STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2133 February 25, 1974

TABLE OF CONTENTS

ITEM

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
25 Commerce Drive Cranford, N.J. 07016

BULLETIN 2133 February 25, 1974

1. APPELDATE DECISIONS - HOST SERVICES OF NEW YORK, INC. v. ELIZABETH ET AL. - ORDER DISMISSING APPEAL.

Host Services of New York, Inc., Appellant,	)	
v.	)	O R D E R
City Council of the City of Elizabeth, and TWA Ambassador Club, Respondents.	)	Dismissing Appeal

Pitney, Hardin & Kipp, Esqs., by William H. Hyatt, Jr., Esq., Attorneys for Appellant
Frank P. Trocino, Esq., by Daniel J. O'Hara, Esq., Attorney for Respondent City Council
Suzanne B. Clarke, Esq., Attorney for Respondent TWA Ambassador Club

BY THE DIRECTOR:

Appellant appeals from the action of the respondent City Council of the City of Elizabeth which, by resolution dated August 1, 1973, granted the application of respondent TWA Ambassador Club for a club license for use at Newark International Airport, Terminal Building "A".

At the time of the hearing, and before testimony was taken, the attorney for respondent TWA Ambassador Club stated that the said respondent had entered into a contract for the purchase of a plenary retail consumption license, which purchase is subject to approval by the City Council of an application which it had filed for a person-to-person and place-to-place transfer of the said license to it and for the aforesaid premises. She further represented that the subject club license now held by TWA Ambassador Club would be voluntarily surrendered to the City Council of the City of Elizabeth for cancellation simultaneously with the approval and grant of the said application.

Under these circumstances and based upon the aforementioned representations the attorney for the appellant requested and moved that the within appeal be dismissed, without prejudice. Good cause appearing, I shall enter an order dismissing the said appeal.

Accordingly, it is, on this 28th day of November 1973,

ORDERED that the appeal herein be and the same is hereby dismissed, without prejudice.

ROBERT E. BOWER
DIRECTOR

2. APPELLATE DECISIONS - ALLOWAY BEVERAGES, INC. v. BURLINGTON.

Alloway Beverages, Inc., Appellant, v. Common Council of the City of Burlington, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Begley & Begley, Esqs., by William J. Begley, Esq., Attorneys for Appellant
Maurice Denbo, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from action of respondent Common Council of the City of Burlington (hereinafter Council) which on August 14, 1973 denied appellant's application for person-to-person and place-to-place transfer of a plenary retail consumption license from Josephine Wade and Stanley Devlin to appellant, and from 101 High Street to premises located at the southwest corner of High and Morris Streets, Burlington.

The petition of appeal contends (1) there was no finding of facts upon which the Council's action was based, and (2) appellant was not afforded a hearing on the merits of its application. The Council denied these contentions, alleging that the resolution adopted by it is dispositive of the factual determination upon which such denial was based.

The resolution adopted by the Council bases its denial upon the following factual determination incorporated in its resolution: (1) the proposed location is in close proximity to the Burlington City High School, (2) parking on High Street is presently hazardous, which hazard would be exacerbated by the proposed location, (3) there are three churches in the immediate area, (4) there are presently a liquor store and a bar serving the nearby residents.

Appellant relies upon a determination of the local Board of Adjustment from which it alleges that it received a variance. Respondent vigorously denied that the Board of Adjustment granted a variance for use of a plenary retail consumption establishment but, rather, its approval was for a retail store

only on a lot which was not of sufficient size, hence requiring a variance.

Concurrent with receipt of respondent's answer, a companion resolution adopted by the Board of Education of the municipality was received and became an adjunct to respondent's answer. That resolution expressed opposition to the granting of any transfer of a liquor license to the proposed premises because of that location's proximity to the Burlington High School.

A de novo hearing at this Division was held pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded all parties to introduce evidence and to cross-examine witnesses. By the character of such de novo proceedings, the complaint of appellant alleging the lack of opportunity to move and be heard on its application is thus remedied. Cino v. Driscoll, 130 N.J.L. 535 (1943).

Counsel were noticed that, pursuant to the rule cited, supra, the burden of establishing that the action of the Council was erroneous and should be reversed rests with appellant.

As the thrust of the denying resolution and the emphasis of the petition of appeal appear directed toward denial of the place-to-place application rather than denial of the person-to-person transfer application, counsel were asked if in fact there was such denial of the person-to-person transfer application or, in view of the silence respecting the person-to-person application in the resolution, was such application in fact granted? Thereupon counsel stipulated that the application for a person-to-person transfer had not been denied, hence the issue was restricted to the denial of the said place-to-place transfer.

