Mailing Date: OCT 11 2011

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

PENNSYLVANIA STATE POLICE, BUREAU OF LIQUOR CONTROL ENFORCEMENT	:	Citation No. 11-0158
v.	:	Incident No. W05-420333
THE PHYRST, INC. T/A PHYRST 111 & 111 ½ E. BEAVER AVE. STATE COLLEGE, PA 16801	:	LID - 20533
CENTRE COUNTY LICENSE NO. R-AP-SS-EHF-19796	:	

BEFORE JUDGE THAU
BUREAU COUNSEL NICKLES
LICENSEE: STANLEY J. WOLOWSKI, ESQUIRE

ADJUDICATION

Before me is a Motion filed by the Bureau on September 14, 2011 to withdraw the Citation. The stated reason is that additional evidence was obtained leading the Bureau to conclude the matter lacked prosecutorial merit.

The citation charges Licensee with violation of Section 13.102(a)(2) of the Liquor Control Board Regulations [40 Pa. Code §13.102(a)]. The charge is that on January 11, 2011, Licensee, by its servants, agents or employes, sold and/or served an increased volume of one drink without a corresponding and proportionate increase in the price of the drink in that 20-ounce mugs of beer were sold for the price of a 10-ounce mug of beer.

DISCUSSION:

Had this matter come to a hearing and had the elicited facts therein been consistent with the parties' Prehearing Memoranda[1], based on my hearing preparation, I could not foresee how the Bureau could have prevailed. The Bureau's Motion, together with my initial evaluation, suggested that I needed to gain complete understanding supporting the Bureau's Motion.

[1]The hearing was scheduled for September 19, 2011.

On September 16, 2011, I convened a telephone conference in which counsel for both parties participated. I first asked Bureau counsel to detail the reasoning for the Motion. After hearing counsel's response, I remarked that I heard nothing of any significance that alters the Bureau's case as presented in its Prehearing Memorandum. The parties further agreed with my assessment that Licensee's Prehearing Memorandum offers facts substantially similar to those of the Bureau.[2]

In order to assure that I had the facts correctly, I recited my understanding. Licensee sells beer mugs imprinted with Licensee's logo, the price for which is $30.00.[3] Each time a customer presents a beer mug, the customer receives 17 ounces of a specific beer brand but is charged a price equal to that of a 14 ounce serving of the same brand of beer for customers who do not purchase the mug. For example, if Licensee sells a 17 ounce serving of Brand A for $7.00 and a 14 ounce serving for $5.00, those who present the mug are charged $5.00 for 17 ounces of Brand A. The remaining customers must pay $7.00 for an equivalent service.

Having heard the parties agree that I accurately explained Licensee's two-tier pricing system, I remarked I heard nothing supporting the Bureau's initial position that Licensee's structure violates the regulation referenced in the citation, relating to discount pricing practices. This is so because the pricing structure constitutes Licensee's regular and ordinary business practice; consequently, Licensee offered no discounts.[4]

Ordinarily, that would have been enough to end the telephone conference and grant the Motion. I went on because I was motivated by a concern for all licensees in the State College community as well as the direct consequence of this promotion, i.e. excessive consumption of alcoholic beverages.

I was additionally mindful of a flurry of fairly recent Adjudications involving the State College licensee community, the subject matter of which were unlawful promotions leading to excessive alcoholic beverage consumption. I was hopeful the severe penalties I imposed in those Adjudications and the warnings I announced during the hearings for those Adjudications had a substantial rehabilitative impact. To whatever extent the State College community is quieter and safer, I did not want to reverse that trend by simply granting the Motion without full comment.

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[2]The only factual difference is the maximum capacity of the beer mugs Licensee sold. The Bureau provided an estimate of 20 ounces while Licensee provided the correct value of 17ounces. This distinction does not alter the result, however.

[3]Licensee's counsel estimated the beer mugs to be valued at $10.00, an estimate to which I do not hold counsel as it does not alter this determination.

[4]Licensee's Prehearing Memorandum includes references to a handful of consistent opinions.

