STATE OF NEW JERSEY
Department of Law and Public Safety
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
1100 Raymond Blvd. Newark, N.J. 07102

BULLETIN 2016 December 9, 1971

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1. COURT DECISIONS - SUE AND FRANK CLUB, INC. v. NEWARK and DIVISION OF ALCOHOLIC BEVERAGE CONTROL - ORDER REMANDED FOR FURTHER CONSIDERATION.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1019-70

SUE AND FRANK CLUB, INC.,

APPELLANT

V.

MUNICIPAL BOARD OF ALCOHOLIC BEVERAGE CONTROL, et als.,

RESPONDENTS

Argued November 15, 1971 - Decided November 29, 1971.

Before Judges Sullivan, Leonard and Carton.

On appeal from the State Division of Alcoholic Beverage Control.

Mr. Lawrence Friedman argued the cause for appellant (Mr. Leon Sachs, attorney).

Mr. Althear A. Lester, First Assistant Corporation Counsel, argued the cause for respondents (Mr. William H. Walls, Corporation Counsel for the City of Newark, attorney).

Mr. George F. Kugler, Jr., Attorney General of New Jersey, filed a Statement in Lieu of Brief of Respondent Division of Alcoholic Beverage Control (Mr. David S. Piltzer, Deputy Attorney General, of counsel).

PER CURIAM

(Appeal from Decision in Re Sue and Frank Club Inc., Bulletin 1963, Item 2. Order of Remand. Opinion not approved for publication by the Court Committee on Opinions).

2. APPELLATE DECISIONS - RUBY P. JACKSON v. NEWARK.

Ruby P. Jackson, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Leon Sachs, Esq., Attorney for Appellant
William H. Walls, Esq., by Althear A. Lester, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant brings two appeals, consolidated into one hearing, surrounding the revocation of her Plenary Retail Consumption License C-264 by respondent Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Board) on April 28, 1971 and the subsequent denial of renewal of the license for the 1971-72 licensing period by resolution dated June 22, 1971.

The appeal herein was heard de novo pursuant to Rule 6 of State Regulation No. 15. The transcripts of the proceedings before the Board were received into evidence and were relied upon by both parties in lieu of offering testimony before the Division. Rule 8 of State Regulation No. 15.

An investigation of narcotic activity surrounding the licensed premises was conducted by Detective Mitchell G. McGuire of the narcotics squad of the Newark Police Department. He testified that on March 6, 1970, Louis Westry sold drugs to Joyce Butler in the doorway of the licensed premises and, at arrest, Joyce Butler had narcotics upon her person. A further search of the premises and an apartment above it indicated the tavern was a conduit of narcotic sales. The apartment above the licensed premises was searched and three hundred and fifty decks of heroin were discovered. Known narcotic offenders were in and out of the licensed premises during the period of investigation on that day.

Detective McGuire testified concerning his visit to the premises on March 10, 1970 when he entered and saw a man get up from the bar, leaving his jacket on the stool. As no article of clothing is usually left by anyone in that area, the detective examined the jacket and found seven bags of marijuana and an address book in it. The owner of the jacket was arrested.

The following day, March 11, 1970, Detective McGuire returned to the licensed premises and then arrested Freddie Mims and a woman named Arnett Cureton, after it was discovered that they placed narcotics in a corner of an ice machine and in the electric fuse box in the establishment. Fifteen decks of heroin were confiscated.

On the next day, March 12, 1970, the detective continued his surveillance of the licensed premises. He testified that he saw a known narcotic pusher, known as Cadillac Ike, give a brown bag to someone and Ike was immediately arrested in the licensed premises with thirty decks of heroin in his possession.

The licensee, Ruby P. Jackson, denied any knowledge concerning narcotics activity in her licensed premises. The manager, Melvin Gaddy, testified that he knew of no arrests save for information his barmaid gave him. Detective McGuire gave rebuttal testimony asserting that on March 11, 1970, Gaddy returned to the tavern as the investigation was in progress and another detective conversed with him.

In conjunction with this line of questioning, Detective McGuire testified that he saw a bartender whose name was Eulis, a charged narcotic user, tending bar. While the employment of Eulis had been denied, Detective McGuire referred to a newspaper called "Nitelite" in which an advertisement for the licensed premises carried a picture of Eulis inviting patrons to it. He admitted, however, that such advertisement may have been subsequent to the period during which arrests were made.

