STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
NEWARK INTERNATIONAL PLAZA
U.S. Routes 1-9 (Southbound) Newark, N. J. 07114

BULLETIN 2386 January 29, 1981

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ITEM

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BULLETIN 2386 January 29, 1981

1. APPELLATE DECISIONS - SALE OF ALCOHOLIC BEVERAGES TO A PERSON WHO WAS ACTUALLY OR APPARENTLY INTOXICATED - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary Proceedings against Notty Pyne Grill, Inc. t/a Notty Pyne Tavern 1270 Springfield Avenue Irvington, New Jersey Holder of Plenary Retail Consumption License No. 0709-33-057-001 issued by the Mayor and Council of the Town of Irvington.	CONCLUSIONS AND ORDER S-12,430 H-7079-168

Zucker, Goldberg & Weiss, Esqs., by Sanford J. Becker, Esq., Attorneys for Licensee.
Charles J. Mysak, Deputy Attorney General for Division

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

DATED: February 8, 1980 - RECEIVED: February 8, 1980

BY THE DIRECTOR:

No written exceptions to the Hearer's Report were filed pursuant to N.J.A.C. 13:2-19.6.

Having carefully considered the entire record herein including the transcript of the testimony, the exhibits and the Initial Decision, I concur in the findings and conclusions of the Administrative Law Judge and adopt them as my conclusions herein.

However, the Administrative Law Judge failed to make a recommendation as to a specific penalty to be imposed for violation of the subject offense. He states that "based upon the conclusion (he) directs the Director of the Division of Alcoholic Beverage Control to impose the necessary penalty which may be either affirmed, modified or rejected by the Director.

I wish to emphasize this point because such procedure is improper, is contrary to the mandate of the Administrative Procedure Act and should not be repeated.

I shall, in accordance with the usual Division practice in these matters, impose a license suspension of twenty-five days.

Accordingly, it is, on this 10th day of March, 1980,

ORDERED that Plenary Retail Consumption License No. 0709-33-057-001 issued by the Mayor and Council of the Town of Irvington to Notty Pyne Grill, Inc., t/a Notty Pyne Tavern for premises 1270 Springfield Avenue, Irvington be and the same is hereby suspended for twenty-five (25) days commencing 2:00 a.m. on Thursday, March 20, 1980 and terminating 2:00 a.m. on Monday, April 14, 1980.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

In the Matter of:	)	INITIAL DECISION
	)	
NOTTY PINE GRILL, INC.	)	OAL DKT. NO. A.B.C. 5574-79
	)	AGENCY DKT. NO. S-12,430 H-70-79-168

APPEARANCES:

Charles J. Mysak, Deputy Attorney General

Sanford J. Becker, Esq., attorney for Petitioner

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a hearing concerning the alleged violation by Petitioner of N.J.A.C. 13:2-23.1(b) which provides that no licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage directly or indirectly to any person actually or apparently intoxicated or permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises.

The Petitioner is the holder of Plenary Retail Consumption License #0708-33-057-001 located at 1270 Springfield Avenue, Irvington, New Jersey. Said violation allegedly occurred on September 23, 1979. Petitioner was served with notice of alleged violation on October 29, 1979 and an answer and plea of not guilty was filed with the Director of the Division of Alcoholic Beverage Control on November 20, 1979. The matter was then transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A hearing was held on January 29, 1980.

The issue of the hearing is whether or not on September 23, 1979 the Petitioner sold, served and delivered and allowed, permitted and suffered, the sale, service and delivery of alcoholic beverages directly or indirectly to persons actually or apparently intoxicated and/or allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon their licensed premises.

OAL DKT. NO. A.B.C. 5574-79

The State presented two witnesses, H.W. and C.T., Inspectors of the Division of Alcoholic Beverage Control. H.W. testified that on September 23, 1979 while on an ATRA patrol he was assigned to investigate 1270 Springfield Avenue. He arrived at approximately 1:12 a.m., entered the premises with his partner, C.T., and they sat on the left side, towards the end of the bar. He described the premises as being a small oval bar with a pool table, seating approximately 35 persons which at the time only had approximately 12 patrons. He ordered a shot of blackberry brandy with a side order of 7-up.

