server training.⁴ Moreover, Idaho's law differs from most of the states that prohibit the service of alcohol on the basis of intoxication insofar as they rely on a Visually Intoxicated Person (VIP) standard, which incorporates, typically by administrative regulation, a list of characteristics of intoxication. See e.g. Oregon Liquor Control Commission, R99 50 Signs of Visible Intoxication, available at www.oregon.gov/OLCC/docs/publications/50_signs_of_visible_intoxication.pdf (accessed December 9, 2008); California Department of Alcoholic Beverage Control, ABC-637 Signs of Intoxication, available at <http://www.abc.ca.gov/FORMS/ABC637.pdf> (accessed December 9, 2008).

Unlike states that provide for training and education of alcohol servers, in enforcing its restrictions on the service of alcoholic beverages, Idaho relies solely on whether a person is "obviously" or "apparently" intoxicated, without providing any notice of what standards ABC applies in determining what it is that must be obvious or apparent. ABC argues that the meaning is plain, and within the common knowledge of the general population.

Attitudes toward alcohol vary according to community and cultural standards and personal bias. While community values are important, the persons governed by the statute

⁴ Twelve states (including Nevada, Washington, and Utah) and the District of Columbia have adopted mandatory training regimes. Seventeen states (including Montana and Wyoming) have voluntary programs. Five states (including Oregon) have both. National Institute on Alcohol Abuse and Alcoholism, Alcohol Policy Information System, Beverage Service Training Programs and Related Practices as of January 1, 2008, available at http://www.alcoholpolicy.niaaa.nih.gov/index.asp?Type=BAS_APIS&SEC={BBCD6870-F2E3-4D6B-9FC2-9C77758310B1}&DE={A98C5DAE-4E44-4028-A23F-139D22418690} (accessed December 9, 2008).

are entitled to have the same standards applied to them throughout the state. The danger of the absence of an objective measure for determining intoxication is the substitution of the police officer's discretion for actual discernible standards. The lack of any guidelines beyond "obviously" and "apparently" necessarily subjects bartenders to guessing what the perception of the police officer will be; precisely the "ad hoc and subjective" standards proscribed by *Grayned*.

I do not think it is any answer to say that the common understanding of the common person is adequate to determine the point at which a person passes from an acceptable level of nervous-system impairment to unacceptably intoxicated. Certainly, there are characteristics or actions that indicate a high level of intoxication: vomiting, stumbling, drowsiness, or falling off a barstool, for example. However, the characteristics commonly put forward by police officers – bloodshot and glassy eyes, slurred speech, lack of fine-motor control – while perhaps obvious to a police officer trained to recognize them, may not be readily apparent to a layperson. Further, alcohol has disparate effects on people depending on body chemistry, metabolism, and other physical processes. I do not think either the prediction or recognition of the point at which a particular person becomes "intoxicated" is within the common understanding of the general public. I am confident that the local Methodist minister and the local gyppo logger would have very different views of what constitutes "intoxicated." Absent an objective standard, a bartender or the licensee have nothing against which to measure the difference between mild impairment and a level of intoxication sufficient to trigger application of the statute. While police officers may be trained to recognize physical characteristics consistent with

intoxication, they are not the persons governed by the statute; licensees and their employees are.

“Obviously” and “apparently” are subjective by their very nature. The implicit question, when presented with either term, is “obvious or apparent *to whom?*” The statute does not specify. A standard that weighs the existence of a specific physical condition only against an undefined community expectation is no standard at all. Forcing a licensee or server to conform to a standard that can be expected to vary in accordance from place to place and person to person forces them to speculate what the standard of lawful conduct is.

Alcohol abuse is a significant problem in our communities. I see its effects on a daily basis. Certainly, the interests of the community, the individuals who patronize establishments that serve alcohol, and those establishments themselves are best served by responsible dispensing of alcohol. While I hope a server would err on the side of refusing to serve patrons in any case where a patron’s ability to function responsibly is questionable, neither my preference nor that of ABC or its investigators is a standard sufficient to provide notice to a licensee of what the law requires. Unfortunately, the statute’s reliance on what is obvious or apparent creates a statutory scheme that subjects the licensee to precisely that standard. Because it does, I conclude that Idaho Code section 23-615(2) is too vague to provide adequate notice of the conduct it prohibits and is therefore subject to arbitrary enforcement.

D. Idaho Code section 23-615 is a strict liability statute.

When I engage in statutory interpretation, my purpose is to effectuate the intent of the legislature. *State v. Rhode*, 133 Idaho 459, 462 (1999). I must begin by examining the

literal words of the statute. *State v. Burnight*, 132 Idaho 654, 659 (1999). The language of the statute is to be given its plain, obvious, and rational meaning. *State v. Broadway*, 138 Idaho 151, 152 (Ct.App.2002); *State v. Scott*, 135 Idaho 457, 458 (Ct.App.2001). If the language is clear and unambiguous, we must give effect to the statute as written, without engaging in statutory construction. *Broadway*, 138 Idaho at 152, 59 P.3d at 323.

