

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

BULLETIN 2164

November 11, 1974

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STATE OF NEW JERSEY  
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1. APPELLATE DECISIONS - BILLFIN, INC. v. PATERSON.

Billfin, Inc., t/a Ron's,	)	
Appellant,	)	
v.	)	On Appeal
Board of Alcoholic Beverage	)	CONCLUSIONS
Control for the City of	)	and
Paterson,	)	ORDER
Respondent.	)	

-----  
Iannaccone, Rapkin, Chessin & Carrion, Esqs., by Ramon Carrion, Esq.,  
Attorneys for Appellant  
Adolph A. Romei, Esq., by Richard M. Freid, Esq., Attorney for  
Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant pleaded not guilty to a charge preferred by the respondent Board of Alcoholic Beverage Control of the City of Paterson (hereinafter Board) which reads, as follows:

"On Sunday, January 12, 1974, and on divers dates prior thereto, you allowed, permitted and suffered your place of business to be conducted in such manner as to become a nuisance in that you allowed, permitted and suffered brawls, acts of violence or other disturbances and otherwise conducted your licensed place of business in a manner offensive to common decency and public morals; in violation of Rule 5 of State Regulation No. 20."

After a hearing was held therein, the Board, by resolution dated April 10, 1974, found appellant guilty of that part of the charge pertaining solely to January 12, 1974 and suspended appellant's plenary retail consumption license for twenty days, effective April 22, 1974.

In its petition of appeal, appellant alleges that the action of the Board was erroneous in that (1) the finding of

guilt was contrary to the weight of evidence; and (2) "Rule 5 of State Regulation No. 20 is unconstitutional and void as the result of its vagueness." In its answer, these contentions were denied by the Board.

Upon the filing of this appeal, an Order was entered herein on April 19, 1974 staying the Board's action pending the determination thereof.

The matter was heard de novo pursuant to Rule 6 of State Regulation No. 15. Additionally, the stenographic transcript of the hearing before the Board was submitted at this hearing, pursuant to Rule 8 of State Regulation No. 15.

At the hearing before the Board, the testimony of Russell Edsall (the victim of the alleged act of violence) reflects that he entered appellant's licensed premises (a tavern) accompanied by his sister, Alice Bonilla, on the evening of January 12, 1974, in order to persuade his wife who was intoxicated to leave the tavern. Edsall's wife's sister was tending bar.

Then: "All of a sudden I felt a cue stick. A guy ran and hit me with a pool stick in back of my head. I got four stitches over my right eye and over the right side of my head. There was one in my mouth. I got three teeth knocked out. I got kicked inside."

Edsall was also struck in the front of his face by two patrons, whom he identified as John Serveri and Richard Barr, and by his wife's brother Alan De Vita. He estimated the duration of the altercation as "seconds". He was dragged outside of the tavern where "they were still kicking me in the face and head when the police officers pulled up."

Edsall believed he was rendered unconscious. He was taken to the hospital for treatment of his injuries.

Edsall conceded that he had consumed about ten beers at another tavern shortly before he entered these premises, and some beers in this tavern; that he was "feeling pretty good" but not drunk. He further conceded "I was feeling the drinks I was having."

Alice Bonilla, a sister of the previous witness, Russell Edsall, testified that she accompanied Edsall to appellant's tavern on January 12. She and Edsall tried to get Edsall's wife Alice to come out of the tavern.

Alice's brother, Alan DeVita, who had been playing pool, apparently interfered with Edsall's efforts, and struck Edsall with a cue stick. Two of DeVita's companions joined in the assault upon Edsall, causing him to sustain cuts about his head, face and

lips, as a result of which he was briefly hospitalized. He also sustained injuries about his eyes and some teeth were damaged or loosened. The incident was of short duration inside the tavern; however, his assailants continued to assault Edsall on the outside of the tavern.

During this time, no one tried to stop the assault or call the police. Upon observing that the males were continuing their assault upon her brother outside the tavern, Bonilla went to a friend's house in the area and summoned the police.

On cross-examination, the witness asserted that, prior to the assault, DeVita and Edsall were arguing. During the time that the altercation was in progress this witness left the tavern for "a couple of minutes" in order to check on her baby who was left in the car. She reentered the tavern and tried to "get them to stop fighting. Nobody was trying to help (my brother)."