The Chairman of the Board, in announcing the decision of the Board, was quoted as follows:

> "As Chairman of this Board, and speaking also on behalf of my associates, I feel that after listening to the testimony concerning this vile and illicit situation, that the operation and management of this licensed premises was detrimental to the community and the health and welfare of the citizens at large, and I personally feel that for anyone to allow this obnoxious and disgraceful activity to occur is to become in my eyes unworthy to hold a privilege of this type and I accordingly vote to revoke this license immediately."

The ultimate question presented by the record on this appeal is one of fact. Notwithstanding the de novo character of this appeal the Director, in his determination of the issues, should affirm where there is competent evidence in the record from which the conclusion of the local issuing authority could be deduced. Cf. Vajtauer v. Commissioner of Immigration, 273 U.S. 103; Abad v. Newark, Bulletin 619, Item 8.

It is noteworthy that the Board, in announcing its decision, supra, prefaced its conclusion with a reminder to the licensee that she had been expressly warned in the previous year that any serious situation in the future would result in the "drastic suspension or perhaps a revocation of their license if convicted". Despite such warning, the evil traffic surrounding the licensed premises continued unabated.

The Director's function on appeal is not to substitute his personal judgment for that of the local issuing authority but merely to determine whether reasonable cause exists for its opinion and, if so, to affirm irrespective of his own personal use. Fanwood v. Rocco, 59 N.J. Super. 306 (App. Div. 1960). The Director should affirm the determination of the Board unless he finds that "the act of the Board was clearly against the logic and effect of the presented facts". Hudson Bergen County Retail Liquor Stores Ass'n v. Hoboken, 135 N.J.L. 502 (1947).

Appellant urged that, absent any proof that the licensee participated in the narcotic activity, the penalty of revocation impressed was too severe, if in fact, any penalty at all should be imposed.

It was uncontroverted that narcotics were found on the licensed premises, in an ice machine, in a fuse box, in an unidentified jacket and in a patron's hands open to direct observation. A sale of narcotics was made in the doorway and drug users and known pushers came and went in the licensed premises with impunity. The series of arrests covered a six-day period during which period more than seven persons were arrested and charged with possession of narcotics. Almost four hundred decks of heroin were seized during the investigation. To all of this the licensee alleges she was unaware; her manager denied being in the premises during one arrest when the testimony of detectives clearly placed him inside the premises before the arrests were concluded.

Such activity of narcotic possessors and users in and about the licensed premises clearly places a burden of notice upon the licensee and her agents, and the extent to which such activity took place openly is clearly violative of Rule 4 of State Regulation No. 20. The Board acted circumspectly in its finding, particularly after the prior warning having been given to the licensee.

Under the circumstances herein, and after a careful examination of the record, it is recommended that an order should be entered affirming respondent's action in revoking the said license and dismissing the appeal.

It therefore follows and I so recommend, that the action of the Board in denying renewal of appellant's license for the current licensing period be affirmed, the appeal be dismissed, and the order herein staying the Board's action be vacated.

Conclusions and Order

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

I have carefully considered the matters contained in the exceptions and find that these matters have either been considered by the Hearer in his report or are without merit.

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

Accordingly, it is, on this 22nd day of October 1971,

ORDERED that the action of respondent Board of Alcoholic Beverage Control of the City of Newark, in revoking appellant's 1970-71 plenary retail consumption license be and the same is hereby affirmed and the appeal be and the same is hereby dismissed; and it is further

ORDERED that my order of June 23, 1971, staying the Board's order of revocation pending the determination of this appeal be and the same is hereby vacated, effective immediately; and it is further

ORDERED that the action of respondent in denying renewal of appellant's plenary retail consumption license for the 1971-72 licensing period, be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Richard C. McDonough
Director

3. APPELLATE DECISIONS - LONZIE JACKSON'S LOUNGE, INC. v. NEWARK.

Lonzie Jackson's Lounge, Inc., t/a Jackson's Lounge, Appellant, v. Municipal Board of Alcoholic Beverage Control of the City of Newark, Respondent.	)	On Appeal CONCLUSIONS and ORDER

Leon Sachs, Esq., Attorney for Appellant
William H. Walls, Esq., by Althear A. Lester, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

This is a consolidation of two appeals from actions of the respondent Municipal Board of Alcoholic Beverage Control (hereinafter Board) wherein it revoked the plenary retail consumption license of appellant, designated as License C-576, on April 28, 1971 upon a guilty finding based on charges that appellant permitted, allowed and suffered the use of narcotics in the licensed premises; and thereafter the Board adopted a resolution on June 22, 1971 denying renewal of the license for the 1971-72 licensing period.