While seated at the bar, he observed a white male who appeared to be swaying in his seat and was having difficulty picking up his glass, drinking from same and in fact took several seconds to locate his mouth with same. His clothes were observed to be disheveled, his hair was mussed and there were approximately seven or eight swizzle sticks lying in front of him. Ashes were observed upon the bar in front of him which were apparently there as a result of the party's inability to locate the ash tray, which was directly in front of him. In the Inspector's opinion, the patron who was later identified as James P. Craggin, was intoxicated.

At approximately 1:35 a.m. the bartender asked the patron if he wanted a drink, the patron responded by shaking his head in an affirmative manner and a Seagrams 7 and soda was served to him. The patron was then observed to have difficulty in lifting and bringing the glass to his mouth, spilling some of same on his hand, the bar and down his cheek. H.W. then exited the premises to obtain two state police officers and two ATRA agents, who were positioned outside as back-up units. When he returned, the patron, he was advised, had gone to the bathroom. He went to the bathroom door, opened same and the patron responded, "I'll be right out". The patron then came out and was stopped by the agent. He looked at the state police and said "What the fuck do they want". He was advised by the agent that he had had too much to drink to which he responded, "Who the fuck are you to tell me how much to drink". The bartender was then called and advised with regard to what was transpiring. He was identified as Douglas William Kite. The inspector then produced a bottle of alcoholic beverage, marked R-1 and a lab report certifying same to be an alcoholic beverage, marked R-2 in evidence.

Under cross-examination H.W. admitted to having made six stops between the period of 10:00 p.m. and his stopping at the Notty Pines at 1:12 a.m. The first six stops were either closed

or in black areas which he felt no white should be in since his presence would be obvious and the neighborhoods were rough. He admitted that to be absolutely certain that an individual is intoxicated a breath test, blood test, urine test as well as balance and coordination tests would be the best evidence. He was asked if he knew whether or not Petitioner had any disabilities to which he stated no and clarified that the knowledge of same would not affect his opinion as to intoxication.

C.T., an Inspector with the New Jersey State Police Bureau of Alcohol Enforcement, testified that he accompanied H.W. to the premises known as the Notty Pine Grill and entered same between 1:00 and 1:12 a.m. Upon entering he also made an observation as to a white male seated 10 to 12 feet away from where he was seated, who appeared to have had quite a bit to drink. He made this determination based upon the number of swizzle sticks in front of the individual as well as the individual's physical appearance. The patron was observed to have to hold onto the bar for balance when standing, turn slowly and proceed in a slow manner to the bathroom, and when he attempted to walk faster, staggered. It was his opinion, based on his 17½ years experience as an investigator and his personal experience that the patron was intoxicated. He remained at the bar by the patron's drink, which he observed the patron to have drank from previously while his partner went outside and after the individual went to the bathroom.

Under cross-examination, he stated that what first attracted his attention was the patron's rocking precariously on the bar seat and when the patron leaned backwards, he had to grab onto the bar to keep from falling over. In addition, the patron took approximately three minutes to walk six to seven feet to the bathroom. The patron was observed to stagger profusely and when questioned whether or not he would have permitted the individual to walk up 15 steps to his home, he stated he would not, since, in his opinion, the patron would have extreme difficulty in doing so. He admitted that all his determinations were made pursuant to the physical observations and that he did not request any type of tests be administered to the patron to determine sobriety.

The patron, Hugh Craggin, testified that he resided around the corner from the bar and went to the same every Saturday and Sunday, arriving at approximately 9:00 or 9:30 p.m. It was his testimony that he had just finished a game of shuffle board, gone to the bar to get a drink and then proceeded to the mens room. Upon exiting the mens room, he was confronted by two troopers and two plain clothesmen. He admitted to having drank several Seagram 7 and club sodas while at the bar and that upon being informed by the State Troopers that he should go home due to being intoxicated, he obtained a ride home with a friend from the bar. Additionally,

he stated he had a nervous condition as a result of a war injury which had been classified as a 30% disability. He denied being questioned by any of the investigators or troopers with regard to his name, address or anything else.