In defense of the charge, Margaret Brown, who was employed as a barmaid by appellant, testified at the hearing before the Board that Edsall came into the bar on the evening of April 12, consumed one beer and remained in the tavern for approximately twenty minutes. During his stay at these premises he had no words with anyone and was not involved in a fight inside the premises. DeVita was in the tavern; however, Serveri was not in the tavern at all on this occasion.

Later, someone came into the tavern and notified DeVita that someone was lying on the outside of the premises. DeVita went outside and he and a black male brought Edsall back into the tavern. Edsall's face was covered with blood. The witness directed DeVita to remove Edsall from the premises because he wasn't injured in the premises. She does not know what happened to Edsall after he was removed from the premises. Edsall's wife was not in the premises.

On cross-examination, Brown testified that she did not know whether or not Edsall's wife was in the premises. Edsall was out of the tavern approximately twenty minutes before he was brought back in. Brown refused to call an ambulance at DeVita's request. "Because when you call an ambulance, the cops come." She conceded that Edsall was bleeding "very badly."

At the de novo hearing Margaret Brown's testimony was mainly corroborative of her prior testimony except that she revised her estimate of period of the time during which Edsall remained outside the tavern prior to his reentry with DeVita and the black male to approximately one-half hour.

James Brown (not related to the previous witness) testified that on the evening charged, he was sitting at the end of the bar when he first observed Edsall at the bar. However, he asserted that no fight ensued in the tavern. He observed Edsall leave the tavern

with a male and saw him brought back inside the door by DeVita and another male. He was bleeding and the barmaid told DeVita not to bring him in "because nothing happened in the bar."

On cross-examination, the witness testified that he was playing pool when he first observed Edsall positioned at the bar.

Edsall was outside "about a minute at the most" when he was brought back into the tavern by DeVita and another male.

### I

Appellant argues that the Rule under which it was found guilty is unconstitutional and void. I find this contention to be totally without merit.

A challenge to the constitutionality of a statute or rule can only be adjudicated by a court of competent jurisdiction, since statutes are presumed to be valid on their face. Cf. Klein and Tucker v. Fairlawn and Schweder, Bulletin 1175, Item 3; Blanck v. Magnolia, 73 N.J. Super. 306. (App. Div. 1962), reversed on other grounds, 38 N.J. 484 (1962). The Director is not empowered to disregard or repeal a statute or a rule. As hereinabove stated, such authority is vested in a court of plenary jurisdiction. Cf. Blanck v. Magnolia, supra; Phillipsburg v. Burnett, 125 N.J.L. 157 (Sup. Ct. 1940).

### II

In determining this matter on the merits I observe, preliminarily, that we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus the proof must be supported only by a preponderance of the credible evidence. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956).

It is firmly settled that the Director's function on appeal, is not to reverse the determination of the municipal issuing authority unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2, and cases cited therein.

The burden of establishing that the Board acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Board. Or, to put it another way: Could the members of the Board, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? The Director should not reverse unless he finds as a fact that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by the Board. Cf. Hudson Bergen County Retail Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957); Lyons Farms Tavern v. Mun. Bd. of Alc.

Bev. Newark, 55 N.J. 292, 303 (1970).

In assessing the credibility of the testimony offered by the barmaid Brown, I note that in her direct testimony, she stated that Edsall's wife was not in the tavern, but on cross-examination, she was not sure whether she was or wasn't in the tavern.

I have noted that, in his direct testimony, James Brown testified that he was positioned at the end of the bar when he first observed Edsall's presense in the tavern; whereas, on cross-examination, he testified that he was playing pool at that time.

Further, there is a significant difference in the testimony of Margaret Brown and James Brown relative to the interval of time in which Edsall was outside the tavern prior to being helped back in a bloodied condition. Margaret Brown testified that the elapsed time was between twenty minutes and a half hour. On the other hand, James Brown testified that no more than a munute elapsed before Edsall was taken back into the tavern.

The common sense rule must be applied in each given situation, namely, where the licensee or his employee, acting under the obligation of the tremendous responsibility which is reposed in the holder of a liquor license, exercises that degree of care consistent with such obligation in keeping the premises free from brawls and disturbances, he will be exculpated.

