UIdaho Law
Digital Commons @ UIdaho Law

Idaho Supreme Court Records & Briefs

7-15-2009

# Alcohol Beverage Control v. Boyd Respondent's Brief Dckt. 36124

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

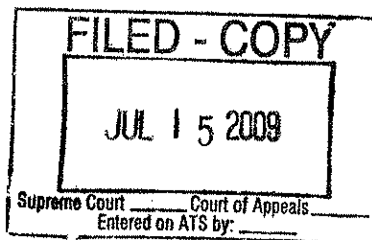
Recommended Citation
"Alcohol Beverage Control v. Boyd Respondent's Brief Dckt. 36124" (2009). *Idaho Supreme Court Records & Briefs*. 2321.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/2321

This Court Document is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALCOHOL BEVERAGE CONTROL,<br>Complainant - Appellant,<br>vs.<br>GORDON BOYD, LICENSEE,<br>Dba SHOT GLASS,<br>Respondent.

Docket No. 36124-2009




## RESPONDENT'S BRIEF

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

HONORABLE JOHN H. BRADBURY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

JENNY C. GRUNKE
Attorney at Law
Deputy Attorney General
Idaho State Police
P.O. Box 700
Meridian, Idaho 83680-0700
2008-884-7050

Attorney for Appellant

JOHN R. HATHAWAY
Attorney At Law
P.O. Box 271
Orofino, Idaho 83544
208-476-9110

Attorney for Respondent

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| ALCOHOL BEVERAGE CONTROL, | ) | |
| | ) | |
| Complainant - Appellant, | ) | |
| | ) | Docket No. 36124-2009 |
| vs. | ) | |
| | ) | |
| GORDON BOYD, LICENSEE,<br>Dba SHOT GLASS, | ) | |
| | ) | |
| Respondent. | ) | |

**RESPONDENT'S BRIEF**

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

HONORABLE JOHN H. BRADBURY
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

JENNY C. GRUNKE
Attorney at Law
Deputy Attorney General
Idaho State Police
P.O. Box 700
Meridian, Idaho 83680-0700
2008-884-7050

Attorney for Appellant

JOHN R. HATHAWAY
Attorney At Law
P.O. Box 271
Orofino, Idaho 83544
208-476-9110

Attorney for Respondent

# TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES ........ 2

STATEMENT OF THE CASE ........ 4

Statement of the Facts ........ 4

Course of the Proceedings ........ 6

ISSUE PRESENTED ON APPEAL ........ 7

STANDARD OF REVIEW ........ 7

ARGUMENT ........ 9

1. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT IDAHO CODE SECTION 23-615 IS UNCONSTITUTIONALLY OVERBROAD. ........ 9

2. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT IDAHO CODE SECTION 23-615 IS UNCONSTITUTIONALLY VAGUE. ........ 11

3. THE CASE LAW OF OTHER JURISDICTIONS IS OF LIMITED VALUE DUE TO SIGNIFICANT DIFFERENCES BETWEEN FOREIGN STATUTES AND IDAHO CODE SECTION 23-615. ........ 15

CONCLUSION ........ 17

CERTIFICATE OF SERVICE ........ 17

## TABLE OF CASES AND AUTHORITIES

**Cases**

*Aberdeen-Springfield Canal Company v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999)...... 4

*Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972)............................ 5

*Campos v. State*, 623 S.W.2d 647 (Tex. Ct. App., 1981)............................................ 12

*Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972)............ 8, 10

*O'Donnell v. Municipality of Anchorage*, 642 P.2d 835 (Alaska App., 1982)................ 13

*Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972)............................ 5

*Smith v. Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247 (1974)................................ 8

*State v. Bitt*, 118 Idaho 584, 586, 798 P.2d 43, 45 (1990)............................................ 8

*State v. Cobb*, 132 Idaho 195, 196, 969 P.2d 244 (1998)............................................ 4

*State v. Cotton*, 686 S.W.2d 140 (1985)........................................................... 12

*State v. Leferink*, 133 Idaho 780, 785, 992 P.2d 775, 780 (1999)................................ 4

*State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979)................................................ 4

**Statutes**

Idaho Code § 23-605........................................................................................ 7

Idaho Code § 23-615.................................................................................. passim

Idaho Code § 23-933.................................................................................. 5, 6, 7