Under cross-examination, he stated that he had five or six drinks over a two hour period. Upon being advised by the State Troopers as well as the investigators that in their opinion he was drunk and needed to go home, he was taken outside and placed in the rear of another vehicle and taken around the corner to his house.

He was questioned with regard to how much he normally drinks at the bar to which he responded that he never gets enough to drink while he's there. He admitted that he normally does not stagger, is pretty fussy about ashes and generally is a neat person who does not use profanity. He was then asked if he normally had difficulty finding his mouth with a glass when drinking, to which he responded he has no difficulty drinking a drink and doesn't miss his mouth since the alcohol tastes good to him. In his opinion, six drinks are only warming up and are not intoxicating. He again reiterated that he had been playing shuffle board prior to his being told that he was drunk.

The bartender, Douglas W. Kite testified that he knew the patron prior as a friend as well as a patron and has seen him at the bar quite a few times since he was a regular customer. In his opinion, the patron was not drunk, nor was he staggering or swaying. However, he did admit that he did not observe the patron walk to the bathroom. When questioned with regard to his background he stated that he had been a police officer in Ponce Inlet Florida for three years, had moved to the area approximately two years ago and has since applied for the Maplewood Police Force. His background with the Ponce Inlet Police Department included training in breathalyzer operation as well as field sobriety tests. It was his opinion that the patron was not drunk. He did not know whose glass the inspector had seized at the bar.

He felt he was better able to make a determination as to intoxication based upon his personal knowledge of a patron rather than an individual who was not familiar with the drinking habits or physical characteristics of an individual.

Under cross-examination he admitted that he did not keep track of the number of drinks served but does by appearance of the individual. He testified that when a patron cannot shoot a game of shuffle board and looks tired, he makes the determination that the patron has had enough to drink. It was his testimony that the inspectors only observed the patron for approximately 15 minutes and that the patron did not have a drink or order any during the time the officers were present. He observed one of the agents to

leave the bar for approximately three or four minutes, return with two troopers and confront Mr. Craggin. He admitted he had never observed a patron to be falling down drunk or to fumble or sway, but has seen him slightly intoxicated.

Frank Cleveland, a patron at the bar on the night in question testified that he was seated three stools away from the patron, that the patron had been playing shuffle board for two to three hours and was not observed to stagger. According to his testimony, Mr. Craggin had finished a game of shuffle board approximately 10 to 15 minutes prior to the entry of the troopers.

He stated that he arrived at 8:00 p.m. and Mr. Craggin was present at that time. He also stated that the patron had been seated with him for approximately two hours prior to going to the mens room. When questioned as to the time the two investigators arrived, he stated that the agents walked in after 8:00 p.m., sat separately one across the bar and one on the end of the bar. He never observed the patron to be drunk, has known him for five years and does not know of any physical maladies that the patron might have.

Both parties then rested their case.

After having observed all the witnesses for both sides and having considered the entire record, including the testimony and arguments of counsel, the court makes the following findings of fact:

1. Notty Pine Grill, Inc. is the possessor of Plenary Retail Consumption License No. 0708-33-057-001 located at 1270 Springfield Avenue in the Town of Irvington and it was so owned on September 23, 1979.

2. On September 23, 1979, two inspectors with the New Jersey State Police Division of Alcoholic Beverage Control,two State Troopers and two ATRA agents were assigned to investigate the Notty Pine Grill.

3. Two investigators entered the premises at approximately 1:12 a.m. and observed a white male seated approximately 10 to 12 feet from them.

4. The white male was observed to be seated precariously on his stool, to continuously sway while seated, to have to grab the bar to prevent from falling over when leaning backwards, to have difficulty locating his glass on the bar, to have difficulty bringing the glass to his mouth, to stagger and sway when walking, to take three minutes to walk six or seven feet to the bathroon.

5. The patron was observed to have a large number of swizzle sticks in front of him and to order an additional drink in the presence of the agents.

6. The patron consumed at least five or six drinks by his own admission.

7. The patron was at the bar from 9:00 or 9:30 p.m. until 1:30 a.m. when confronted by the two agents.

8. They based upon observations of ashes on the bar in front of the patron that he had missed the ash tray in smoking his cigarette.