The facts as developed by the testimony of witnesses both for appellant and Council were not significantly in dispute. Robert F. Dotti, Superintendent of Schools for the City of Burlington, testifying on behalf of Council, stated that the proposed location is about 400 feet from the front entrance of the local high school. A continuous problem exists, he explained, resulting from the change of the minimum drinking age from 21 to 18. Students consume alcoholic beverages during their lunch recess and during the nighttime school social activities. This problem would be substantially increased, he believed, if the application for transfer were granted. He advised that the Board of Education adopted a resolution requesting the Council to deny the application; a copy of the said resolution was submitted to the Division concurrently with receipt of the answer to the petition of appeal.

The Traffic Safety Coordinator of Burlington County, John Karakashian, testified that the proposed location of appellant's premises was at the intersection of two county roads, both of which have a high volume of traffic. He cited statistics concerning a vehicle count conducted in 1971 in support of his contention that the traffic situation at that intersection was

presently insolvable. Furthermore, he asserted that the proposed site, which presently is vacant land, could carry no commercial activity whatever without compounding the present traffic problem.

Councilman Alexander R. Shultz testified that he is one of eleven councilmen who voted unanimously to deny appellant's application. He stated that he had attended meetings of the Planning Board prior to the Council's action on the application, and from that meeting learned of appellant's proposals. The traffic problem at Morris and High Streets has been the subject of the Council's study and deliberation for a long period, and an application to the State of New Jersey for approval of a traffic signal at that intersection had been denied. Although the proposed site has been vacant land for forty-two years, to his knowledge, he voted against appellant's application for what, in his opinion, was in the best interests of the community.

Testifying on behalf of appellant, Samuel P. Alloway introduced a site and building plan for the proposed structure. He indicated that both were before the local Board of Adjustment, from which a variance was received. The Board had before it the full consideration of the traffic situation as well as a drainage problem, and the solutions offered by appellant to both were satisfactory to the Board. He admitted on cross-examination that the notice of the hearing before the Board was silent as to the specifics of the proposed use involving an application for alcoholic beverage license.

A traffic engineer, John H. Comiskey, Jr., testified that his firm had made a survey of the proposed site and the intersection involved. He visited the site on the morning of the hearing and, in his opinion, the proposed parking layout was a satisfactory one. He did not believe that the establishment of the proposed business would unduly interfere with the traffic flow. He concurred with the traffic-flow figures testified to by the County Traffic Safety Coordinator, and explained that those figures may well have increased since the date of the study.

Appellant contended that the Council acted arbitrarily in that the proposed use would not be detrimental to the area and, as compared with other commercial establishments that could legally be established there, would actually constitute less of a traffic threat. He emphasized that no objectors had come forward, other than the Board of Education, to protest Council's action, or in support thereof. Hence, in the absence of such objection, the Council should have approved appellant's application. Fanwood v. Rocco, 33 N.J. 404 (1960) was distinguished by the heavy presence of objectors in that cited matter, as against the negligible objectors in the instant matter.

Council advanced the argument that the school problem, i.e., the illicit drinking of the teen-agers, would increase with a nearer source of alcoholic beverages; the traffic problem is

all but insolvable presently, and appellant's proposed business could only increase it. Reference was made to Marter v. Burlington, Bulletin 1983, Item 2, in which an application for a place-to-place transfer to an opposite corner of the same intersection was denied, and the denial was affirmed by the Director. In that matter similar objections were raised to the approval of that application and similar reasons were given for its denial. There is a marked parallel between the two appeals.

A restatement of the legal principles as applied to Marter v. Burlington, supra, applies equally here. In the absence of clear abuse of discretion, the action of the municipal issuing authority will not be set aside. Blanck v. Magnolia, 38 N.J. 484 (1962).

Counsel for appellant cites Fanwood v. Rocco, supra, as distinguishable from the present matter in that the volume of objections to the proposed transfer in Fanwood was not paralleled. While such factual differences do exist, the legal principles cited are equally applicable.

> "... The Director conducts a de novo hearing of the appeal and makes the necessary factual and legal determinations on the record before him.... Under his settled practice, the Director abides by the municipality's grant or denial of the application so long as its exercise of judgment and discretion was reasonable...." Fanwood v. Rocco, supra, at p. 414.