Idaho Code § 23-933A...................................................................................... 6

Idaho Code § 23-935...................................................................................... 6, 7

Alaska Stat. § 04.21.025 ........ 13

Tex. Alco. Bev. Code Ann. § 106.14 ........ 12,13

Tex. Alco. Bev. Code Ann. § 2.02 ........ 13

## STATEMENT OF THE CASE

### Nature of the Case

This case arises from an administrative action by the Alcohol Beverage Control Bureau of the Idaho State Police (ABC) which sought to suspend Gordon Boyd's Retail Alcohol Beverage License after one of his employees served an allegedly intoxicated patron. ABC cited the employee for a misdemeanor offense, and then brought an action against Respondent Mr. Boyd under Idaho Code section 23-615. Respondent appealed from the decision of the ABC hearing officer to the district court, alleging that the statute is facially invalid. The district court concluded that section 23-615 is unconstitutionally vague. ABC now appeals that decision.

### Statement of the 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. (Tr. P.9, L18-21). At the time of the events complained of, Mr. Boyd employed Dawn Moler (Moler) as a bartender. (Tr. P.66, L. 7-10).

On Friday, September 15 and Saturday, September 16, 2006, during the annual Lumberjack Days celebration, the Shot Glass was open. (Tr. p. 14, L.18-22). Lumberjack Days typically draws large numbers of people to Orofino, and the Shotglass was unusually crowded. (Tr. p. 14, L 25).

On September 15, Idaho State Police Corporal Tim Davidson (Davidson) and Sergeant Greg Harris (Harris), who were at that time assigned to Alcohol Beverage Control (ABC), entered the Shot Glass for the purpose of enforcement inspection. (Tr. p. 13, L. 2-3). They observed a male patron approach a service window behind the bar and order two bottles of beer. (Tr. p. 16, L. 19-21). Moler served him (Tr. p. 16, L. 19-21). Davidson and Harris believed the patron, Justin Anderson, to be intoxicated, and after summoning the Orofino Policed Department to verify their observations, Davidson cited 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. (Tr. p. 20, L. 20-22). The ABC investigators also advised Shot Glass manager Lee McAlister of the citation. (Tr. p. 21, L. 1-18). The Clearwater County Prosecuting Attorney dismissed the charge against Moler. (Tr. p. 190, L. 24-25, p. 191, L 1-3).

The following night, September 16, Davidson and Harris again entered the Shot Glass. (Tr. p. 66, L. 19-25, p. 67, L. 1-4). Again, the bar was extremely crowded. (Tr. p. 67, L. 18). The officers observed a different male patron they believed was intoxicated. (Tr. p. 69, L. 13-14). Before the officers could contact him or complete their investigation, some patrons identified them as police officers. (Tr. p. 74, L. 5). They left the bar to avoid trouble with other

patrons. (Tr. p. 74, L. 11-13). The ABC investigators did not issue any citations arising from the event. (Tr. p. 74, L. 18-20).

**Course of the Proceedings**

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, respectively. *Complaints for Suspension of Retail Alcohol Beverage License* for each case were filed December 21, 2006. On October 26, 2007, Respondent moved to dismiss both violations on the grounds that I.C. § 23-615(2) is unconstitutionally vague and indefinite, and thus facially invalid. (R. p. 51). Prior to the scheduled hearing, the Hearing Officer denied the motions for want of statutory authority to rule on a motion presenting constitutional issues. (Tr. p. 7, L. 17-25, p. 8, L 1-19). The hearing was held November 15, 2007.

On December 4, 2007, the Hearing Officer filed a Memorandum Decision and Preliminary Order deciding the two cases. (R. p. 3-20). 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. (R. p. 3-20). On the basis of the September 15 violation, he entered a preliminary order suspending Retail Alcohol Beverage License No. 2007-3017. (R. p. 3-20). 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. (R. p. 3-20). Mr. Boyd did not seek agency review, and the order became final on December 18, 2007.

Mr. Boyd timely appealed the decision and moved to stay the suspension of the permit. (R. p. 1-2). The district court granted the motion. (R. p. 24-25). Oral arguments were heard on November 18, 2008. (R. p. 30). The district court issued its Memorandum Decision and Order concluding that Idaho Code section 23-615 is facially invalid on December 23, 2008. (R. p. 30-46). ABC timely appealed. (R. p. 48-50).