The owning of an alcoholic beverage license is a privilege, not a right, and should be protected as such. It is clear that the Appellant did make a sale of an alcoholic beverage to an intoxicated or apparently intoxicated individual on the date in question and that they did in addition permit the consumption of an alcoholic beverage to an intoxicated or apparently intoxicated individual. I arrive at this conclusion based upon the following. In State vs. Guerrido, 60 N.J. Super. 505, 511 (App. Div. 1960), it was stated that " ***whether a man is sober or intoxicated is a matter of common observation, not requiring any special knowledge or skill, and is habitually and properly inquired into by witnesses who have occasion to see him and whose means of judging correctly must be submitted to the trier of facts ***". The court held in Hornauer vs. Division of ABC, 40 N.J. Super. 510, 504 (1956) that the general accepted gauge of administrative factual finality is whether the findings are supported by substantial evidence. Additionally, in Freud vs. Davis, 64 N.J. Super. 242, 247 (App. Div. 1960) **** as our highest court said almost a century ago, it is 'the constant and established practice' to permit lay opinion evidence on the question of intoxication. Castner vs. Sliker, 33 N.J.L. 507, 509-510 (E & A 1969).

The evidence presented before the Court of an individual swaying while seated, staggering, having difficulty locating his glass on the bar and bringing same to his mouth, as well as staggering when walking, being boisterous and profane when talked to are all indicative of intoxication and the Court concludes that

the two investigators were proper and correct in their determination that the individual observed was intoxicated. In addition, we have direct admission by the party involved that he had consumed five or six Seagram 7 and club sodas and in his opinion never gets enough to drink when he's at the bar. The Court, when arriving at this conclusion, has not considered the testimony of Frank Cleveland at all since his testimony was in total contradiction of everyone else and it was apparent that the individual was confused as to what actually did occur on the premises on the night in question.

Therefore, the Court, based upon its conclusions, directs the Director of the Division of Alcoholic Beverage Control to impose the necessary penalty for violation of N.J.A.C. 13:2-23.1.

This recommended decision may be affirmed, modified or rejected by the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the Director of the Division of Alcoholic Beverage Control does not so act in forty-five (45) days and unless such time limit is otherwise extended, this reccomended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

2. DISCIPLINARY PROCEEDINGS - ALLEGED SALES TO MINORS - LICENSEE FOUND NOT GUILTY.

In the Matter of Disciplinary Proceedings against Dr. Jekyll's High Times, Inc. t/a Dr. Jekyll's High Times 3905 Federal Street Pennsauken, NJ Holder of Plenary Retail Consumption License No. 0427-33-011-001 issued by the Township Committee of the Township of Pennsauken.	CONCLUSIONS AND ORDER S-12,354 X-53,878-D C-13,778

Igor Sturm, Esq., Attorney for Licensee.
Charles J. Mysak, Esq., Deputy Attorney General for Division

Initial Decision Below

Hon. Gerald I. Jarrett, Administrative Law Judge

DATED: January 24, 1980 - RECEIVED: January 28, 1980

BY THE DIRECTOR:

Written Exceptions to the Initial Decision were filed on behalf of the Division and a written Answer thereto was filed on behalf of the licensee pursuant to N.J.A.C. 13:2-19.6.

In its Exceptions, the Deputy Attorney General appearing on behalf of the Division, argues that the admission by the minors that they were below the statutory ages to the agents who testified thereto, was sufficient to establish the age of the minors notwithstanding the fact that the minors who were present at the hearing and presumably prepared to testify were not called to testify on behalf of the Division. It is contended that the testimony of the minors was unnecessary, and no adverse inference should be drawn from the failure to call the minors.

The licensee argues, however, in support of the conclusions of the Administrative Law Judge, that there was lacking sufficient, competent and credible evidence to support the charges since the Division relied upon what was clearly hearsay evidence.

Hearsay evidence may be employed to corroborate competent proof or competent proof may be supported or given added probative force by hearsay testimony but an administrative decision must be based on a residuum of legal and competent evidence and cannot be based on hearsay alone. Weston v. State, 60 NJ 36 (1972).

Thus, I find the exception to be lacking in merit.

