Mailing Date: SEP 9 2008

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 07-1919
	:	Incident No. W05-357524
v.	:	
	:	LID - 20533
THE PHYRST, INC. T/A PHYRST 111 & 111 ½ E. BEAVER AVE. STATE COLLEGE, PA 16801	:	
CENTRE COUNTY LICENSE NO. R-AP-SS-EHF-19796	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Nadia L. Vargo, Esquire
Pennsylvania State Police
313 Mt. Nebo Road
Pittsburgh, PA 15237-1305

For Licensee
Virginia B. Eisenstein, Esq.
403 South Allen Street
The Towers
Suite 210
State College, PA 16801

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on August 27, 2007, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against The Phyrst, Inc., t/a Phyrst (Licensee), License Number R-AP-SS-EHF-19796. On October 10, 2007, Chief Administrative Law Judge Maunus granted the Bureau's Motion to correct the date of violation on the citation from June 14, 2007 to July 14, 2007.

The citation[1] charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on July 14, 2007, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one visibly intoxicated male patron.

An evidentiary hearing was conducted on July 10, 2008 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began and completed its investigation on July 14, 2007. (N.T. 24)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on July 31, 2007. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)

3. On July 14, 2007, a Bureau Enforcement Officer entered the premises at about 9:40 p.m., in an undercover capacity. He maintained surveillance but observed no violations. He intended to depart the premises and return at a later time. As he was leaving, the Officer noticed a customer entering the premises. He was staggering and "high fiving" people in addition to yelling. (N.T. 25-28)

4. The Officer followed the customer into the premises. The doortender asked the customer for identification about four times. It appeared to the Officer as if the customer did not comprehend or understand what the doortender was requesting. He did provide identification, paid the cover charge and was permitted to enter the premises. The customer continued to yell; he bumped into other people; his speech was slurred. At one point, the customer turned around and began talking to the Officer who had a difficult time in determining what the customer was saying. The customer purchased alcoholic beverages for himself, the Officer and two other customers. He paid for the purchase with a credit card. He had difficulty finding the credit card in his pants pocket. (N.T. 29-30)

5. In addition to what was already indicated, his prepurchase behavior included: grabbing the Officer by the shirt and actually hanging on. As the customer navigated down the bar, he had a tendency to go towards the right. He put his arm around the shoulders of patrons. (N.T. 36-37)

1. Commonwealth Exhibit No. C-2, N.T. 6.

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

2. The citation is **sustained** as charged.

DISCUSSION:

Merits

I accord the Officer's testimony significant weight.

Due Process

The essential element in Licensee's defense is that the confusion in dates caused an approximate three months delay which was sufficient in length to deprive Licensee of a meaningful defense. Licensee's defense has two components.

The first is that Licensee's practice is to discard credit card receipts short of the three months time interval Licensee was finally notified of the correct date of violation. This argument is posed in the conditional as Licensee's counsel asserts in her brief, the receipt "may well have shown that the patron had no trouble signing it." In point of fact, the receipt may well have shown the patron did have trouble signing it.[2]

Licensee's second attack relates to the unavailability of an employe. Once again, Licensee's counsel employs the conditional mood when she asserts the witness "may have been" able to describe the visibly intoxicated patron. Perhaps, counsel claims, the missing witness might have been able to ascribe any number of conditions imitating visible intoxication.

In response, I repeat a statement I have made in any number of Adjudications. If a patron is exhibiting behavior consistent with visible intoxication, that patron ought not to be served alcoholic beverages. A licensee ought not to engage in an endeavor to determine the cause.

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2. Precisely how a document can demonstrate the condition of one endorsing it is a concept beyond my scope of intelligence. Moreover, that Licensee has made a business decision on how long to maintain documents does not drive Due Process. Arguably, Licensee may have violated Liquor Code Section 493(12) [47 P.S. §4-493(12)] in failing to keep those receipts for at least two years.

Due process requires nothing more than a licensee be given notice and opportunity to be heard and to defend in an orderly procedure adapted to the nature of the case. ***Salters v. Pennsylvania State Police Com'n***, 912 A.2d 347 (Pa.Cmwlth. 2006). Due process is a flexible concept rather than a technical one, imposing such safeguards as the situation warrants. ***Fountain Capital Fund v. Securities Com'n***, 948 A.2d 208 (Pa.Cmwlth. 2008). Timeliness of a hearing in order to insure witness availability is an element of Due Process. The burden of establishing harm rests with the proponent. ***Liquor Control Bd. V. S & B Restaurants***, 535 A.2d 709 (Pa.Cmwlth. 1988).

Mere conjecture or speculation are inadequate to satisfy that burden. Otherwise, both sides would be allowed to present a virtually endless stream of witnesses offering opinions on what might have been relegating Due Process to an exercise of: "would have, should have, could have."

PRIOR RECORD:

Licensee has been licensed since August 9, 1967, and has had two prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge, (Commonwealth Exhibit No. C-4, N.T. 137):

Adjudication No. 99-1964. Fine $100.00.
Offered and/or gave allowances, rebates or concessions.

Adjudication No. 05-1617. Fine $1,000.00.

1. Failed to maintain coil cleaning records.
   August 1, 2004 through July 8, 2005.
2. Failed to clean coils at least once every 7 days.
   August 1, 2004 through July 8, 2005.
3. Used loudspeakers or devices whereby music could be heard outside.
   May 21 and July 8, 2005.
4. Served malt or brewed beverages from a dispensing apparatus that was not identified with the trade name or brand of the product being served.
   June 10 and 11, 2005.
5. Failed to maintain complete and truthful records covering the operation of the licensed business for a period of 2 years immediately preceding July 8, 2005.
6. Failed to keep records on the licensed premises.
   July 8, 2005.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than $1,000.00 or more than $5,000.00 or both for violations of the type found in this case.

That Section further provides for mandatory compliance with Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management when, as in this matter, Licensee has been found to have to have violated Section 493(1) as a first offense as it relates to sales to minors or sales to a visibly intoxicated patron.

I find Licensee's system for maintaining surveillance of its customers on a busy occasion such as the one in question to be woefully inadequate. Accordingly, I impose a $2,000.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of $2,000.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

R.A.M.P. Requirements

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1 pertaining to Responsible Alcohol Management in the following manner. Licensee is directed to initiate contact with The Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No.: 1-866-275-8237; Web Site: www.lcb.state.pa.us; Email Address: LBEducation@state.pa.us), within 30 days of the mailing date of this Adjudication for assistance in the compliance process. Licensee must receive Certification within 90 days of the mailing date of this Adjudication. Licensee must remain in compliance for a period of one year from the date such Certification is issued.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 26th day of August, 2008.

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Felix Thau, A.L.J.

pm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A $25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

Detach Here and Return Stub with Payment

The fine must be paid by treasurer's check, cashier's check, certified check or money order. Personal Checks, which include business-use personal checks, are not acceptable. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Citation No. 07-1919
THE PHYRST, INC.