Also resonating within me were two often expressed realities. When one licensee in a community engages in a business promotion, even if unlawful, other licensees are driven to join in for fear of losing business. Further, the time it takes for this administrative process to penalize the initial offender is of such length that business for other licensees in the community may be permanently damaged, even to the point of forcing a licensee to close.[5]

Supported by the above concerns, I intended the additional discussion in the conference call to promote thought but more to forestall the State College licensee community from engaging in the promotion described herein.

It was then that I evidently threw a legal grenade into the discussion. I remarked that Licensee's practice is otherwise illegal. I opined the promotion violates Liquor Code Section 493(24) [47 P.S. §4-493(24)] as an unlawful, direct inducement. Apparently, I further shocked the parties by stating the promotion also violates 40 Pa. Code §13.52(f) which, prior to promulgation, was expressed in Advisory Notice No. 10[6], issued by the Pennsylvania Liquor Control Board.

The pertinent regulation provides:

> Licensees of any class may sell promotional items advertising their own business only, such as tee shirts, mugs, caps and other similar items, to the general public.[7]

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[5] I have come to the awareness that penalties not only punish the offending licensee but also reward all other licensees for not succumbing to the economic urge of protecting a business by copying an illegal promotion. Furthermore, it is not as if this administrative process is incapable of responding with greater dispatch. There is nothing precluding the Bureau or a licensee from filing a motion requesting an expedited proceeding with thorough explanation.

[6]The law well recognizes that legislative agency announcements ordinarily must comport with the Commonwealth Document's Law. Without having engaged in extensive research, I cannot say whether the 20, Advisory Notices are legislative or interpretative. In fact, such an analysis must be carried out on a line-by-line basis. Even if appropriately enacted, a regulation may still be challenged on the theory that it does not track the statute from which it is derived.

[7]The Regulation is in ***pari matera*** with 40 Pa. Code 3.52(c), which prohibits licensees from conducting another business on the licensed premises without approval by the Pennsylvania Liquor Control Board.

In determining the contours of the above regulation[8], I am guided by the statutory construction imperative of Liquor Code Section 104 [47 P.S. §1-104] which demands interpretation that promote the public welfare, health, peace and morals. Case law has clarified this directive. The Liquor Code is to be interpreted in a manner to regulate and restrain the sale of alcoholic beverages. ***Malt Beverage Distributors v. Liquor Control Board***, 974 A.2d 1144 (Pa. 2009).

Applying this strict construction requirement to the pertinent regulation, I advised the parties during the conference call the reason that Licensee's promotion violates the referenced regulation, is that the regulation does not specifically authorize licensees to combine the privilege of selling beer mugs with logos to a beer pricing policy. The regulation limits licensees to selling promotional items advertising their own business and no more.

Entitled "Things of value offered as an inducement," Liquor Code Section 493(24), in relevant part, provides:

> It shall be unlawful –
>
> (24) For any licensee…, or to offer or give or solicit or receive anything of value as a **premium** or present to induce **directly** the purchase of…malt or brewed beverages,… (emphasis mine)[9]

During the conference call, Licensee's counsel conceded the obvious. Licensee's motive for engaging in this promotion is to increase alcoholic beverage sales in two ways. First, as customers have invested a substantial sum in a beer mug, they are more likely to return to Licensee's premises rather than frequent others. Secondly, the beer-mug-purchasing customer knows she may obtain a 17 ounce serving for a 14 ounce price. Considering the initial investment, she is motivated to purchase additional alcoholic beverages to take advantage of the price break.

I liken this incentive to the common restaurant business practice of offering an all-you-can-eat buffet for a fixed price. Few can limit food intake to a healthy limit. Spurred by the compulsion to seize every bit of value out of every penny, most return to the table with plates over-filled with food. Some readily become wasteful, taking food that will not be eaten.

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[8] Statutory construction principles apply to regulations. ***Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Fifth & Filmore, Inc.***, Adjudication No. 90-1193, 4 Sel. Ops. ALJ 217.