The words of Idaho Code section 23-615 are plain and unambiguous. On its face, the statute does not incorporate any element of knowledge on the part of the bartender or licensee that they served alcohol to an intoxicated person. By omitting any mens rea element from the statute, the legislature intended to subject all culpable licensees and their employees to the penal provisions and administrative penalties contemplated by the Idaho Liquor Act, irrespective of whether *they knew* they had served an intoxicated person.

While the statute does not require any intent to violate the law, the existence of strict liability does not eliminate the requirement that those subject to the laws have notice of the proscribed conduct. In arguing that the statute imposes strict liability, ABC proffers *Haxforth v. State*, 117 Idaho 189 (Ct. App. 1990), which is fitting in this case. In *Haxforth*, a driver was convicted of vehicular manslaughter for causing an accident while driving on the left side of center on a highway. The *Haxforth* court concluded that violations of certain regulations, particularly those related to the public welfare, may be premised upon strict liability. I note, however, that Mr. Haxforth's liability only arose when he crossed over the center of the highway, despite the fact that the state provided him with clear notice – by way of a yellow line – of where he could legally drive. Idaho Code section 23-615 provides no such notice.

E. Attorney's Fees

ABC requests attorney fees on appeal. Idaho Code section 12-121 provides that "[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties" ABC is not the prevailing party, and thus is not entitled to attorney fees.

IV. CONCLUSION

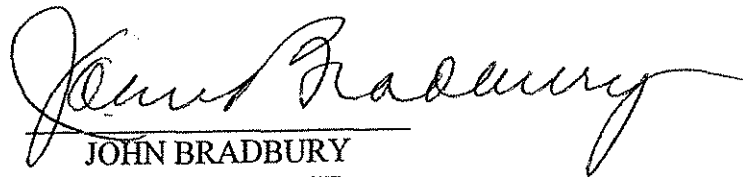
The rule of law resonates with citizens only to the extent that they understand what it requires and know that it will be equally applied to everyone. Compliance is possible only with objective standards. Liberty and property cannot be put at peril by having to guess what the personal standards of an enforcement officer might be.

I am keenly aware of the presumption of constitutionality embodied in *Olsen*. Nonetheless, due process requires that citizens have notice of what the law requires before they can be held to account for its mandates. This is the difference between the rule of law and the rule of man.

V. ORDER

The decision of the hearing officer is REVERSED and the case is remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED, this the 23 day of December, 2008


JOHN BRADBURY
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I, the undersigned, a Deputy Clerk of the above entitled Court, do hereby certify that a copy of this document was mailed or delivered on date mailed, to the following persons:

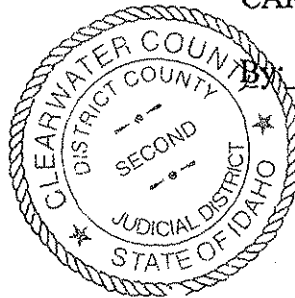
Jenny C. Grunke
Deputy Attorney General
Idaho State Police
PO Box 700
Boise, Idaho 83860-0700

U.S. Mail
 Overnight Mail
 Fax
 Hand Delivery

John R. Hathaway
PO Box 271
Orofino, Idaho 83544

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CARRIE BIRD, CLERK



Sue K. Emmerton
Deputy Clerk

LAWRENCE G. WASDEN
Attorney General

STEPHANIE A. ALTIG
Lead Deputy Attorney General
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Meridian, Idaho 83680-0700
Telephone: (208) 884-7050

CARRIE BIRD
CLERK-DISTRICT COURT
CLEARWATER COUNTY
OROFINO, IDAHO

2009 FEB -2 P 10: 37

CASE NO W08-4

BY STG DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ALCOHOL BEVERAGE CONTROL,	)	Case No. CV 2008-0004
)	
Plaintiff/Appellant,	)	NOTICE OF APPEAL
)	
v.	)	Fee Category: T
	)	Exempt
GORDON J. BOYD, Licensee dba,)	
SHOT GLASS,)	
)	
Defendant/Respondent.)	

TO: THE ABOVE NAMED RESPONDENT, GORDON J. BOYD, AND HIS ATTORNEY,
JACK HATHAWAY, PO BOX 271, OROFINO, IDAHO 83544, AND THE CLERK OF THE
ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Alcohol Beverage Control, appeals against the above-named respondent to the Idaho Supreme Court from the final decision contained in the Opinion and Order entered in the above-entitled action on the 23rd day of December, 2008, Honorable Judge John Bradbury presiding.

