

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

BULLETIN 2216

February 24, 1976

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STATE OF NEW JERSEY
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1. APPELLATE DECISIONS - ENGLISH LIMITED, INC. v. WOODBURY.

English Limited, Inc.,)

Appellant,)

v.)

City Council of the City)
of Woodbury,)

Respondent.)

On Appeal

CONCLUSIONS
and
ORDER

-----)
Chell and Camp, Esqs., by Eugene P. Chell, Esq., Attorneys for Appellant
Boakes, Lindsay & Smith, Esqs., by Donald A. Smith, Esq., Attorneys for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of the City Council of the City of Woodbury (hereinafter Council) which, on June 17, 1975, renewed appellant's Plenary Retail Consumption License C-2, without according to it the "broad package privilege" to which it alleges that it is entitled. Such action was the result of a hearing held by the Council and brought about by an objector to the inclusion of the said "privilege".

The appellant contends that its annual consumption license had inserted upon it language granting the "broad package privilege" and all of the prior licenses that appellant could discover (beginning with the 1961-62 license still retained by appellant) contained such permissive language.

A factual statement as a concomitant part of the Council's "Determination of Hearing" concluded with:

"There was no evidence which would indicate in 1948 that Ernest A. Stoerrle complied with the then-requirements of the alcoholic beverage commission to file for the broad package privilege and, in fact, the evidence seems to indicate that sale of package goods from a separate room or store ceased at or shortly after 1948 and was not revived until an attempt was made in 1972."

Appellant contends that the above action was erroneous or, alternatively, the Council is now estopped to deny the existence of the privilege.

The facts surrounding this controversy are either not in dispute, or are uncontroverted. The subject license was once owned by Ernest A. Stoerrle who owned and operated the Woodbury Hotel. He had obtained the license shortly after repeal of prohibition and was its holder when the statute was adopted (N.J.S.A. 33:1-12.23) which limited the area of sale for off-premises alcoholic beverages to the public barroom, but specifically excepted therefrom such premises which had, on May 28, 1948, a separate place for such sales.

The privilege to sell alcoholic beverages for off-premises consumption by holders of retail consumption licenses, from other than the public barroom, was called the "Broad Package Privilege". By regulation adopted by the then-Director (Rule 1 of State Regulation No. 32), each municipal issuing authority was directed to provide for this Division on or before June 30, 1948 a certification of the premises where such "Broad Package Privilege" was applied.

Following the adoption of that regulation, the then-City Clerk of the City of Woodbury, notified each holder of a plenary retail consumption license to make a declaration of the applicability of the "Broad Package Privilege" if such applied to them. A copy of such letter-notice was placed into evidence.

Thereafter, the issuing authority in each municipality was required to notify this Division of the licenses which were using and entitled to the "Broad Package Privilege".

The records of this Division are silent respecting such privilege having been claimed by appellant's predecessor. Division records relating to the respondent City do show one licensee has had such "Broad Package Privilege" continuously since 1948.

Additionally, the records of the City of Woodbury relating to the issuance of retail consumption licenses for the years 1948 through 1965 have been destroyed in accordance with the statute permitting the destruction of "old" records; hence, they are unavailable to shed light on the possibility of such privilege having been then attached to appellant's license.

It is uncontroverted that, since 1961, the annual license has had affixed thereon, words indicating that the "Broad Package Privilege" applied to that license. It is further uncontroverted that the appellant's predecessor in 1948 did not operate a separate package goods area in his building. About the only evidence that was generated concerning the custom of the establishment extant 1948 was that a shelf with bottles on it, rested in an eating area apart from the public barroom from which occasional sales were made. The description of such area could, in no wise, be stretched to include a "package-goods area".

The Council, after conducting a plenary hearing in the matter, determined that there was no evidence to support the contention that the then-owner of the license in 1948, had developed a "broad package" business which he then attempted to protect by compliance with State Regulation No. 32. To the contrary, it was apparent to the Council, and equally apparent as a result of the evidence adduced at the de novo appeal hearing in this Division, that there never was a separate area used for the sale of off-premises alcoholic beverages. It was apparent that the favorable wording contained on the license certificate was merely the gratuitous act of the then-municipal Clerk.

