

BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD

IN THE MATTER OF:

VILLAGE TAVERN INC.
d/b/a VILLAGE BAR & GRILL
203 N DENNIS ST
KENNEWICK, WA 99336-3129

LICENSEE

LICENSE NO. 354882
AVN: 4K9056A

LCB NO. 23,517
OAH NO. 2009-LCB-0026

FINAL ORDER OF THE BOARD

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

1. An administrative hearing was held on October 2, 2009 at the Licensee's timely request for a hearing on an Administrative Violation Notice issued by the Liquor Control Board on March 3, 2009.
2. On June 3, 2009, the Board issued a Complaint alleging that on or about February 25, 2009, the above-named Licensee, or an employee(s) thereof, permitted a person apparently under the influence of liquor to physically possess and/or consume liquor on the licensed premises in violation of WAC 314-16-150(1), (2).
3. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Gordon Karg and the Licensee was represented by Attorney at Law Shelley Ajax.
4. On December 1, 2009 Administrative Law Judge Randolph Bolong entered his Findings of Fact, Conclusions of Law and Initial Order in this matter which sustained the administrative violation.
5. No exceptions were filed by the parties.

6. The entire record in this proceeding was presented to the Board for final decision, and the Board having fully considered said record and being fully advised in the premises; NOW THEREFORE; IT IS HEREBY ORDERED that that the Administrative Law Judge's Findings of Fact, Conclusions of Law and Initial Order heretofore made and entered in this matter be, and the same hereby are, AFFIRMED and adopted as the Findings of Fact, Conclusions of Law and Final Order of the Board and that the liquor license privileges granted to Village Tavern, Inc. d/b/a Village Bar & Grill, License 354882, are hereby suspended for a term of five (5) days. In lieu of a license suspension, the Licensee may pay a monetary penalty in the amount of five-hundred dollars (\$500) due within 30 days of this order. If timely payment is not received, suspension will be scheduled. Failure to comply with the terms of this order will result in further disciplinary action.

Payment in reference to this order should be sent to:

Washington State Liquor Control Board

Enforcement and Education Division

PO Box 43085

Olympia, WA 98504-3085

DATED at Olympia, Washington this 22 day of December, 2009.

WASHINGTON STATE LIQUOR CONTROL BOARD





Reconsideration. Pursuant to RCW 34.05.470, you have ten (10) days from the mailing of this Order to file a petition for reconsideration stating the specific grounds on which relief is requested. A petition for reconsideration, together with any argument in support thereof, should be

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

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

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

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

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE WASHINGTON STATE LIQUOR CONTROL BOARD

MAILED
DEC 01 2009
YAKIMA OAH

In the Matter of:

Village Tavern Inc. dba
Village Bar & Grill

Licensee

License No. 354882

OAH Docket No. 2009-LCB-0026
LCB Case No. 23,517

INITIAL ORDER

STATEMENT OF THE CASE

The hearing was held before Randolph F. Bolong, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), on October 2, 2009, in Pasco, Washington. The Washington State Liquor Control Board (Board or LCB), Education and Enforcement Division (Enforcement), was represented by Gordon Garg, Assistant Attorney General. Lieutenant Kent Williams and Caine Hilario, Liquor Enforcement Officer, appeared as witnesses for the Board. The Licensee, Village Tavern, Inc., dba Village Bar & Grill, was represented by Attorney at Law Shelley Ajax. Lainie Houston, Shanda Molina, Pam Shupe, Willie Mackey and Lot Hollenback, owner, appeared as witnesses for the Licensee/Appellant.

Based on the record presented, the ALJ makes the following Findings of Fact:

FINDINGS OF FACT

1. The Licensee, Village Tavern, Inc., dba Village Bar & Grill, is a restaurant and lounge located at Pasco, Washington. The premises have been licensed by the Board for the sale of spirits, beer and wine pursuant to License Number 354882.

