Mailing Date: DEC 03 2010

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 09-2372
	:	Incident No. W03-389460
v.	:	
	:	LID - 39009
JADE, INC. T/A QUICK SIX SOUTH/SUB CITY 3008 S. QUEEN ST. DALLASTOWN, PA 17313-9584	:	
YORK COUNTY LICENSE NO. R-AP-SS-20009	:	

BEFORE: JUDGE THAU
BUREAU COUNSEL: Thomas M. Ballaron, Esquire
LICENSEE: L. C. Heim, Esquire

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 15, 2009, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Jade, Inc., t/a Quick Six South/Sub City (Licensee), License Number R-AP-SS-20009.

This citation[1] contains two counts.

The first count charges Licensee with violations of Section 437 of the Liquor Code [47 P.S. §4-437] and Section 5.41 of the Pennsylvania Liquor Control Board Regulations [40 Pa. Code §5.41]. The charge is that from July 1, 2008 through February 12, 2009, Licensee, by servants, agents or employes, operated its licensed establishment without a valid health permit or license, which expired on June 30, 2008.

1. Commonwealth Exhibit No. C-2, N.T. 4.

The second count charges Licensee with a violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5503 of the Crimes Code [18 Pa. C.S. §5503]. The charge is that on May 6, 2009, Licensee, by servants, agents or employes, engaged in disorderly conduct.

An evidentiary hearing was conducted on October 8, 2010 at Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, 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 its investigation on February 17, 2009 and completed it on September 22, 2009, and was an ongoing and continuous investigation. (N.T. 4)

2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on September 30, 2009. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 4)

Count No. 1:

3. On July 1, 2008 through February 12, 2009, Licensee was operating without a valid health permit which expired on June 30, 2008. Licensee was not aware of the expiration until the issuing authority advised Licensee of same. (N.T. 5-7)

Count No. 2:

4. Mr. G., Licensee's President, was working on the premises on May 6, 2009. A doortender alerted Mr. G. that he flagged an intoxicated customer. Mr. G. went over to the customer, who was in the billiard table area of the premises, and took his drink away. Mr. G. also asked him to leave. The customer responded by saying that he was going to kill Mr. G. (N.T. 118-125)

5. Mr. G. removed the billiard balls from the table, placing them in one of the table's pockets. Mr. G. motioned to the doortender to remove the patron. The doortender began to remove the intoxicated patron who inquired as to whether he could get an article of clothing.

6. Mr. G. made eye contact with the doortender to allow the patron to get his clothing. The patron retrieved his clothing. (N.T. 125-127)

7. Mr. G. was concerned about his doortender. Mr. G. stood immediately behind the doortender who was escorting the patron out of the premises. A fight erupted. The fight lasted a few seconds. The customer and the doortender fell backwards. Mr. G. put his hands down to keep the doortender's head from hitting the floor. Mr. G. followed the doortender and the patron out of the premises. The doortender placed the patron in a reverse head lock to protect the customer from other patrons who were attempting to hit the customer. (N.T. 53;127-129)

8. Mr. G. did not call for emergency assistance but other people were making calls "left and right." Mr. G. was concerned about what was going on inside the premises. He wanted to make sure everything was taken care of inside the premises. (N.T. 130-133)

9. A customer pled guilty to disorderly conduct based on his participation in the fight (Commonwealth Exhibit No. C-3, N.T. 91)

CONCLUSIONS OF LAW:

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

Count No. 1:

2. **Sustained** as charged.

Count No. 2:

3. The Bureau **failed** to prove Licensee, by servants, agents or employes, engaged in disorderly conduct on May 6, 2009.

DISCUSSION:

I am reminded of how easily one's thinking may go astray. I found myself enmeshed in every detail of the video and testimony as it related to the fight. I thought my obligation was to determine who did what to whom, to evaluate who was the aggressor and who the victim.

While I was mentally reviewing the case, the recognition light bulb began to flicker. As the sober customer was found guilty of disorderly conduct based on his involvement in the fight, that determination precludes me from determining otherwise based on the doctrine of issue preclusion (collateral estoppel).