The "Broad Package Privilege" is an enlargement of license benefits which the court has described as:

"A license with a broad package provision is distinct from one without such privilege and grants the holder thereof more extensive rights."
Petrangeli v. Barrett, 33 N.J. Super. 378
(App. Div. 1954).

It is a right which developed from the adoption of the Alcoholic Beverage Law in 1933 and continued, until it was terminated for all licensees except those who had, by 1948, established such ancillary businesses. To protect those who had, the statute and the regulation thereunder (State Regulation No. 32) permitted the municipal issuing authorities to make the determination as to who, among their licensees, had been using such extension, and to certify those to this Division. It was an act of the "municipal issuing authority" - - not an act or a function of the licensing clerk of such municipality.

In short, the Council has determined that it could not have accorded appellant's predecessor with such privilege as there was no basis for the then-Council having done so.

The burden of establishing that the action of the Council was erroneous and should be reversed lies with the appellant, pursuant to Rule 6 of State Regulation No. 15. I find that this has not been met by this appellant.

Hence, it is recommended that the action of the Council be affirmed and the appeal herein be dismissed.

Conclusions and Order

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

Having carefully considered the entire record herein, including the transcript of 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 11th day of December 1975,

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

LEONARD D. RONCO
DIRECTOR

2. APPELLATE DECISIONS - THE PARTNER'S, INC. v. ROCKAWAY.

The Partner's, Inc.,
t/a Deanna Jean's,

Appellant,

v.

Mayor and Council of the
Borough of Rockaway,

Respondent.

On Appeal

CONCLUSIONS
AND
ORDER

Kenihan and Cohen, Esqs., by Lawrence P. Cohen, Esq., Attorneys
for Appellant

Vogel, Chait and Wacks, Esqs., by Edward Wacks, Esq., Attorneys
for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is an appeal from the action of respondent Mayor and Council of the Borough of Rockaway (hereinafter, Council) which granted renewal of appellant's Plenary Retail Consumption License C-8, for premises 160 East Main Street, Rockaway, on June 26, 1975, but reduced the area of the licensed premises so that it included only the interior of a three-story building, rather than the several buildings and grounds belonging to appellant, which had been licensed in prior years.

Appellant's petition of appeal contends, principally, that:(a) appellant was not provided an opportunity to examine the witnesses who had testified before the Council adversely to the renewal of appellant's license; and (b) that the action of the council was arbitrary and capricious.

Respondent answers that appellant was provided full opportunity to appear before the Council and to introduce evidence prior to the adoption of the resolution limiting appellant's licensed premises. It countered appellant's contention of lack

of opportunity to present its position by averring that the subject of appellant's license, first before the Council on June 12 was deferred to its meeting on June 26, 1975, in order to afford appellant a full opportunity to respond to objections.

A de novo hearing was held in this Division pursuant to Rule 6 of State Regulation No. 15, with full opportunity afforded the parties to introduce evidence and to cross-examine witnesses. By stipulation, the application of appellant for renewal of its license with a survey of the property embraced by the application was introduced into evidence as a joint exhibit. Similarly, a photograph of the front exterior of appellant's hotel was also accepted into evidence as a joint exhibit.

Testimony was elicited by the Council of two of its members and the Borough Clerk. Their testimony was to the effect that a problem arose within the municipality concurrently with the statutory reduction of the drinking age to eighteen. Thereafter, problems with teen-age drinkers resulted in the passage of an ordinance prohibiting the consumption of alcoholic beverages in public places.

Concurrently, the appellant increased its patronage of teen-agers who could (legally, if not permissibly) consume alcoholic beverages on the front porch of appellant's hotel (the licensed premises was then inclusive of appellant's realty plot) which consumption was thus interdicted by the reduction of the licensed area to the interior of appellant's building.