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LIQUOR CONTROL BOARD
BOARD ADMINISTRATION

2. The Licensee has had no previous administrative violations in its history.
3. On the evening of February 24, 2009, at approximately midnight, Officer Caine Hilario, an LCB enforcement officer, performed an inspection of the Licensee's premises. Accompanying him on the inspection was Lt. Kent Williams. The lighting was fair and there were approximately 25 to 30 patrons on the premises. Officer Hilario observed an individual later identified as Michael Thomas standing next to a table while holding a pint glass. He appeared to Officer Hilario to be intoxicated. Officer Hilario observed the individual swaying, would grab the table to steady himself, and appeared to have "heavy eyes". He appeared to stagger when he went to the restroom and, when he returned, he missed part of his glass when he attempted to pour beer. He began to consume beer from the glass. Mr. Thomas was also observed by Lieutenant Kent Williams, who observed Mr. Thomas swaying and looking sleepy. When contacted, Mr. Thomas admitted having had three beers. When asked if he had a physical condition causing the observed deficiencies, Mr. Thomas answered no. Mr. Thomas was cited for a civil infraction which was later found to have been committed.
4. A sample of Mr. Thomas' drink was confiscated at that time. The sample sat in Officer Hilario's truck overnight, was taken to the LCB office that next morning and sent to the Washington State Toxicology Laboratory that next day. A Toxicology Report was issued on May 20, 2009 finding that the liquid contained 4.25% ethanol.
5. After his initial contact with Mr. Thomas, Officer Hilario was speaking to the bartender when Mr. Thomas approached Officer Hilario and spoke to him in a hostile and aggressive manner. The bartender told Mr. Thomas to leave the premises.

6. Appellant's staff has received training to identify persons who show apparent signs of intoxication. Staff had contact with Mr. Thomas initially about 9:30 or 10 p.m. He is well known to staff because he frequently performs karaoke at the Village Bar and Grill. He arrived with friends and had three bottles of beer while his friends ordered two pitchers. He left for 20 minutes at approximately 11:30 p.m. When he returned, he was not served alcohol but told the bartender that he was going to help his friends finish their remaining beer from the pitcher. Two bartenders and two people involved with the karaoke program testified that Mr. Thomas was not swaying, staggering, slurring his speech, or appear intoxicated when they had intermittent contact with him throughout the night.

7. On March 3, 2009, the Washington State Liquor Control Board (Board) served an Administrative Violation Notice (Notice) to Village Bar & Grill by delivering a copy upon the bartender on duty on that date. In its Notice, the Board alleged that on February 25, 2009, the Licensee had violated the provisions of Washington Administrative Code (WAC) 314-29-020 by the "[s]ale or service to apparently intoxicated person, or permitting consumption or possession by an apparently intoxicated person". The penalty for the administrative violation sought by the Board against the Licensee is a five day suspension or \$500.00 fine in lieu of suspension. The Case number of this alleged violation is 4K9056A.

8. The Licensee made a timely request for a formal administrative hearing without an informal settlement conference on March 25, 2009.

CONCLUSIONS OF LAW

1. As the holders of a retail liquor license, Village Tavern is subject to the jurisdiction of the Washington State Liquor Control Board. The Board has the authority pursuant to RCW

66.24.010 to suspend or cancel a license so long as the Licensee is afforded an opportunity for a hearing. RCW 66.08.150, WAC 314-29-010. A proper hearing was provided in this case.

2. The provision of WAC 314-16-150 are applicable and provides as follows:

(1) No retail licensee shall give or otherwise supply liquor to any person under the age of twenty-one years, either for his/her own use or for the use of his/her parent or of any other person; or to any person apparently under the influence of liquor; nor shall any licensee or employee thereof permit any person under the said age or in said condition to consume liquor on his/her premises, or on any premises adjacent thereto and under his/her control.

(2) No retail licensee shall permit any person apparently under the influence of liquor to physically possess liquor on the licensed premises.

3. The opposing parties obviously differ in their description of Mr. Thomas, and this matter turns on the issue of whether Mr. Thomas was "apparently under the influence of liquor". Different degrees of alcohol intoxication are defined by the standards "apparently under the influence" and "obviously intoxicated." *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259,267 (2004). A determination that a person is "apparently under the influence" requires at least some reflection and thought. *Id.* "Apparently" means in an apparent manner, seemingly, or evident, i.e., readily perceptible to the senses or capable of being readily perceived by the sensibilities or understanding as certainly existent or present. "Obviously" means in an obvious manner, certainly, or unmistakably, i.e., readily perceived by the senses or readily perceived by the sensibilities or mind. "Apparently" implies less certainty than "obviously." *Id.* at 268.

