

**BEFORE THE WASHINGTON STATE LIQUOR CONTROL BOARD**

IN THE MATTER OF:

THE BROWN BROTHERS, INC.  
d/b/a MAX'S BAR & GRILL  
1107 S 3<sup>RD</sup> ST  
YAKIMA, WA 98901

LICENSEE

LICENSE NO. 353519  
AVN NO. 4F9156B

LCB NO. 23,554  
OAH NO. 2009-LCB-0042

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 January 21, 2010 at the Licensee's timely request for a hearing on the Administrative Violation Notice issued by the Liquor Control Board on June 18, 2009. The Administrative Violation Notice alleged that on June 5, 2009, the violation of "Sale or service to apparently intoxicated person" was committed, and the "WAC/RCW" citation was listed as "RCW 314.16.150".
2. At the hearing, the Education and Enforcement Division of the Board was represented by Assistant Attorney General Brian Considine, and the Licensee was represented by Wes Gano, Attorney at Law.
3. On February 26, 2010 Administrative Law Judge Randolph Bolong entered his Findings of Fact, Conclusions of Law and Initial Order in this matter which dismissed the proceeding "without prejudice".
4. The Enforcement Division filed a timely Petition for Review of the Initial Order.
5. 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 Board adopts the Administrative Law Judge's Initial Order of Dismissal, but revises the Findings of Fact, Conclusions of Law as follows:

FINDINGS OF FACT

- A. The Board adopts Findings of Fact Nos. 1, 2, 4 and 6 without change.
- B. The Board adopts Finding of Fact No. 3, with the exception of the last sentence, which is revised to read as follows: The evidence was inconclusive as to whether a copy of the regulation allegedly violated was attached to the AVN when it was served.
- C. On October 1, 2009, the Board issued a Complaint alleging that on or about June 5, 2009 the Licensee, and/or an employee thereof allowed a person under the influence of liquor to purchase, possess, and/or consume liquor on the licensed premises, contrary to RCW 66.44.200 and WAC 314-16-150. The Complaint was served on the Office of Administrative Hearings and the Licensee, on or about October 8, 2009.
- D. The Board revises Finding of Fact No. 7 to read as follows: Counsel for the Education and Enforcement Division of the Board and counsel for the Licensee participated in a prehearing conference held on November 9, 2009. At that time, Licensee's counsel raised no objection to jurisdiction or whether the AVN was properly issued, and agreed that the sole issue at the hearing would be whether or not the Licensee allowed an apparently intoxicated person to purchase, consume, or possess liquor on June 5, 2009. The Licensee's counsel made no objection to the form of the AVN at the prehearing conference. An administrative hearing was set for January 21, 2009.
- E. The Licensee submitted exhibits, and a list of witnesses, to prepare for the hearing in accord with the prehearing conference order. At the hearing, the Education and Enforcement Division presented its case first. The Licensee presented one witness in support of its case before moving for

dismissal based on the AVN not containing the proper citation and allegedly not attaching a copy of the statute, in accord with WAC 314-29-005.

#### CONCLUSIONS OF LAW

The Board adopts Conclusions of Law Nos. 1 through 3 from the Initial Order. The Board adopts the following additional Conclusions of Law:

4. The AVN failed to supply the correct citation for the violation, as it used the citation for a WAC, but called it an RCW. It is not clear that the Liquor Enforcement Officer attached a copy of the regulation or statute allegedly violated to the AVN, as required by Board rule, and the Enforcement and Education Division did not present proof that any such copy was attached. The licensee timely requested a hearing to contest the violation. Prior to the hearing on the alleged violation, the Licensee was clearly informed, and was aware of what statute and rule was allegedly violated.

5. A Licensee is entitled to procedural due process, meaning notice of the charges and an opportunity to be heard. These legal requirements were met by the issuance of the complaint and the Licensee's opportunity to contest the alleged violation at a hearing. The Licensee did not demonstrate that it was prejudiced by the error in the AVN and the alleged failure to attach a copy of the statute or regulation violated.

