Mr. Gossweiler

STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

August 3, 1961

BULLETIN 1395

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STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark 2, N. J.

August 3, 1961.

BULLETIN 1395

1. COURT DECISIONS - NORTH CENTRAL COUNTIES RETAIL LIQUOR STORES ASSOCIATION v. MUNICIPAL COUNCIL OF THE TOWNSHIP OF EDISON, DIVISION OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF NEW JERSEY AND R. H. MACY & CO. INC., T/A BAMBERGER'S NEW JERSEY - DIRECTOR REVERSED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-318-60

NORTH CENTRAL COUNTIES RETAIL LIQUOR STORES ASSOCIATION,

Appellant,

vs.

MUNICIPAL COUNCIL OF THE TOWNSHIP OF EDISON, DIVISION OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF NEW JERSEY, and R. H. MACY & CO., INC., t/a BAMBERGER'S NEW JERSEY,

Respondents.

Argued June 6, 1961 -- Decided June 30, 1961

Before Judges Conford, Freund and Kilkenny

Mr. Samuel J. Davidson argued the cause for appellant (Mr. Samuel Moskowitz, attorney).

Mr. Herbert D. Kelleher argued the cause for respondent R. H. Macy & Co., Inc., t/a Bamberger's New Jersey (Messrs. Lum, Biunno and Tompkins, attorneys).

Mr. Samuel B. Helfand, Deputy Attorney General, argued the cause for respondent Division of Alcoholic Beverage Control (Mr. David D. Furman, Attorney General, attorney).

The opinion of the court was delivered by
CONFORD, S.J.A.D.

This is an appeal from an order of the Director of the Division of Alcoholic Beverage Control (hereinafter "Director" and "Division") affirming the determination of the Municipal Council of the Township of Edison to renew the Class "C" Plenary Retail Consumption liquor license held by respondent R. H. Macy & Co., Inc., t/a Bamberger's New Jersey (hereinafter "Bamberger's"), for its department store located in the Menlo Park Shopping Center, Edison Township, New Jersey. The renewal was approved by the Council on June 27, 1960, after a public hearing necessitated by an objection filed on behalf of appellant, North Central Counties Retail Liquor Stores Association (hereinafter "plaintiff"). Thereafter plaintiff appealed to the Director, a de novo hearing was held before a Hearer, and the latter

rendered his report recommending conclusions and an order in favor of respondents. The report was approved and effectuated by order of the Director. This appeal ensued.

The gravamen of the appeal is the contention that the manner of conduct by Bamberger's of its liquor department in the store is violative of N.J.S.A. 33:1-12(1), which provides, in the case of a Plenary Retail Consumption License:

> "* * * but this license shall not be issued to permit the sale of alcoholic beverages in or upon any premises in which a grocery, delicatessen, drug store or other mercantile business (except the keeping of a hotel or restaurant, or the sale of cigars and cigarettes at retail as an accommodation to patrons, or the retail sale of nonalcoholic beverages as accessory beverages to alcoholic beverages) is carried on. * * *"

Bamberger's operates a department store in a two-story building at the intersection of Woodbridge and Parsonage Roads in the Township of Edison. In the southeast corner of the second floor of this store it maintains a bar, restaurant and packaged goods department which is run as an integrated unit under a Class "C" Plenary Retail Consumption license. The area of the bar-restaurant-packaged goods section, approximating 4,000 square feet, is defined in Bamberger's license application as the "licensed premises" and is clearly delineated on a diagram accompanying the application. The remainder of Bamberger's store is unlicensed, and no sales of liquor are made there. Correspondingly, no sales of other merchandise are made in the liquor department.

The only means of access to the liquor department for store patrons is by entrance from the street to the first floor, thence by escalator or elevator to the second floor. At the entrance to the escalator there is a posted store directory, which includes under the head "Upper Level" a designation, "Garden State Restaurant & Cocktail Lounge." The record does not indicate whether a similar directory is posted at the elevator, but this is probably a fair inference, since a directory circular published by the store shows "liquor" and "cocktail lounge" in the alphabetical list of departments and store locations. Upon leaving the escalator or elevator a patron enters general merchandising floor areas which he must traverse before reaching the licensed area. From the testimony, illustrated by a number of photographs taken on the premises, it appears that the merchandise departments immediately contiguous to the licensed area are those for sale of books and religious articles. Beyond the latter is a section where toys and games are sold. One may pass freely from these departments directly into the licensed area through an open space measuring about 30 feet obstructed only by a cashier's booth. Clearly visible from the books, toys and religious articles areas, and perhaps beyond, are two large overhead signs captioned: "Fine Wines and Liquors" and "Garden State Restaurant-Cocktail Lounge."

From the photographs in evidence it is clear, and not denied, that customers in the books and religious articles areas can look into both the packaged goods and bar sections of the licensed premises. Customers in the general merchandise areas mentioned (including minors who are shown in the photographs) have easy visibility of the bar in the licensed premises and of patrons being served there.