The appeals herein were heard de novo pursuant to Rule 6 of State Regulation No. 15. The transcript of the proceedings before the Board was received into evidence and in addition thereto testimony was presented by appellant, pursuant to Rules 6 and 8 of said regulation.

Testimony was adduced before the Board concerning a series of arrests in the licensed premises of persons on charges of possession of narcotics. Detective Mitchell G. McGuire of the narcotics squad of the Newark Police Department testified that on December 9, 1969, he arrested one Dolores Walker on the licensed premises after a search of her revealed a revolver and one hundred forty-five bags of heroin.

Detective Pariso testified that on February 6, 1970 he arrested a woman, whom he did not identify, from whose coat cuff a glassine envelope protruded. This envelope contained a narcotic drug.

On the same date, Detective McGuire discovered forty decks of heroin in the kitchen under the sink. Jennie May Archer, was then frying chicken in the kitchen adjacent to the sink, and she was charged with possession of the heroin found.

Detective McGuire further testified that on March 5, 1970 one Sissy Johnson was arrested on the licensed premises, and a search of her revealed fifty-four glassine envelopes containing heroin. Prior to her arrest, the premises were under surveillance by the police, and Sissy Johnson was observed acting suspiciously like a narcotic peddler in that she would meet persons in front of the premises, enter with them and shortly thereafter they would emerge, followed by her.

On February 8, 1970, Detective Joseph Calabrese arrested one Patricia Walker in the licensed premises. He stated that she possessed two hundred and ten packets of heroin and a revolver.

Detective Scott testified that on April 3, 1970 he arrested Albert Adams and Gwendolyn Bishop at the subject premises for possession of drugs, a search revealing some twenty-five bags of heroin. Five bags were found in a space directly under the top of the bar and he believed that Adams had placed those five bags there.

Lonzie Jackson, who owns the stock of the licensee corporation, testified before the Board as well as at the hearing at the Division that he was unaware of narcotic activity in his establishment; that neither he nor any of his employees participated in any narcotic activity; and he cooperated with the police by answering any questions they asked him.

Captain Leonard M. Paradiso of the Newark Police Department was called as a witness for the licensee at the hearing in the Division. He testified that he was connected with the then-First Precinct station within which area the licensed premises was located. He recommended that the licensed premises be continued in operation provided it had closer supervision. He compared it to other taverns in the area, claiming that it is very similar to the others. On cross examination, he admitted that he was not captain of that precinct at the time the arrests were made in the tavern. He also admitted that he had previously recommended the license be disapproved, but claimed that such recommendation was procedural where, as here, there were charges pending before the Board against a licensee.

Disciplinary proceedings against liquor licensees are civil in nature and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Division of Alcoholic Beverage Control, 20 N.J. 373 (1956); Freud v. Davis, 64 N.J. Super. 242 (App. Div. 1960).

Counsel for appellant has urged reversal of the Board's action, basing such argument on the allegation that the mere presence of narcotic possessors on the licensed premises is not sufficient cause for revocation of license. Such argument has its underlying rationale that a licensee cannot be charged with conduct over which he has no control. Rule 4 of State Regulation No. 20 provides in part, that no licensee shall allow, permit or suffer "any unlawful possession of or any unlawful activity pertaining to narcotic drugs...."

There is no denial whatever that investigation of the subject premises beginning in December 1969 and extending to April 1970 culminated in at least seven arrests and the confiscation of four hundred and seventy-five packets of heroin. It is inconceivable that Jackson or his bartenders and employees were unaware that this establishment was a hotbed of narcotic activity. Jackson's own testimony manifested he made no effort to seek police assistance in coping with the torrent of narcotic activity surrounding the premises. Even in the absence of such knowledge of such activity, a licensee cannot escape the consequences of the occurrence of the incidents as related herein which took place in the licensed premises over a four to five month period. Greenbrier, Inc. v. Hock, 14 N.J. Super. 39 (1951). Licensee or others in charge may not avoid their responsibility for the conduct of their premises by merely closing their eyes and ears. On the contrary, licensees or employees must use their eyes and ears and use them effectively to prevent the improper use of their premises. Bilowith v. Passaic, Bulletin 527, Item 3; Re One-Thirty-Five Mulberry St. Corp., Bulletin 892, Item 2; Re Ehrlich, Bulletin 1441, Item 5; Re DiMattia, Bulletin 1645, Item 1; Re Schuler, Bulletin 1787, Item 1; Re Perla's, Inc., Bulletin 1946, Item 3.