It is, however, no answer for the barmaid to state that she is not interested in what happens on the outside of the premises. Licensees are responsible for conditions both in and outside of the premises which are caused by patrons thereof. Seidel v. Upper Freehold, Bulletin 1246, Item 1; D'Ambola v. North Caldwell, Bulletin 1922, Item 1. The reason for the imposition of such a strict rule is that the liquor business is an exceptional one, and courts have always dealt with it exceptionally. See X-L Liquors v. Taylor, 17 N.J. 444 (1955); Mazza v. Cavicchia, 15 N.J. 498 (1954).

Since there was a sharp conflict in the testimony adduced before the Board, it became the function of the Board to evaluate the testimony, after observing the demeanor of the witnesses and giving weight to such testimony as it found credible. It is axiomatic that evidence, to be believed, must not only proceed from the mouths of credible witnesses but must be credible in itself, and 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); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). It is apparent that the Board found the testimony of the witnesses called by the Board to be believable in the circumstances.

A brawl is defined as "a loud, angry, and disorderly quarrel; a rough noisy and often prolonged hand to hand fight," (Webster's Third New International Dictionary); a "clamorous or tumultuous quarrel in a public place, to the disturbance of the public peace" (Black's Law Dictionary, 11 C.J.S. 767).

I find from the record herein that a brawl did in fact occur on the date alleged herein and that the appellant, through its agents or employees (Rule 33 of State Regulation No. 20) permitted, allowed or suffered such occurrence.

There is no persuasive evidence to indicate any improper motivation on the part of the Board in its action, and there appears to be substantial evidence to support its determination herein. Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (App. Div. 1956). The Director's function on appeal is not to substitute his personal opinion for that of the issuing authority but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal view. Tumulty v. Dunellen, Bulletin 1487, Item 4; Fiory v. Ridgewood, Bulletin 1932, Item 1, and cases therein cited. Indeed, as the court stated in Lyons Farms Tavern, Inc. v. Newark et al., supra: (p. 307).

"...Our penetrating review of all the evidence was engaged in by retreating to the fundamental issue in these cases: Did the decision of local board represent a reasonable exercise of discretion on the basis of evidence presented? If it did that ends the matter of review both by the Director and by the courts...."

I am satisfied that respondent has proved its case by a fair preponderance of the believable evidence and thus appellant has failed to meet the burden of establishing that the action of respondent herein was erroneous. Rule 6 of State Regulation No. 15.

In passing, it may be well to note that former Director Lordi in Jackson v. Newark, Bulletin 1600, Item 2, made the following observation: "...As stated by the Hearer, where, as here, a dangerous weapon such as a knife has been wielded by a participant in a fight on licensed premises, a licensee or his employee, upon becoming aware of same, should exercise proper judgment by notifying the police of such fact. Indeed, where a licensee or his employee become aware of the apparent commission of any crime in connection with the licensed business, they should notify the police. I am taking this opportunity to impress this point upon licensees in order that they, as citizens with a strong stake in proper law enforcement, may assume a leading position in cooperating with law enforcement agencies."

Accordingly, it is recommended that the action of the

Board be affirmed, the appeal be dismissed, and that the suspension heretofore imposed by the Board and stayed by the Director pending this appeal be reimposed.

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 conclusions of the Hearer and adopt them as my conclusions herein.

Accordingly, it is, on this 20th day of August 1974,

ORDERED that the action of respondent be and the same is hereby affirmed, and that the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that Plenary Retail Consumption License C-235 (for the 1974-75 licensing period), issued by the Board of Alcoholic Beverage Control for the City of Paterson to Billfin, Inc., t/a Ron's, for premises 803 Market Street, Paterson, be and the same is hereby suspended for twenty (20) days, commencing at 3:00 a.m. Tuesday, September 3, 1974, and terminating at 3:00 a.m. Monday, September 23, 1974.

Leonard D. Ronco  
Director

2. APPELLATE DECISIONS - HAYS v. WOOD-RIDGE.

Grace B. Hays, )  
 Appellant )  
 v. )  
 Mayor and Borough Council )  
 of the Borough of Wood-Ridge, )  
 Respondent. )  
 ----- )

On Appeal

CONCLUSIONS  
and  
ORDER

Philip C. Geibel, Esq., Attorney for Appellant  
 George D. Malhiot, Esq., Borough Attorney, Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Respondent Mayor and Council of the Borough of Wood-Ridge (Council) preferred five charges against appellant, as follows: that on July 5, 1973 she permitted the licensed premises to remain open to 2:35 a.m. contrary to Borough Ordinance No. 422A; that on September 13, 1973, November 11, 1973, November 22, 1973 and on December 8, 1973 she allowed, permitted and suffered the occurrence of brawls, acts of violence and disturbances upon her licensed premises. The charge pertaining to the date of November 22, 1973 was withdrawn.