In recommending a denial of plaintiff's appeal, the Hearer, whose report was approved by the Director, said:

> "Since alcoholic beverages may be sold only on

> the licensed premises, it is, perhaps, a complete answer to appellant's contention to point out that the license does not permit the sale of alcoholic beverages in any other portion of the licensed building where other mercantile business is carried on."

The Hearer then referred to plaintiff's reliance upon a number of state administrative rulings by one of the early predecessors of the Director (discussed with others later herein) holding that the statute here involved (or similar local ordinances) was violated if a customer could have direct access from the portion of a building used for a general merchandise business to a licensed plenary consumption area on the same property. The test stated in these rulings was whether the "respective businesses and their locations renders them substantially separate and distinct." The rulings required, in practical effect, a solid partition between the respective areas, or a door not available to customers but only for the use of staff. The Hearer (and Director) held, however, that a different problem was presented in respect of licensed premises "on the upper floors of department stores," these having assertedly been permitted "since the earliest days of the Division," and access allowed from other areas to licensed premises "where it has been determined that the licensed premises are substantially separate and distinct." However, no specific rulings were cited by the Hearer in his opinion-report in support of his explanation, nor have any been submitted in the brief submitted to us on behalf of the Division by the Attorney General. The conclusion was that "a solid partition" here would prevent store patrons from entering the licensed premises; "no problems have arisen"; a contrary ruling in this case would cause the closing of "many licensed premises which have operated for years"; and that the action of the municipal authorities should be affirmed, the evidence supporting their conclusion "that the licensed premises were separate and distinct."

The essence of plaintiff's position is that the operation of this department store is as an integrated business unit, in which the licensed operations consititute a department thereof not to be realistically differentiated in its relationship to the rest of the store and the business conducted therein from any of the ninety-odd other departments conducted in the building. In that context, it maintains, the entirety of the building is a single "premises," and since a "mercantile business" is conducted therein, a plenary retail consumption license to permit the sale of alcoholic beverages " in or upon" the same premises is proscribed by the statute cited above.

The response by the licensee and the Attorney General is that all that is required by the statute is that the licensed premises be physically segregated from the portion of the premises where other merchandise is sold in such manner that the respective areas may reasonably be regarded as "substantially separate and distinct," so as to prevent "commingling of licensed and unlicensed activity," and that such requirement is met by the arrangements here maintained.

At the outset, we distinguish our recent decision in Essex Co., etc., Stores Ass'n v. Newark, etc., Bev. Cont., 64 N.J. Super. 314 (App. Div. 1960). That case involved a plenary retail distribution license, not a consumption license, as here. In the case of the former, separation of the licensed from the general merchandise premises is required only if a municipal ordinance so directs. N.J.S.A. 33:1-12(3a); 64 N.J. Super., at pp. 322, 323. Since Newark had no such ordinance, the present problem was not at all implicated in the Essex Co., etc., Stores Ass'n case, and nothing we passed on there bears upon a solution to the problem now before us.

There is no dispute between the parties as to what the uniform practical construction of the statute by the Division and its

predecessor department has been so far as evidenced by written rulings. This is that there may be no direct access by customers between the licensed premises and those in which other kinds of merchandise is sold.

Illustrative is the exposition by the then Commissioner Burnett in Re Johnson, Bulletin 212, Item 10 (1937). There a question arose concerning the issuance of a consumption license for premises in a building which adjoined another building where the licensee conducted a grocery store. There was a conflict of claims as to whether the two buildings were totally separate and apart or whether they were actually connected by a door. In the course of his advisory opinion, the Commissioner gave the Department's official interpretation of R.S. 33:1-12(1) and also of a like ordinance which the municipality had adopted:

> "There is nothing in the law which would prevent a person holding a plenary retail consumption license from conducting a grocery business on other premises.
>
> "What the statute and your ordinance do require is that he not conduct the tavern and grocery on the same premises. In other words, the tavern and the grocery premises must be separate and distinct.
>
> "They are separate and distinct if there is no direct public access between them.
>
> "Thus, where two premises are side by side connected by a door at the rear of the dividing wall, not usable by customers of either place, the premises are substantially separate and distinct. See Re Rockefeller, Bulletin 200, Item 1, and Retail Liquor Distributors v. Atlantic City, Bulletin 88, Item 5.
>
> "But, on the other hand, if instead of a mere service door connecting the tavern and the grocery, there is an archway or door through which the public may freely pass from one premises to the other, then the premises would not be substantially distinct. See Shapiro v. Trenton, Bulletin 34, Item 8; Re Millville, Bulletin 35, Item 15; Reed v. Independence, Bulletin 57, Item 10."

In the course of the opinion, Commissioner Burnett also indicated that if the door existed and provided direct public access between the buildings, a special condition requiring the licensee to sell the grocery business would not cure the matter. He stated, "Merely separation of the business is not enough; it is separation of the premises the statute requires." He also stated that the matter could be corrected, however, if the municipality imposed a special condition on the licensee requiring that the connecting doorway be closed up.