It should be added that the Administrative Law Judge had the authority to direct the minors, present at the hearing, to testify, in the interests of fairness, and for completion of the record, upon the failure, for whatever reason, of Counsel for the Division to elicit such critical testimony. However, the Judge was not mandated to do so.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Initial Decision, the exceptions with respect thereto and the Answer to the said exceptions, I concur in the findings and conclusions contained in the Initial Decision, and adopt them as my conclusions herein.

Accordingly, it is, on this 4th day of March, 1980,

ORDERED that the licensee be and is hereby adjudged "not guilty" of the subject charge, and the charge be and is hereby dismissed.

JOSEPH H. LERNER
DIRECTOR

Appendix - Initial Decision Below

IN THE MATTER OF:	INITIAL DECISION
	OAL DKT. NO. ABC 3859-79
DR. JEKYLL'S HIGH TIMES, INC.	AGENCY DKT. NO.S-12354Y53078-D

APPEARANCES:

Charles J. Mysak, Deputy Attorney General, representing the Division of Alcoholic Beverage Control

Igor Sturm, Esq., attorney for Petitioner

BEFORE THE HONORABLE GERALD I. JARRETT, A.L.J.:

This is a hearing concerning the alleged violations by petitioner of N.J.A.C. 13:2-23.1 allowing, permitting or suffering the consumption of alcoholic beverage in and upon the licensed premises of a person under the age of 18 years and N.J.A.C.13:2-14.3 employing, allowing, permitting, or suffering the employment in or upon the licensed premises of a person under the age of 18 years. The petitioner is the holder of plenary retail consumption license number 0427 33011 001 located at 3905 Federal Street, Pennsauken, New Jersey. Said violations allegedly occurred on April 27, 1979. Petitioner was served notice of the alleged violations on August 27, 1979 and answered and filed a plea of not guilty on September 4, 1979 with the Director of the Division of Alcoholic Beverage Control. The matter was transmitted to the Office of Administrative Law, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The hearing was held on December 3, 1979 and final papers were received by the Court on January 3, 1980. The issues of the hearing are:

1. Whether or not on April 27, 1979 petitioner allowed, permitted or suffered the consumption of alcoholic beverage in or upon their licensed premises of a person under the age of 18 and, in addition, whether or not on the same date he did employ, allow, permit or suffer the employment in or upon their premises of a person under the age of 18.

The State presented two witnesses, H.W. and D.S. inspectors of the Division of Alcoholic Beverage Control. H.W. testified that on April 27, 1979 he made an investigation of Dr. Jekyll's High Times for a possible violation of N.J.A.C. 13:2-23.1. He arrived at the premises at 8:25 P.M. and observed approximately twenty people seated at a bar and approximately 120 to 125 persons seated throughout the premises. At approximately 10:50 P.M. he observed two males seated in front of him at a table with a bottle of Pabst in front of each. It was his opinion that one of the individuals appeared to be of questionable age and he therefore requested some form of identification from him. The individual produced a New Jersey driver's license and upon careful observation of same was noted to have been altered from 1961 to 1960. The individual then produced another form of identification with a different name on it and some time thereafter admitted that he was only 17 years old. He then proceeded with that individual to the manager's office of the premises and while there elicited information from the individual that one of the I.D.'s he presented belonged to a band member who was performing on the premises that evening. The band member was then called in and it was determined that he too was only 17 years old. It was stipulated by all parties that the bottle of alcoholic beverage which was in front of the initial minor was in fact beer.

Under cross-examination the inspector admitted that when he initially entered the premises there was someone on the door checking I.D.'s and collecting money. The inspector said other than the two juveniles who were apprehended they made no additional identification checks and left the premises at midnight. He stated that he initially checked the individual's identification because he felt that he appeared to be a borderline individual. Upon checking the youth's I.D. he insisted for several minutes that he was in fact 18 years old. The inspector who was trained to look for alterations on licenses and other things was able to determine that the individual was not 18 by comparing the date at the top of the driver's license with that on the bottom. The band employee was not observed consuming any alcoholic beverages.

Inspector D.S. cooperated the testimony of his partner and additionally added that the minor initially observed was operating lights and sound equipment for the band, but after determining that this individual was only 17 years old, the owner was informed of the determination. In addition, he was able to make a determination that the drummer in the band was only 17 years old and he apprehended him.