[9]Generally see, ***Big Mikes Beverages, Inc.***, Adj. No. 89-0235, IV Sel. Ops. ALJ 107. Also see ***Mill Street Inn, Inc.***, Adj. No. 89-0143, VI Sel. Ops. ALJ 82, ***Gretna Hideaway, Inc.***, Adj. No. 89-0177, VI Sel. Ops. ALJ 142, ***State Street Beer & Soda Discounters, Inc.***, Adj. No. 88-1972 (consolidated), VI Sel. Ops. ALJ 198, and the discussions regarding Liquor Code Section 493(24).

If it is still unclear that Licensee's promotion violates the above excerpted portion of Liquor Code Section 493(24), I trust the following mathematical analysis will be sufficiently convincing. Let us again assume that Licensee sells beer Brand A at $7.00 for a 17 ounce serving, and $5.00 for a 14 ounce serving. For those who invest in a beer mug, the first 17 ounce purchase costs $35.00 (an initial investment of $30.00 for the beer mug plus $5.00 for the beer); for other customers, the cost for a 17 ounce serving of Brand A is $7.00. At this point, it is clear the beer mug purchaser (BMP) has made a huge economic mistake.

Going further, however, the second, 17 ounce purchase for the BMP is an additional $5.00. The BMP now has a total investment of $40.00, (an initial investment of $30.00 plus $10.00 for two, 17 ounce beer servings). The price per 17 ounce serving for the BMP has now decreased from $35.00 to $20.00. Other customers have invested $14.00 for two equivalent servings.

If one calculates similar values for the tenth purchase, the BMP has now invested $80.00 ($30.00 for the beer mug plus an additional $50.00 for 10, 17 ounce servings). The comparable investment for other customers is now $70.00. At the 20th, 17 ounce purchase, the BMP has invested $130.00 ($30.00 for the beer mug plus $100.00 for 20, 17 ounce beer servings). The comparable value for other customers is now $140.00.

Were we to graph the above examples, the visual would relentlessly demonstrate how the disparity between the BMP cost per serving, when compared to other customers, widens. The graph would further show that the cost per 17 ounce serving for the BMP approaches, as a limit, $5.00. The inevitable conclusion is that Licensee's promotion directly encourages (induces, if you will) beer consumption.

In order to find a violation of the pertinent statute, the inquiry cannot end here. The law also requires that the direct inducement be caused by the act of offering a "thing of value". The thing of value which must directly induce alcoholic beverage sales, is defined as a premium or present.[10]

A thesaurus search yields a substantial number of synonyms for "premium." Consistent with strict statutory construction, those I find to be most relevant are: allowance, bonus, gain, profit, and dividend. This family of synonyms may readily be applied to Licensee's promotion. The reduced price Licensee offers to those who purchase a beer mug, for every purchase of a 17 ounce serving is the premium.

[10]One synonym for "present" is gift.

It has been my consistent opinion, what I first announced in ***All American Rathskeller***, Adj. No. 89-1082, III Sel. Ops. ALJ 236, and supported by case law, that the reference to law that regularly appears in a citation is largely irrelevant. If the Bureau proves the charged conduct has occurred, I am next required to determine whether that conduct violates law, independent of the reference within the citation. If a citation references statute A and I conclude the described conduct actually violates statute B, I am constrained to sustain the charge and indicate that the conduct is illegal because it violates statute B.

In this matter, that rock-solid principle could not have salvaged the Bureau's case even though I have concluded Licensee's promotion is otherwise unlawful. The behavior which the charge asserts Licensee has engaged in is not couched in terms of promoting excessive consumption of alcoholic beverages. Consequently, even though I find the practice to be illegal, the wording of the charge does not conform to my conclusions.

If the wording of the charge were unchanged and the Bureau's reference was to Liquor Code Section 493(24) and 40 Pa. Code §13.52(f), I shall be barred from finding a violation precisely because it is the description of the alleged unlawful conduct that is the yardstick for applying the notice requirements of due process.

I grant the Bureau's Motion.

ORDER

IT IS HEREBY ORDERED that Citation No. 11-0158 be **WITHDRAWN**.

Jurisdiction is retained.

Dated this 7TH day of October, 2011.

Felix Thau, A.L.J.

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