After hearing thereon, the Council found appellant guilty of the remaining four charges, in consequence of which, it suspended appellant's license for sixty (60) days, effective April 1, 1974.

In her petition of appeal challenging the conviction, appellant alleged that the Council's action was erroneous in that the findings of guilt (1) were contrary to the weight of evidence and based upon hearsay; (2) that, in effect, the finding would render the licensee a guarantor of peace and (3) the penalty was excessive.

In its answer, the Council denied the substantive allegations contained in the petition of appeal.

Upon filing of the appeal, an order dated March 22, 1974 was entered by the Director staying the Council's order of

suspension pending the determination of this appeal.

The stenographic transcript of the hearing below was submitted into evidence supplemented by testimony of witnesses produced by appellant at this de novo hearing, in accordance of Rules 6 and 8 of State Regulation No. 15.

### I

With respect to the first charge wherein it is alleged that the closing hour ordinance was violated, and that such act constituted a nuisance, the ordinance provides, in its pertinent part, that no alcoholic beverage shall be sold in any licensed premises between 2:00 a.m. and 6:00 a.m. on week-days.

The Council relied upon the testimony of police officers Frank and Simon who were cruising in their police car on July 5, 1973 at 2:30 a.m. when they observed lights in appellant's tavern. They stopped the car and, after noting that the door was locked, they peered in the window and observed three males, one female and a bartender in the premises. There were glasses on the bar containing a liquid which appeared to them to be beer. The bartender came to the door and was directed to close the bar. He asserted that he had been cleaning. Everyone departed from the barroom at 2:35 a.m.

In order to sustain a finding of guilt under the quoted ordinance it is essential that the sale of an alcoholic beverage be proven. The evidence is totally lacking in this respect. The subject ordinance which was admitted into evidence refers only and is limited to the sale of alcoholic beverages during the hours prohibited thereunder. It does not provide for the closing of premises during those hours.

Consequently, I conclude that this charge has not been established, and appellant has succeeded in sustaining the burden of establishing that the action of the Council was erroneous and should be reversed as required by Rule 6 of State Regulation No. 15; and I so recommend.

### II

Pertaining to the charge of September 13, Michael Delli Paoli testified that he entered appellant's tavern at approximately 7:00 p.m. At approximately 12:25 a.m. a patron objected to language used by him and requested that he apologize, which he did. The unidentified patron expressed dissatisfaction with the apology and knocked him to the floor. The bartender, Dennis Kelly, directed Delli Paoli to leave.

Before leaving Delli Paoli wanted to retrieve some change he had left on the bar. Delli Paoli was told that he would have the change brought to him and he was pushed out of the door. He

reentered the tavern and said that he wasn't leaving until he received his change. He was again asked to leave and, after doing so, the door was slammed and locked. Delli Paoli then kicked and banged on the door. Thereupon the unidentified male and Kelly went outside of and in front of the tavern, kicked and punched Delli Paoli on the sidewalk, causing injuries which necessitated Delli Paoli to be hospitalized overnight. The attack ceased when someone came out of the tavern and said that the police had been summoned.

Delli Paoli testified that, prior to the time that he was propelled to the floor most of the dialogue was in a conversational tone.

In defense of this charge, Dennis Kelly, the bartender on duty, testified that he heard Delli Paoli employ foul language; that a male patron whom he identified as Joseph Schaeffer requested that he desist; that Delli Paoli started pushing Schaeffer; he shouted to them to break it up, finally he broke it up by getting between them and then told Delli Paoli to leave and escorted him to the door. No blows were struck.

On cross-examination, Kelly testified that Schaeffer did land a blow on Delli Paoli and they ended on the floor. After he escorted Delli Paoli to the door, Delli Paoli kicked the door a few times, and asked to be allowed in so that he could retrieve change which he allegedly left on the bar.

Kelly asserted that, in order to defend himself, he punched Delli Paoli three times while they were outside the door. Although police officers arrived, he did not summon them.