## ISSUE PRESENTED ON APPEAL

The Respondent concurs with the issue as stated by the Appellant, to wit: whether the district court erred when it held that Idaho Code Section 23-615 is unconstitutional.

## STANDARD OF REVIEW

The constitutionality of statutes is a question of law over which this Court exercises free review. *State v. Cobb,* 132 Idaho 195, 196, 969 P.2d 244 (1998). The party asserting the unconstitutionality of a statute bears the burden of showing its invalidity and must overcome a strong presumption of validity. *Aberdeen-Springfield Canal Company v. Peiper*, 133 Idaho 82, 982 P.2d 917 (1999). It is generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional. *State v. Rawson*, 100 Idaho 308, 597 P.2d 31 (1979).

## ARGUMENT

1. ***The district court did not err in determining that Idaho Code section 23-615 is unconstitutionally overbroad.***

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, 992 P.2d 775, 780 (1999), *citing State v. Richards,* 127 Idaho 31, 896 P.2d 357 (Ct.App.1995). While the regulation of the sale of alcohol is a necessary and legitimate exercise of the State's police power, Idaho Code section 23-615 allows the State to deprive licensees of the right to continue a legal, regulated commercial venture in which they enjoy a property interest, thereby unduly interfering in a privileged activity.

The district court concluded that issuance of a Retail Alcohol Beverage License confers upon the licensee a protected interest in continuing "to operate a business." (R. p. 41). In reaching its conclusion, the district court relied, in part, on *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972), which provides that where a state establishes an entitlement, the beneficiary of that entitlement is protected from the deprivation of the benefits by the Fourteenth Amendment. *Id.* at 576.

The district court correctly analyzed the nature of the license at issue here. In the constitutional context, the type of license is immaterial. The determinative issue is, rather, whether the continued enjoyment of the benefits of the license are protected from state action. An interest in such a benefit is a protected property interest "if there are such rules or mutually

explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972). In cases of license suspensions, ABC has established a hearing procedure pursuant to Idaho Code section 23-933, which allows a licensee to press his claim for entitlement.

Moreover, the district court properly considered Retail Alcohol Beverage Licenses as being of the same nature as other benefits, including those derived from employment, from statutory entitlement, or from professional licensing, due to the reliance of the licensee on the continued benefit of the license. In explaining the nature of the license, the district court wrote:

> 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.

(R. p. 40).

While ABC does, in fact, provide for due process in suspension proceedings, the process is egregiously flawed because it lacks a statutory basis other than the expansion of section 23-615 beyond its proper function. The fundamental problem with application of Idaho Code section 23-615 is that it is penal statute. Violation of section 23-615 is a misdemeanor offense,

attributable to the licensee. I.C. § 23-935. Upon conviction of a violation, the director of ABC may revoke the license in question. *Id.* Here, no conviction occurred, and ABC – citing section 23-615 as authority – sought suspension of the license. Suspension of a retail license is authorized by Idaho Code sections 23-933 and 23-933A, the second of which is not implicated here. Section 23-933 provides, in relevant part, that "[t]he director may suspend . . . a license issued pursuant to the terms of this chapter for any violation of or failure to comply with the *provisions of this chapter* or rules and regulations promulgated by the director . . . ." I.C. § 23-933 (emphasis added).

Except by operation of section 23-935 – that is, by virtue of a conviction – an alleged violation of section 23-615 is not grounds for suspension. ABC, in a classic case of mission-creep, seeks to extend section 23-615 beyond its purpose as a penal statute to serve as independent grounds for the suspension of a license, thereby depriving licensees of a protected property interest by operation of a statute that has no application in suspension proceedings, except upon proof of a conviction. Idaho Code section 23-615 is apparently so broad that it can not even be confined to its own chapter. As a result, a protected interest is infringed by a statute that does not authorize the suspension of a license.

The Appellant argues that the conduct regulated by section 23-615 is narrowly drawn to include only service of alcohol to certain, specific persons. This, the Appellant, concludes, is adequate to escape invalidation for overbreadth. However, while the statute falls within the penal provisions of the Idaho Liquor Act, it is not self-limiting in scope, as ABC's enforcement efforts clearly demonstrate. On its face, it is a legitimate (albeit vague) attempt to regulate conduct

allowed by license. However, the statute contains no specific penalty, or even reference to a penalty, except by operation of the aforementioned section 23-933 or, in the alternative, section 23-605, which provides that any person who distributes alcohol to an intoxicated or apparently intoxicated person is guilty of a misdemeanor. As such, section 23-615 is all things to all regulators, permitting penal as well as administrative punishments not contemplated by the text. A statute susceptible to such wide-ranging application provides no real guidance, for due process purposes, and demands invalidation when it has so devastating a potential effect upon a protected interest.