It has been further repeatedly held that the licensee is responsible for the conditions both inside and outside the licensed premises which are caused by patrons thereof. Re Sue & Frank Club, Inc., Bulletin 1963, Item 2; Garcia v. Fair Haven, Bulletin 1149, Item 1; Conte v. Princeton, Bulletin 139, Item 8.

Appellant's counsel urged that this matter falls within the scope of Ishmal v. Div. of Alcoholic Bev. Control, 58 N.J. 347 (1971) where the termination of license growing out of narcotic activity was reversed. Between that case and the matter sub judice is a wide gulf. In Ishmal, the licensee was credited with her persistent cooperative effort with the narcotic squad of the police department and her apparent sincere effort to rid her premises of narcotic users. Such is not the case here. To all of the obvious narcotic activity in the appellant's licensed premises, Jackson appeared oblivious, and his simple denial of knowledge of the rampant narcotic activity surrounding his facility defies belief. His readiness to answer questions by the police is hardly comparable to Mrs. Ishmal's energy and affirmative conduct.

It is quite apparent under the circumstances herein that the licensee suffered narcotic activities to take place on the licensed premises. As the Supreme Court said in Essex Holding Corp. v. Hock, 136 N.J.L. 28 at p.31:

> "Although the word 'suffer' may require a different interpretation in the case of a trespasser, it imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with his authority." (Emphasis supplied)

Testimony of Captain Paradiso was offered by the appellant presumably in connection with the penalty imposed by the Board. Such testimony was empty of any substantive value. That the appellant's premises is similar to others in the area is a comparison affording no benefit to the appellant. The Captain's assertion that his recommendation initially that the license be disapproved was procedural, is without merit. All licensees are not weighed down by such recommendation of the Police Department merely because of an impending infraction.

The testimony in this matter has been carefully considered and I find, as a fact that appellant is guilty of the charges upon which the revocation was based. Thus, the appellant has failed to sustain the burden that the Board's action was erroneous, as required by Rule 6 of State Regulation No. 15.

It is accordingly recommended that an order be entered affirming the action of the Board in revoking the said license dismissing the appeal. It therefore follows, and I so recommend, that an order also be entered affirming the action of the Board in denying renewal of appellant's license for the current licensing period, dismissing the said appeal, and vacating the order extending the term of the said license pending the determination hereof.

Conclusions and Order

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

I have carefully considered the matters contained in the exceptions and find that these matters have either been considered by the Hearer in his report or are without merit.

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

Accordingly, it is, on this 22nd day of October 1971,

ORDERED that the action of respondent Board of Alcoholic Beverage Control of the City of Newark, in revoking appellant's 1970-71 plenary retail consumption license be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed; and it is further

ORDERED that my order of June 23, 1971 staying the Board's order of revocation pending the determination of this appeal, be and the same is hereby vacated, effective immediately; and it is further

ORDERED that the action of respondent in denying renewal of appellant's plenary retail consumption license for the 1971-72 licensing period be and the same is hereby affirmed, and the appeal herein be and the same is hereby dismissed.

Richard C. McDonough
Director

4. APPELLATE DECISIONS - NEW MC QUEEN'S LOUNGE, INC. v. NEWARK.

New McQueen's Lounge (Corp.) t/a McQueen's Lounge,

Appellant,

v.

Municipal Board of Alcoholic Beverage Control of the City of Newark,

Respondent.