Other decisions of the Department consistently applying the stated interpretation of the statute, in addition to those cited in the Re Johnson matter, are Hudson Bergen, etc., v. Gold's Drug Stores, et al., Bull. 253, Item 3 (1938); Re Hershenstein, Bull. 330, Item 7 (1939); Zager v. Passaic, Bull. 385, Item 9 (1940); Re D'Addetta, Bull. 561, Item 10 (1943); Re Fredricks, Bull. 565, Item 4 (1943). The last two rulings cited were by Commissioner (later Governor) Driscoll. In the Fredricks matter he said: "Because of the provisions of R.S. 33:1-12(1), the licensed premises and the grocery store cannot be operated as a single place of business with free access to the public from one to the other." Cf. Peer v. Excise Commissioners, 70 N.J.L. 496 (Sup. Ct. 1904).

Long-continued practical construction of a statute by the administrative authorities charged with its enforcement, particularly where contemporaneous with the adoption and early years of operation under the act, is persuasive evidence of its meaning if doubtful on its face. Presbyterian Church, etc., v. Div. of Alcoholic Beverage Control, 53 N.J. Super. 271 (App. Div. 1958), certif. den. 29 N.J. 137 (1959).

Having in mind the stringent public policy of this State, evidenced both in many other legislative provisions in Title 33 and in judicial utterances, toward the tight control of the liquor business so as to prevent its impairing the general health, welfare and morality, we discern sound justification for the construction of the statute reflected by the foregoing rulings. "As it [commerce in liquor] is a business attended with danger to the community it may * * * be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils." Crowley v. Christensen, 137 U.S. 86, 91 (1890). The public policy of this State favors temperance, and the statutes governing sale of intoxicating liquor should be construed to effectuate this end. Canada Dry Ginger Ale, Inc. v. F. & A. Distrib. Co., 28 N.J. 444, 455 (1958). As the act itself recites: "This chapter is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed." R.S. 33:1-73.

As we read the provisions of N.J.S.A. 33:1-12(1) here involved, we discern somewhat more in the legislative intent than, as the Attorney General suggests, the prevention of "the commingling of licensed and unlicensed activity," although that objective is certainly fundamental. Clearly, of course, liquor is not to be dispensed for consumption in a grocery store, nor groceries sold over a bar. But were these the only legislative objectives, less sweeping language would have been apt for the purpose. Moreover, other provisions of the act expressly or impliedly already carry out those limited purposes. The section we are dealing with has in contemplation any "mercantile business," etc. (with certain stated exceptions) which is "carried on" "in" certain "premises," and it prohibits the licensing of the sale of alcoholic beverages "in or upon" any such premises. Thus, whatever else the section intends to cover, it clearly envisages as one distinct condition of legislative concern the situation where there is, at one time, both a specific locale or place where alcoholic beverages are sold (by plenary retail consumption license) and also a specific locale or place where general merchandise is sold, with the licensed place or locale constituting a part of ("in or upon") the premises in which the general merchandise business is carried on. That arrangement is flatly prohibited by the statute.

It is self-evident, for example, that the statute could not be satisfied by merely drawing a chalk line around an area licensed for a bar and allowing general merchandise to be sold on the same open floor space outside the chalk line--a contention which Bamberger's advances on the definitional argument that the segregated physical floor space taken up by the licensed activity constitutes automatically different "premises" from the floor space not within the licensed chalk line merely because "premises" is defined in N.J.S.A. 33:1-1(s) as "the physical place at which a licensee is or may be licensed to conduct and carry on the * * * sale of alcoholic beverages." Obviously, the term "premises" as used in N.J.S.A. 33:1-12(1) is potentially broader than the licensed "premises" as defined in the definitional section of the act.

We suppose there would be little argument that the underlying objective--or at least one important objective--of the proviso now under consideration is to prevent the generality of the public which comes to a store to buy groceries or general merchandise from being exposed by proximity to the temptation of imbibing alcoholic beverages at a bar (or, where a local ordinance so provides, of buying

packaged liquor). Another obvious policy consideration is that the general public, shopping, as here, for example, at book or toy counters, might include children who should not be exposed to the presumptively harmful effect of witnessing the drinking of liquor at a bar by patrons in perhaps various stages of sobriety. It is not beyond the realm of possible legislative policy, moreover, that the substantial portion of our population which looks askance at any degree or kind of drinking as a social or moral evil should be free to shop at a store for necessaries or conveniences (mayhap religious articles, as here) without being exposed to what may to them be the offensive sight or sound of drinkers at a public bar. We are, of course, not necessarily expressing the social or moral predilections of the members of the court; rather, we are recognizing the full potential range of public policy which legislative prophylaxis may legitimately serve in this sensitive area of police power control.