4. The current statutory standard is "apparently under the influence of liquor." "Apparently under the influence of liquor" means "seemingly" drunk, as opposed to the higher standard of

"unmistakably" or "certainly" drunk. *Faust v. Albertson*, 143 Wn. App. 272 (2008), citing *Barrett*, 152 Wn.2d at 264, 268. " To meet the legal standard, the plaintiffs needed to present evidence concerning whether the individual was "seemingly" drunk at the time served alcoholic beverages. If evidence does not show that the individual appeared intoxicated to those around him, the evidence is insufficient to raise an issue of fact as to overservice. *Faust v. Albertson*, 143 Wn.App. 272 (2008). Whether a person is obviously intoxicated or not is to be determined by the person's appearance to others around him or her at the time the intoxicating liquor is furnished to that person." *Christen v. Lee*, 113 Wn.2d 479, 487, 780 P.2d 1307 (1989).

5. The preponderance of evidence in the hearing record establishes that in the early morning of February 25, 2009, Michael Thomas, a patron of the Village Bar & Grill, was consuming alcohol on a licensed premises. The evaluation of whether a person is "apparently under the influence of liquor" is subjective. This is a reasonably close case. The testimony was such that the enforcement officers' observations and the observations of the employees differed. The law is clear that intoxication need not be unmistakable or certain, but may require some reflection and thought in the determination. In describing Mr. Thomas' condition, the undersigned concludes that the enforcement agents were able to describe in more thorough reflection why they believed that Mr. Thomas was under the influence of alcohol. Certainly, they are more practiced at this testimony, but it seems to the undersigned that the other witnesses' testimony was more conclusory, and they were involved in other duties during

the period at issue and may not have noticed “apparent” signs of intoxication as opposed to “obvious” or “unmistakable” signs of intoxication.

6. The undersigned therefore concludes that Mr. Thomas was in physical possession of liquor on the licensed premises while under the apparent influence of liquor on February 25, 2009.

7. The Board has the authority to establish an appropriate penalty as a matter of its discretion. RCW 66.24.010. The board in suspending any license may further provide in the order of suspension that such suspension shall be vacated upon payment to the board by the licensee of a monetary penalty in an amount then fixed by the board. RCW 66.24.120. Pursuant to RCWs 66.24.010 and 66.240.120, the Board adopted as rules a set of “standard penalties” which may apply to certain offenses. WAC 314-29-015.

8. WAC 314-29-020 contains the public safety violations, which includes the violation by permitting possession of liquor by an apparently intoxicated person. The standard penalty for a first violation of WAC 314-16-150(2) is a five (5) day license suspension or five hundred dollars (\$500.00) fine in lieu of suspension. WAC 314-29-020.

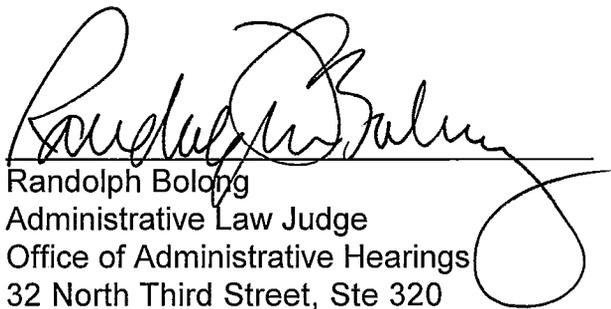
9. In the matter of penalties, WAC 314-29-015(4) sets forth certain examples of mitigating or aggravating circumstances which the Board may wish to consider; however, it does not appear that these examples are exclusive. An example of mitigating circumstances is “[h]aving an employee training plan that includes annual training on liquor laws.”. WAC 314-29-015(4)(a). One example of an aggravating circumstance is “committing the violation willfully.” WAC 314-29-015(4)(b). Mitigation or aggravation of the standard suspension period or fine in lieu of suspension may be granted at the discretion of the Board.