On Appeal

CONCLUSIONS and ORDER

Leon Sachs, Esq., Attorney for Appellant
William H. Walls, Esq., by Melvin Simon, Esq., Attorney for Respondent

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Appellant appeals from the action of respondent Municipal Board of Alcoholic Beverage Control of the City of Newark (hereinafter Board) whereby it suspended the plenary retail consumption license issued to appellant for premises 68-11th Avenue, Newark, for twenty-five days, effective July 26, 1971, upon finding appellant guilty of the following charge:

> "You did on Sunday November 22, 1970, sell, serve, deliver or allowed, permitted or suffered the sale, service or delivery of an alcoholic beverage, and permitted consumption of same on your licensed premises between the hours of 2:00 a.m., and 7:00 a.m., when sales of alcoholic beverages are prohibited and when the entire licensed premises shall be closed; and no licensee shall sell or offer for sale or delivery to any consumer any alcoholic beverage, or allow, permit or suffer the consumption of any alcoholic beverage in or upon the licensed premises; in violation of City Ordinance, Number 4, Alcoholic Beverages, Section 4:1, Part A. B. and C."

Upon filing of the appeal an order was entered by the Director on July 23, 1971, staying the Board's order of suspension until entry of a further order herein.

Appellant alleges that the action of the Board was erroneous as being contrary to the weight of evidence and that its findings were based on matters extraneous to the evidence. No answer was filed on behalf of the Board.

The matter was presented for determination upon the transcript of the proceedings held before the Board which was admitted into evidence pursuant to Rule 8 of State Regulation No. 15, and was supplemented by further testimony on behalf of the appellant.

The transcript reflects the following:

Mrs. Lydia Davis testified that on November 22, 1970 she visited the appellant's licensed premises alone entering about 11:00 p.m., and remained there until 2:00 a.m. At that time, a man later identified as Al Young, offered to take her home and upon her refusal, took the keys to her car. Somebody closed up the establishment, turned off the lights and locked her in along with the man, Al Young. She recounted that "...he stripped my slacks off. And then when I got in the ladies room I locked myself in there."

Two hours later, she emerged from the ladies room and found Young, nude, lying on the pool table. She again tried to get out, cut her hand in the attempt and, as Young tried to open the door, the alarm went off. After leaving the premises, she visited Police Headquarters and thereafter attended the hospital for treatment of her injured hand. She admitted that, following the closing hour, she was neither served nor consumed any alcoholic beverage. She further admitted that she did not know Young to be an employee, saying "Well, I don't know if he might have worked there or not" and "I did not see him lock the door".

Clifford Irving testified that he lives with his wife in an apartment directly upstairs over the licensed premises; that the entrance to the licensed premises and the stairway leading to his apartment both share a common hallway. At 7:00 a.m. on the morning of November 22, he was coming downstairs and saw Mrs. Davis and Young in the hallway in front of the door to the licensed premises. Young was shaking the door which was closed and, from his efforts, was apparently locked. Mrs. Davis complained that there was something wrong with the door. At the same time, Mrs. Davis and Young were arguing about some keys belonging to Mrs. Davis, at which the witness was asked by Mrs. Davis for aid in retrieving the keys.

Young surrendered the keys to the witness who gave them to Mrs. Davis who thereupon ascended the stairs, visited the apartment of the witness where her injured hand was wrapped by the witness' wife. None of Mrs. Davis' clothes were torn. Mrs. Davis stated to the wife of the witness "...her husband was going to be mad with her and she did not know what to tell her husband". He testified that the tavern door was locked and that he had not heard the burglar alarm sound during the night.

Detective Patrick Meehan testified before the Board that he investigated the complaint of Mrs. Davis, and that Young was subsequently arrested and charged with attempted rape. Furthermore, in a telephone call to the licensed premises he spoke to Young who later claimed to be the manager and the beneficial owner of the premises. He did not report the results of his investigation as to the ownership of the premises to either the Board or to this Division. He was not asked if his investigation revealed any sale of alcoholic beverages in the licensed premises after the prohibited hours.

Alden McQueen testified that he is one of the principal officers of the corporate licensee and that on November 22, 1970 he and his bartender had all patrons out of the licensed premises by 2:00 a.m. They cleaned the bar and left by 2:15 a.m. He then closed the premises by locking all doors and setting the burglar alarm. He recalled that Young and Mrs. Davis had left the premises, Young going first and she following. He admitted hearing a little argument between them when they were near the pool table but he paid no attention to it.

He explained that the setting off of the burglar alarm alerts both a central agency and the police from which aid would come promptly. The following morning, he opened the door normally with the key and turned off the alarm; no one from the alarm company notified him of any alarm having been received during the night.