As the court emphasized in Lubliner v. Paterson, 33 N.J. 428, 446 (1960), in matters involving a transfer of liquor licenses the responsibility of the municipal issuing authority is "high", its discretion "wide" and its guide "the public interest." Where reasonable men, acting reasonably, have arrived at a determination in the issuance or transfer of a license, such determination should be sustained by the Director unless he finds that it was clearly against the logic and effect of the presented facts. Cf. Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (1947).

It is recommended that the same conclusion be reached in this matter as was reached in Marter v. Burlington, supra, as follows:

> "The Council has, in my opinion, understood its full responsibility, has acted circumspectly and in the reasonable exercise of its discretion in rejecting the application for transfer."

I do not find the objections of sufficient merit and thus conclude that appellant has failed to sustain the burden of establishing that the action of the Council was erroneous or in abuse of its discretion. Rule 6 of State Regulation No. 15. For the reasons aforesaid, it is recommended that an order be entered affirming

the action of the Council and dismissing the appeal.

Conclusions and Order

No exceptions to the Hearer's report were filed by appellant pursuant to Rule 14 of State Regulation No. 15.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits and the Hearer's report, I concur in the findings and recommendations of the Hearer, and adopt them as my conclusions herein.

Accordingly, it is, on this 19th day of December 1973,

ORDERED that the action of respondent Common Council of the City of Burlington be and the same is hereby affirmed and the appeal herein be and the same is hereby dismissed.

ROBERT E. BOWER
DIRECTOR

3. DISCIPLINARY PROCEEDINGS - HOURS VIOLATION - PRIOR SIMILAR VIOLATION - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary Proceedings against Big Mike's (a Corp. of N. J.), 199 Rose Street Newark, N. J., Holder of Plenary Retail Consumption License C-268, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark.	CONCLUSIONS and ORDER

Maurer & Maurer, Esqs., by Myron P. Maurer, Esq., Attorneys for Licensee
Carl A. Wyhopen, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleads not guilty to a charge alleging that on Sunday, March 18, 1973, at about 2:35 p.m., it permitted the sale of alcoholic beverages for off-premises consumption, in violation of Rule 1 of State Regulation No. 38.

ABC agent M testified that on the date alleged in the charge he, accompanied by another agent of this Division, and armed with marked money, visited the licensee's premises. Upon entering he observed a long bar served by two bartenders. Approaching one of the bartenders, he ordered a pint of alcoholic beverages to be taken from the premises and was denied; the bartender explained "No. We don't sell alcoholic beverages to go on Sunday." The agent then entered the lavatory and, upon emerging, observed a patron (later identified as Lawrence Harris) order and receive an unopened bottle of vodka. The bartender demanded of the patron "That will be $7.70," which sum was paid. The patron placed the bottle under his coat and departed, followed by the agent.

On the exterior of the premises agent M signaled his fellow agent awaiting outside, who followed Harris to a car. The bottle was turned over to the agents and agent M, agent G and Harris returned to the licensee's premises. There the bartender (later identified as William Lewis) denied making the sale, and Harris would neither affirm nor deny making the purchase.

ABC agent G testified that he was at a post of observation outside of the premises, saw Harris leave followed by agent M. He observed Harris had something under his coat as he entered his car. Receiving agent M's signal, he approached Harris' car where he observed a bottle lying on the seat between Harris and another passenger. He instructed Harris to accompany him and agent M back into the premises and seized the bottle. There Harris would neither affirm nor deny making the purchase. The bartender Lewis denied the sale.

Testifying on behalf of the licensee, Curtis Hayes stated that he was the only bartender on duty in the licensed premises on the date and time of the charge. William Lewis, whom the agents described as the bartender, was in fact merely a patron who had volunteered to sweep behind the bar and remove refuse. He denied that Lewis or anyone could have entered the storage room without use of the key which he alone possessed at the time. The only bottles that were available for use were behind the bar, and all had been opened. On cross examination he admitted that Lewis could have been wiping the bar at the agent's entry. However, he denied seeing agent M in the premises alone. He admitted that there were between fifteen and twenty patrons in the premises at the time.

William Lewis testified that he is a patron of the licensee's tavern and is a friend of the bartender. He denied that he is employed in any way by the licensee. He stated that, at the request of bartender Hayes, he was sweeping up behind the bar and disposing of the rubbish. He recalled that, while engaged in sweeping, a man entered the premises with a bottle in his hand and demanded to know if he had sold that bottle to another man behind him. He denied selling any bottle to anyone, and declared that, in sweeping up, this was the only time he was ever behind the bar.