The State rested its case and the petitioner presented two witnesses, Thomas Prusckowski and Elaine Scannell. Mr. Prusckowski testified that on April 27, 1979 he was employed by Dr. Jekyll's High Times as the floorman. It was his duty to check the I.D.'s of band members and workers with the band as they entered the premises that night. He so checked their I.D.'s and all individuals involved produced driver's license showing that they were at least 18 years of age. He did not detect any alterations on the licenses and did not know, nor was ever advised that there were two spots on a driver's license to look to make a determination that an individual is of age.

Under cross-examination he stated the driver's license of the first individual showed a date of 1960 and that based on his observations he did not detect any alterations on same. In addition, since the individuals were not paying customers they were not checked any further. With regard to the band members he stated that there were five of same and that, as far as he could remember, no one was more than 19 years old.

Elaine Scannell testified that on the date in question she was employed as a barmaid and was working directly in front of the band where the individuals were arrested. She also stated that she checks the identification of individuals who appear to be under age and that she did not sell or serve the minor any alcoholic beverage.

Under cross-examination it was brought out that there were one or two other barmaids on duty that night and that said minor could have purchased the beer he was consuming at another bar on the premises.

Both parties rested their case and agreed to submit memoranda of law with regard to all issues involved in the matter and defenses thereto. Petitioner, by way of memoranda of law, submitted on December 28, 1979 argues that the disciplinary proceedings against the licensee must be dismissed for lack of substantial evidence and insufficient competent proof to support the truth of the charges. The respondent, by way of the Attorney General's office, submitted a letter memoranda on January 3, 1980 wherein they took the position that the only defense to sell alcoholic beverage to a minor was based upon the three criteria found in N.J.S.A. 33:1-77 and also took the position that there was sufficient competent and credible testimony to sustain their charges.

The Court FINDS as a fact that on April 27, 1979 the two investigators heretofore mentioned visited the premises of Dr. Jekyll's High Times and while there made certain observations with regard to two individuals in question and that based on their observations and further investigation did file a report with the Director of the Division of Alcoholic Beverage Control which resulted in petitioner being cited for violation of N.J.A.C.13:2-23.1 and 13:2-14.3. The Court after reviewing the facts and the memoranda submitted makes the following determination as to the issue of sufficient and competent evidence. In the case of Mazza v. Kavichia, 28 N. J. Super, 280, 284-5, 1953 stated that,

> "...It must be kept in mind that as an administrative agency respondent is not bound by the technical rules of evidence and that the admission of incompetent testimony does not justify a reversal if there is sufficient competent proof in the record to support the determination."

In addition to page 289

> "...The Supreme Court has recognized that the conclusives of a trial court is entitled to more weight when they have seen and heard the witnesses than when such opportunity has not been afforded...The test, which has general application to the review of an administrative tribunal's decision, is whether the factual finding, out of which it rules is supported by substantial evidence."

In New Jersey Bell Telephone Co. V. Communications Workers' 5 N. J. p. 377 it is held that in any such appeal the finding of the board of arbitration upon the facts is supported by any evidence shall be conclusive. Obviously, the words 'any evidence' means more than scintilla evidence and the meaning to be attributed thereto must be in accord with accepted judicial construction. They then went on and cited Foster v. Goodpaster, 290 Kentucky 410, 161 Southwest 2d. 626, 140 A.L.R. 1044 when the Court expressed the rule in the following manner at p.1046:

> "An express provision that an administrative body's finding of fact shall be conclusive is subject to qualifications that it must be supported by relevant evidence such as reasonable mind might accept as adequate to support a conclusion."