Preliminarily, I observe that we are dealing with a purely disciplinary action; such action is civil in nature and not criminal. In re Schneider, 12 N.J. Super. 449 (App. Div. 1951). Thus the proof must be supported by a preponderance of the credible evidence only. Butler Oak Tavern v. Alcoholic Beverage Control, 20 N.J. 373 (1956).

It is a firmly settled principle that the Director's function on appeal is not to reverse the determination of the municipal issuing authority unless he finds, as a fact, that there was a clear abuse of discretion or unwarranted finding of fact or mistake of law by respondent. Schulman v. Newark, Bulletin 1620, Item 1; Monteiro v. Newark, Bulletin 2073, Item 2, and cases cited therein.

The burden of establishing that the Council acted erroneously and in an abuse of its discretion rests with appellant. Rule 6 of State Regulation No. 15. The ultimate test in these matters is one of reasonableness on the part of the Council. Or, to put it another way: Could the members of the Council, as reasonable men, acting reasonably, have come to their determination based upon the evidence presented? Cf. Hudson Bergen County Retail

Liquor Stores Ass'n. v. Hoboken, 135 N.J.L. 502 (E. & A. 1947); Nordco, Inc. v. State, 43 N.J. Super. 277, 282 (App. Div. 1957); Lyons Farms Tavern v. Mun. Bd. of Alc. Bev. Newark, 55 N.J. 292, 303 (1970).

The natural inquiry is whether the licensee or its employee, acting under the obligation of the tremendous responsibility which is reposed in the holder of a liquor license, has exercised that degree of care consistent with such obligation in keeping the premises free from brawls and disturbances.

Since there was a sharp conflict in the testimony adduced before the Council, it became the function of the Council to evaluate the testimony, after observing the demeanor of the witnesses and giving weight to such testimony as it found credible. It is axiomatic that evidence, to be believed, must not only proceed from the mouths of credible witnesses but must be credible in itself, and 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); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

A brawl is defined as "a loud, angry, and disorderly quarrel; a rough noisy and often prolonged hand to hand fight" (Webster's Third New International Dictionary); a "clamorous or tumultuous quarrel in a public place, to the disturbance of the public peace" (Black's Law Dictionary, 11 C.J.S. 767).

It is apparent that the Council concluded, from the testimony of the witnesses, that Delli Paoli and Schaeffer engaged in a brawl which had been preceded by the use of foul language in the licensed premises. It is also apparent that the Council placed credence upon Delli Paoli's testimony to the effect that Kelly, an employee of the licensee, committed a battery upon the person of Delli Paoli immediately outside the premises. Unquestionably, licensees are responsible for conditions both in and outside the premises which are caused by their employees. Seidel v. Upper Freehold, Bulletin 1246, Item 1; D'Ambola v. North Caldwell, Bulletin 1922, Item 1. Also it is a well-established principle that a licensee is responsible for the misconduct of his employees, and is fully responsible for their activities during their employ on licensed premises. In re Olympic, Inc., 49 N.J. Super. 299 (App. Div. 1958). In re Schneider, 12 N.J. Super. 449 (App. Div. 1951), Rule 33 of State Regulation No. 20.

Furthermore, the responsibility of the licensee does not depend upon his personal knowledge or participation. In fact, it has been held that a licensee is not relieved even if the employee violates his explicit instructions. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (App. Div. 1951); F. & A. Distrib. Co. v. Division of Alcoholic Beverage Control, 36 N.J. 34 (1961).

There is no persuasive evidence to indicate any improper motivation on the part of the Council in its action, and there appears to be substantial evidence to support its determination herein. Hornauer v. Div. of Alcoholic Beverage Control, 40 N.J. Super. 501 (App. Div. 1956). The Director's function on appeal is not to substitute his personal opinion for that of the issuing authority but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his personal view. Tumulty v. Dunellen, Bulletin 1487, Item 4; Fiory v. Ridgewood, Bulletin 1932, Item 1, and cases therein cited.

I find nothing in the record to substantiate appellant's argument that the Council did not invite this licensee or any other licensee to seek the assistance of the police department whenever the occasion arises.

My examination of the facts and the applicable law generates no doubt that this charge was established by a preponderance of the believable evidence. I conclude therefore, that appellant has failed to sustain the burden of establishing that the Council's action, relative to this charge, was erroneous and against the weight of the evidence, as required by Rule 6 of State Regulation No. 15.