There is no doubt in our minds that the arrangements under which Bamberger's operates its liquor department and bar at the premises in question are offensive to the public policy underlying the statute. We need not repeat the facts already stated. Bamberger's runs this liquor department and bar in a manner completely indistinguishable from any other department. The fact that it is situated in a corner of the second floor does not distinguish it from, let us say, a music department which might be located in another corner, partly partitioned off for acoustical purposes, but open for unimpeded access to and from other portions of the floor. The liquor department and "cocktail lounge" is advertised both on the main floor and by large signs on the second floor. Clearly, Bamberger's makes a concerted effort to influence those of its patrons who come to the store to buy general merchandise to also patronize its liquor department and bar. As the business in its entirety is here conducted, there is no fair escape from the conclusion that the whole physical enterprise and structure is a single "premises" and that both the letter and spirit of the act are being contravened.

Plaintiff does not argue, nor do the prior administrative rulings hold, that licensed plenary retail consumption premises may not lawfully exist in a building in which other merchandise is sold, even by the same owner of both businesses. The position is simply that the degree of physical separation of the respective different businesses, licensed and unlicensed, must be such that a patron of one cannot pass directly into the other. This seems to us, as it did to former Commissioners Burnett and Driscoll, an altogether reasonable minimum requirement for attaining the goal envisaged by the statute.

The Attorney General argues that because the licensed area here is but a small part of the department store as a whole, the test of "separation" should be applied more liberally in favor of the licensee than if the respective areas were more nearly equal in size. We fail to see why. There remains the direct impingement upon the policy of the statute at the point where the licensed and unlicensed areas converge, and the more people who come, in the first instance, to shop only in the latter, the greater the potential baneful influence of the former which the statute seeks to prevent. Nor are we impressed by the argument that many licenses for bars now exist in connection with restaurants which sell various odds and ends to their customers and therefore may not have the benefit of the statutory exception in favor of restaurants. The judicial function is to decide one case at a time. The sale of incidentals of certain kinds (perhaps candies, cookies, etc.) by restaurants may possibly be held to be a customary incident of the restaurant business and therefore not to involve a loss of the restaurant exemption, regardless of our holding in the instant matter. But in any case, modifications of clear legislative policy in hardship situations are for treatment by the Legislature, not by the administrative agencies or the courts through interpretation amounting to amendment of the statute and subversion of its apparent policy.

The practical question remains as to whether and how the instant licensee can conduct its business without violation of the statute. Plaintiff concedes, and we agree, that the escalator properly separates the two floors into different premises. It argues, however, that the licensed area would have to be the sole business conducted on the second floor. We do not think the statute requires that extreme. The mere closing up of the open area on the second floor by a partition will not suffice, if a door remains for passage from unlicensed to licensed areas by the general public, as the administrative rulings clearly indicate. But if there were interposed between the two respective areas, otherwise physically walled off from each other, a neutral area or space from which a customer who had come there from an exit door in one of the areas, licensed or unlicensed, could elect whether to go into the other or to pass to the lower floor via the escalator, the intent and purpose of the statute as reflected by the administrative rulings would be satisfied. The same holds true as to the elevator. In other words, whatever the physical arrangements, there must intervene between the licensed and unlicensed areas on the second floor a neutral space or area, from which a customer can leave the floor, if he chooses, without having to enter either of the business areas mentioned.

The order of the Division is reversed, but without costs, and without prejudice to further proceedings before the Division or the Municipal Council which may eventuate in arrangements for the licensee to conduct its operations conformably with the views expressed herein.

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2. COURT DECISIONS - CALDWELL'S LIQUOR STORE v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL - DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-76-60

In the Matter of Disciplinary Proceedings against

CALDWELL'S LIQUOR STORE, t/a CALDWELL'S LIQUOR STORES, 3301-3303 ATLANTIC AVENUE, ATLANTIC CITY, NEW JERSEY, Holder of Plenary Retail Distribution License D-3, issued by the Board of Commissioners of the City of Atlantic City.

CALDWELL'S LIQUOR STORE, t/a CALDWELL'S LIQUOR STORES,

Appellant,

vs.

DIVISION OF ALCOHOLIC BEVERAGE CONTROL, et ano.,

Respondents.

- -

Argued June 19, 1961. Decided June 26, 1961

Before Judges Price, Gaulkin and Sullivan.

Mr. Harold H. Fisher argued the cause for appellant (Messrs. Shanley & Fisher, attorneys).

Mr. Samuel B. Helfand, Deputy Attorney General, argued the cause for respondent (Mr. David D. Furman, Attorney General, attorney; Mr. David S. Piltzer, on the brief).

PER CURIAM.

Our examination of the record presented on this appeal convinces us that the "Conclusions and Order" of the Director, dated October 13, 1960, are supported by substantial evidence and should be affirmed. Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501, 503-504 (App. Div. 1956). So ordered.