10. In this case, the undersigned cannot conclude that there are any mitigating or aggravating circumstances. Accordingly, this tribunal concludes that it is appropriate to recommend a penalty to the Board consisting of a five day suspension of the Licensee's liquor license or, in lieu thereof, a civil monetary penalty option in the amount of \$500.00.

INITIAL ORDER

IT IS HEREBY ORDERED: that the Board's alleged administrative violation is Sustained. On a date to be established in the Board's Final Order, the license privileges of Village Tavern, Inc., dba Village Bar & Grill, under License Number 354882, shall be suspended for a period of five (5) days. In lieu of such suspension, the Licensee may pay a civil monetary fine of five hundred dollars (\$500.00).

Dated and Mailed this 1st day of December, 2009 at Yakima, Washington.


Randolph Bolong
Administrative Law Judge
Office of Administrative Hearings
32 North Third Street, Ste 320
Yakima, WA 98901
(509) 575-2147, or 1-800-843-3491
FAX: (509) 454-7281

RB:jls



**Washington State
Liquor Control Board**

December 24, 2009

Shelley Ajax, Attorney for Licensee
8390 W Gage Blvd, Ste 111
Kennewick, WA 99336-8105

Village Tavern, Inc
d/b/a Village Bar & Grill
2839 W Kennewick Ave #312
Kennewick, WA 99336-2927

Gordon Karg, AAG
GCE Division, Office of Attorney General
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

**RE: FINAL ORDER OF THE BOARD
ADMINISTRATIVE VIOLATION NOTICE NO. 4K9056A
LICENSEE: Village Tavern, Inc
TRADE NAME: Village Bar & Grill
LOCATION: 203 N Dennis St, Kennewick, WA 99336-3129
LICENSE NO. 354882
LCB HEARING NO. 23,517
OAH NO. 2009-LCB-0026**

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Final Order in the above referenced matter. **The applicable monetary penalty of \$500.00 was received on 12/9/2009.**

If you have any questions, please contact me at (360) 664-1602.

Sincerely,

A handwritten signature in black ink that reads "Kevin McCarroll".

Kevin McCarroll
Adjudicative Proceedings Coordinator

Enclosures (2)

cc: Spokane and Pasco Enforcement and Education Divisions, WSLCB
PO Box 43076, 3000 Pacific Ave. SE, Olympia WA 98504-3076, (360) 664-1602
www.liq.wa.gov

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4 **WASHINGTON STATE LIQUOR CONTROL BOARD**

5 IN THE MATTER OF

6 VILLAGE TAVERN, INC
7 d/b/a VILLAGE BAR & GRILL
8 203 N DENNIS ST
9 KENNEWICK, WA 99336-3129

10 LICENSEE

11 LICENSE NO. 354882

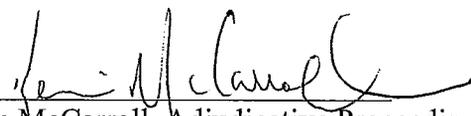
LCB NOS. 23,517

OAH NO. 2009-LCB-0026

DECLARATION OF SERVICE BY
MAIL

12 I declare under penalty of perjury under the laws of the state of Washington that on
13 December 24, 2009, I served a true and correct copy of the FINAL ORDER OF THE BOARD
14 in the above-referenced matter, by placing a copy of said documents in the U.S. mail, postage
15 prepaid, to all parties or their counsel of record.

16 DATED this 24th day of December, 2009, at Olympia, Washington.

17
18 
19 Kevin McCarroll, Adjudicative Proceedings Coordinator

20 SHELLEY AJAX, ATTORNEY FOR
21 LICENSEE
22 8390 W GAGE BLVD, STE 111
23 KENNEWICK, WA 99336-8105

GORDON KARG, ASSISTANT ATTORNEY
GENERAL, GCE DIVISION
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26 2839 W KENNEWICK AVE #312
KENNEWICK, WA 99336-2927

DECLARATION OF SERVICE BY
MAIL