McQueen further testified that Young was the brother of his bartender; he is not an employee, has no interest in the license but once did some carpentry work there which is still incomplete. He was vehement in his denial that Mrs. Davis, Young or anyone else was or could have been in the licensed premises after closing, and he further denied service of alcoholic beverages to anyone beyond the legal hour.

In disciplinary proceedings of this kind, the respondent is only required to establish the truth of the charge by a preponderance of the believable evidence and not to prove guilt beyond a reasonable doubt. See Kravis v. Hock, 137 N.J.L. 252, 254 (1948). Had this been a criminal charge in which guilt would have had to be proven beyond a reasonable doubt, there is no question that a motion for a directed verdict of acquittal at the end of the State's case would be allowed in a matter in which the evidence was as barren as in this present matter.

The charge upon which the finding of guilt and the consequent suspension were based revolved solely about the sale, service, delivery and consumption of an alcoholic beverage during the prohibited hours. Mrs. Davis was definite in her testimony that she had not been served nor consumed alcoholic beverages after closing hours. Nor was there any testimony whatever indicating such sale. From an examination of all of the testimony no other conclusion can be reached.

It is noteworthy that the Board made no finding of guilt upon such sale but rather determined that the appellant was guilty of "being open after 2:00 a.m." Such finding was not within the charge leveled nor were the charges amended upon which such finding could be based. "The minimal requirements of 'due process of law' include reasonable notice of the nature of the proceedings and a fair opportunity to be heard therein." Fantony v. Fantony, 36 N.J. Super. 375, 378 (Ch. Div. 1955). The conclusion of the Board, i.e. open after 2:00 a.m. is not responsive to the charge directed against the appellant to which his defense could be addressed. The action of the Board is fatal in this regard.

Moreover, assuming that the charge had been properly laid, that the licensee violated another section of the ordinance requiring that the premises be closed after 2:00 a.m. and without further proof adduced in defense, the proofs fall short of establishing this charge.

The bizarre story of Mrs. Davis, when weighed against the testimony of the upstairs neighbor and that of the appellant, fails to establish that the premises were allowed to remain open after closing hours. Contrariwise, Mrs. Davis alleged that the premises were so secure that she could not escape. Any presumption that the appellant's agents or employees had failed to close the premises or had permitted Mrs. Davis and Young to have remained inside after closing was dispelled by the uncontroverted testimony of the upstairs neighbor who saw Young "messing with the door knob, trying to open it like that". The door was then locked; had it been open there is the further presumption that the alarm would have sounded. Detective Meehan offered no testimony that the police had been alerted by such alarm.

The rule in a case such as this, is that the finding must be based on competent legal evidence, and must be grounded on a reasonable certainty as to the probabilities arising from a fair consideration of the evidence. 32A C.J.S. Evidence, sec. 1042. We have the testimony of Mrs. Davis entrenched with implausibilities being affirmatively contradicted by the testimony of the appellant and an independent witness.

On the charge laid against the appellant, it is apparent that the finding of respondent was not based upon any evidence whatever. Even if the charges were properly grounded, the finding would not have been supported by a fair preponderance of the believable evidence. Crespo v. Hoboken, Bulletin 1915, Item 2; Ondina Corp. v. Newark, Bulletin 1826, Item 1.

It is, therefore, recommended that an order be entered reversing the action of respondent and dismissing the charge.

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 transcripts of the testimony, the exhibit and the Hearer's report, I concur in the findings and conclusions of the Hearer and adopt his recommendation.

Accordingly, it is, on this 27th day of October 1971,

ORDERED that the action of respondent be and the same is hereby reversed and the charge herein be and the same is hereby dismissed.

Richard C. McDonough
Director

5. DISCIPLINARY PROCEEDINGS - SALE TO MINOR - LICENSE SUSPENDED FOR 25 DAYS.

In the Matter of Disciplinary Proceedings against

Mildred Jane Triggs
t/a Sullivan's Inn
259 Broadway
Keyport, N. J.

Holder of Plenary Retail Consumption License C-10, issued by the Borough Council of the Borough of Keyport.

CONCLUSIONS and ORDER

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Philo, Sawyer and Newman, Esqs., by Sidney I. Sawyer, Esq., Attorneys for Licensee.
Walter H. Cleaver, Esq., Appearing for Division.