Councilmen Donofrio and Matta related complaints from area neighbors to appellant's premises regarding allegedly noisy patrons when they left the premises; on parking in proscribed areas and causing traffic congestion, both for vehicles and pedestrians. They felt that the requirement that alcoholic beverages could be sold within the appellant's hotel only, would permit better control by the police, while simultaneously dissipating some of the problems.

Appellant's sole stock holder, Paul J. Fiorentino, testified that his establishment, consisting of a three-story hotel on a main street of Rockaway does a tavern business perhaps four times greater than any other licensed premises in that municipality. He has a basement bar which accommodates a hundred people, and is serviced by two bartenders; and a main floor bar which accommodates a maximum of one hundred and fifty persons and is also serviced by two bartenders. The number of patrons has exceeded two hundred only once; and it is usually considerably less than that.

He forbids any drinking by any of his patrons on the front porch of his hotel and restricts any drinking to their two bars. He has discontinued selling alcoholic beverages for off-premises consumption, so that his premises could not be the indirect cause of litter.

In order to reduce the parking problem in the entire area, he had the rear portion of his property, which once contained a large swimming pool, converted into a parking area for forty cars.

Fiorentino addresses his complaint of the Council's action to his desire to have the porch of his hotel and a grassy area in the front of the dwelling house alongside the hotel in which he resides, and the area to its rear, all included as part of the licensed premises. He admits that none of these areas are presently used for the sale of alcoholic beverages; but he proposes to have tables on the porch at which service could be made, and the grassy areas to be used at times for picnics and clambakes. Neither of these proposals have reached any fruition, and are merely expressions of intent by Fiorentino.

The sole and single issue presented herein is: has the issuing authority, in reducing the area of the licensed premises in this instant matter, abused its discretion in such a manner as to require reversal of its action.

The burden of establishing that the action of the municipal issuing authority is erroneous and should be reversed rests with the appellant. Rule 6 of State Regulation No. 15.

"The conclusion is inescapable that if the legislative purpose is to be effectuated the Director and the courts must place much reliance upon local action. Once the municipal board has decided to grant or withhold approval of a premises-enlargement application of the type involved here, its exercise of discretion ought to be accepted on review in the absence of a clear abuse or unreasonable or arbitrary exercise of its discretion." Lyons Farms Tavern v. Mun. Bd. Alc. Bev. Newark, 55 N.J. 292, 303 (1970).

Moreover, the rule is well settled that the Director will not substitute his judgment for that of the local board or reverse the ruling if reasonable support for it can be found on the record. Margate Civic Ass'n. v. Margate, 132 N.J. Super 58,63 (App. Div. 1975).

It is apparent that the appellant, in order to be successful on appeal, must show that the action of the municipal issuing authority was arbitrary, discriminatory or unreasonable. Appellant has indicated through the testimony of the sole owner of its corporate stock, Paul J. Fiorentino, that it is prejudiced by the reduction in size of the licensed premises because it (a) may not henceforth use the front porch for the service of alcoholic beverages; and (b) may not use the grassy portion of the property in the front and rear of Fiorentino's residence adjacent to the motel.

However, no plans, sketches or projection for such use was ever shared with the Council or developed by Fiorentino. Those plans remain but imaginative proposals resting in his

own mind. The total lands formerly embraced by the license were not used for the dispensing of alcoholic beverages and were apparently, included within the frame of the license merely as identity.

The appellant's contention that, by accepting the reduction in size of the licensed premises it closes the door upon the future use of the exterior of the licensed premises is not persuasive. As the court said in Essex County Retail Liquor Stores Ass'n. v. Newark, 64 N.J. Super. 314, 322 (App. Div. 1960).

"Extension and enlargement of premises in the circumstances under one single license has been consistently, upheld by the Division and the Courts for many years. For example, in Re Dodd, Bulletin 241, Item 8, it was ruled that a single license could cover two social halls on the opposite side of the highway--if 'so arranged and operated that they could be said to constitute a single place of business within the meaning of the statute.' "

Cf. Margate Civic Association v. Margate, supra, which affirmed the Director's Conclusion as set forth in Bulletin 2128, Item 3.