Two patrons (George Gray and Fred Taylor) testified that they were in the premises when the agents accosted Lewis demanding to know if he sold liquor to another man accompanying them. They repeated his denial and affirmed that they did not see any prior visit by either agent. They described Lewis as a patron who had volunteered to "sweep up."

It is a firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App.Div. 1960); Howard Tavern, Inc. v. Division of Alcoholic Beverage Control (App.Div. 1962), not officially reported, reprinted in Bulletin 1491, Item 1.

Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954). The finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042. "... Every fact or circumstance tending to show ... the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence." State v. Spruill, 16 N.J. 73, 78 (1954). "It is fundamental that the interest or bias of a witness is relevant in evaluating his testimony." In re Hamilton State Bank, 106 N.J. Super. 285, 291 (App.Div. 1969).

Based upon the foregoing principles, I am persuaded that the testimony of the agents, presented in a forthright and detailed manner, was not a fabrication but was factual and credible. A sale and delivery of alcoholic beverages was made in the manner described and in violation of Rule 1 of State Regulation No. 38.

The testimony of licensee's witnesses was likewise incredible and appeared to be totally self-serving. It is apparent that sales of alcoholic beverages for off-premises consumption were not readily made to strangers, hence the refusal to sell to the agent. The agent's reappearance from the lavatory in time to observe the sale and the seizure of the bottle and purchaser upon the heels of the purchase gives rise to no other conclusion than that an illegal sale had been made. Hence, the testimony of the witnesses for the licensee that the agent had not been within the premises prior to the accosting of the purchaser and bartender moments later has no ring of truth to it. The testimony of the bartender Hayes that Lewis was wiping off the bar and that the storeroom was locked was in direct contravention to Lewis' testimony that he was only sweeping; and the agent's testimony that he entered the storeroom without it being unlocked for him leads to the inescapable conclusion that the bartender's story was partially manufactured to fit his interest.

Accordingly, after considering the entire record and the various precedents cited, I am convinced that the charge has been established by a fair preponderance of the credible evidence, and it is recommended that the licensee be found guilty of the said charge.

Licensee has a prior record within the past five years of suspension of license for fifteen days effective April 15, 1968, for an hours violation. It is further recommended that the license be suspended on the charge herein for twenty days, to which should be added five days by reason of the similar offense occurring within the past five years, making a total suspension of twenty-five days.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the licensee pursuant to Rule 6 of State Regulation No. 16.

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions filed with respect thereto, which I find either to have been satisfactorily resolved by the Hearer in his report or are lacking in merit, I concur in the findings of the Hearer and adopt his recommendations as my conclusions herein.

Accordingly, it is, on this 4th day of December 1973,

ORDERED that Plenary Retail Consumption License C-268, issued by the Municipal Board of Alcoholic Beverage Control of the City of Newark to Big Mike's (a corp. of N.J.) for premises 199 Rose Street, Newark, be and the sameis hereby suspended for twenty-five (25) days, commencing at 2:00 a.m. Thursday, January 3, 1974 and terminating at 2:00 a.m. Monday, January 28, 1974.

Robert E. Bower
Director

4. DISCIPLINARY PROCEEDINGS - SALE TO A MINOR - SALE TO AN INTOXICATED PERSON - LICENSE SUSPENDED FOR 60 DAYS.

In the Matter of Disciplinary Proceedings against Such's 1365 Roosevelt Avenue Carteret, N. J., Holder of Plenary Retail Consumption License C-8, issued by the Borough Council of the Borough of Carteret.	CONCLUSIONS and ORDER

Orlando & McGimpsey, Esqs., by Edward J. Barone, Esq., Attorneys for Licensee
Davis S. Piltzer, Esq., Appearing for Division

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charges:

"On March 30, 1973 you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly to persons under the age of eighteen (18) years, viz., Nancy Ann K___, age 17, and allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon your licensed premises; in violation of Rule 1 of State Regulation No. 20.

"On March 30, 1973, you 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 allowed, permitted and suffered the consumption of alcoholic beverages by such persons in and upon your licensed premises, in violation of Rule 1 of State Regulation No. 20."

In behalf of the Division, ABC agent D testified that, accompanied by agent M, he entered the licensed premises on the evening of March 30, 1973, and positioned himself at the far end of the bar. Three males and one female were tending bar.

The agent observed a male seated next to him, identified as Paul Maupin. It was his opinion that Maupin was apparently intoxicated. Maupin faced agent D "with glassy bloodshot eyes and slurry speech" and asked him what his problem was.