BY THE DIRECTOR:

The Hearer has filed the following report herein:

Hearer's Report

Licensee pleaded not guilty to the following charge:

"On October 3, 1970, you sold, served and delivered and allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person under the age of twenty-one (21) years, viz., Herbert ---, age 16; in violation of Rule 1 of State Regulation No. 20."

On behalf of the Division Herbert --- testified that he was born on July 21, 1954, was sixteen years of age on the date of the alleged violation herein and has been to the licensed premises on several occasions. On the date in question he arrived at the licensed premises in a car driven by Suzanne --- at approximately 7:00 p.m. Allan --- was also a passenger in the car.

After Suzanne parked the vehicle he entered the licensed premises and approached the end of the bar where a bartender, subsequently identified as James Flynn, was on duty. He requested and was sold three six-packs of Rheingold beer by Flynn for which he paid $4.05. Flynn requested no proof of age or other identification. Thereafter he returned to the car and placed the beer on the rear seat next to Allan.

On cross examination he testified that thereafter, he and Suzanne proceeded by car to the home of a friend where he consumed six or seven cans of beer and Suzanne consumed the remainder, or about ten cans.

They departed the friend's home at approximately 10:30 p.m., taking the empty beer cans with them and disposing of them along the way. Shortly thereafter the vehicle was involved in an automobile accident in which both he and Suzanne were injured. Both were helped into the home of a Mr. Stone for emergency treatment and, shortly thereafter, were taken to a local hospital.

Suzanne testified that she was born on March 10, 1953. On October 3, 1970, at approximately 7:00 p.m., she picked up Herbert and Allan in her father's car and drove to the licensed premises to purchase beer. Herbert entered the premises empty-handed, returned approximately five to eight minutes later with three six-packs of Rheingold beer and placed them on the back seat of the car.

On cross examination, she testified that she consumed approximately ten cans of beer, two cans in the car while driving and the remaining eight cans at the home of a friend. Herbert consumed the remaining eight cans. Thereafter an accident occurred as the result of which she was first taken to the home of Mr. Stone, and then to the hospital.

Allan testified that he was born on October 21, 1953. As a passenger in the car, he accompanied Herbert and Suzanne to the licensed premises on October 3, 1970 at approximately 7:00 p.m. He and Suzanne waited in the parked vehicle while Herbert entered the premises empty-handed. Approximately seven or eight minutes later he departed the licensed premises and returned to the car with three six-packs of Rheingold beer which he handed to Allan.

On cross examination, he testified that he did not see Suzanne consume any beer in the car; he did not accompany Herbert and Suzanne to the friend's home; he witnessed the scene of the accident shortly after it occurred and saw Suzanne being removed from the Stone residence on a stretcher.

ABC Agent O testified that on October 28, 1970, pursuant to a specific assignment, and in the company of Agent B, he proceeded to Suzanne's home and took statements from Allan, Suzanne and Herbert with respect to the alleged sale charged herein. Suzanne's parents were also present. Thereafter, he, Agent B, Suzanne and Herbert proceeded to the licensed premises. He entered the premises, confronted the licensee, Mildred Triggs, and explained the purpose of his visit. Several patrons and one bartender, subsequently identified as James Flynn, were also on the premises. He thereafter summoned Agent B who escorted Herbert into the premises. He then asked Herbert "... if he could identify a person that sold him alcoholic beverages on October 3, 1970". Herbert identified Flynn who vigorously denied ever having seen Herbert and further affirmed that he would not have served such a youthful appearing person in any case.

Agent B testified that on October 3, 1970 he was an ABC agent and substantially corroborated the testimony of Agent O with respect to those incidents which occurred in his presence.

On cross examination, he testified that he witnessed Herbert's identification of Flynn but left immediately thereafter and heard no response from Flynn. In his opinion Herbert appeared to be considerably younger than twenty-one years of age.

Patrolman James Lawson, an officer of the Keyport Police Department for a year and four months, testified that he was on duty on the night of October 3, 1970 and investigated the accident herein. He observed both Suzanne and Herbert at close range and detected no odor of beer, nor did he observe any further physical indication that either of the minors had consumed any beer. Further, upon inspection of the vehicle he found no evidence of the presence of alcoholic beverages therein. He added that he had no personal knowledge with respect to the alleged purchase of alcoholic beverages by Herbert.