I, therefore, find that the Council has both the authority and discretion to reduce appellant's licensed premises in size in the public interest, and in doing so, has endeavored to reduce the legal prospect of consumption of alcoholic beverages outside of the hotel building itself. There was no evidence that the Council was improperly motivated. By Fiorentino's own admission, his clientele is of the younger group which he finds needs constant policing at his entranceways. To be sure that there will be no exposure of any drinking on the outside of appellant's hotel building, the Council has restricted the area of sale and consumption of alcoholic beverages to the interior of the premises. In doing so, I find that appellant has not been prejudiced whatsoever.

Fiorentino candidly admitted, that he has never permitted anyone to consume alcoholic beverages out of the hotel building. Therefore, by the reduction of the scope of the license the licensed business should not be affected. Hence, the appellant cannot conclude that the action of the Council has had a harmful result upon his present business.

I, therefore, conclude that the appellant has failed to establish that the action of the Council was erroneous and should be reversed, as required by Rule 6 of State Regulation No. 15.

Accordingly, it is recommended that the action of the Council be affirmed, and the appeal herein be dismissed.

Conclusions and Order

No Exceptions to the Hearer's report were filed 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 2nd day of December 1975,

ORDERED that the action of the respondent Mayor and Council of the Borough of Rockaway be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Leonard D. Ronco
Director

3. DISCIPLINARY PROCEEDINGS - HOURS VIOLATION - LICENSE SUSPENDED FOR 15 DAYS.

In the Matter of Disciplinary Proceedings against)

Lawrence M. Black)
t/a Black's)
1554 Maple Avenue)
Hillside, N.J.,)

CONCLUSIONS

Holder of Plenary Retail Distribution License D-2, issued by the Municipal Board of Alcoholic Beverage Control of the Township of Hillside.)

and ORDER

-----)
Samuel Raffaello, Esq., and Robert W. Schwankert, 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, August 25, 1974, at about 12:40 pm., he sold an alcoholic beverage, viz., a one pint bottle of Smirnoff Vodka, at retail, in its original container, for consumption off the licensed premises, and permitted the removal of said alcoholic beverage, in its original container, from the licensed premises, in violation of Rule 1 of State Regulation No. 38.

At the hearing herein, testimony was elicited of ABC agent M, who stated that, on the date in question, he, along with ABC agents G and S, arrived at the licensed premises at approximately 12:30 p.m. Agent M entered the premises, while agents G and S remained outside, at a post of observation. Upon entering, agent M observed the licensee, Lawrence M. Black, behind the service counter. Agent M. subsequently departed the premises, and joined ABC agents G and S at their post of observation.

Agents M and G then began to walk back toward the licensed premises, a distance of approximately seventy yards, at which time they observed a white Chrysler automobile, occupied by four black males, pull up to the premises parking lot. The driver, subsequently identified as James Wicks, emerged from the automobile and entered the premises.

ABC agent G testified as follows: he walked up to the front of the premises and took a position to the right of the entrance, outside, and looked through the window (this being the

window to the right of the front door, as viewed from outside the premises). He explained:

"At this time I observed Mr. Wicks in the rear of the premises, on the patrons' side of the counter. There was a white male behind the counter, later identified as Mr. Black. I then observed Mr. Black and Mr. Wicks converse. I then observed Mr. Black move to his right ... and go to a counter, located along the left wall, left of entry, which contained bottles of alcoholic beverages. He then returned to the counter carrying a bottle that had white liquid in it. He handed the bottle to Mr. Wicks. Mr. Wicks then took the bottle of white liquid and put it in the right side of his pants and covered it with his shirt. Mr. Black then placed a bottle into a brown paper bag. And then observed Mr. Black and Mr. Wicks to exchange monies."