2. ***The district court did not err in determining that Idaho Code section 23-615 is unconstitutionally vague.***

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, 92 S.Ct. 2294, 2298 (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, 94 S.Ct. 1242, 1247 (1974). Unconstitutionally vague laws are those that delegate 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). Due process requires that statutes must be definite and certain in

establishing prohibited conduct so that a person of ordinary intelligence who reads the statute may understand what activity is proscribed and govern his actions accordingly. *See, State v. Bitt*, 118 Idaho 584, 586, 798 P.2d 43, 45 (1990).

The prohibition at issue here is the provision in Idaho Code section 23-615(2) that prohibits the service of alcoholic beverages to "any person actually, apparently or obviously intoxicated." In deciding this case, the district court, while recognizing the importance of regulating alcohol service, examined the text of the statute as it applies to those subject to it. (R. pp. 44-45). The district court noted that intoxication is a physiological process that has "disparate effects on people depending on body chemistry, metabolism, and other physical processes." (R. p. 44). As importantly, the court recognized the difference in individual and community attitudes towards intoxication. (*Id.*)

There is no doubt that most people of average intelligence would recognize that someone exhibiting extreme symptoms of alcohol impairment is intoxicated. Likewise, magistrate judges routinely accept that certain physiological responses observed by police officers are adequate to establish a level of impairment sufficient to authorize the arrest of a motor vehicle operator. However, in the words of the district court, neither of the above instances is sufficient to instruct the person of common intelligence of "the point at which a person passes from an acceptable level of nervous-system impairment to unacceptably intoxicated." (R. p. 44). In other words, when examining the physiological effects of alcohol consumption, there is no standard to measure when a person is "actually," "obviously," or "apparently" intoxicated, because the

common person is not trained to recognize symptoms that a police officer or ABC investigator might notice.

The Appellant, contends that "actual" intoxication is ascertainable by, among other things, the results of Blood Alcohol Concentration testing. Putting aside the argument that few bartenders possess the requisite training and equipment to conduct such tests, the fallacy of the certainty of "actual" intoxication, within the meaning of the statute is easily laid bare. The Appellant presumes an extremely narrow set of circumstances giving rise to prosecution under Idaho Code section 23-615 – that is, enforcement only by means of entry into a licensed establishment and observation by law enforcement personnel. The statute is not so narrowly defined. Under section 23-615, the arrest of a person who is "actually" intoxicated for Driving Under the Influence exposes the server or licensee to potential criminal and administrative sanction even in cases where the licensee, or his agent, has no knowledge of the person's level of intoxication when they were served. Moreover, the only circumstance in which standards sufficient to establish "actual" intoxication even exists is in the motor vehicle context. Even in that context, a specific alcohol concentration is indicative not of intoxication, but of motor skills and cognitive impairment inconsistent with the safe operation of a motor vehicle.

Although Idaho has established a specific alcohol concentration that stands as *per se* evidence of a criminal act, this state has nowhere defined "intoxicated." The very nature of the term renders useless the "actually," "apparently," and "obviously" modifiers. For example, *Merriam-Websters Medical Dictionary* defines "intoxicated" to mean "affected by an intoxicant and especially by alcohol." Any person who consumes an alcoholic beverage, then, could be said

to be intoxicated, or to appear intoxicated. While few reasonable people would argue that intoxication begins upon the first instance of consumption, the fact remains that intoxication is a physiological state that is "apparent" or "obvious" only to the extent that the observer maintains some preconceived notion of how much alcohol consumption is too much. As the district court concluded, criminal liability and the administrative sanctions that accompany it can not be left to the preferences of ABC or the courts if the law is to retain any force at all. With no standard beyond what is "obvious" or "apparent" to an ABC investigator, the statute is subject to precisely the ad hoc and subjective enforcement warned of in *Grayned*, or in the words of the district court:

> "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. (R. p. 45).