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3. COURT DECISIONS - MURPHY'S TAVERN INC. v. DIVISION OF ALCOHOLIC BEVERAGE CONTROL -- DIRECTOR AFFIRMED.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-244-60

MURPHY'S TAVERN, INC.,

Appellant,

vs.

WILLIAM HOWE DAVIS, Director
of the Division of Alcoholic
Beverage Control,

Respondent.

Argued June 6, 1961 -- Decided June 26, 1961.

Before Judges Conford, Freund and Kilkenny

Mr. George R. Sommer argued the cause for appellant (Mr. Morris Barr, of counsel).

Mr. Samuel B. Helfand, Deputy Attorney General, argued the cause for respondent (Mr. David D. Furman, Attorney General, attorney; Mr. Helfand, of counsel).

The opinion of the court was delivered by

FREUND, J.A.D.

Murphy's Tavern, Inc. appeals from an order of the Director of the Division of Alcoholic Beverage Control suspending its retail consumption license for a period of 60 days on the grounds of violation of Rule 5 of State Regulation No. 20, providing that:

> "No licensee shall allow, permit or suffer in or upon the licensed premises any lewdness, immoral activity, or foul, filthy or obscene language or conduct, or any brawl, act of violence, disturbance or unnecessary noise; nor shall any licensee allow, permit or suffer the licensed place of business to be conducted in such manner as to become a nuisance."

Appellant, whose establishment is located on Mulberry Street in Newark, was charged in two separate proceedings. The first charge alleged that on October 24, 30 and November 8, 1959, the defendant permitted its licensed premises to become a nuisance in that it "allowed, permitted and suffered thereon persons, males impersonating females, who appeared to be homosexuals," and "allowed, permitted and suffered such persons to frequent and congregate in and upon" the licensed premises, and otherwise conducted the licensed place of business "in a manner offensive to common decency and public morals." The second set of charges was directed towards activities on May 6, 13 and 14, 1960, and asserted that defendant had permitted male persons on the licensed premises "to engage and participate in foul, filthy and obscene conduct and to solicit and make overtures for and arrangements with other male persons * * * for acts of perverted sexual relations;" the substance of the initial charge was also repeated in order to cover the dates in May, 1960.

The hearing officer concluded that the Division had established appellant's guilt as to all charges by a fair preponderance of the evidence. The Director concurred in and adopted the findings and conclusions of the hearer. This appeal is predicated solely on the contention that the proofs adduced in the two proceedings do not justify the inference of violation of the Regulation as set forth in the charges. It is claimed that all that was demonstrated by the testimony was that persons with effeminate characteristics may have frequented the premises, and that this in itself does not constitute grounds for license suspension.

The initial hearing covered charges directed to activity upon the licensed premises in October and November of 1959. Investigator R., an agent for the New Jersey Division of Alcoholic Beverage Control, testified that he visited Murphy's Tavern on all three of the dates mentioned in the charge. He described the premises as consisting of one small barroom, about 20 x 25 feet in size. On his October 24 visit, he noted about 40 patrons in the place, seated at the bar and milling around. Approximately 20 of the customers attracted his attention because of "their feminine actions and mannerisms, the manner in which they conducted themselves." More specifically, "* * * they would speak to the male seated with them, they would roll their eyes at each other and simulate a kiss now and then, like you would peck a kiss at a person, and occasionally they would put their arm around each other and feel different parts of the body * * *." He added, "We could definitely smell the odor or perfume on the premises."

On his second visit, on October 30, agent R. again singled out about 15 to 20 of the 40 to 45 males on the premises as displaying marked feminine characteristics. On one occasion he observed one male to say to another, " 'I thought you were going home with me tonight,' and they would grab each other's private parts and simulate kissing each other." Agent R. also witnessed an argument between two male patrons in which obscenities were freely exchanged; he testified that the bartender did not move to halt the dispute. On November 8, the same agent again visited the premises, which were filled to capacity with about 75 to 80 males and one couple. He observed about 20 to 25 of the males "grabbing each other as they would pass going to the men's room * * * they would grab each other's buttocks or each other's private parts * * * they acted as though they were like a man and wife would act. They helped each other drinking and put their arms around one another, and we observed two directly opposite us that had eyebrow pencil on." Later that evening, agent R. had a conversation with bartender Joseph Yeachshino; the investigator, still unrevealed, said, "The kids must have really been dressed up for Halloween," and Yeachshino replied, "if you were new in town and came in here for the first time that night, you would have had a ball with all the [obscenity] in here."

At about 1:50 a.m., as bartender Carmine Lubertazzi began to extinguish the lights in the tavern and as "three of these apparent homosexuals passed him [on their way out] they grabbed him by his private parts, at which time he pulled away * * * laughing and joking with them * * * on one occasion one of the apparent homosexuals kissed Mr. Lubertazzi on the cheek as he left." Several minutes later, agent R. and agent S., who was with him, identified themselves to the bartenders. Lubertazzi was asked whether it was normal for patrons to grab him by his private parts as they left the premises, and he allegedly replied, "That's nothing * * * you could see that in any straight bar too." Agent S. asked Lubertazzi if he would kiss him, the agent, also, and the bartender replied, "Sure, if you were my cousin."