### III

Relative to the charge of November 11, it appears that Dennis Tucci was in the appellant's tavern with an acquaintance, John Feldwater, at approximately 1:30 a.m. Words were exchanged between Tucci and James F. Hays, (Appellant's husband who is also employed in the premises) concerning Tucci's presence in the premises, because Tucci was only 17 years of age. Tucci did not drink in the premises; he had some drinks at a party prior to entering appellant's tavern.

Tucci testified that two males held him up against the wall and Hays struck him. The combat was terminated when police officers entered the premises.

Feldwater testified that he was sitting at the far end of the bar conversing with friends when he "heard a bunch of yelling" and then observed Hays strike Tucci in the face. At that time Tucci's arms being held by patrons.

In defense of this charge, Grace B. Hays, the licensee-appellant, testified that she and her husband, James Hays, who assists her in the operation of the tavern, were in the tavern at the time of the alleged violation. Dennis Kelly was tending bar. She first saw Tucci when he came out of the tavern while she was outside conversing with three males who claimed that an individual had directed "slurring" remarks at them inside the tavern. When Tucci insisted on talking with them, she ordered him to go inside or she would summon the police.

Thereafter she observed Tucci seated next to her husband. She heard her husband question Tucci concerning his identification. Tucci employed foul language and started swinging his arms. A Bob Conway held "Tucci up against-by the cigarette machine" to prevent him from fighting. At no time did she see her husband strike Tucci. She was about to call the local police when police officers suddenly entered the premises.

The witness conceded that she was aware that there was some ill-feeling in the tavern and that someone had made a remark that someone else was "thinking about doing something about it". She did not have the opportunity to call the police.

Kelly, who was tending bar on the date charged herein, testified that, when he observed Tucci enter the tavern with a few companions at approximately midnight, he appeared to be drunk. Kelly served him a coke. He was in no condition to drink an alcoholic beverage.

Said, Kelly "I was pretty busy. I observed Jimmy Hays sitting down next to Tucci, and I heard him ask for his ID card. He couldn't produce it, and he asked him to leave. He made a couple of snotty remarks to Jimmy. Another customer, Freddie Nadler was sitting at the bar. First of all, Dennis got off the stool, looked like he was going to hit Jimmy, but he didn't. There was no trouble. He said, 'I'll fight you outside.' The next thing, he was picking on Freddie. He goes outside and comes running back in and grabs Freddie, and he says, 'I'll fight you outside.' The next thing you know, Bobby Conway grabbed Dennis and he just held him, and Freddie went out and got the police. The police came in and escorted Tucci away."

No one struck Tucci in his presence.

James F. Hays testified that he observed Tucci enter the tavern at approximately 11:30 p.m. and he started "getting fresh". Upon asking Tucci for his identification card, he commenced "talking loudly and raving." Hays told Tucci to leave the tavern. Prior to asking Tucci for his identification card he observed Tucci "shoving around, pushing, shoving, tried to talk to people in the place." Tucci did not strike anyone. At one time Tucci walked out. He then reentered. He denied ever striking Tucci.

Robert J. Conway, who has frequented appellant's tavern three or four times a week for the past five years testified that he had arrived at the tavern at approximately 11:00 p.m. He heard Tucci arguing relative to an identification card. Tucci said to someone "I'll take care of you outside." Tucci did actually go outside. He returned in a "matter of seconds." He came back in swinging. He did not strike anyone. He was heading for a patron. Conway then grabbed Tucci and held him. Within a minute or two the police entered the tavern. No one struck Tucci. Tucci appeared to have been drinking.

My analysis of the transcript and the evidence produced before me in conjunction with the existing milieu convinces me that the Council acted properly, and that the testimony before the Council preponderates in support of its determination.

It is apparent to me that Tucci was permitted to remain in the tavern while he was apparently intoxicated and in a belligerent mood. The licensee should have ordered him out immediately or, in the alternative, immediately called for police assistance. Instead, the licensee permitted Tucci to remain in the tavern until his presence became so objectionable as to cause the licensee's husband (who was in her employ) to commit a battery upon him in excess of the force required to restrain an unruly patron.