There was a filled whiskey shot-glass and a glass of beer on the bar in front of Maupin. After consuming the contents of the shot-glass and the beer, Maupin, in walking toward the front of the premises, staggered and brushed against patrons. Upon returning to his seat, Maupin repeated these actions. Maupen then ordered and was served a shot of whiskey and a glass of beer by a bartender identified as George Bialy. In payment Bialy picked up money lying on the bar in front of Maupin. Thereafter Maupin "picked up the shot-glass, spilling most of it on the bar and himself and, not being able to control the shot, then consumed what was left in the shot-glass and drank some beer from the glass."

A short time later three elderly females entered and sought service from Bialy. Maupin turned to the women and said, "I would make you sit down, but I'm not buying you a drink." Maupin's speech was slurred. Bialy directed the women to a position towards the front of the bar. Maupin became rowdy and boisterous with one of the local police officers and later directed obscene language at the agents.

Later agent D confronted several females who appeared to be minors. He ascertained that one of them, Nancy Ann --- (who was seated three or four bar stools to the agent's left) was seventeen years of age. Prior to confrontation the agent had observed a glass in front of the minor. After Nancy consumed the contents thereof, he heard her order a sloe gin fizz from Bialy. He then observed Bialy mix a drink, place it in front of Nancy, and saw Nancy consume a portion of it. A telephone call was made to the local police station, and agent M seized the remainder of Nancy's drink.

On cross examination agent D conceded that he had never heard Maupin talk or seen him walk prior to the night of March 30.

Agent M's testimony concerning his observations of Maupin's gait and speech was corroborative of agent D's testimony. He described Maupin's walking as "staggering." Agent M observed Bialy serve Maupin a shot of whiskey and a glass of beer and take money lying on the bar in front of Maupin. After the agents made their identities known, Maupin directed obscene language at them. It was agent M's opinion that Maupin was intoxicated.

Referring to Nancy's activity, the agent observed that, after she completely consumed the beverage in a glass, he heard her ask Bialy for a sloe gin fizz. After mixing the drink, he served it to Nancy and accepted a dollar in payment therefor. After Nancy consumed a part of the drink, he seized the drink from Nancy for submission to the Division chemist. The chemical analysis, admitted into evidence, indicated the seized liquid

was an alcoholic beverage.

Despite an intensive cross examination, agent M's testimony did not vary from his direct testimony. The agents were dispatched to the licensed premises in order to investigate an allegation of service to minors.

Agent M observed Nancy leave the bar with the drink in her hand and proceed to a table, a distance of approximately twenty feet. Referring to the actual seizing of the drink, agent M testified that, while Nancy was taking her wallet out of her shoulder handbag in order to show the agents her driver's license, he took the drink from her hand.

The agent had never seen Maupin prior to the night of March 30.

Nancy testified that she was born on December 31, 1955. Therefore she was seventeen years of age on the date mentioned in the charges. On that night she visited the licensed premises accompanied by two acquaintances and sat at the bar. She ordered a sloe gin fizz of a bartender whom she identified as "George." After service and payment of a dollar for the drink, Nancy consumed the drink. The bartender did not question her nor did she sign a statement concerning her age. Nancy was served "three or four" sloe gin fizz drinks by the same bartender. Agent M took the last drink after she had consumed a part thereof.

Referring to the seizure of the drink by the agents, Nancy testified on cross examination that she left her drink on the bar and then, "as I was leaving, they had it in their hand." Upon being asked, "Who had it", Nancy replied, "The ABC man."

In defense of the second charge, Paul Maupin testified that he patronizes the licensed premises approximately three or four nights a week.

Upon entry on the night of March 30, he commenced drinking beer, later he drank whiskey and beer. While playing shuffleboard and pool, he engaged in a considerable amount of walking. He then testified as follows:

"Q Were you staggering at all?
A Not that I know I was.
Q Did you bump into anybody, knocking the people who were sitting at the bar?
A Not to my knowledge I wasn't."

He did not recall three females approach the area of the bar where he was positioned. He heard the female, identified as Nancy, scream. The male with whom he was playing shuffleboard said that a male (later identified as one of the two ABC agents involved in these proceedings) reached for her purse. He then "swore at the men."

Finally, Maupin testified that he drank two shots of whiskey that night but did not recall how much beer he consumed.

Preliminarily, I observe that, in evaluating the testimony and its legal impact, we are guided by the firmly established principle that disciplinary proceedings against liquor licensees are civil in nature and not criminal, and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App.Div. 1960).