Direct examination of agent S. was waived upon the stipulation that he had accompanied agent R. on the three dates mentioned and that his testimony would be entirely corroborative. On cross-examination, he was asked what made him think any of the patrons were

homosexuals; he replied, "When you see a man put his arm around another man and rest his head on his shoulder, and another man while he's doing that is rotating his hand on a man's buttocks or grabbing each other by the private parts or kissing each other on the lips or cheeks, is to me apparent homosexuals."

The testimony on behalf of appellant at this initial hearing included that of William R. Peters, a patron of the tavern, who testified that while some of the customers "have fairly high voices," none of them ever annoyed or bothered him and he did not perceive any homosexuals; Lubertazzi, who admitted that persons with feminine characteristics frequented the tavern, said that there were no patrons whom he considered homosexuals, denied that a patron had kissed him on the cheek upon leaving ("* * * I remember this fellow leaning over and saying to me good night, I had a nice time * * * it sort of probably could have looked like a kiss on the cheek, but it wasn't"), and disputed the substance of the alleged conversations with the agents; part-time bartender Theodore Hirsch, who testified that he worked on November 7 and 8, that there were no homosexuals present, and that he did not see anything obscene or improper but that if he saw one male put his hand around another male at the bar he "would tell them to cut it out;" Yeachshino, who conceded that some of the patrons had feminine characteristics but denied that any of them, to his knowledge, were homosexuals, explained possible touching of each other by the patrons on November 8 in terms of the crowded conditions in the tavern ("there was no other way you could have gotten around unless you touched somebody one way or another"), disputed the substance of the "Halloween" verbal exchange with agent R., and maintained that he did not know what the expression, "fag or fairy," meant; Jack Trachtenberg, one of the owners and the manager of the tavern, who stated that there were customers with effeminate characteristics who usually congregated by themselves but that they never bothered other patrons, that the Newark police had the establishment under surveillance for several months in the summer of 1959 but failed to point out to him any people they considered undesirable, and that he did not take any steps to determine whether the effeminate patrons were in fact homosexuals because "the only way * * * is to be approached by one or to actually see them do something," which did not occur in his experience and observation; and Al Thoma, an athletic director at the Newark Athletic Club, who testified that, in his opinion, it is not possible to tell from a person's mannerisms whether he is a homosexual.

At the second hearing, relating to charges focused on May 6, 13 and 14, 1960, three of the respondent's investigators and an administrative inspector testified as to their observations, which were quite similar to those of agents R. and S. on the prior occasions.

Agent D. noted that after he had sat down at the bar on May 6, a male patron named Jimmy (later identified as James Geddings, Jr.) brushed by him, said, "Excuse me," introduced himself and started a conversation. According to the investigator, "through the course of the conversation he was rubbing his left leg against my right leg, and from time to time he placed his hand on my leg. When I was about to leave, he grabbed me in my privates and asked if I was going to return." When agent D. did return to the premises, on May 13, he again encountered Geddings, who once more rubbed the agent's leg and grabbed his privates while attempting to convince him to engage in a sex orgy. The agent was at that time introduced to another male patron named Fred, who openly admired his physique, and, when rebuffed once on a "proposition" to the agent, said, "That is too bad because I could do a lot with that body of yours." Agent D. testified that he mentioned to one of the bartenders, Bruce Adams, that he and Geddings were going to have a sex orgy and asked if Bruce would like to come along; Adams purportedly answered, "No, only with you," and rolled his eyes. Agent D. left

the tavern at midnight with Geddings, and they were met outside by the other agents, who identified themselves and brought Geddings into the back room of the tavern for questioning.

The testimony of agent S. was largely repetitive of that of agent D. He observed many of the male patrons calling each other such names as "Honey," "Doll," "Mary," and "Mother." At one point, as he moved down a crowded aisle to the men's room, agent S. accidently brushed against one of the male patrons, who looked up at him and said, "Oo, no wonder I always sit here. I get to feel all these warm bodies." He also overheard a conversation in which one male said to the other, "Well, I don't go out with him any more. We are incompatible * * * It is better this way. Besides, Artie is so much younger." Agent S. also observed, on May 13, "two males standing very close to each other, facing each other, place their arms about each other in embrace, and moving the lower parts of their bodies in circular motion in time to the music on the juke box."

Agent N. testified that he observed agent D. with Geddings, and he confirmed Geddings' physical advances. He recalled that a patron seated next to him had mentioned, nodding in the direction of agent D., "I wish I could get an introduction to him. He has such a body. There should be a law against that." Administrative inspector D. confirmed the general observations of the other agents.