6. The Board finds there was no violation of procedural due process requirements in this case, as the Licensee was aware of the substance of the charges against the Licensee, and its actions in contesting the charges clearly show the Licensee was aware of what the charges were, when the actions leading to the charges took place, and the facts surrounding the charge.

7. However, the Board does expect its Liquor Enforcement Officers to comply with the rules adopted by the Board. The Board's rules require the AVN to include both the proper citation to the

statute and/or rule allegedly violated, and require that a copy of the statute and/or rule be attached to the AVN. The Enforcement Division has not proven that this regulation was complied with, therefore the Board affirms the Initial Order dismissing the Complaint. The Initial Order dismissed the case without prejudice, pending final order of the Board.

ORDER

AVN number 4F9156B, and the Complaint in LCB No. 23, 550, is hereby dismissed with prejudice.

DATED at Olympia, Washington this 4 day of May, 2010.

WASHINGTON STATE LIQUOR CONTROL BOARD

  
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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).

MAR 05 2010

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

**LIQUOR CONTROL BOARD  
BOARD ADMINISTRATION**

**In the Matter of:**

**The Brown Brothers, Inc., dba Max's  
Bar and Grill**

**Licensee**

**License No. 353519**

**OAH No. 2009-LCB-0042**

**LCB No. 23,554**

**FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND INITIAL ORDER OF DISMISSAL**

**STATEMENT OF THE CASE**

Pursuant to notice duly given, an administrative hearing was held before Randolph F. Bolong, Administrative Law Judge, in Yakima, Washington, on the 21st day of January, 2010, in the matter of the violation of the Liquor Control Board regulations by The Brown Brothers, Inc., doing business as Max's Bar & Grill, liquor license 353519. The Liquor Control Board (board) was represented by Brian Considine, Assistant Attorney General. The Brown Brothers, Inc., was represented by Wes Gano, Attorney at Law. Appearing as witnesses for the board were Officer Gabriel Ramos, Officer Caine Hilario, and Christine Davis. Appearing as a witness for the licensee was Alisha Rock.

The Administrative Law Judge, having considered the entire record in this proceeding, including the arguments of the respective representatives, now enters the following findings of fact:

**FINDINGS OF FACT**

1. The Brown Brothers, Inc., owns and operates Max's Bar and Grill in Yakima, Washington.
2. The Brown Brothers, Inc., is licensed by the Washington State Liquor Control Board (License No. 353519) to sell spirits, beer and wine in Max's Bar and Grill.

3. On June 18, 2009, an administrative violation notice (AVN) was issued against the license/Appellant by enforcement staff of the Liquor Control Board. The AVN alleged that staff at Max's Bar and Grill had sold or served alcohol to an apparently intoxicated person, citing RCW 314.16.150. Pursuant to the alleged violation, the AVN sought a penalty of 5 days suspension or \$500 fine in lieu of suspension. Attached to the AVN was a notice regarding the licensee's hearing rights. The AVN contained a comment that a female subject was intoxicated and in possession of a 12 ounce bottle of Budweiser beer. A copy of the regulation allegedly violated was not attached to the AVN.

4. The regulation that was allegedly violated was WAC 314-16-150, which prohibits a retail licensee from giving or supplying liquor to any person apparently under the influence of liquor.

5. The AVN was served on the manager of Max's Bar and Grill on June 19, 2009.

6. A request for a formal administrative hearing was filed by the licensee to contest the AVN on July 7, 2009.

7. An administrative hearing was set in this matter for January 21, 2009. After the board had presented substantive evidence of their case, the licensee/Appellant moved for dismissal based upon the failure of the AVN to provide due process notice of the violation.

#### **CONCLUSIONS OF LAW**

1. Due process requires that notice be reasonably calculated to inform the affected party of the pending action and of the opportunity to object. *State v. Baker*, 49 Wn. App. 778, 781, 745 P.2d 1335 (1987) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The power of the Liquor Control Board to make regulations in the manner set out in that subsection shall extend to prescribing the manner of giving and serving notices required by this title or the regulations. RCW 66.08.030(2)(o).