Wicks departed the premises and entered his automobile, at which time agent G went up to the driver's door, identified himself as a Division agent, and asked Wicks for the bottle he had bought. At this point, agent M. was situated at the passenger door. Wicks handed agent G the bottle of alcoholic beverage. At this time, the brown paper bag was on the front seat between Wicks and a passenger in the car. Continuing, agent G testified:

"I asked him what was in the bag? He showed me - if I recall - I think a bottle of Pepsi or Coke."

At this time, agents G and M, together with Wicks, re-entered the licensed premises. Agents G and M identified themselves to Black. Agent G continued:

"I then asked Mr. Black if he had sold Mr. Wicks the pint bottle of Smirnoff Vodka, which I was holding in my hand. Mr. Black said he couldn't. I then informed Mr. Black I had observed him making the sale of the Smirnoff Vodka to Mr. Wicks. At this time, Mr. Black said, 'Okay, I sold the bottle of vodka to him, you got me, it's not the first time and it won't be the last time that I've got hit.'"

The testimony of agents M and G was similar, with the exception that agent M could not testify as to the physical facts of the alleged sale transaction, which took place out of his viewing area.

Testifying on behalf of the licensee, James Wicks denied that he had purchased alcoholic beverages on the date in question, stating that he had only purchased a bottle of family size soda which had been placed into the brown paper bag, and that the pint bottle of vodka had been purchased the previous afternoon. Wicks further stated that the pint bottle had been located on the front seat, at the time the bottle was seized.

Furthermore, he asserted that the window on the front right side of the store, the window through which agent G allegedly viewed the sales transaction, was cracked and had been covered from top to bottom by plaster plywood board on the date in question.

The licensee, Lawrence M. Black, testified that he sold Wicks the bottle of soda on the date in question, and that he had sold the pint bottle of vodka to Wicks the previous afternoon. He explained:

"On Saturday, the 24th, somewhere between four and six o'clock in the afternoon, I sold James Wicks a bottle of Smirnoff Vodka, and he paid three dollars and fifty-two cents for it."

Previously, Wicks had testified:

"Q Do you know how much a bottle of vodka costs?

A Yes, I paid three dollars and fifty-two cents that Saturday afternoon."

Black categorically denied that he had made any admission of guilt, i.e., the statement being attributed to him by agents G and M, and indicated supra.

Black corroborated the testimony of Wicks with respect to the allegation that, on August 25, 1974, a large piece of plywood covered half of the shattered right front window. Black further testified:

"Q Sir, on August 25, 1974, in the early part of that afternoon, if anyone was looking, standing in front of that window, could he look into the store?

A He would have to twist his neck to --

Q Answer the question, please.

A No."

Willie Slatter, Jr., a passenger in the car driven by Wicks, testified that the pint bottle of vodka had been located

on the floor of the car, under the feet of the passenger in the front seat, and that one of the agents told Wicks to pick up that bottle and give it to him. Slatter then testified that Wicks had previously informed the occupants of the car that he had to stop and pick up the soda. He explained that he had observed the pint bottle of vodka in the car before the car arrived at the liquor store.

In rebuttal, agent G testified that there were no cracked, broken or shattered windows, nor any boards or other devices placed up against any windows, at the licensed premises on the date in question.

At this point in the proceeding, the licensee was granted an opportunity to present additional evidence in defense of the charge.

Upon being recalled as a witness, the licensee, Lawrence M. Black, testified that, on or about June 19, 1974, the window on the right front of the premises was broken, a piece of plywood, approximately four feet by eight feet, was used to board up the opening, and, that the board was not removed, nor the window repaired, until March of 1975. A police report and a report from a burglar alarm company were introduced into evidence. These reports indicated that a window in the front of the premises had been broken on June 9, 1974. Also accepted in evidence was a bill from a glazier, indicating that a window at the premises was installed on March 7, 1975.

Black testified that the burglar alarm system was rewired, on a temporary basis, at the time that the plywood board was placed over the window opening; no bill was submitted to substantiate this statement. Black acknowledged that, between June 9, 1974 and March of 1975, the window to the left of the front door of the premises had been broken at least twice, and replaced each time.