Appellant produced Jack Schultz, manager of the tavern on the nights in question, Lubertazzi, and Geddings. Schultz and Lubertazzi merely denied that homosexuals congregated in the tavern, to their knowledge, and insisted that they could not evict a patron from the premises simply because of the way he dressed or the manner in which he spoke. Geddings recalled sitting and talking with agent D. but denied that the subject of homosexual relations ever came up or that he had touched the agent's private parts. He emphatically proclaimed that he was not a homosexual. He admitted that he and agent D. had left the tavern about the same time on the evening of May 13, but he asserted that they were not together and that he was just going on to another bar for a drink.

Our review of the proceedings before the Division is to determine whether there is substantial competent primary evidence to support the inferences of violation drawn by the administrative tribunal. In re Larsen, 17 N.J. Super. 564, 573 (App. Div. 1952); Benedetti v. Bd. of Com'rs. of Trenton, 35 N.J. Super. 30, 34 (App. Div. 1955); Hornauer v. Division of Alcoholic Beverage Control, 40 N.J. Super. 501, 504 (App. Div. 1956). Therefore, to the extent that appellant asks us to reject the testimony of the respondent's agents in the light of the absolute denials of its own witnesses, we must, having found the agents' testimony reasonably credible, reject its contention. As stated in Freud v. Davis, 64 N.J. Super. 242, 246-47 (App. Div. 1960),

> "The choice of accepting or rejecting the testimony of witnesses rests with the administrative agency, and where such choice is reasonably made, it is conclusive on appeal. We canvass the record, not to balance the persuasiveness of the evidence on one side as against the other, but in order to determine whether a reasonable mind might accept the evidence as adequate to support the conclusion and, if so, to sustain it."

It is further urged that there was no direct proof of the homosexual nature of those patronizing appellant's premises and, alternatively, that even if there was sufficient proof, the mere presence of persons with abnormal physical or emotional tendencies

does not, without more, require their exclusion from the premises.

In the first place, the testimony outlined above undeniably demonstrates that an inordinate number of the patrons habitually congregating at the tavern displayed the dress, mannerisms, speech and gestures commonly associated with homosexuals. We have previously held that such concentrated mingling of persons manifesting these characteristics is sufficient foundation for an inference as to their actual condition and tendencies, and warrants punishment of any licensee who acquiesces in their assemblage upon his premises, Paddock Bar, Inc. v. Alcoholic Beverage Control Division, 46 N.J. Super. 405 (App. Div. 1957). Such a result is justified by the Division's policy, supported in law and in its own long-term practice, of thwarting reasonably apprehended sexual misconduct upon licensed premises in its embryonic stages. Cf. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951).

Secondly, aside from the question of actual homosexuality, the proofs herein are, considering our reviewing function, highly persuasive as to the overt acts of lewdness practiced upon the premises. The testimony of the agents with respect to the physical touching of private parts, the simulated kissing, and the suggestiveness of many of the conversations cannot be overlooked in this regard. And the recital of agent D. with respect to his encounter with Geddings, though denied by the latter, could reasonably be believed by the hearing officer and the Director. Agent D.'s direct testimony that he was "propositioned," along with the reports of other conversations overheard by the investigators, provides ample support for the finding of guilt on the charge of soliciting.

It should not be thought that the court is callous to the problem of the homosexual, medically or socially. The public interest in tight control over the liquor business, In re Olympic, Inc., 49 N.J. Super. 299, 306 (App. Div.), certif. denied 27 N.J. 279 (1958), involves, however, neither the curative approach of the physician nor the analytical view of the sociologist. The primary concern in this regard is maintenance of accepted standards of public decency and morality, and when these standards are, as here, impinged upon, proper sanctions are not only justified but are demanded.

Affirmed.

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4. DISCIPLINARY PROCEEDINGS - SALES TO MINORS - PRIOR RECORD - LICENSE SUSPENDED FOR 25 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against

Club 75 Corporation
75 Miller Street
Highlands, N. J.

Holder of Plenary Retail Consumption License C-21, issued by the Borough Council of the Borough of Highlands.

CONCLUSIONS AND ORDER

Arnone and Zager, Esqs., by John P. Arnone, Esq., Attorneys for Defendant-licensee.
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

Defendant has pleaded non vult to a charge alleging that it permitted the sale of alcoholic beverages to four minors and permitted the consumption of alcoholic beverages by said minors in its licensed premises, in violation of Rule 1 of State Regulation No. 20.

On April 8, 1961, two ABC agents entered defendant's premises at about 8:30 p.m. Upon entering they observed a female, who apparently was a minor, seated at the bar and consuming a glass of beer. At about 9:15 p.m. two females and a male, all of whom were apparently minors, entered and sat at the bar. Joan P. McGuiness (a barmaid) served a drink of Seagram's 7 Crown whiskey and Seven-up to each of these patrons. After summoning a local police officer, the ABC agents identified themselves to each of the four patrons heretofore mentioned and seized their drinks. Subsequent investigation disclosed that the patron who was seated at the bar when the agents entered was Mary --- (age 18) and that the three patrons who afterward entered were Patricia --- (age 19), Susan --- (age 19) and Anthony --- (age 19). The barmaid told the agents that she had been employed on the premises for about one week; that she had sold and served the drinks to each of the four minors, and that Patricia, Susan and Anthony had verbally represented to her that they were of full age, but had made no written representation as to their respective ages.