2. The purpose of chapter 314-29 WAC is to outline what a liquor licensee or a mandatory alcohol server training permit holder can expect if a licensee or permit holder receives an administrative violation notice alleging a violation of a liquor control board statute or regulation.

WAC 314-29-003. WAC 314-29-005 states as follows:

**What are the procedures for notifying a licensee or a mandatory alcohol server training permit holder of an alleged violation of a board statute or regulation?**

- (1) When an enforcement officer believes that a licensee or a mandatory alcohol server training permit holder has violated a board statute or regulation, the officer may prepare an administrative violation notice (AVN) and mail or deliver the notice to the licensee, licensee's agent or permit holder.
- (2) The AVN notice will include:
  - (a) A brief narrative description of the violation(s) the officer is charging;
  - (b) The date(s) of the violation(s);
  - (c) A copy of the law(s) and/or regulation(s) allegedly violated;
  - (d) An outline of the licensee's or permit holder's options as outlined in WAC 314-29-010; and
  - (e) The recommended penalty....

WAC 314-29-005. The recipient of a AVN has 20 days from receipt of the notice to either accept the recommended penalty, request a settlement conference in writing, or request an administrative hearing in writing. WAC 314-29-010. A response must be submitted on a form provided by the agency.

3. If the licensee or permit holder requests an administrative hearing, it is conducted pursuant to chapter 34.05 RCW (Washington Administrative Procedure Act and chapter 314-42 WAC). The procedure is outlined as follows:

**What are the procedures when a licensee or mandatory alcohol server training permit holder requests an administrative hearing?**

- ...(2) The board's hearing coordinator will notify the assistant attorney general of the licensee's or permit holder's request for an administrative hearing.

- (3) If the hearing concerns an administrative violation notice, the assistant attorney general will draft an administrative complaint and send it to the licensee or permit holder and to the office of administrative hearings.
- (4) The office of administrative hearings will schedule the hearing date, and notify the licensee or permit holder and his/her attorney and the assistant attorney general in writing of the hearing date, time, and location.
- (5) The hearing will be conducted by an administrative law judge assigned by the office of administrative hearings. Subpoenas may be issued by an attorney for any party, or by the assigned administrative law judge.

WAC 314-42-051.

4. In this case, the licensee received the AVN from the enforcement officers. The AVN failed to supply the correct citation for the violation. The error could have been corrected by simply following the mandatory requirement of the board's own regulation to attach a copy of the regulation violated to the AVN. However, this was not done. The licensee timely requested an administrative hearing, the administrative complaint drafted, and hearing was scheduled in accordance with the regulations. Though the board argues that the complaint meets the notice requirement, the regulations do not describe a process intended to provide notice of the violation at the complaint stage. First, the procedure described in the regulations does not indicate that the complaint is intended to provide notice to the licensee. The procedure described indicates that the AVN notifies the licensee of the charge, the licensee requests a hearing based upon the allegations in the AVN, and the hearing results from the request for hearing. At that stage of the proceeding, the licensee has already considered his options and elected to proceed to an administrative hearing. By contrast, the regulation does not describe either the intent of an administrative complaint nor what is to be contained in the complaint. One can only surmise from the procedure described that the administrative complaint is to give notice to the licensee and the hearing office that a hearing will be scheduled. Moreover, the intent of WAC 314-29-005 is very clear in that the very title of WAC 314-

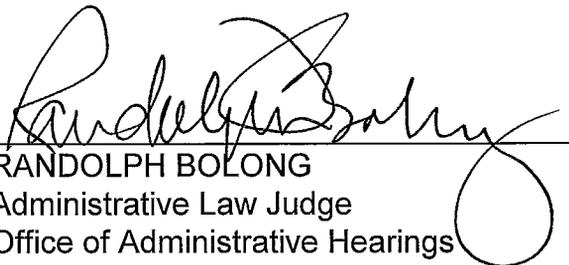
29-005 states that that regulation describes the procedure intended to notify the licensee of the alleged violation. While it may be argued that the AVN provided adequate actual notice, the board's regulation is specific as to what constitutes adequate notice. The board's regulations set out what information must be contained in the AVN in order to inform the licensee of the allegation. The regulation is very clear that a copy of the regulation allegedly violated will be included with the AVN. The board failed to follow their regulations. An ALJ must follow the regulations as written.