Stanley Stone and Francis Stone testified that the accident occurred on the night in question in front of their residence and although they did not know either Herbert or Suzanne personally, they brought both youngsters into their home for emergency treatment. They were in close proximity to both during the incident and detected no odor of alcoholic beverages. Stanley Stone further testified that he carried Suzanne into the house and that he is an experienced member of the First Aid Squad in Keyport.

James Flynn testified that he was employed as bartender at the licensed premises on the night in question and that he did not see Herbert on the premises that evening. He first saw Herbert on the night of the identification in the presence of Agent O and he emphatically denied that he ever served Herbert anything. On cross examination, he testified that the licensed premises does stock Rheingold beer in six-pack containers.

Mildred Triggs, the licensee, testified that she was not on the licensed premises on October 3, 1970 and has no personal knowledge of the incidents which occurred.

With respect to October 28, 1970, she testified that she was contacted in advance by Agent O and agreed to have Flynn available for an interview. Agent O entered alone and asked to speak to Flynn. She excused Flynn from duty and she assumed control of the bar while Flynn and Agent O proceeded to another room for the interview and subsequent identification by Herbert.

Doris Silvestri testified on behalf of the licensee that Suzanne, her daughter, has on occasion had one drink at home but she has never seen her consume ten cans of beer in one sitting.

Joseph Silvestri, father of Suzanne, testified that he would never permit Suzanne to have more than one drink at home at a given time.

On being recalled as a witness for the Division, he testified that on the night of October 3, 1970, he was summoned to the hospital at midnight. Upon inspection he discovered a strong odor of beer about her. He thereafter took her home.

Preliminarily certain observations should be made. Firstly, the three minors clearly appeared to be considerably younger than twenty-one years of age. Secondly, the three minors testified out of the presence of one another as did the numerous witnesses for the licensee.

In adjudicating matters of this kind we are guided by the long established principle that disciplinary proceedings against liquor licensees are civil in nature, and not criminal, and require proof by a preponderance of the believable evidence only. Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373 (1956).

Since the testimony herein presents a sharp factual conflict, the credibility of witnesses must be weighed. 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).

I have had an opportunity to observe the demeanor of the witnesses as they testified and in view of the testimonial conflict, the credibility of witnesses must be weighed.

The three minors, notwithstanding their testimony out of the presence of one another did not vary significantly in their versions of the incident. Wigmore ranks the sequestration of witnesses "... just below cross-examination as a device to expose untruthfulness." State of N.J. in interest of W.O., 100 N.J. Super. 358 (App. Div. 1968) at p. 363.

The fact that Allan saw no beer consumed in the vehicle is not contradictory when it is remembered that he did not accompany Herbert and Suzanne on the entire trip. Herbert and Suzanne corroborated one another with respect to the number of cans of beer each consumed. Allan and Suzanne did not vary with respect to their observations as to Herbert's entry, empty-handed and exit with three six-packs of beer which he thereafter placed on the back seat of the vehicle. The testimony of Mr. and Mrs. Stone and Officer Lawson does not significantly dilute the testimony of the three minors which I find to be truthful and accurate, notwithstanding the taint of prejudice alluded to by counsel for the licensee.

It was suggested by counsel for the licensee that certain action alleged to have been taken by Silvestri after the unfortunate accident occurred should seriously affect his credibility. Assuming, without deciding this to be so, even totally disregarding the testimony of Silvestri does not negate the affirmative testimony of the minors.

I am satisfied that the identification of Flynn by Herbert was satisfactory and sufficient and I reject the vigorous denial of the sale by Flynn as an attempt by him to avoid the consequences of his act.

I conclude that the Division has proven its case by a clear preponderance of the believable evidence and I recommend that the licensee be found guilty of the charge.

Licensee has no prior adjudicated record. It is further recommended that the license be suspended for twenty-five days. Re J.B.T., Inc., Bulletin 1996, Item 7.

Conclusions and Order

Written exceptions tothe Hearer's report were filed by the licensee within the time permitted by Rule 6 of State Regulation No. 16.

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

Accordingly, it is, on this 28th day of October 1971,

ORDERED that Plenary Retail Consumption License C-10, issued by the Borough Council of the Borough of Keyport to Mildred Jane Triggs, t/a Sullivan's Inn, for premises 259 Broadway, Keyport, be and the same is hereby suspended for twenty-five (25) days, commencing at 2:00 a.m. Monday, November 15, 1971, and terminating at 2:00 a.m. Friday, December 10, 1971.

Richard C. McDonough
Director