NOTICE OF APPEAL - 1

000048

2. That Alcohol Beverage Control has a right to appeal to the Idaho Supreme Court, and the order described in paragraph 1 above are appealable orders under and pursuant to Rule 11(f) I.A.R.

3. The issue on appeal is;

Did the District Court err when it held that Idaho Code section 23-615 is unconstitutional?

4. There is no order sealing all or any portion of the record.

5. The appellant requests the preparation of the following reporter's transcript:

Oral arguments on appeal, November 13, 2008, at 11:00 a.m.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.:

Notice of Lodging Agency Record and the entire Agency Record attached thereto.

7. I certify:

(a) that a copy of this notice of appeal has been served on the reporter and a transcript has been requested from him at the address set out below:

Name and address: Keith Evans, Idaho County Courthouse, Grangeville, Idaho 83530.


(b) That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.

(c) That appellant is exempt from paying the estimated fee for preparation of the record pursuant to Idaho Code section 67-2301 and Rule 23 I.A.R.

(d) That appellant is exempt from paying the appellate filing fee pursuant to Idaho Code section 67-2301 and Rule 23 I.A.R.

(e) That service has been made upon all parties required to be served pursuant to IAR Rule 20.

DATED THIS 29rd day of January 2009.


JENNY C. GRUNKE
Deputy Attorney General
Idaho State Police Bureau of Alcohol
Beverage Control
Attorney for the Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ALCOHOL BEVERAGE CONTROL,	)	CASE NO. CV2008-00004
)	
Plaintiff-Appellant,	)	DOCKET NO. #36124-2009
)	
	)	CLERK'S
	)	CERTIFICATE OF EXHIBITS
Vs.)	
)	
GORDON J. BOYD, dba SHOT GLASS,)	
)	
Defendant-Respondent,)	
)	

I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify:

That the following is a list of lodged document which are being forwarded to the Supreme Court as Exhibits in this cause:

EXHIBITS: None

LODGED DOCUMENTS:

Transmittal of the Record (Agency Record)
Transcription of Audio Proceedings
Appellant's Brief
Respondent's Brief

18th IN WITNESS WHEREOF, I have hereunto set my hand and official seal this
day of March, 2009.

CARRIE BIRD
Clerk of the District Court

BY: Sue K. Summerton
Deputy

CLERK'S CERTIFICATE OF EXHIBITS

00000051

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

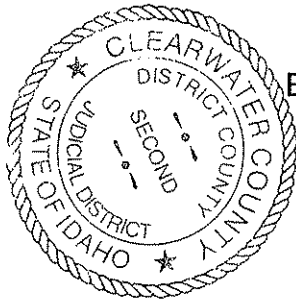
ALCOHOL BEVERAGE CONTROL,	)	CASE NO. CV2008-00004
)	
Plaintiff-Appellant,	)	DOCKET NO. #36124-2009
)	
	)	CLERK'S CERTIFICATE
)	
Vs.)	
)	
GORDON J. BOYD, dba SHOT GLASS,)	
)	
Defendant-Respondent,)	
)	

I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleading and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that all documents lodged, including briefs, in the above entitled cause will be duly lodged as Exhibits with the Clerk of the Supreme Court, along with the Court Reporter's Transcript, if requested, and Clerk's Record.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Orofino, Idaho this 18th day of March, 2009.

CARRIE BIRD
Clerk of the District Court



By: Sue K. Summerton
Deputy

CLERK'S CERTIFICATE

00000052

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

ALCOHOL BEVERAGE CONTROL,)
) CASE NO. CV2008-00004
)
) Plaintiff-Appellant,) DOCKET NO. #36124-2009
)
)
 Vs.) CERTIFICATE OF SERVICE
)
)
) GORDON J. BOYD, dba SHOT GLASS,)
)
)
) Defendant-Respondent,)
)

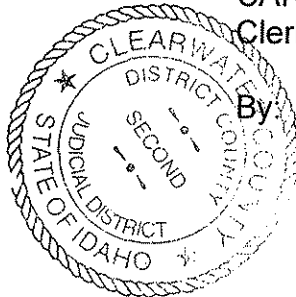
I, Sue K. Summerton, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that I have personally served or mailed, by United States mail, postage prepaid, a copy of the Clerk's Record and Reporter's Transcript, if a transcript was requested, to each of the parties or their Attorney of Record as follows:

Jenny C. Grunke
Deputy Attorney General
P.O. Box 700
Meridian, ID 83680-0700

John R. Hathaway
Attorney at Law
P.O. Box 271
Orofino, ID 83544

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal of the said Court this 18th day of March, 2009.

CARRIE BIRD,
Clerk of the District Court



By Sue K. Summerton
Deputy Clerk

CERTIFICATE OF SERVICE

00000053