With neither standards nor formalized training to instruct servers and licensees as to the level of intoxication ABC investigators deem legally unacceptable, those subject to the law are left to weigh operation of their business against a moving target known only to the enforcement arm of the State. Idaho Code section 23-615 places the determination of what does or does not constitute "actual," "obvious," or "apparent" intoxication entirely within the discretion of the law enforcement personnel responsible for its enforcement. While they may know intoxication when they see it, servers and licensees are constitutionally entitled to enough information to enable them to conform to the statutory requirements. The necessary information should be delineated

by statute, no matter how enlightening sitcoms and comedians may be on the subject. This statute does not provide for adequate notice of the conduct it proscribes.

### 3. The case law of other jurisdictions is of limited value due to significant differences between foreign statutes and Idaho Code section 23-615.

ABC proffers three examples of decisional law from foreign jurisdictions in support of its position, concluding that the courts of Texas and Alaska offer sufficient insight into Idaho's own statutory scheme to support overruling the district court. Nonetheless, as ABC points out, one of those cases involved a statute that was overruled, one relied on the "visibly intoxicated" standard utilized by a state that provides for mandatory server training, and the third involved a statute that referred only to "intoxicated" persons.

In *State v. Cotton*, 686 S.W.2d 140 (1985), the Texas Court of Criminal Appeals ruled unconstitutional a law that allowed the liquor control board to suspend the license of any licensee who "sold, served, or delivered beer to a person *showing evidence of intoxication.*" *Id.* at 142. The *Cotton* court examined various symptoms that might be evidence of intoxication, ultimately concluding that any single symptom that might be considered evidence of intoxication "may be demonstrated by the intoxicated or the abstemious, the soused or the sober." *Id.* at 143. The concurring opinion of Judge Teague, pointed to by the Appellant as evidence that the phrases "obviously intoxicated," "visibly intoxicated," or "actually or apparently under the influence of liquor" were constitutionally acceptable was apparently not deemed sufficient by the Texas legislature. As the Appellant notes, the legislature did use the term "obviously intoxicated," but modified it by the inclusion of a specific level of intoxication. The relevant standard is not

"obviously intoxicated" but rather "obviously intoxicated to the extent that he presented a clear danger to himself and others." Texas State Alcohol Beverage Control Act, Title 2, Chapter 2. Idaho Code section 23-615 contains no such language.

The Appellant correctly cites *Campos v. State*, 623 S.W.2d 647 (Tex. Ct. App., 1981) as upholding a Texas Statute that provides that it is illegal to serve an "intoxicated person." However, the statute is silent as to "apparent" or "obvious" intoxication. Further, Texas maintains a server training program. Under Texas law, licensees who require their employees to attend training, and whose employees actually attend the training, are not held liable for overservice by those employees. Tex. Alco. Bev. Code Ann. § 106.14.

Alaska, which, in *O'Donnell v. Municipality of Anchorage*, 642 P.2d 835 (Alaska App., 1982) upheld a statute employing the "visibly intoxicated" standard discussed by Judge Bradbury, maintains a mandatory server training program. Alaska Stat. § 04.21.025. Significantly, the district court in the instant case discussed the impact of server training, as well as the number of states that maintain such regimes. The court noted that Idaho stands in the minority of jurisdictions that have no server training system, and that absent such training and education, ABC relies 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." (R. p. 43). Idaho's system stands in contrast to jurisdictions that provide servers training to inform them of the law. Insofar as other jurisdictions provide enforcement training in addition to the text of their analogous statutes, any conclusions drawn from decisional law are of limited use in this jurisdiction.

## CONCLUSION

Based on the above, Respondent respectfully requests that this Court affirm Judge Bradbury's December 28, 2008 Memorandum Opinion and Order remanding this case to the Administrative Hearing Officer.

## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2009, I caused to be served a tru and correct copy of the foregoing RESPONDENT'S BRIEF in the above referenced matter by United States Mail, Postage paid, and addressed to the following:

| | |
|---|---|
| Jenny C. Grunke | [ ✓ ] U.S. Mail |
| Deputy Attorney General | [ ] Overnight Mail |
| Idaho State Police | [ ] Fax |
| PO Box 700 | [ ] Hand Delivery |
| Boise, Idaho 83860-0700 | |

JOHN R. HATHAWAY
Counsel for Respondent