My examination of the facts and the applicable principles of law which I have hereinabove detailed leads me to the conclusion that the subject charge was established by a fair preponderance of the credible evidence. It is my view that appellant has failed to sustain the burden of establishing that the Council's action relative to this charge was erroneous and against the weight of the evidence as required by Rule 6 of State Regulation No. 15.

#### IV

Concerning the charge relating to December 8, 1973, Patrolman John Frank testified that, pursuant to a call which he received complaining that there was a fight in progress in appellant's tavern, he, accompanied by Police Officer Joseph Abitante, proceeded to and entered the subject tavern. He observed two males fighting on the floor, encircled by observers. The first male was pulled off his adversary without incident. The second male had to be forcibly subdued by one of the police officers. He did not observe who was tending bar. He was not aware of the duration of the altercation. Neither of the combatants were intoxicated. Police Officer Joseph Abitante substantially corroborated the testimony of his fellow officer. He did not speak to anyone employed in appellant's tavern.

In defense of this charge, Dennis Kelly testified that he was on duty as bartender on December 8 at the time of the alleged violation. Two patrons engaged in a verbal dispute for a period of approximately five minutes. He asserted that he had no reason to anticipate that this would lead to physical violence. He summoned the police as soon as the fight erupted. The police officers arrived within two or three minutes.

On cross-examination, the witness testified that he had told the patrons who were arguing to "break it up" and "calm down."

He was asked by one of the councilmen:

- "Q And at what point in an argument would you call the police?  
 A Well, like I said, it didn't look to me like they were going to have a fight, but--  
 Q In other words, it's a judgment factor on your part?  
 A Right. And that's what I am supposed to do, call the police, and they come. Can't let a fight go on. So I got to call the police."

The crucial issue presented is entirely factual. Was a brawl or act of violence allowed, suffered or permitted to occur on the licensed premises as alleged. The test in this and similar matters involving a brawl or act of violence is:

"...The question involved here is whether the licensees could reasonably have taken steps to prevent the act of violence and disturbance that took place on their licensed premises, but failed to do."

Riverside Corp. v. Elizabeth, Bulletin 2144, Item 3.

I find no testimony to contradict the testimony of the appellant's bartender which would establish that he, should have anticipated a possible act of violence. I find that this employee acted reasonably in calling for police assistance as soon as the act of violence erupted. Cf. Riverside Corp. v. Elizabeth, Bulletin 2144, Item 3; Luisi v. Orange, Bulletin 1814, Item 3.

In disciplinary proceedings, a preponderance of the evidence is necessary to support and justify a finding of guilt and doubtful questions of fact must be resolved in appellant's favor. See, Wasserman and Goldberg v. Newark, Bulletin 1590, Item 1; Club Zanzibar Corp. v. Paterson, Bulletin 1408, Item 1.

After carefully considering the legal testimony adduced, I find an absence of substantial credible evidence to support a finding of guilt. Thus, I conclude that appellant has sustained her burden of establishing that the action of respondent was erroneous and should be reversed.

Accordingly, I recommend that the action of the respondent be reversed and this charge be dismissed.

V

In sum, it is recommended that the Council's finding of guilt on the first and fourth charges be reversed and that its

finding of guilt on the second and third charges be affirmed.

The Council did not admeasure a penalty for each offense charged. A total suspension of sixty days on all offenses was imposed.

The precedential penalty imposed by the Division in cases involving brawls is thirty days. Considering, however, that the total penalty assessed by the Council was sixty days, I further recommend that appellant's license be suspended for a total of forty days.

#### 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 27th day of August 1974,

ORDERED that the action of the respondent in finding the appellant guilty of the charges herein be and the same is hereby affirmed; the action of respondent in suspending appellant's plenary retail consumption license for sixty days is hereby modified to a suspension for forty days; and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that the previous order of March 22, 1974 staying the effective date of the suspension imposed by the respondent be and is hereby vacated; and it is further

ORDERED that Plenary Retail Consumption License, C-4 issued by the Mayor and Borough Council of the Borough of Wood-Ridge to Grace B. Hays, t/a Jim's Place for premises 187 Hackensack Street, Wood-Ridge, P.O. Rutherford, be and the same is hereby suspended for forty (40) days commencing 2:00 a.m. on Friday, August 30, 1974, and terminating 2:00 a.m. on Wednesday, October 9, 1974.



Leonard D. Ronco  
Director