

Mailing Date: JAN 07 2010

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-0844
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W05-391072
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
BUREAU COUNSEL: Nadia L. Vargo, Esquire
LICENSEE: Stanley Wolowski, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on April 17, 2009, 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.

The citation¹ charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on March 17, 2009, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated female patron.

An evidentiary hearing was conducted on November 18, 2009 at the Hampton Inn, 180 Charlotte Drive, Altoona, Pennsylvania.

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

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 March 17, 2009. (N.T. 8)
2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on April 1, 2009. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 6)
3. Bureau Enforcement Officers were conducting investigations in the State College area in relationship to St. Patrick's Day.
4. A Bureau Enforcement Officer entered the premises in an undercover capacity at 12:40 p.m., on March 17, 2009. Shortly after entry, the Officer observed a female customer. He determined she was obviously intoxicated as she was staggering and having a hard time standing up. She appeared to be with a male companion. The companion was holding the targeted customer up by her pants and shirt in an effort to steady her. At one point, the targeted customer fell face down on the table. Other patrons at the table and her companion helped her steady herself to go to the dance floor. While on the dance floor, the targeted customer fell. She was lying on the floor. A customer assisted her in standing up. The Officer's shift ended at 2:00 p.m. At 1:50 p.m., he called another Bureau Enforcement Officer who was to enter the premises. He described the visibly intoxicated patron to the second Officer via voice mail and departed the premises. (N.T. 8-11)
5. A second Bureau Enforcement Officer arrived at the premises in an undercover capacity at 3:10 p.m. He received the voice mail sent to him by the previous Officer. While standing at the bar, the Officer noted a female customer having a difficult time maintaining her balance. There was nobody pushing her or knocking her around or causing her to lose her balance. She appeared to be accompanied by a young man. While standing next to the targeted customer, the Officer engaged her in conversation. She was mumbling. Her speech was broken and unintelligible. Her eyes were very glassy and very bloodshot. She continued to have a difficult time maintaining her balance. At one point she began to fall over; her boyfriend reached out and grabbed her belt. He held on to her jeans where her belt is in the small of her back in an effort to keep her from falling down. (N.T. 22-26)

6. While the targeted customer and her companion were standing at the bar, the companion leaned over to the bar in an apparent attempt to order a drink. He let go of the targeted customer's belt. When he did so, she slumped down to the floor and sat there. While seated on the floor, other patrons pointed at the targeted customer laughing and making jokes and comments about her. Some of the staff passed by the targeted customer within several feet as she was sitting on the floor. Her companion ordered a beer. After receiving the beer from the bartender, the companion helped the targeted customer to her feet and handed her the beer. She took the beer and consumed well over three quarters of it. This service occurred at about 3:50 p.m. The targeted customer and her companion went into another area. The Officer departed the premises at 3:55 p.m. (N.T. 31-34)

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:

While I make extensive Findings regarding the first Officer's observations on the licensed premises that evening (Finding of Fact No. 4), I cannot conclude the targeted customer was the same the second Officer determined was visibly intoxicated later in the evening. In any event, the point is largely irrelevant as the second Officer's testimony (Findings of Fact Nos. 5 and 6) was much more than sufficient to sustain the Bureau's burden.

Licensee bases a defense on *Pennsylvania State Police v. J.E.K.*, 680 A.2d 53 (Pa.Cmwlth. 1996). That decision is peppered with expansive phrases which, when taken out of the factual environment of the case, lose all their potency. *J.E.K.*, supra is a unique case which demonstrates how a Court sometimes responds to a compelling set of facts and, in the process, selects terms which, when standing alone, created a false impression that the fundamental legal principles related to a specific issue have been abrogated.²

2. In *J.E.K.*, supra, even though the licensee refused service to a customer who was visibly intoxicated, the customer was permitted to remain on the premises. The customer consumed alcoholic beverages without licensee's knowledge. The Opinion noted the continuing presence of a visibly intoxicated customer on a licensed premises is not illegal.