Defendant has a prior record. Effective January 5, 1961, its license was suspended by the local issuing authority for ten days for permitting its premises to remain open during prohibited hours. There is nothing contained in the letter submitted to me by defendant's attorney which would warrant me in imposing less than the usual suspension. The minimum penalty for sale to an 18-year-old minor is fifteen days but, in view of the number of minors involved, I shall suspended defendant's license for twenty days (Re Zebro, Bulletin 1336, Item 1), to which will be added five days because of the dissimilar violation within the past five years (Re Hilltop Tavern, Inc., Bulletin 1386, Item 8). Five days will be remitted for the plea herein, leaving a net suspension of twenty days.

Accordingly, it is, on this 8th day of May 1961,

ORDERED that plenary retail consumption license C-21, issued by the Borough Council of the Borough of Highlands to Club 75 Corporation,

for premises 75 Miller Street, Highlands, be and the same is hereby suspended for twenty (20) days, commencing at 3:00 a.m. Tuesday, May 16, 1961, and terminating at 3:00 a.m. Monday, June 5, 1961.

WILLIAM HOWE DAVIS
DIRECTOR.

5. DISCIPLINARY PROCEEDINGS - SALE ON ELECTION DAY - LICENSE SUSPENDED FOR 15 DAYS, LESS 5 FOR PLEA.

In the Matter of Disciplinary Proceedings against	)	
Michael Lazar t/a Mike Lazar's Tavern 357-359 Bramhall Avenue Jersey City 4, New Jersey,	)	CONCLUSIONS AND
Holder of Plenary Retail Consumption License C-188, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City.	)	ORDER

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Defendant-licensee, Pro se
Edward F. Ambrose, Esq., Appearing for Division of Alcoholic Beverage Control

BY THE DIRECTOR:

Defendant pleaded guilty to the following charge:

"On Tuesday, April 18, 1961, Primary Election Day, while the polls were open for voting at such election, you sold and offered for sale at retail and delivered alcoholic beverages to consumers and allowed, permitted and suffered the consumption of alcoholic beverages in and upon your licensed premises; in violation of Rule 2 of State Regulation No. 20."

Defendant has no prior adjudicated record. I shall suspend his license for fifteen days. Re Patron & Wetzel, Bulletin 1024, Item 7. Five days will be remitted for the plea entered herein, leaving a net suspension of ten days.

Accordingly, it is, on this 9th day of May 1961,

ORDERED that plenary retail consumption license C-188, issued by the Municipal Board of Alcoholic Beverage Control of the City of Jersey City to Michael Lazar, t/a Mike Lazar's Tavern, for premises 357-359 Bramhall Avenue, Jersey City, be and the same is hereby suspended for ten (10) days, commencing at 2 a.m. Monday, May 15, 1961, and terminating at 2 a.m. Thursday, May 25, 1961.

WILLIAM HOWE DAVIS
DIRECTOR

6. DISCIPLINARY PROCEEDINGS - DATES FIXED FOR SUSPENSION PREVIOUSLY IMPOSED UPON RESUMPTION OF BUSINESS.

In the Matter of Disciplinary Proceedings against

Helen Mullray Friedel
t/a Princeton Hotel
21st St. & Dune Drive
Avalon, N. J.,

Holder of Plenary Retail Consumption License C-4, issued by the Board of Commissioners of the Borough of Avalon.

ORDER

Morton I. Greenberg, Esq., Attorney for Defendant-licensee
William F. Wood, Esq., Appearing for Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

By order dated October 11, 1960, I suspended defendant's license for twenty days. Because it appeared that the business was not then being conducted, the order provided that the effective dates for said suspension would be fixed by subsequent order after the licensed premises shall have been reopened for the 1961 season. Bulletin 1363, Item 5.

It now appearing to my satisfaction that defendant's licensed premises have reopened for the 1961 season,

It is, on this 29th day of May 1961,

ORDERED that the twenty-day-suspension heretofore imposed shall commence at 2 a.m. Tuesday, June 6, 1961, and terminate at 2 a.m. Monday, June 26, 1961.

WILLIAM HOWE DAVIS
Director

7. STATE LICENSES - NEW APPLICATION FILED

256 Water Street, Inc.
t/a Frank's Beverage Distributors
256 Water Street
Paterson, New Jersey

Application filed August 1, 1961 for person-to-person transfer of State Beverage Distributor's License SBD-93 - from Arnold Sacks and Doris Sacks, t/a Frank's Beverage Distributors.

William Howe Davis
Director

New Jersey State Library