Frank Irving testified, on behalf of the licensee that Black had called him at home early in the morning of June 8 or 9, 1974, and had asked him to come down to the licensed premises and board up a window. Irving indicated that the window boarded up, with a four foot by eight foot piece of plywood, was the window to the right of the front door of the premises, and that the window remained in this state, i.e., plywood covered, until at least a time subsequent to January 1, 1975.

Irving explained that the piece of plywood did not cover the entire window, as part of the glass was merely cracked. One of his employees had also given Black a board at another time, to board up a broken window; however, Irving did not pinpoint the time, nor could he state the specific place at which Black had placed this second board.

Lawrence Moses, an employee of Josloff Industries, the glazier referred to above, testified that he replaced the glass in Black's front right and left windows, on March 7, 1975 and that a piece of plywood covered each window before the glass was replaced on that day.

In rebuttal testimony, ABC agents M and S corroborated the testimony of agent G, i.e., that there were no cracked, broken or shattered windows, at the licensed premises, on August 25, 1974. In addition, agent M testified that he had occasion to drive past the subject licensed premises during the latter part of September 1974, and that a front window was being repaired at the premises at this time.

I

We are dealing here with a purely disciplinary matter and its alleged infraction. Such measures are civil in nature, and not criminal. Kravis v. Hock, 135 N.J.L. 259 (Sup. Ct. 1947). Thus, the Division need establish its case only by a fair preponderance of the believable evidence. 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). In other words, the finding must be based upon a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042.

In appraising the factual picture presented herein, the credibility of witnesses must be weighed. 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 the common experience and observation of mankind can approve as probable in the circumstances. Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

Using the said principle as a guide I have carefully evaluated the extensive testimony produced both on behalf of the Division and the licensee and have had the opportunity to observe their demeanor as they testified. I am persuaded that the testimony of the ABC agents was forthright, concise, credible and fully supportive of the charge.

In contrast, I find the testimony of the witnesses for the licensee to be vague, imprecise, inconsistent and, at times, incredible. This is readily understandable because these witnesses did not engage, in the activities testified to, with any foreknowledge that they would be required to testify with respect thereto. The Division agents, on the other hand, were assigned to this investigation and it was only natural that their observations should be specifically directed to the full scope of activities which occurred on the date in question. Consequently, the testimony of the agents was of a positive nature, clear and credible.

I was particularly unimpressed with the testimony of the licensee, Black and Wicks, particularly with reference to the exterior condition of the premises on August 25, 1974. The self-serving statements by the licensee, buttressed by the testimony of a regular customer at the licensed premises (the buyer in the alleged sales transaction), are in direct contradiction to the testimony of agents G, M and S, which testimony is objective and without bias. This contradiction reflects adversely on the credibility of the testimony of the licensee and Wicks in this matter.

II

The licensee, in his written summation avers that the testimony of the Division agents stands in equipoise with the testimony of the licensee Black, and that, "Each has a profound interest in the outcome ... Black certainly wishing not to be found guilty ... and the agents involved ... certainly wishing to sustain their arrest." I disagree. While the degree of interest of Black is clear, upon considering the totality of the testimony, I find there is no evidence sustaining an allegation of improper motivation on the part of the agents. The agents conducted their investigation pursuant to a specific assignment and I find that they objectively reported the events that transpired. Their testimony closely paralleled the contents of their reports in this matter upon which they were vigorously cross-examined, which were prepared the day following the alleged occurrence. Neither the reports nor the testimony of the agents evidences any subjective bias toward "sustaining their arrest"; rather, I am impressed that the reports and testimony are consistent and credible accounts of the events that transpired.

I do not find, as alleged by the licensee, that the testimony of Wicks (the alleged purchaser), and Slatter, (passenger in Wicks' car), is disinterested. Wicks would seem to have a definite bias against his own unwitting participation in the arrest of Black, the owner of a liquor store which Wicks frequents. The link between the testimony of Wicks and that of Slatter is readily apparent.