For issue preclusion to apply, the legal or factual issues: must be the same; must have been litigated; must be essential and material to the judgment. ***Boron v. Pulaski Tp. Bd. Of Sup'rs***, 960 A.2d 880 (Pa.Cmwlth. 2008). I therefore have no basis or cause to render any determination to the contrary.

I was also sidetracked by yet another red herring. The prosecution placed much emphasis on attempting to clothe the sober customer with the mantle of employe. Even though the effort was fruitless, the case to which we all must turn for legal guidance ***Pa. Liquor Control Bd. V. TLK, Inc.***, 544 A.2d 931 (Pa. 1988), draws no distinction between patron or employe conduct when placing vicarious liability upon a licensee.

Because issue preclusion bars me from relitigating the circumstances surrounding the fight, I would not have had to render any credibility or weight and sufficiency determinations. Since the Bureau argues that Mr. G. violated 18 Pa. Code §5503(a)(4) [18 Pa. C.S. §5503(a)(4)] by failing to call for medical assistance or to provide aid, I was required to evaluate the Bureau's sole eye witness's testimony as to the after-fight events.

Although, I found her to be truthful, the Bureau's only eye witness to the fight made her observations from a location farther from the fight than Mr. G. Her testimony was inconsistent at times. She first said the fight lasted abut two or three minutes (N.T. 29) but later acknowledged it lasted but a few seconds (N.T. 53)

The record contains additional inconsistencies in her testimony when compared to the municipal officer who was dispatched to the licensed premises and arrived several minutes later. As the entire situation was highly charged, common sense tells me the customer's eye witness testimony must be given little weight. I am therefore left with only one eye witness, Mr. G., whose testimony was supported by the video and who I find credible.

The Bureau refers me to the below excerpted Crimes Code provision to buttress the argument that Licensee has a duty to render aid.

> §5503. Disorderly conduct
>
> (a) Offense defined – a person is guilty of … if, with intent to cause public inconvenience, annoyance or harm, or recklessly creating a risk thereof, he …
>
> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.

Never mind that no case has been cited to support the argument; never mind that criminal statutes are to be strictly construed; never mind the Bureau's witness confirmed that Mr. G. did render assistance by providing water when asked to do so. Putting all of those concerns aside, the statute mandates action, i.e., some affirmative, observable behavior. A failure to act does not constitute a violation.

I need not belabor the additional analysis required by ***TLK***, supra. I cannot impute liability for unforeseen conduct, of no more than two seconds duration, where Licensee's employes were attempting to remove an obviously drunk and threatening customer, what is essentially, a responsible manner.[2]

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2. I cannot fathom what the Bureau's expectations are. We are dealing with the lawful business, given special permission by the Commonwealth to dispense a socially dangerous and toxic drug, known and purposefully imbibed for its inhibition loosening effects, which tends to transform otherwise well behaved people into all sorts of beasts. While some may recommend a change in the law, licensees are still permitted to serve alcoholic beverages to a point where a patron is visibly intoxicated; even when a patron reaches that threshold, there is no legal obligation to remove any previously served alcoholic beverages so that the patron drinks no more.

PRIOR RECORD:

Licensee has been licensed since November 19, 1996, and has had one prior violation (Commonwealth Exhibit No. C-4,):

Adjudication No. 08-1480. Fine $350.00.
Used loudspeakers or devices whereby
music could be heard outside.
December 31, 2007, March 16, April 20 and May 9, 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 $50.00 or more than $1,000.00 or both for violations of the type found in Count No. 1 in this case.

I impose a $100.00 fine.

ORDER:

Imposition of Fine

THEREFORE, it is hereby ordered that Licensee pay a fine of $100.00 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.

Dismissal of Count No. 2

IT IS FURTHER ORDERED that Count No. 2 of Citation No. 09-2372, issued against Jade, Inc., is DISMISSED.

Retaining Jurisdiction

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 10TH day of November, 2010.

Felix Thau, A.L.J.

pm

NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A $25.00 FILING FEE.

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, PA 17110-9661

Citation No. 09-2372
JADE, INC.