Licensee's additional defense was, to put it bluntly, shameless. Through a series of hypothetical questions regarding the relative position of servers to that of the visibly intoxicated patron, Licensee attempted to show the patron could not have been observed by the server. In that vein, I heard any number of questions regarding the length and width of the serving counter and how, if one were standing behind the bar, one could not see an individual who was on the floor immediately in front of the bar.

Besides belaboring the obvious, these points do nothing but put Licensee on notice that greater care must be taken by its staff. These "excuses" are actually factors which ought to heighten the level of observation by Licensee's staff.

Given the testimony I heard, I find the Officer's Opinion that Licensee's staff did not appear to be taking time to assess patrons (N.T. 33-36) to be accurate. Indeed, the facts in this case are such that I may draw that conclusion, without the Officer's assistance, given the extensive factual observations in this record.

PRIOR RECORD:

Licensee has been licensed since August 23, 1967, and has had four prior violations since July 1, 1987, the date of establishment of the Office of Administrative Law Judge:

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.

Adjudication No. 07-1919. Fine \$2,000.00.
Sales to a visibly intoxicated person.
June 14, 2007.

Adjudication No. 08-0840. Fine \$1,450.00.

1. Permitted patrons to possess and/or remove alcoholic beverages after 2:30 A.M.
March 17, 2008.
2. Sales during prohibited hours.
March 17, 2008.

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.

Further, Section 471(c) of the Liquor Code [47 P.S. §4-471(c)] requires that the penalty imposed include license revocation or suspension where the violation in question is the third or subsequent violation of any of the offenses referred to in subsection 471(b) of the Liquor Code [47 P.S. §4-471(b)] and/or the Crimes Code within a four year period. The following Adjudications (07-1919 and 08-0840 – Count No. 2), in combination with the charge in this citation, requires that license revocation or suspension must be included as part of the penalty.

At the conclusion of the hearing, Mr. L., one of Licensee's principals, expressed his doubt concerning the accuracy of the Bureau's testimony and thought Licensee was being "picked on." As I stated to Licensee's counsel after Mr. L. spoke, if Mr. L. represents Licensee's thinking then I must become deeply concerned that Licensee is more interested in seeing itself as the victim than in recognizing its obligations to see to it that the sobriety of every customer must be assessed at every service.

Counsel advised Licensee is a new client. Counsel further indicated he will be devoting much energy to educating and to assist his new client in taking corrective actions to insure no further violations occur. Based on those assertions, I impose a \$2,000.00 fine and a one day suspension. But for those promises, I assure Licensee, the penalty would have been much more severe.

I warn Licensee, if I see future violations of this nature, I will respond in kind, with severe sanctions, which very may include revoking the license.

I also order Licensee to comply with the requirements set forth in Liquor Code Section 471.1 [47 P.S. §4-471.1], pertaining to Responsible Alcohol Management, for a period of one year from the mailing date of this Adjudication.

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.

Imposition of Suspension

IT IS FURTHER ORDERED that the Restaurant liquor license (including all permits) of The Phyrst, Inc., t/a Phyrst, License No. R-AP-SS-EHF-19796, be suspended for a period of one day, **BEGINNING** at 7:00 a.m., on Monday, March 1, 2010, and **ENDING** at 7:00 a.m., on Tuesday, March 2, 2010.

Licensee is directed, on Monday, March 1, 2010, at 7:00 a.m., to place a placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised, if replacement placards are needed for any reason, they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized, on Tuesday, March 2, 2010, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

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 must remain in compliance for a period of one year from the mailing date of this Adjudication.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 23RD day of December, 2009.



Felix Thau, A.L.J.

pm

Detach Here and Return Stub with Payment

The fine must be paid by Cashier's Check, Certified Check or Money Order. **Personal and business checks, are not acceptable unless bank certified.** 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, Pennsylvania 17110-9661

Citation No. 09-0844
THE PHYRST, INC.