It is conceded that the testimony of Irving, (that he installed the plywood, on June 9, 1974), and that of Moses, (that he replaced the glass, in March of 1975), are objective in nature. However, the licensee's contention that, "The testimony that the plywood was installed in June, 1974, and remained there through March of 1975 is uncontroverted", is simply not an accurate statement. This contention was specifically contradicted by the testimony of the Division agents, who testified with respect to the condition of the premises on the date in question.

In contrast, the licensee submits Irving's imprecise and generalized testimony to the effect that the piece of plywood board which he installed at the premises, in June of 1974, remained in place at the window until beyond the Christmas season of 1974-75.

It is significant to note that Irving could not testify as to when another window at the licensed premises had been broken, although he acknowledged that at least one more plywood board had been borrowed from his store in order to cover a broken window at the licensed premises. I find, therefore, that Irving's testimony is not persuasive with reference to the condition of the right front window at the licensed premises on the date in question.

That part of testimony of Irving and Moses that is uncontroverted, is that Irving placed a plywood board in the right front window, in June of 1974, and that Moses took boards from both windows, and replaced the broken glass in each window, in March of 1975. The interim period between these dates, in particular the date of August 25, 1974, is dealt with in imprecise and vague terms in the testimony elicited on behalf of the licensee, and is directly and specifically contradicted by the testimony of the Division agents.

Thus, I find the testimony of the Division agents to stand in a better posture and to be more credible in this matter. I, therefore, conclude that the Division has established the truth of the charge by a preponderance of the credible evidence. Accordingly, it is recommended that the licensee be found guilty of the charge herein.

The licensee has no prior adjudicated record. It is further recommended that the license be suspended for fifteen days.

Conclusions and Order

Written exceptions to the Hearer's report were filed by the licensee and answering argument to the said exceptions were filed on behalf of the Division, pursuant to Rule 6 of State Regulation No. 16.

The licensee argues that the Hearer gave more credence to the testimony of the Division witnesses merely because they are law enforcement officers. He asserts that, although the officers had no "improper or illegal motivation" to testify falsely, they were interested in "sustaining the particular arrest."

The licensee has simply missed the point that the Hearer was making. The Hearer pointed out that, since the ABC agents were investigating the subject incident pursuant to a specific assignment, it was natural that they make a conscious effort to note all of the details as the events occurred because they knew that they probably would be called to testify about them in the event that disciplinary proceedings were instituted.

On the other hand, the licensee's witnesses were required to recall events which were apparently insignificant to them

at the time they occurred. Obviously they did not, therefore, make a conscious effort to note the details thereof.

The Hearer had the opportunity to observe the demeanor of the witnesses as they testified, and to evaluate the credibility of their testimony. He found that the testimony of the witnesses for the licensee was "imprecise and vague." On the other hand, he found the testimony of the agents to have the ring of truth, and to be more "credible". My examination and analysis of the transcripts leads me to the same conclusion.

I have examined and evaluated the other exceptions and find that they have either been considered and correctly resolved by the Hearer, or are devoid of merit.

Thus, having carefully considered the entire record herein, including the transcripts of the testimony, the exhibits, the Hearer's report, the written exceptions filed on behalf of the licensee and the answering argument thereto, submitted on behalf of the Division, I concur in the findings and recommendation of the Hearer and adopt them as my conclusions herein. Therefore, I find the licensee guilty as charged.

Accordingly, it is, on this 26th day of November 1975,

ORDERED that Plenary Retail Distribution License D-2, issued by the Municipal Board of Alcoholic Beverage Control of the Township of Hillside to Lawrence M. Black, t/a Black's, for premises 1554 Maple Avenue, Hillside, be and the same is hereby suspended for fifteen (15) days, commencing 2:00 a.m. on Monday, January 5, 1976 and terminating 2:00 a.m. Tuesday, January 20, 1976.

Leonard D. Ronco

Leonard D. Ronco
Director