The general rule in these cases is that the finding must be based on competent legal evidence and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

I

Relative to the first charge, I have noted that the attorney for the licensee in his summation placed great emphasis on the discrepancy of the testimony offered by one of the agents and by the minor in that the agent testified that he seized the drink which was submitted to the Division chemist for analysis while it was being held by the minor, whereas the minor testified that the drink was on the bar. Granted, this discrepancy was present in the testimony. However, the discrepancy, which I have carefully considered and analyzed, does not relate to the substance of the charge, or to any material issue, and this would not be a proper case to apply the doctrine of "falsus in uno, falsus in omnibus."

The minor's testimony that she ordered three or four sloe gin fizzes and paid for them is uncontroverted. Although not required, this testimony was empirically substantiated by the testimony of both agents who testified that they heard the minor order a sloe gin fizz. In this connection it is also noteworthy that, even if no sample of the beverage served or sold was available for chemical analysis, testimony by the purchaser or any other person that the purchaser ordered an alcoholic beverage by name (e.g., beer, whiskey, Tom Collins, etc.) and that a drink, bottle or other container, was sold or served pursuant to that order creates the permissible inference that the beverage ordered was actually served. It further warrants judicial notice of the fact that such beverage had an alcoholic content of more than one-half of one percent. by volume and hence constitutes an "alcoholic beverage" within the purview of N.J.S.A. 33:1-1(b).

In State v. Marks, 65 N.J.L. 84 (Sup.Ct. 1900), it was held that proof that a vendor, in compliance with the request of a vendee for a half-pint of whiskey, sold to him a half-pint of liquor and received payment for it as whiskey will, in the absence of proof to the contrary, justify the conclusion that the liquor sold was in fact whiskey.

In Holmes v. Cavicchia, 29 N.J. Super. 434, 436 (App. Div. 1954), wherein minors testified that they had ordered beer by the glass, the court held that there is an implication that a purchaser received that which he has ordered and paid for, citing State v. Marks, supra; Lewinsohn v. U. S., 278 F. 421, 426; 48 C.J.S. Intoxicating Liquors, sec. 371(a), p. 548 and sec. 371(c), p. 549. The cases in this Division are myriad wherein this principle has been followed.

From the evidence adduced at the hearing I find that Nancy ordered, received and consumed a sloe gin fizz, and that such drink is an alcoholic beverage within the purview of N.J.S.A. 33:1-1(b).

My examination of the facts and the applicable law generates no doubt that this charge was established by a fair preponderance of the credible evidence. I therefore recommend that the licensee be found guilty of the first charge.

II

In considering the merits of the second charge, it is apparent that the major point of inquiry is factual.

It is my view that the agents' graphic and detailed testimony clearly established the observable manifestations of apparent or actual intoxication. Their description of Maupin's speech, gait and general deportment clearly and inevitably leads to a finding of apparent or actual intoxication. Maupin admitted to drinking two shots of whiskey but did not recall the number of beers he drank. It is noteworthy that the court stated in Freud v. Davis, supra, that such witnesses do not exaggerate their estimates.

During the course of the subject hearing I have had the opportunity to hear Maupin's speech and to observe him walk. I find that his speech was not slurred, his gait was steady, and that he walked with no impediment.

A fair evaluation of the evidence clearly preponderates in favor of a finding of guilt on this charge, and I so recommend.

III

The licensee has no prior adjudicated record of suspension of license. I further recommend that the license herein be suspended on the first charge for thirty days, and on the second charge for thirty days, or a total of sixty days.

Conclusions and Order

Written exceptions to the Hearer's report with supportive argument were filed by the licensee, pursuant to Rule 6 of State Regulation No. 16.

I find that the matters contained in the exceptions have either been fully considered by the Hearer in his report or are without merit. The attorney for the licensee has requested to present oral argument, which I find to be unwarranted, and is, accordingly, denied.

Consequently, having considered the entire record herein, including the transcript of the testimony, the exhibits, the Hearer's report and the exceptions and argument filed with reference thereto, I concur in the findings and recommendations of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 10th day of December 1973,

ORDERED that Plenary Retail Consumption License C-8, issued by the Borough Council of the Borough of Carteret to Such's, for premises 1365 Roosevelt Avenue, Carteret, be and the same is hereby suspended for sixty (60) days, commencing at 2:00 a.m. Thursday, January 3, 1974 and terminating at 2:00 a.m. Monday, March 4, 1974.

Robert E. Bower
Director