The two investigators in this particular matter testified as to admissions made to them by the alleged minors. The Court notes that said testimony is heresay especially where the witnesses are present and available to testify for the Court. In Black's Law Dictionary, 5th Edition, heresay is defined as a"statement, other than one made by the declarant, or testifying at the trial or hearing offered in evidence to prove the proof of the matter asserted." They conclude in the definition that the very nature of the evidence shows its weakness and is admitted only in specified cases from necessity. In this particular instance there was no necessity to present that type of testimony since the State had already subpoened the two individuals in questions. Black's also define competent evidence as that which"the very nature of the thing to be proven requires, as, the production of writing or its contents of the subject of inquiry." The Court FINDS that the testimony of the two officers though competent as to their observations and beliefs is not competent as to the truth of those statements made by other parties. The State may argue that upon the investigators presenting testimony that said individuals admitted to them that they were minors the burden shifts to the petitioner, but the Court calls that the burden at that particular instance did not shift since said testimony as to alleged omissions by third parties do not by the petitioner are incompetent and were not substantiated at the time of trial. Therefore, the Court must dismiss this action for the failure of the State to present competent evidence to substantiate the claims asserted. The Court arrives at this determination in that the two alleged minors who are the subject of this matter were present in Court and could have been called by the State to substantiate their claim as to the allegations. The State chose not to call said individuals and therefore, the Court must CONCLUDE that the testimony of said individuals would not have been favorable to the State's allegations. The Court cites O'Neil v. Billotta 18 N. J. Super, 82, 86, 1952. The witnesses though available to both parties were necessary to substantiate the State's case and since the Court has found that the State has not substantiated its allegations it makes no inferences from the defendant's failure to call said witnesses since the burden of proof or presumption had not shifted to the defendant.

It is hereby ORDERED that the complaint in this particular instance be DISMISSED.

This recommended decision may be affirmed, modified or rejected by the head of agency, the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, who by law is empowered to make a final decision in this matter. However, if the head of the agency does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A.52:14B-10.

I HEREBY FILE with the Director of the Division of Alcoholic Beverage Control, Joseph H. Lerner, my Initial Decision in this matter and the record in these proceedings.

3. DISCIPLINARY PROCEEDINGS - CONSOLIDATED CASES (COMMON OWNERSHIP)-EMPLOYMENT OF A REGULAR POLICE OFFICER - DIRECTOR PERMITTED PAYMENT OF FINE IN LIEU OF SUSPENSION FOR 15 DAYS PREVIOUSLY IMPOSED.

In the Matter of Disciplinary Proceedings against

Harry J. Sosangelis and Helen Sosangelis
t/a Indian Chief Tavern
Route 70
Medford Township, N.J.

(Affil. File) S-12,282 X-23,906-K X-55,610-A

Holder of Plenary Retail Consumption License No. 0320-33-003-001 issued by the Township Committee of the Township of Medford.

AMENDED CONCLUSIONS AND ORDER

AND

Zarifis Corporation
t/a Harry's
24-36 Stokes Road
Medford Township, N.J.

S-12,280 X-55,610 A

Holder of Plenary Retail Consumption License No. 0320-32-004-001 issued by the Township Committee of the Township of Medford.

Skoloff and Wolfe, Esqs., by Saul A. Wolfe, Esq., Attorneys for Licensee.
David Griffiths, Esq., Deputy Attorney General, Appearing for Division.

BY THE DIRECTOR:

Conclusions and Order were entered on January 7, 1980 in these consolidated cases (common ownership) suspending each license for 15 days in consequence of findings of guilt to charges alleging that each licensee employed a regular police officer, in violation of N.J.S.A. 13:2-23.31.

Prior to the commencement of the suspension, the licensees petitioned the Director for the opportunity to pay fines, in compromise, in lieu of license suspensions, pursuant to N.J.S.A. 33:1-31.

I have favorably considered the applications and I shall permit each licensee to pay a fine of $1,500.00 in lieu of the 15 days suspension.

Accordingly, it is, on this 4th day of March, 1980,

ORDERED that my Order of January 7, 1980 be and the same is hereby amended as follows:

ORDERED that the payments of $1,500.00 fines by each licensee be and the same are hereby accepted in lieu of suspension of licenses for fifteen (15) days.

JOSEPH H. LERNER
DIRECTOR

4. STATE LICENSES - NEW APPLICATIONS FILED.

Patrick Windle and Sons Inc.
Building #18, Howard Plaza
Route 34, Monmouth County Airport
(Wall Twp.) Farmingdale, New Jersey
Application filed January 23, 1981
for limited wholesale license.

Cinzano (USA) Inc.
14 Commerce Drive
Cranford, New Jersey
Application filed January 29, 1981
for wine wholesale license.

Joseph H. Lerner
Director