5. The licensee moved to dismiss the proceeding because the AVN failed to provide notice as required in the regulation. The undersigned concludes that he is correct and that this proceeding must be dismissed without prejudice.

**DECISION**

This matter is dismissed without prejudice because the board failed to follow the notice requirements of the AVN as outlined in the regulations.

**Dated and Mailed** this 26<sup>th</sup> day of February, 2010, at Yakima, Washington.

  
RANDOLPH BOLONG  
Administrative Law Judge  
Office of Administrative Hearings

Copies mailed to:

The Brown Brothers. Inc., dba Max's Bar and Grill, Licensee  
Wes Gano, Attorney at Law, Licensee's Representative (509) 698-3362  
Brian Considine, AAG (360) 753-2711  
Pat Wilson Parmer, Chief



**Washington State  
Liquor Control Board**

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May 12, 2010

Wes Gano, Attorney for Licensee  
115 S 2<sup>nd</sup> St  
Selah, WA 98942-1321

Mryl Brown, Licensee  
The Brown Brothers, Inc.  
d/b/a Max's Bar & Grill  
1915 S First St  
Yakima, WA 98903-2229

Brian Considine, 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. 4F9156B  
LICENSEE: The Brown Brothers, Inc.  
TRADE NAME: Max's Bar & Grill  
LOCATION: 1107 S 3<sup>rd</sup> St, Yakima, WA 98901  
LICENSE NO. 353519-4F  
LCB HEARING NO. 23,554  
OAH NO.2009-LCB-0042  
UBI: 601 483 221 001 0001**

Dear Parties:

Enclosed please find a Declaration of Service by Mail and a copy of the Final Order of the Board in the above referenced matter as well as the Initial Order.

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

Sincerely,

  
Kevin McCarroll  
Adjudicative Proceedings Coordinator

Enclosures (3)

cc: Spokane and Pasco Enforcement and Education Divisions, WSLCB  
Amber Harris, WSLCB

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3 **WASHINGTON STATE LIQUOR CONTROL BOARD**

4 IN THE MATTER OF:

5 THE BROWN BROTHERS, INC.  
6 d/b/a MAX'S BAR & GRILL  
7 1107 S 3<sup>RD</sup> ST  
8 YAKIMA, WA 98901

LCB NO. 23,554  
OAH NO. 2009-LCB-0042

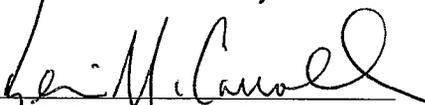
DECLARATION OF SERVICE BY  
MAIL

9 LICENSEE

10 LICENSE NO. 353519  
11 AVN NO. 4F9156B

12 I declare under penalty of perjury under the laws of the state of Washington that on  
13 May 12, 2010, I served a true and correct copy of the FINAL ORDER OF THE BOARD in the  
14 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 12<sup>th</sup> day of May, 2010, at Olympia, Washington.

17   
18 Kevin McCarroll, Adjudicative Proceedings Coordinator

19 WES GANO, ATTORNEY FOR LICENSEE  
20 115 S 2<sup>ND</sup> ST  
21 SELAH, WA 98942-1321

BRIAN CONSIDINE, ASSISTANT  
ATTORNEY GENERAL, GCE DIVISION  
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1125 WASHINGTON STREET SE  
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OLYMPIA, WA 98504-0100

23 MRYL BROWN, LICENSEE  
24 THE BROWN BROTHERS, INC.  
25 d/b/a MAX'S BAR & GRILL  
1915 S FIRST ST  
YAKIMA, WA 98903-2229

26  
DECLARATION OF SERVICE BY  
MAIL